EQUITABLE THIRD PARTY LIABILITY: RATIONALE, PRINCIPLE, METHOD AND CLASSIFICATION

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University

July 2016
STATEMENT OF ORIGINALITY

This thesis contains my original work.

I am the sole author of all chapters of this thesis, except for Chapters 2 and 3, which are Chapters 8 and 7 of Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015). Although I am the author of these two chapters, Joachim Dietrich provided extensive feedback on my drafts and the final work reflects our joint understanding of the relevant law.

Pauline Ridge

Professor Joachim Dietrich, Bond University
ACKNOWLEDGEMENTS

First and foremost, I thank Jane Stapleton, my primary supervisor, for her wise and generous mentoring over many years. She has been an inspiration. My good friend, Joachim Dietrich, has read and commented upon all of the chapters of this thesis; I owe him an enormous debt both professionally and personally. Other scholars who have encouraged me over the period in which the thesis chapters were written include Jamie Glister, Elise Bant, Simone Degeling, Michael Bryan and Matthew Harding. I am particularly grateful to Jamie Glister for reading the capstone chapter of this thesis. I also thank Peter Cane who has read my work and provided insightful feedback as well as advice as to my future scholarship. Finally, I wish to thank Paul Finn, Former Justice of the Federal Court of Australia. Paul introduced me to Equity, became a trusted mentor, and is now a friend. It is indeed fitting that the last chapter of this thesis pays tribute to him.
ABSTRACT

This thesis considers the equitable liabilities of third parties to relationships governed by equity from a doctrinal perspective. Its particular focus is upon the personal liabilities of persons associated through culpable conduct with the equitable wrongdoing of another. Such conduct could be by way of procurement of, or assistance in, that wrongdoing (accessory liability) or the beneficial receipt of property protected by equity and tainted by that wrongdoing (recipient liability) or both. The thesis also considers other equitable third party liabilities that interact with or relate to accessory liability and recipient liability. The thesis comprises a capstone chapter, plus eight publications (three journal articles, two chapters from a co-authored book, and three chapters from edited collections). The capstone chapter ties together my work in this area of law. It identifies four general questions, concerning equitable rationale, principle, method, and classification, that are addressed in the publications and explains how they are resolved. The jurisdictional focus of the thesis is upon Australian and English law; however, one chapter considers the law in Singapore and Hong Kong in depth and several chapters also refer to the law in Canada, New Zealand, and the United States.
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5. ‘Constructive Trusts, Accessorial Liability and Judicial Discretion’ in Elise Bant and Michael Bryan (eds), Principles of Proprietary Remedies (Lawbook Co, 2013) 73-96.


This thesis considers the equitable liabilities of third parties to relationships governed by equity. The particular focus of the thesis is upon the personal liabilities of persons associated through culpable conduct with the equitable wrongdoing of another. Such conduct could be by way of procurement of, or assistance in, that wrongdoing (accessory liability) or the beneficial receipt of property protected by equity and tainted by that wrongdoing (recipient liability) or both. The thesis also considers other third party liabilities that interact with or relate to accessory liability and recipient liability in some way, generally because they also turn upon the third party’s conduct and mental state.¹

Most commonly, equitable third party liability, in whatever form, concerns third parties to a trust or fiduciary relationship; however, other relationships regulated by equity are also considered in this thesis.

Equitable third party claims are of immense practical importance and are ubiquitous in litigation involving corporate or trust wrongdoing. Such claims expand the pool of potential defendants beyond the primary wrongdoer (who may be impecunious or have absconded) to agents with professional indemnity insurance and other deep pocket defendants, as well as to the primary wrongdoer’s associates and intimate companions, corporate or otherwise. They also deter professional third parties generally from facilitating equitable wrongdoing and vindicate the high standards imposed by equity upon the primary wrongdoer. Third parties found liable are subject to a range of remedies. These include gain-based remedies and, depending upon the jurisdiction and circumstances, can be proprietary. The remedies make equitable liability much more attractive compared to concurrent common law and statutory liabilities. In all these ways, equitable third party liabilities greatly bolster the protection given by equity to the beneficiaries of relationships of trust and confidence.

Despite its importance, the law concerning equitable third party liabilities is complex and, in some respects, confused. In jurisdictions such as Australia, the modern law has not

¹ Vicarious liability of a third party for the equitable wrongdoing of another is not discussed because vicarious liability is predicated simply upon a defendant’s relationship to the wrongdoer rather than upon culpable association with the wrongdoing. It raises quite different concerns. See further, Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010).
shaken off completely its nineteenth century antecedents in the law governing family trusts: the traditional formulation of accessory liability and recipient liability as ‘the rule in *Barnes v Addy*’ is unwieldy when applied in a modern context and, particularly, to corporate entities. Even jurisdictions that have a reformed framework for accessory liability and recipient liability have struggled with how to conceptualise and formulate those liabilities. In all jurisdictions, remedial questions were overlooked for a long time, the remedies against the third party simply being subsumed into consideration of the primary wrongdoer’s liability. The monetary remedies for breach of equitable obligations pose difficult questions generally; these are multiplied when the liability of third parties to such breaches is considered. Similarly, debates regarding the legitimacy of remedial discretion, particularly concerning proprietary relief, spill over to third party liabilities. Consequently, significant questions remain as to the choice and assessment of remedy. Furthermore, equity’s pragmatic and gap-filling role in relation to deficiencies in the common law has resulted in there being related and overlapping third party liabilities that are difficult to disentangle. A final cause of complexity and confusion comes from policy concerns; for example, why and to what extent should third parties bear a claimant’s losses caused by the principal wrongdoer, or be required to look out for the claimant’s interests more generally?²

B  The Thesis Publications: Their Content and Chronology

The thesis is comprised of this capstone chapter and eight publications (‘the thesis publications’) written by me over a nine year period. The thesis does not contain all of my work on equitable third party liability for reasons of space and because some is co-authored in the fullest sense.³ The selected publications include three journal articles, three chapters from edited books, and two chapters of a book, *Accessories in Private Law* (‘Accessories’), co-authored with Joachim Dietrich and published in 2015.⁴ After this capstone chapter follow the two chapters from *Accessories*. I am the author of these chapters.⁵ The first (Chapter 2 of this thesis) presents a detailed analysis of equitable

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⁵ Joachim Dietrich provided extensive feedback on the drafts of each chapter; their substantive content represents our shared understanding of the law.
'participatory liability' (this encompasses accessory liability and recipient liability) as it currently operates in common law jurisdictions. This chapter includes consideration of rationales, scope, doctrinal content, defences, remedies, and apportionment of liability. The focus is on trust and fiduciary wrongdoing, but it also considers the extent to which third party liability for breach of confidence or pursuant to equity’s vitiating doctrines can be regarded as accessorial. The second chapter from Accessories (Chapter 3 of this thesis) explains the relationship of equitable third party liabilities concerning equitable proprietary rights to equitable accessory liability. In so doing, it also describes each of those liabilities. These two chapters provide reference material and context for the more specialised thesis publications that follow.

The following five thesis publications (Chapters 4-9) are presented chronologically according to date of publication (2008-forthcoming). They deal with specific issues concerning equitable third party liabilities, primarily participatory liability, from doctrinal, conceptual, methodological and jurisdictional perspectives. Chapters 4, 5 and 8 focus upon the remedies available for particular third party liabilities. The remedy question was my first significant pathway for exploring equitable third party liabilities and continued as a theme of my work. Chapter 4 (a journal article) considers the remedies for dishonest accessory liability in England and jurisdictions that follow the English law. It begins by identifying the rationales for that liability and then uses these to argue that the complete range of personal equitable remedies, loss-based and gain-based, as well as proprietary remedies, should be available. The chapter was written primarily for an English audience, but also draws upon Australian law to support its arguments. It generated significant academic response and has been cited by the Federal Court of Australia.6

Chapter 5 (a commissioned book chapter) considers discretionary proprietary relief by way of the remedial constructive trust for participatory liability in the context of Australian law.7 It also discusses how the discretion to award proprietary relief is exercised. Questions concerning judicial method and the legitimacy of remedial discretion that are introduced here are also discussed in Chapters 2, 3 and 9. Chapter 8 (a

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7 The title of this chapter refers to ‘accessorial liability’. The term was intended to encompass recipient liability, however, I no longer consider that recipient liability is accessorial and so ‘participatory liability’ is the preferable term.
forthcoming commissioned book chapter) explains the general principles that inform the remedies for participatory liability and uses these general principles to resolve three particular questions concerning the award of equitable monetary remedies against third parties. This chapter engages with difficult and topical questions in trust and fiduciary law concerning these remedies.

Chapter 7 (a journal article) broadened the scope of my work on equitable third party liabilities. It considers the rationales for the strict liability of the donee of a gift tainted by another person’s undue influence over the donor (the donee is a third party to the undue influence). The donee’s strict liability and supporting rationales are compared with those of equitable recipient liability in order to evaluate and reject arguments that recipient liability should also be recast as a strict liability cause of action grounded in a Birksian conception of unjust enrichment.

Chapter 9 (a forthcoming commissioned book chapter) returns to the question of judicial method and participatory liability. It describes the judicial method espoused by Justice Finn of the Federal Court of Australia. Justice Finn was inspired by the equity jurisprudence of the High Court of Australia during the period that Sir Anthony Mason was Chief Justice. Two features of that jurisprudence concern the exposition of doctrine in terms of its basal principle, organising ideas, and policy underpinnings; and, the discretionary and holistic application of equitable principles and determination of equitable remedies. The chapter critically evaluates this judicial method by reference to participatory liability and the judgment of the Full Federal Court in *Grimaldi v Chameleon Mining NL (No 2) (Grimaldi)* of which Justice Paul Finn was the primary author.8 This chapter adds an important dimension to the thesis because it focuses directly upon judicial methodology.

The jurisdictional focus of the thesis is upon Australian and English law; however, a visiting fellowship at the National University of Singapore in 2013 exposed me to the benefits of further comparative research. Consequently, the thesis includes a journal article on the law in Singapore concerning accessory liability and recipient liability (Chapter 6). This article critically evaluates the law in Singapore, with reference also to the law in England, Hong Kong and Australia. It then considers various legal and non-legal factors that may influence future development of the law in that jurisdiction. In particular, the article considers how legal autochthony may be pursued in this area of law.

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8 *Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296 (Finn, Stone and Perram JJ).*
in Singapore. The comparative dimension of this thesis is also demonstrated in Chapters 2 and 3 which refer to the law in Canada, New Zealand, Singapore and Hong Kong. The American Law Institute’s *Restatements* and secondary sources were also used to indicate, in very broad terms, approaches taken in the United States.

C  *The Thesis Terminology*

I have generally adopted the following abbreviations for the various parties in a third party claim:

C = the claimant;

D = the defendant third party;

A = the accessory. This abbreviation is used in Chapters 2 and 3 (the two chapters from *Accessories*) to encompass both a third party defendant who is an accessory and one who is a recipient of trust property. This was done for stylistic reasons and convenience, although Joachim Dietrich and I concluded that the basis for recipient liability is not accessorial;

PW = the primary wrongdoer. This is used where D/A’s liability is predicated upon the wrongdoing of another. Sometimes, this person is referred to as ‘F’ for Fiduciary.

It can be difficult to find terminology that accommodates different doctrinal formulations of similar liabilities. A particular problem in this regard concerns accessory liability and recipient liability. As discussed in the thesis, these liabilities are either conceptually grouped together (as in the Australian law) or sharply distinguished (as in most strands of the English law). The thesis uses the label of ‘participatory liability’ to encompass equitable accessory liability and recipient liability where the law across jurisdictions or in Australia alone is being discussed.9 This reflects my view that accessory liability and recipient liability should be grouped together conceptually. The thesis sometimes uses the generic label of ‘ancillary liability’ to refer to third party liabilities predicated upon the equitable wrongdoing of another person.10 ‘Secondary liability’ is an alternative

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9 The terminology is used in *Grimaldi* (2012) 200 FCR 296 [242]-[247].
description that can also be used, but it is one that I avoid because it has connotations as
to the nature of the liability with which I do not agree.11

‘The common law’ has two meanings in this thesis. In its first and more general sense it
refers to judge-made civil law as a whole, including equity. In its second and more
specific sense it refers to the law that, prior to the English nineteenth century judicature
reforms was administered by the Courts of King’s Bench, Common Pleas and Exchequer,
and in contrast to ‘equity’ which is used to describe the law that originated in the Court
of Chancery as it has developed since then.12 The particular sense of ‘common law’ will
be evident from the context in which it is used.

D The Purpose and Structure of this Chapter

The purpose of an ANU staff PhD thesis by compilation is to demonstrate that a group of
publications represents a coherent and valuable body of scholarship: in other words, that
the sum is greater than its parts. It is also desirable that a thesis by compilation
demonstrate the potential for further research. Accordingly, the remainder of this chapter
identifies four general questions addressed by the thesis publications in relation to third
party liabilities and explains how the thesis resolves them. In so doing, it shows how this
thesis has made a valuable contribution to the law. The chapter concludes by briefly
noting some questions for further research opened up by the thesis.

The relevant law is set out in detail in the thesis publications and is not repeated in this
chapter, except where conducive to meaning. Hence, the following discussion assumes
some familiarity with the law concerning equitable third party liabilities.

II FOUR QUESTIONS ADDRESSED BY THE THESIS

A Introduction

My overall objective in the thesis publications was to understand and accurately portray
the law concerning equitable third party liabilities from a doctrinal perspective in order
to resolve questions concerning this important area of law. Taken in chronological order,
the thesis publications show the evolution of my research. I began with specific questions

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11 ‘Secondary’ is sometimes used to denote that accessory liability is duplicative of another’s primary
liability. I reject the duplicative theory of accessory liability and argue instead that it is merely derivative
of the primary liability. See Part V B below and Chapters 4 and 2 [8.1.5].
12 Equity refers to ‘the distinctive concepts, doctrines, principles and remedies which were developed and
applied by the old Court of Chancery, as they have been refined and elaborated since.’ Anthony Mason,
‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110
Law Quarterly Review 238.
concerning the remedies for accessory liability and recipient liability (Chapters 4 and 5), but found that it was not possible to answer these questions without understanding the rationales, nature and content of the relevant doctrines establishing liability. Consideration of those matters led me to broader questions in private law concerning the conceptual ordering of doctrine and the legitimacy of indeterminacy and discretion in the formulation and determination of liability and remedy (Chapters 2, 5 and 9). They also led me to examine other forms of third party liability (Chapters 3 and 7) and the law in other jurisdictions (Chapters 2 and 6) so as to form a complete and coherent picture of this complex area of law.

Broadly speaking, therefore, the general questions with which this thesis deals concern:

(i) The rationales for accessory liability, recipient liability and third party vitiating doctrines;
(ii) The tests for accessory liability and recipient liability and accompanying judicial method;
(iii) The remedies for accessory liability and recipient liability and accompanying judicial method; and,
(iv) The relationship of equitable third party liabilities to each other (their classification).

The answers to each question informed the others: these lines of inquiry were not self-contained. In the following four parts of this chapter I summarise the findings of the thesis publications in relation to each of the four questions.

III RATIONALES

A Overview

The first general question addressed by this thesis concerns the rationales of equitable third party liabilities, particularly accessory liability and recipient liability. Resolving the ‘why’ question in relation to the law, enabled principled answers to be given to questions of doctrinal content and remedy. Once I realised this, my method in the thesis publications became to consider first the rationales of whichever doctrine was under consideration and then to marry these with the operation of that doctrine and the available remedies.\(^\text{13}\) A unique feature of third party liabilities is that the rationales of the primary wrong are also

\(^{13}\) See especially, Chapters 4, 5, 7 and 8.
relevant; the implications of this are explored most fully in Chapter 8 with respect to the monetary remedies for participatory liability (encompassing accessory liability and recipient liability). The thesis publications focus upon the rationales of accessory liability (Chapters 2, 4 and 8), recipient liability (Chapters 2, 3, 5 and 8), and the liability to rescission of the innocent third party recipient of a gift tainted by another’s undue influence (Chapter 7). Important findings of the thesis concern the identification of both principled and pragmatic rationales for D’s participatory liability and of their interdependent operation.

B Principled and Pragmatic Rationales for D’s Participatory Liability

The rationales for participatory liability range from principled to purely pragmatic in nature. The former are fundamental and must always be satisfied; supporting rationales tend to be more pragmatic. The pragmatic rationales will fluctuate in their significance, depending upon current mores.14 There is a summary of the rationales in Chapter 2 [8.1.3]. Briefly, the principled rationale is fault-based and this is expressed in two, overlapping ways. The most pervasive expression of D’s culpability in the cases is that of knowing exploitation of the equitable relationship between C and PW for gain. The alternative expression of D’s culpability refers more broadly to deliberate interference in that relationship by D, but without the emphasis on gain by D. The pragmatic rationales concern deterrence, improvement of C’s chance of redress by expanding the pool of defendants, vindication of the primary equitable obligation, and so on.

C The Interdependent Operation of the Rationales

What is clear from the thesis is that participatory liability and the vitiated transaction liability are justified by a combination of rationales, rather than one rationale in isolation. The interdependent relationship of the rationales is particularly important in explaining the claimant-favouring nature of participatory liability: it is not just D’s culpability that justifies D’s liability, but also the pragmatic rationales which reflect the importance placed upon relationships of trust and confidence and upon equitable proprietary rights.

The interdependent nature of the rationales is also demonstrated in Chapter 7. This chapter explains why strict liability (to rescission) is imposed on the innocent recipient of a gift tainted by another’s undue influence (a vitiated transaction claim).15 This is in order

14 In Chapter 8 I refined my terminology and referred to principled functions as ‘rationales’ and pragmatic functions as ‘purposes’.
15 See further below, Part VI B.
to determine whether the same rationale/s apply to recipient liability so as to justify its reformulation as a strict liability, unjust enrichment claim (by discarding the fault element, adding defences of change of position and bona fide purchaser, and mandating a restitutionary remedy). If strict liability is available in the undue influence vitiated transaction claim scenario, the argument goes, why not in the recipient liability scenario as well? The principled rationale for strict liability in the vitiated transaction claim is expressed by the courts in the language of ‘conscience’. In this instance conscience is a shorthand expression for, or judicial distillation of, one or more judicial norms that underpin the relevant case law.16 Conscience in the vitiated transaction claim, rather unusually, does not require personal fault on the part of D. It is based upon the lack of reciprocity by D (the absence of consideration for the gift) combined with the tainted nature of the gift and the fact that the parties can be returned substantially to their original positions. The conscience rationale is interdependent with the nature of equitable rescission (it can sensitively accommodate any change of position by D), the lack of any strong policy concerns against disrupting gifts in this context, and a concern to prevent the primary wrongdoer from too easily ‘getting away with it’.17

IV TESTS FOR LIABILITY AND JUDICIAL METHOD

The second general question addressed by the thesis publications concerns the tests and accompanying judicial methods for determining participatory liability: must liability be determined by the application of discrete elements to the facts, each element being satisfied to a fixed standard? Or can liability be determined by way of a holistic, contextual (and necessarily indeterminate) consideration of the three elements of the liability (the primary wrong, D’s conduct and D’s mental state) applied to the factual scenario in question? The question reflects a broader debate in private law concerning the legitimacy of indeterminacy and discretion in judging.

Chapter 2 first describes the judicial method for determining participatory liability in Australia: the ‘traditional framework’, which adheres to fixed and highly formulaic tests for liability. It then describes the judicial methods for determining accessory liability and

16 See SW Symons, John Norton Pomeroy, A Treatise on Equity Jurisprudence, (Bancroft-Whitney, 5th ed, 1941), vol 1, §57: ‘conscience is ‘a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors, – a juridical and not a personal conscience.’ Quoted in Kakavas v Crown Melbourne Limited (2013) 250 CLR 392 [15].
17 ‘Courts were loath to countenance X’s equitable fraud or to leave C without a remedy simply because the benefit had instead gone to a close relative or associate of X.’ Chapter 7, 130.
recipient liability in jurisdictions that apply English law: the ‘reformed framework’, which adopts two versions of ‘judgment in the round’. Judgment in the round involves a holistic determination of liability by reference to ‘basal principle’ and factors of indeterminate weight. In the English formulation of recipient liability ‘conscience’ is used as the standard by which one discrete element of liability, D’s mental state, is assessed: was D’s knowledge of the primary wrong in all the circumstances ‘such as to make it unconscionable for [D] to retain the benefit of the receipt?’ In the English formulation of accessory liability the overall standard for liability is described as ‘dishonesty’, rather than ‘conscience’. The three elements of liability – a primary wrong, D’s accessorical conduct and D’s mental state – are ascertained and then assessed against the overall standard of dishonesty. This judicial method can be seen most clearly in Lord Nicholls’ judgment for the Privy Council in Royal Brunei Airlines with respect to accessory liability and Chapter 2 suggests that it is working well in practice. Chapter 9 of the thesis identifies judgment in the round as one of the Justice Finn’s proposed hallmarks of Australian equity (in the sense of distinctive features denoting excellence) and considers how it might be incorporated into the Australian law on participatory liability by reforming the traditional framework.

My overall conclusion in the thesis is that participatory liability is best determined by judgment in the round. There are at least three reasons for preferring judgment in the round in relation to participatory liability.

First, the appropriateness of judgment in the round may depend upon where, in its evolutionary cycle, a particular doctrine is situated. Doctrines become settled over time, but eventually a re-evaluation may be required (because, for example, the social or legal context in which the doctrine operates has altered). When this happens, effective doctrinal change may best be achieved by beginning with a doctrinal reformulation in broad, holistic terms that requires judgment in the round. This will then necessitate a re-working and embedding of the reformulated elements by subsequent courts until the doctrine

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20 Determination of liability by reference to ‘broadly stated legal rules and standards’ and ‘guiding criteria of liability’ in this way is just as much a feature of the common law’s judicial method, although equity appears to attract more criticism in this regard. See Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560 [23] (French CJ).
becomes more settled again. Over time a less indeterminate doctrinal inquiry may emerge; alternatively, it may be the case that the nature and subject matter of the doctrine mean that it can never fully be bedded down: judgment in the round will always be required.

Revived interest in, and novel uses of, equitable participatory liability during the latter twentieth century (especially in the context of corporate fraud, rather than breach of express trust) accompanied by unsatisfactory formulaic applications of the nineteenth century precedents meant that this area of law was ripe for reform. A doctrinal re-evaluation was required. Given the unsuitability of the fixed rules at that time, doctrinal reformulation in terms of guiding criteria requiring judgment in the round was natural and this is what has occurred in relation to accessory liability in the Privy Council and English courts. Whether it will also occur in Australia is an open question. As discussed in Chapter 9, the Federal Court in Grimaldi described equitable participatory liability in holistic, indeterminate language, but did not purport to reformulate existing doctrine. The English courts’ reformulations of accessory and recipient liability are not without problems in their content; but the judicial method adopted is sound.

Secondly and relatedly, the question of the requisite mental state for D’s participatory liability lends itself to resolution by judgment in the round rather than fixed tests of ‘knowledge’. As explained in Chapter 2, the requisite mental state for D’s liability is a vexed question, made more so by the difficulty of distinguishing and articulating possible states of mind in the abstract. A further complication is evidential: how to determine whether D possessed the necessary state of mind at the time of the receipt of trust property or accessorial conduct? After a period of considerable uncertainty, the English courts plumped for judgment in the round to determine whether D has the requisite mental state for liability, albeit formulating the inquiry differently in relation to recipient liability (a test of unconscionability with respect to D’s knowledge specifically) and accessory liability (an overall threshold of dishonesty in relation to D’s conduct and mental state). Conversely, according to the Australian traditional framework, whether D possessed the requisite mental state is determined according to a fixed scale of types of mental state. The scale obviates some evidential difficulties by allowing for some objectivity in the inquiry (whether D had ‘knowledge of circumstances which would indicate the facts to

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an honest and reasonable man’). Nevertheless, it has been criticised for its artificiality and difficulty of application.

Thirdly, the factual contexts that raise participatory liability (often involving corporate players and professional agents) and resulting policy concerns about impeding the efficient operation of the market mean that this is an area suited to standard-setting by judges. Transparent judgment in the round allows the courts to set standards of conduct for the general commercial community whilst delivering judgment on the particular facts: by this means social norms are transposed into law.

Judgment in the round is criticised for allowing a judge to indulge in a subjective and normative assessment of the facts, particularly where the basal principle of conscience is invoked. It is naïve, however, to think that the exercise of normative judgment can ever be completely eliminated from the determination of liability. And nor should it be: judging is a creative process by which social norms are transposed into the law by means of the existing law, albeit at an incremental and generally imperceptible pace and that is restrained by institutional checks and balances. At its best, judgment in the round is a highly transparent means by which normative judgment occurs.

V REMEDIES AND JUDICIAL METHOD

A Overview

The third general question with which the thesis deals concerns the remedies available for participatory liability (accessory liability and recipient liability) and accompanying judicial method. Remedies drive this area of law; it is their range and attractiveness that makes participatory liability so important in practice. A comprehensive overview of the current remedies for accessory liability and recipient liability is given in Chapter 2. Chapters 4, 5 and 8 deal with specific remedial questions. In particular, Chapters 4 and 5 argue in favour of gain-based remedies, including proprietary remedies, being available

24 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 [177]. See further Chapter 2 [8.3.4.3].
25 See the general discussion of standard-setting by Harding and Hickey, ‘Equity and the value of gifts’, above n 18, 24.
26 See, eg, Starglade Properties Ltd v Nash [2011] Lloyd’s Rep FC 102 [39] (the Chancellor, Sir Andrew Morritt, finding that ‘[t]he deliberate removal of the assets of an insolvent company so as entirely to defeat the just claim of a creditor is, in my view, not in accordance with the ordinary standards of honest commercial behaviour, however much it may occur’). See generally, Chapter 2, 262-263.
for participatory liability and defend the merits of discretionary remedialism in that context. The thesis publications had to grapple with:

(i) the remedial relationship between the primary wrong and D’s participatory liability;
(ii) the availability of gain-based relief; and,
(iii) the method for determining the remedy.

B The Remedial Relationship of the Primary Wrong and D’s Participatory Liability

A recurring question addressed in the thesis is the extent to which the generous, claimant-favouring approach taken by courts to the formulation and assessment of the remedies for breach of trust and fiduciary duty should also apply against the third party, D. D is, by definition, not subject to the loyalty-infused, primary obligations of the trustee or fiduciary, but he or she is implicated in their breach. Furthermore, in some factual scenarios PW and D may be virtually indistinguishable, as where one is the corporate alter ego of the other, for example.

One response to this question of remedial relationship between primary wrong and D’s liability, advocated by Steven Elliott and Charles Mitchell in the context of accessory liability, is to conceptualise accessory liability as a duplicative (‘secondary’) liability because of its ancillary nature. The duplicative theory is explained fully in Chapter 4, but in brief outline means that once a causative link between D’s conduct and the primary wrong is shown, D stands in PW’s shoes for remedial purposes. That is, the remedies for breach of trust and fiduciary duty apply directly to D. I reject the duplicative theory of equitable accessory liability in Chapter 4 and my arguments in this respect have been widely acknowledged. They are also consistent with Australian law.

D is liable for D’s own wrongdoing: the liability is derivative, but not duplicative, of PW’s liability. This means that the remedies available against D must match the rationales for D’s independent liability. Hence, in the thesis publications I consider whether there are rationales for D’s liability that justify the same range of remedies and the same methods

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28 See above, n 6.
29 See, eg, Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427.
of calculation being available as for the primary wrong even though those remedies need not be identical to those appropriately awarded against the primary wrongdoer.

The remedial relationship of the primary wrong to D’s liability is also significant with respect to the assessment of remedies. This is explored most fully in Chapter 8 which deals with three current questions concerning the monetary remedies for participatory liability: to what extent, if at all, can equitable account-based remedies apply to D; why is equitable compensation for accessory liability calculated by reference to losses caused by the primary wrong, rather than by D’s wrongful conduct; and is the causal link between an accessory D’s gains and the primary wrong determined by the same causation test used to calculate an account of profits against PW? Such questions have always been latent in the law, but are only now coming to the fore, perhaps because the conceptual distinction between the primary wrong and D’s wrong has become clearer. They also reflect increased interest more generally in the procedures of account (and related orders) and the equitable compensation remedy.

C The Availability of Gain-Based Relief

Two chapters of the thesis consider gain-based remedies. Chapter 4 argues that gain-based relief, including proprietary relief, is justified by the rationales for accessory liability. Chapter 5 explicates the law in Australia concerning gain-based proprietary relief for participatory liability more generally. Overall, I argue in the thesis that gain-based relief is consistent with the most pervasive principled rationale for participatory liability: that it is wrong for D to interfere with (exploit) the equitable relationship between C and PW for gain. The lack of interest in England of gain-based relief for accessory liability, until quite recently, appears to have been contributed to by an assumption that relief for accessory liability should be the same across the common law, including equity, and hence should be limited to compensation. My counter-argument is that although the analytical framework for determining accessory liability wherever in the law it occurs is

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30 An example of renewed interest in gain-based remedies for accessory liability is *Novoship (UK) Limited v Yari Nikitin* [2015] QB 499 (*Novoship*).
31 See, eg, *AIB Group (UK) plc v Mark Redler & Co* [2014] 3 WLR 1367.
32 See now *Novoship* [2015] QB 499. In Chapter 4 I explain that gain-based relief for participatory liability in Australia is uncontroversial.
33 See Chapter 4, 450-452.
the same, the doctrinal content and remedies are determined by the purposes and values of the primary wrong and hence may vary.  

The argument that equitable recipient liability (which is fault-based) should be reformulated as a strict liability has been rejected by the courts in England and Australia. On that argument, only restitutionary relief would have been available for the equitable claim. It is now uncontroversial that gain-based relief is available for recipient liability, although the justifications for this vary. This is explained in Chapters 2, 5 and 8.

The case for proprietary gain-based relief is controversial in England. It is complicated by the English courts’ reluctance to recognise discretionary proprietary relief even for the primary wrong of breach of fiduciary duty. In Chapters 2, 4 and 5 I argue that gain-based relief for participatory liability should include proprietary relief and I explain how this is already the case in Australia in relation to recipient liability and may be so, as a matter of principle, for accessory liability.

D Remedial Method

Chapter 8 elaborates upon equity’s remedial method in discussing how the remedies for participatory liability are determined and draws support from the important Australian jurisprudence on this question. Chapters 4, 5 and 7 conclude that remedial discretion is unexceptional and defensible. It is argued that the rationales of equitable participatory liability justify the fullest range of equitable remedies being available. These can be moulded to the particular facts and awarded on terms. In practice, the range of possible remedies naturally reduces to those that are ‘appropriate’ to the facts, as well as the purposes and values of the cause of action. The notion that equitable proprietary rights should never be awarded at a court’s discretion is disingenuous.

VI CLASSIFICATION

34 See further, Dietrich and Ridge, *Accessories*, above n 4, [3.1]. In the case of inducing breach of contract, the doctrinal content is affected by the purposes and values of both contract and tort.

35 *Bank of Credit and Commerce International (overseas) Ltd v Akindele* [2001] Ch 437; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89. But see now, renewal of interest in strict recipient liability at common law in aid of equitable rights discussed below in Part VII.

36 But see Jamie G Affero, ‘Accounts of Profits and Third Parties’ in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, forthcoming) (arguing that a knowing recipient will not necessarily be liable to disgorge profits).

37 The question whether the remedies available for common law (in the narrow sense) claims should be available for equitable claims, in other words, full remedial discretion, was not raised by the thesis subject-matter. See further, Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish, R Nolan, J O’Sullivan and G Virgo (eds), *Restitution: Past Present and Future* (Hart Publishing, 1998) 251.
A  Introduction

The final general question addressed by the thesis publications concerns the relationship of equitable third party liabilities to each other. When I began working in this area, with two notable exceptions, there had been little sustained scholarly attempt to identify and explain the multiple ways in which a third party to a relationship governed by equity could become liable in relation to that relationship.\textsuperscript{38} Chapters 2, 3 and 7, in particular, have filled that gap. The focus of Chapters 2 and 3 was upon which equitable third party liabilities were accessorial (that is: personal liability for wrongful involvement in another’s wrongdoing). My concerns were to identify which doctrines fell within that description and whether accessory liability was a meaningful description in equity. In particular, the relationship of recipient liability to accessory liability is scrutinised.\textsuperscript{39} In this capstone chapter it seems useful to widen the focus to equitable third party liabilities more generally. In this Part I pull together the threads of my classificatory discussion in the thesis publications and present a full classificatory scheme for equitable third party liabilities. Before doing so, however, it is necessary to clarify what I mean by ‘a classificatory scheme’.

There is a large body of literature concerning the proper role of classificatory schemes in private law, much of which was generated by Peter Birks’ work on legal taxonomy.\textsuperscript{40} Birks challenged orthodox understandings of equity’s doctrines and method. This appears to have been the by-product of a desire to better understand the operation and arrangement (‘taxonomy’) of the common law, including equity, especially the relevance of unjust enrichment reasoning to equitable doctrines.\textsuperscript{41} His objective was to formulate an exclusive doctrinal classificatory scheme ordered according to principle, rather than historical origins of the law.\textsuperscript{42}

\textsuperscript{39} The relationship of equitable accessory liability to criminal, common law and statutory accessory liabilities is explored fully in Dietrich and Ridge, \textit{Accessories}, above n 4; it is not the focus of this thesis.
\textsuperscript{41} A leading contribution in this respect is Birks, ‘Equity in the Modern Law’, above n 40.
\textsuperscript{42} See also, Andrew Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22 \textit{Oxford Journal of Legal Studies} 1.
My classificatory scheme for equitable third party liabilities does not purport to be an exclusive scheme; that is, it is not a Birksian-style taxonomy. Concurrent and equally valid classifications that incorporate some or all of equitable third party liability are possible (such as schemes concerning accessory liability across private law, for example). Furthermore, equitable third party liabilities may, and often do, overlap in their elements, remedies and purposes. The law has evolved in a pragmatic, gap-filling, haphazard fashion. With that understanding in mind, the objective here is to draw out from the thesis publications as a whole a coherent classificatory scheme for equitable third party liabilities by choosing the most significant similarities and differences between each form of liability.

The classificatory scheme presented by the thesis publications as a whole concerns third parties to any relationship governed by equity. That is, it is not limited to trust and fiduciary relationships. The following discussion, however, generally will refer to the scenarios of breach of trust and fiduciary duty because of their ubiquity in this context.

B **Content and Labelling of the Classificatory Scheme**

The thesis publications as a whole consider eight forms of equitable third party liability:

*Diagram 1:*

Wherever possible, I refer to these liabilities by their doctrinal labels, such as in the case of recipient liability; the *Diplock* claim; liability as a *trustee de son tort*; and liability for inconsistent dealing. But in some instances a generic label is less cumbersome. So, for example, ‘accessory liability’ is a generic, judicially recognised label for liabilities across private law that are based upon wrongful involvement in another’s wrong. It has three elements: a primary wrong; involvement through conduct in that wrong before or at

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44 See, eg, Dietrich and Ridge, *Accessories*, above n 4, [1.4].
45 *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 [53] (Leeming JA) (‘Fistar’).
46 Also known as ‘knowing receipt’ and ‘unconscionable receipt’.
the time of its commission; with a sufficient mental state (generally, knowledge of the primary wrong). A label in my classification that is not used by the courts is ‘the persisting property claim’ (discussed in Chapters 3 and 5). This refers to the proprietary claim, based upon priority, to trust property or its traceable proceeds now held by a third party who is not a bona fide purchaser for value without notice. ‘Persisting property’ captures the essence of C’s claim which is that C’s proprietary rights ‘persist’ in property now held by D: the claim is proprietary, rather than personal, in nature.

Finally, ‘the vitiated transaction’ label describes third party liabilities generated by equity’s vitiating doctrines, such as undue influence (discussed in Chapters 2 and 7). Such liabilities arise where D is a counterparty to a transaction with C that is vitiated because of C’s relationship with a non-transacting party. The transaction may be a gift or a contract.

C The Primary Liability/Ancillary Liability Distinction

My classificatory scheme groups the liabilities of third parties to relationships regulated by equity according to the features that most distinguish them from each other. Among the eight forms of liability discussed in this thesis, an important distinction can be drawn between ancillary and primary liability. ‘Ancillary’ indicates that one element of the third party claim is equitable wrongdoing by the non-claimant party to the relationship regulated by equity (the primary wrongdoer). ‘Primary liability’ indicates the converse; that is, no such element is required. The third party is subject to primary liability irrespective of whether the non-claimant party to the relationship is a wrongdoer. (Only primary liabilities that attach specifically to a third party to a relationship governed by equity, rather than primary liabilities more generally, are included in this scheme.)

Distinguishing ancillary and primary liabilities is justified by their significantly different natures. The rationales of the ancillary liabilities are concerned not only with addressing D’s circumstances, but also with shoring up the function/s of the related primary wrongs. Ancillary liability thus requires consideration of the rationales and purposes of both the

47 Dietrich and Ridge, Accessories, above n 4, Chapter 3.
48 I have taken the term ‘persisting property’ from Mitchell and Watterson, ‘Remedies for Knowing Receipt’, above n 6.
49 The claim comprises ‘proprietary, in rem, proceedings to make specific restitution to the “true owner” of such trust property (or its traceable proceeds) as remains in [D’s] hands.’ Grimaldi (2012) 200 FCR 296 [251]. It is also available against the primary wrongdoer who retains trust property or its traceable proceeds.
ancillary liability and its primary wrong. Conversely, primary liability does not require a primary wrong to have been committed by another; hence, only its own rationales and purposes are relevant. Similarly, consideration of remedy is simpler in relation to primary liability in that the remedies are directed to the circumstances generating that liability, whereas the remedies for ancillary liabilities may be directed to the circumstances generating the primary wrong, the ancillary liability, or both. Thus, the tripartite nature of the determination of an ancillary liability claim, as compared with the binary nature of the primary liability claim, adds a layer of complexity that justifies this fundamental classificatory distinction.

D Primary Third Party Liabilities

Three primary liabilities that may be incurred by third parties to relationships regulated by equity are discussed in the thesis. The first concerns trustees de son tort and is discussed in Chapter 3 at [7.2]. This category is peripheral to the core concerns of the thesis. The second concerns the primary liability of inconsistent dealing with property which is the subject of a trust or fiduciary relationship. Such dealing need not be for personal benefit. Inconsistent dealing liability does not require there to be any breach of duty by the trustee or fiduciary; therefore, it is a primary, fault-based liability. Traditionally, inconsistent dealing was grouped with recipient liability. This recognised that both involve conduct with respect to ‘trust’ property that is inconsistent with the trust, both require personal fault and both are personal liabilities, but I argue in Chapter 3 that these are not as important criteria for classificatory purposes as the ancillary/primary liability distinction. My discussion of inconsistent dealing and recipient liability in Chapter 3 has been cited with approval by the NSW Court of Appeal. 51

A third primary liability imposed upon third parties to a relationship governed by equity is for breach of confidence. This occurs where a third party to a breach of confidence either knowingly receives and deals with that confidential information or, having innocently received the confidential information, subsequently learns of its confidential nature. Some such scenarios are susceptible to dual characterisation; ancillary and primary claims can be pleaded in the alternative. Nonetheless, primary liability will always arise and, in most instances, will be the most appropriate characterisation of the claim. This is explained in Chapter 2. 52

50 See Chapter 3 fn 15.
51 Fistar [2016] NSWCA 81 [45]. See further, Chapter 3 [7.3].
52 [8.4.1.1]-[8.4.1.2].
My classificatory scheme does not categorise third party liabilities generated by equity’s vitiated transaction claims as primary liabilities. Conversely, some commentators argue that vitiating doctrines such as undue influence are based solely upon the vitiation of C’s consent, rather than the fault of the influencing person. On this view, there is no primary wrong at all in an undue influence scenario and hence the third party’s liability to rescission of the vitiated transaction can only be a primary liability. This thesis takes the contrary view, namely, that vitiating doctrines such as undue influence address actual or presumed primary wrongdoing. Accordingly it categorises such doctrines, where they impact upon third parties, as ancillary liabilities. This point is explained more fully in Chapters 2 and 7.

Thus, of the eight forms of equitable third party liability considered in the thesis, three are primary liabilities: trustee de son tort, inconsistent dealing and breach of confidence. There appear to be no commonalities between the three liabilities that would warrant further classification.

E Ancillary Liabilities

The five ancillary liabilities display similarities in their elements, often overlap in their application and have the same or similar functions. Possible groupings considered here are based respectively upon a personal/proprietary distinction; the degree of fault required; and a participatory/non-participatory distinction.

1 Personal or Proprietary Claim

A clear point of distinction is whether an ancillary claim is personal or proprietary in nature. The persisting property claim discussed in Chapter 3 is the only ancillary liability in the latter category. It is described as being ‘in rem’, a ‘title-based claim’ and as enforcing ‘hard-nosed property rights’. The remedy is proprietary. The remaining four ancillary claims considered in the thesis are personal claims (recipient liability, accessory liability, the Diplock claim and the vitiated transaction claim). They may result in the award of proprietary remedies, but not necessarily. The distinction between recipient liability and the persisting property claim, discussed fully in Chapters 3 and 5 of the thesis, illustrates the difference. Like the persisting property claim, an element of recipient liability is that D received trust property or its traceable proceeds, but in contrast to the

53 Grimaldi (2012) 200 FCR 296 [251].
54 Fistar [2016] NSWCA 81 [42]-[44].
persisting property claim, recipient liability does not depend upon D retaining the trust property or its traceable proceeds. D’s recipient liability is also said to be grounded in ‘conscience’, rather than title. Accessory liability is a personal liability for which, I argue, proprietary remedies may be available if appropriate; the Diplock claim is a personal claim of last resort in relation to the distribution of a deceased estate; and the vitiated transaction claim is also personal, although rescission may have proprietary consequences where the subject-matter of the transaction is property.

2 Participatory liability

A constant theme of my thesis work has been the relationship between accessory liability and recipient liability. In earlier work represented in this thesis I used the label of ‘accessory’ or ‘accessorial’ liability to encompass recipient liability. My understanding of what is properly encompassed by accessory liability has evolved. My considered view now is that ‘accessory liability’ is an accurate and appropriate description of liability for procuring or assisting in equitable wrongdoing by another, but not for receiving trust property in breach of trust or fiduciary duty. Understanding accessory liability in this way promotes coherence given that accessory liability in this sense has the same three core elements in all its manifestations across private law and criminal law, namely:

(i) A wrong committed by a person other than the accessory (the primary wrongdoer);
(ii) Involvement, through conduct (or, exceptionally, inaction), by the accessory in that wrong; and
(iii) A requisite mental state, generally established by reference to the accessory’s knowledge of PW’s wrong.

As is explained more fully in Chapters 2 and 3, recipient liability does not require D to have been involved in the primary wrongdoing before or during its commission in order to be liable; that is, element (ii) need not be present. In other words, although as a factual matter the receipt of misappropriated trust property by D will often be concurrent with the trustee’s breach of trust, this is not necessary to satisfy the liability. Thus, recipient

57 Chapter 2 [8.7.3.3]; Chapter 4. Contra in England: Re Polly Peck International Plc (No 2) [1988] 3 All ER 812, 831-832.
58 Dietrich and Ridge, Accessories, above n 4, [3.1].
liability does not match an accessory liability framework that is consistent across private law.

A complication in understanding the relationship of accessory liability and recipient liability is that the conceptual basis, and consequent framing of the doctrinal elements, of recipient liability are contested. It has been argued that recipient liability should be recast as a strict liability unjust enrichment claim or alternatively that the current fault-based form of recipient liability should co-exist with a strict liability unjust enrichment claim. Chapters 3 and 7 consider and reject the arguments for strict, unjust enrichment-based, recipient liability on either basis.59

The rationales and purposes of accessory liability and recipient liability, whilst overlapping, are not identical. They are clearly different forms of liability in these respects. But it is also true that equitable accessory liability and recipient liability share certain features. In particular, they are distinguishable from other ancillary liabilities on the basis that, broadly speaking, they require a stronger degree of personal culpability (determined by both conduct and mental element) on the part of the third party. Furthermore, in Australia at least, the requisite mental element is the same. Even in jurisdictions that conform to the English model which distinguishes accessory liability from recipient liability, the method for determining liability is remarkably similar, despite the use of different terminology.60 So is accessory liability an exclusive classification or is it defensible to concurrently group equitable accessory liability with recipient liability?

This is not an ‘either/or’ question: equitable accessory liability shares the same elements as accessory liabilities in other areas of private law, but also shares such distinctive elements with recipient liability that a common classification within equity is justified. ‘Participatory liability’ is the term that I adopted from recent Australian case law as a collective description for the fault-based liability of third parties involved (through procurement, facilitation, or knowing receipt of trust property) with another’s equitable wrongdoing.61 This classificatory grouping recognises that the commonalities of accessory liability and recipient liability are at least as important as the accessorial/non-accessorial analytical distinction. The thesis publications, as a whole, conclude that it is coherent to conceptually group accessory liability and recipient liability because of their

59 See also, Dietrich and Ridge, “‘The Receipt of What?’”, above n 3.
60 The similarities are particularly apparent in Lord Sumption JSC’s judgment in Williams v Central Bank of Nigeria [2014] 2 WLR 355 [9].
similar elements, whilst recognising that they have distinctive features that preclude further assimilation. That is, they are distinct forms of ancillary personal, fault-based liability with, broadly speaking, common elements and a common method. This conclusion does not exclude the concurrent recognition of equitable accessory liability as being part of a separate genre of accessory liability across private law.

These conclusions are represented in the following diagram:

*Diagram 2: A Classification of Equitable Third Party Ancillary Liabilities*

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**Categories of Equitable Accessory Liability**

Equitable accessory liability can be classified further according to the conduct element. Procurement (or inducement: the terms are used interchangeably) is the most recognised form of accessory liability across private law and for this reason alone warrants a distinct classification in equity. It is discussed in Chapter 2. A lesser form of accessorrial conduct (in generic terms: ‘facilitative conduct’) also suffices for accessory liability in equity. Facilitative conduct by any third party in relation to another’s equitable wrong is usually described by the courts as ‘assistance’; however, it is useful to distinguish, factually, if not conceptually, facilitation by means of corporate vehicles. Particularly where the corporate vehicle is the primary wrongdoer’s alter ego, perhaps it is artificial to speak of the former’s ‘assistance’ in the primary wrong, although that is precisely what the courts do.\(^6\) Furthermore, specialist rules concerning attribution of knowledge and conduct come into play. Thus, Diagram 3 distinguishes between facilitation through assistance and facilitation by the primary wrongdoer’s alter ego for pragmatic, rather than conceptual, reasons:

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\(^6\) On companies and third party liability, see generally, Dietrich and Ridge, *Accessories*, above n 4, Chapter 11.
G Conclusion on the classificatory exercise

My classificatory scheme for equitable third party liabilities, based upon the thesis publications, is represented in the following diagram. It purports to accurately reflect the current law in most, if not all, jurisdictions to which the thesis applies, although it does not adhere to doctrinal labels and particular doctrinal content may vary amongst jurisdictions.

Diagram 3: A Classification of Equitable Accessory Liability

Diagram 4: A Full Classification of Equitable Third Party Liabilities Considered By This Thesis
VII THE POTENTIAL FOR FURTHER RESEARCH

In addition to presenting a comprehensive and coherent account of equitable third party liabilities, the thesis publications also open up fruitful avenues for further research. A particularly topical question concerns the ways in which private law as a whole (equity, common law and statute) addresses scenarios involving the receipt, by third parties, of property protected by equity. The thesis publications deal only with equitable recipient liability; however, recent authorities in Australia acknowledge two common law recipient liabilities that protect equitable rights from third party interference.

The first form of common law liability comes from a series of decisions in New South Wales that have built upon the House of Lords case of Lipkin Gorman v Karpnale Ltd. They recognise a common law claim for money had and received against the recipient for personal benefit of trust property or its traceable proceeds who retains that property and is not a bona fide purchaser, the rationale for which is D’s unconscionable retention of benefit. This is a claim concerning equitable property, identified through equitable means, but enforced by the common law. It is described as being the personal companion to the persisting property claim. Its fullest exposition is in the NSW Court of Appeal case of Heperu Pty Ltd v Belle (Heperu). The second form of common law liability was recognised most recently by the Federal Court of Australia in Great Investments Ltd v Warner (Great Investments). It imposes strict liability upon a recipient of company assets transferred by an agent without authority. The liability is formulated in Birksian unjust enrichment terms and has an unjust enrichment rationale, also formulated in Birksian terms. It is difficult to reconcile the two Australian claims: why should the formulation and elements of the two claims differ so greatly when both concern the personal strict liability of a recipient of property that is subject to equitable rights and obligations? There are also significant questions concerning the precise relationship of the Heperu claim and the Great Investments claim to the other ancillary liabilities concerning receipt of equitable property, and to the persisting property claim.

63 Heperu Pty Ltd v Belle (2009) 76 NSWLR 230; Break Fast Investments Pty Ltd v Perikles Giannopoulos (No 5) [2011] NSWSC 1508; Sze Tu v Lowe (2014) 89 NSWLR 317; Fistar [2016] NSWCA 81. See also, Ford v Perpetual Trustees Victoria Ltd (2009) 75 NSWLR 43.
64 Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548.
65 Heperu Pty Ltd v Belle (2009) 76 NSWLR 230.
A further and related avenue for further research concerns the operation of the equitable tracing rules and their relationship to the persisting property claim, equitable recipient liability and the *Heperu* claim. The popular view of the tracing rules is that they simply provide a process for identifying property in relation to which C must establish a claim separately. But how credible is this description in the case of the persisting property claim? As discussed above, this claim is distinguished from related ancillary liabilities on the grounds that it is based upon ‘title’, rather than ‘conscience’ and is proprietary in nature.67 A direct priorities contest between C and D in relation to property in its original form can be viewed as ‘title-based’ quite readily because C is simply asserting a right to the same property. But the persisting property claim includes where C’s claim is not to the original property, but to different property that has been traced into D’s hands. Does the interposition of the tracing rules, which introduces an element of indeterminacy, lessen the force of the title-based explanation of the persisting property claim?68

Thus, the relationship of the various claims, at common law and equity, concerning receipt of equitable property requires further study before we can be comfortable with the complexity of this area of law.

VIII CONCLUSION

The publications in this thesis make a substantial and original contribution to the law concerning equitable third party liabilities in Australia, England, and related jurisdictions because they explain in depth how the various liabilities relate to each other, their rationales, their doctrinal content and the remedies available. In so doing, the publications remove much of the complexity and confusion in the law. They also contribute to the wider debates concerning judge-made law and, particularly, modern equity: its arrangement, content and methodology. In attempting to resolve my four general questions concerning equitable third party liability, I have presented a narrative of modern equitable principle, method and remedy. This narrative accepts the complexity of equitable third party liabilities: they are not amenable to simple explanation. It seeks incremental change within the parameters of the existing law and it is comfortable with indeterminacy in the determination of liability and remedy.

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67 See Part VI E 1.
68 *Contra Foskett v McKeown* [2001] 1 AC 102.
CHAPTER TWO
Breach of equitable duties

8.1 Introduction

8.1.1 Overview

The principles governing accessory liability for breach of an equitable duty are to be found within the broader principles that govern third-party participatory liability in equity. This chapter sets out the principles of accessory liability within that broader context, including recipient liability. The law governing accessory liability specifically, and participatory liability generally, is confused in some respects and differs across jurisdictions. The confusion is attributable in part to the extraordinary influence of one nineteenth-century Court of Appeal in Chancery decision, *Barnes v. Addy*, and specifically, Lord Selborne LC’s *ex tempore* leading judgment.1 *Barnes v. Addy* concerned claims against two solicitors who acted in relation to the appointment of a sole trustee to a testamentary trust. The beneficiaries sought redress against the solicitors for the trustee’s misappropriation of the trust fund.2 Lord Selborne was anxious to protect professional agents, particularly solicitors and bankers, acting honestly ‘as the agents of trustees in transactions within their legal powers’ and dismissed the beneficiaries’ appeals.3 His Lordship did not purport to change the law or to expound generally on the liability of third parties to breach of trust. Nonetheless, during the latter part of the twentieth century, his brief statement as to two exceptional circumstances in which agents of trustees would be liable for a trustee’s breach of trust transmogrified into an inflexible

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1 *Barnes v. Addy* (1874) LR 9 Ch App 244.
2 The bill charged that the solicitors ‘being fully cognisant [of the trustee’s fraud] aided and abetted the same, and were parties to the breach of trust, in conjunction and collusion with the [former and new trustees]’... *Barnes v. Addy* (1873) 21 WR 324 (Ch) 325. The beneficiaries were unsuccessful at first instance before Wickens VC: *Barnes v. Addy* (1873) 21 WR 324 (Ch).
3 *Barnes v. Addy* (1874) LR 9 Ch App 244, 251.
template for equitable participatory liability generally, regardless of whether the participant was an agent or not and irrespective of the nature of the participant’s conduct or the primary wrong in question. A distinction was drawn between participants who were involved in the primary wrong through knowingly receiving trust property and those who assisted in egregious breaches of trust (later extended to breach of fiduciary duty more generally) without necessarily receiving property. Little or no attention was paid to primary wrongs other than breach of trust and fiduciary duty. The so-called ‘two limbs’ of Barnes v. Addy were often applied in a formulaic and literal fashion. This need not have been so. In contrast to the jurisdictions focused upon in this chapter, the Barnes v. Addy template has not dominated the United States’ jurisprudence on the topic.

In recent times, there has been a move away from the Barnes v. Addy template in most jurisdictions, but with mixed results. Broadly speaking, there are currently two frameworks used to determine participatory liability for breach of trust and fiduciary duty. These largely involve accessory liability as we understand it, although the equitable

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4 Less attention was paid to the preceding statement that third parties ‘actually participating in any fraudulent conduct of the trustees’ would be liable: ibid.

5 The original passage in Barnes v. Addy ibid. 251–252 from which this distinction derives is:

Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

6 See, e.g., Austin Wakeman Scott, William Franklin Fratcher and Mark L. Ascher, Scott & Ascher on Trusts, 5th edn (Boston, Aspen Publishers, 2006) §30.6.4, where Barnes v. Addy is discussed without special emphasis. Of particular interest is that US law does not apparently single out accessory liability or in personam recipient liability as separate categories of liability. See, e.g., the Restatement (Third) of Trusts §108 (1) (2012): ‘A third party is protected from dealing with or assisting a trustee who is committing a breach of trust if the third party does so without knowledge or reason to know that the trustee is acting improperly.’ See further concerning the bona fide purchaser doctrine, Restatement (Third), Restitution and Unjust Enrichment §§66–69 (2011), especially Illustrations 12 and 13. Similarly, in Scott & Ascher recipient liability is subsumed into the bona fide purchaser doctrine: Ch. 29. See in relation to fiduciaries more generally, Restatement (Second) of Torts §§784 Comment c (1979): ‘A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct …’
principles did not develop by reference to accessory concepts or with such a classificatory scheme in mind. The traditional framework [8.1.4.1] differentiates procurement and knowing assistance and knowing receipt of trust property as instances of participatory liability to which similar elements apply. Culpability is determined according to the third party’s knowledge of the primary wrong. The traditional framework holds most sway in Australia and still applies to an extent in Canada’s common law courts. The reformed framework [8.1.4.2] on the other hand, combines liability for procurement and assistance and distinguishes liability for receipt of trust property. ‘Dishonesty’ [3.5.2] and ‘unconscionability’, rather than knowledge, are the respective culpability tests. The reformed framework was initiated by the Privy Council in the landmark case of Royal Brunei Airlines Sdn Bhd v. Tan (Royal Brunei Airlines).\(^7\) It has been adopted by the English courts and jurisdictions that follow those courts. The requirements for recipient liability are unsettled and have yet to be fully articulated.

Regardless of jurisdictional differences, however, the same two questions dominate the case law. The first concerns the requisite culpable involvement of the third party [3.5.1]. This clearly turns upon the third party’s knowledge of the primary wrong, but the courts have struggled to articulate criteria and a methodology that provide certainty for litigants as well as just outcomes. Secondly, although all jurisdictions to a greater or lesser extent differentiate third parties involved in the primary wrong through receipt of trust property and third parties involved in some other way, there is uncertainty as to the proper conceptualisation of recipient liability and its relationship to other instances of equitable third party liability [7.6].

Leaving aside Barnes v. Addy, the questions that beset participatory liability are policy-driven, rather than doctrinal. In particular, the circumstances in which agents providing professional services to trustees and fiduciaries should be liable for their principals’ misconduct raises contested questions of policy. On the one hand, such agents are well placed to detect and deter such misconduct; on the other hand, the consequent liability, not to mention the cost to business, may be disproportionate to the degree of culpability. The issues are acute where it is unclear whether the agent was dishonest or simply incompetent. The complexity of such questions is exacerbated because the principles determining liability of professional agents tend to be indiscriminately

\(^7\) [1995] 2 AC 378 (PC).
bundled together with those for determining the liability of third parties who are intimate with the primary wrongdoer, PW, such as corporate alter egos and spouses.

In this introductory part of the chapter, preliminary questions concerning equitable duties, the rationales of equitable accessory liability, the divergent frameworks and understandings of the liability and the terminology of constructive trusts are addressed. The second part of the chapter discusses the scope of equitable accessory liability, that is, whether it attaches to all equitable duties. The third part describes and evaluates the current law concerning accessory liability and recipient liability for breach of trust and fiduciary duty. The fourth and fifth parts consider, more briefly, accessory liability for breach of confidence and undue influence. The final two parts of the chapter deal with defences and remedies. As explained in [7.6.2], we regard recipient liability as closely related to accessory liability and hence include it in this chapter. For convenience and where it is not misleading, we use the terminology of 'A' to refer to a third party subject to recipient liability. The main focus of the chapter is upon Anglo-Australian law with reference to Canada, New Zealand, Singapore and Hong Kong as appropriate. The law in the US has developed separately from these jurisdictions. It is occasionally referred to in general terms where it provides a helpful point of comparison.8

8.1.2 The primary wrong: equitable wrongs and 'wrongfulness'

Breach of equitable duty falls within our concept of a primary wrong [3.2] and includes breach of trust, breach of fiduciary duty, breach of confidence and, perhaps, although this is contested, undue influence [8.5.1].

In any event, equity has a more expansive concept of 'wrongfulness' determined by reference to the conscience of the court as exemplified in equitable doctrine and principle.9 This concept includes, but is not limited to,10 conduct that is against good conscience whether or not it

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8 As to US sources of law on participation in breach of trust and fiduciary duty see generally, George Gleason Bogert, George Taylor Bogert, Amy Morris Hess, Bogert's Trusts and Trustees §57, 901.
10 Only unconscionable conduct before or at the time of the primary wrong is relevant to accessory liability, although unconscionability can also arise later: Tanwar Enterprises Pty
constitutes breach of pre-existing duty to the claimant, C. Where unconscionability relates to a person's conduct and results in a cause of action being available to C, then, in principle, accessory liability may attach to that cause of action whether or not PW's unconscionable ('wrongful') conduct is conceived of as constituting breach of a duty. This would encompass undue influence if that doctrine is considered not to involve breach of a duty. How accessory liability might attach to doctrines such as undue influence is discussed in [8.5].

It should also be noted for the sake of completeness that not all equitable claims against persons who owe equitable duties are based upon a breach of duty or even wrongful conduct in a wider sense. Where this is so, there is no primary wrong at all and hence no accessory liability on the part of a third party can arise.

8.1.3 The rationales for accessory liability and participatory liability

Equitable accessory liability is fault-based: the accessory's, A's, culpable involvement in the primary wrong grounds liability; see also


\textsuperscript{13} Cf. a claim for an account of administration on the basis of wilful default, which generally requires at least one instance of 'wilful default' (a breach of duty by the administrator which has caused something to be lost to the fund or not received by the fund when it should have been received). In an Australian case, a claim for account for wilful default was made against the three directors and an associated company of an insolvent trustee company (the primary wrongdoer). Both Austin J at first instance and Giles JA on appeal noted the fact and commented that the defendants' liability was presumably accessorily here (citing \textit{Barnes v. Addy}: \textit{Glazier Holdings Pty Ltd v. Australien Men's Health Pty Ltd} (No 2) [2001] NSWSC 6 [8]; \textit{Meehan v. Glazier Holdings Pty Ltd} [2001] NSWCA 22; [2002] 54 NSWLR 146 [11], [65]–[66]. See also \textit{Prudential Assurance Co Ltd v. Lorenz} (1971) 11 KIR 78 (Ch), in which interlocutory relief was given to restrain a trade union from inducing its members to breach a non-contractual duty to account to the plaintiff employer.
Culpability depends upon A's conduct (accessorial involvement), mental state (knowledge) and the consequent participation link to the primary wrong in question [3.5]. A's culpability is described in the cases in terms of two, overlapping rationales; the first such description is pervasive and applies to equitable participatory liability generally. Here, A's culpability is described in terms of A knowingly taking advantage of the equitable relationship between C and PW, for personal gain. This rationale is used in relation to both accessory liability and recipient liability [7.6.2]. The second description of A's culpability has only been applied to accessories and does not require exploitative conduct as such. Thus, it has been said that the beneficiaries of trust and fiduciary relationships are entitled to expect that third parties will not deliberately interfere in those relationships.

The fault-based rationale for equitable accessory liability is underpinned by pragmatic rationales that reflect the importance attached to equitable obligations of trust and confidence and the historically strong prophylactic and protective function of equity's jurisdiction over trusts and other fiduciary relationships. One such pragmatic rationale is the courts' desire to deter participation in breach of trust or fiduciary duty, so lessening the risk of wrongdoing by trustees and fiduciaries. Another rationale is to vindicate C's rights by providing

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14 In equitable terms, A's conduct is against good conscience. The legal norm at play here is that it is unconscionable to knowingly interfere with relationships and rights protected by equity. While awareness of the significance of one's actions is not the only norm informing conscience, it is a pervasive theme of equitable doctrines. See further, Klinck, 'The Nebulous Equitable Duty of Conscience', 250–257.

15 See, e.g., Consul Development Pty Ltd v. DPC Estates Pty Ltd (1975) 132 CLR 373 (HCA) 397 (Consul Development); Zhu v. Treasurer (NSW) [2004] HCA 56; (2004) 218 CLR 530 [121] (Zhu). The same rationale is given in cases of breach of confidence (Prince Albert v. Strange (1849) 1 Mac & G 25, 44–45; 41 ER 1171, 1178–1179: a third party availing himself of 'a breach of trust, confidence or contract by another will be enjoined') and undue influence (Khan v. Khan [2004] NSWSC 1189; 2004) 62 NSWLR 229 [21]). See also Pyffers Group Ltd v. Templeman [2000] 2 Lloyd's Rep 643 (QB) 669 (Toulson J) (Pyffers): 'although A owes no personal obligation of loyalty to C, it is unconscionable for him dishonestly to suborn the loyalty of the agent [PW] and equally unconscionable for him to keep benefits which he has obtained by dishonestly abusing to his own advantage the position of [PW] whose duty was to [C]'.

16 Royal Brunei Airlines [1995] 2 AC 378 (PC) 386–387 (drawing an analogy with the tort of inducing breach of contract). See also Bogert's Trusts and Trustees, §901.


C with an alternative means of recourse, thereby increasing C's chances of a successful claim.\(^\text{19}\) The pragmatic rationales underpinning equity's intervention can be seen most clearly in relation to professional agents of trustees and fiduciaries. Such agents generally receive no personal gain from the breach by PW other than remuneration for their services (hence, culpability in terms of the first description above cannot apply). Generally, they are related to PW only through the agency relationship. They are characteristically well placed to detect and expose trustee or fiduciary misconduct. Imposing accessory liability provides a strong incentive for such parties to minimise the opportunity for fiduciary misconduct and thus lessens the opportunities for such breaches.\(^\text{20}\)

The pragmatic rationales that underpin equitable accessory liability are controversial because A becomes jointly and severally liable with PW for all of C's losses caused by the breach of trust or fiduciary duty [8.8.1]. Such an extensive liability may be disproportionate to A's involvement in the primary wrong.\(^\text{21}\) Although this was historically explicable, there are signs in some jurisdictions of a desire to rein in the liability.\(^\text{22}\)

\textbf{8.1.4 Current frameworks for participatory liability, including accessory liability}

\textbf{8.1.4.1 The traditional framework}

The traditional framework for determining equitable participatory – including accessory – liability comprises three overlapping categories. They refer to breach of trust or fiduciary duty:

- A's knowing receipt of, or inconsistent dealing with [7.3],\(^\text{23}\) property in breach of trust or fiduciary duty;

\(^{19}\) \textit{Royal Brunei Airlines} [1995] 2 AC 378 (PC) 386–387.


\(^{21}\) This is of particular concern with respect to agents providing professional services, the group described by Lord Selborne in \textit{Barnes v. Addy} where he was at pains to restrict their liability: (1874) LR 9 Ch App 244, 251–252. See also \textit{Royal Brunei Airlines} [1995] 2 AC 378 (PC) 391.

\(^{22}\) See in the US. e.g., the development of a 'modernized rule' – comment d. – of the \textit{Restatement (Third) of Trusts} §108(3) (2012): 'In dealing with a trustee, a third party need not: (a) inquire into the extent of the trustee's powers or the propriety of their exercise; or (b) ensure that assets transferred to the trustee are properly applied to trust purposes.' See also \textit{Uniform Trust Code} §1012(b).

\(^{23}\) Lord Selborne LC in \textit{Barnes v. Addy} (1874) LR 9 Ch App 244, 251–252, referred to those who 'receive and become chargeable with some part of the trust property', but Brightman J in \textit{Karak Rubber Co Ltd v. Burden (No 2)} [1972] 1 WLR 602 (Ch) 633 (Karak), adopted
A's knowing assistance in a dishonest and fraudulent design on the part of the trustee or fiduciary;  
A's procurement or inducement of any breach of trust or (probably) fiduciary duty.

The traditional framework is largely the product of the twentieth-century judicial distillation of the nineteenth-century authorities on third-party liability for breach of trust. It was not conceived of as a framework for accessory liability per se, although it includes that form of liability; instead, broader descriptions such as 'participatory liability' or 'third-party liability' tend to be used. There is little suggestion by courts applying the traditional framework that the three categories might be conceptually, as opposed to factually, distinct. The traditional framework is settled law in Australia. It also continues to inform the Canadian common law with respect to knowing assistance and the New Zealand law with respect to


24 See especially, Selangor United Rubber Estates Ltd v. Cradock (No 3) [1968] 1 WLR 1555 (Ch) 1579–1580 (Selangor), where Unggoed-Thomas J described two categories of 'constructive trustee'. The first category ('[t]hose who, though not appointed trustees, take upon themselves to act as such and to possess and administer trust property for the beneficiaries ...) included trustees de son tort and those who 'receive and become chargeable with some part of the trust property'. The second category comprised those who participate or assist with knowledge in 'a dishonest and fraudulent design'. See also Brightman J's differently worded categories in Karak [1972] 1 WLR 602 (Ch) 633.

25 See also Hasler v. Singtel Optus Pty Ltd [2014] NSWCA 266; (2014) 101 ACSR 167 [72] (Leeming JA) (Hasler): 'ancillary liability'.

26 Indeed, in Grimaldi v. Chameleon Mining NL (No 2) [2012] FCAFC 6; (2012) 200 FCR 296 [247] (Grimaldi), they are grouped with further examples of equitable participatory liability for breach of trust or fiduciary duty that exhibit the same conceptual framework. But see Hasler [2014 NSWCA 266; (2014] 101 ACSR 167 [75]. See also the contrary Canadian position: below n. 39.


8.1 INTRODUCTION

knowing receipt, although this may change.²⁹ Although not a necessary corollary, the framework is associated with a literalist and formulaic methodology.³⁰

The formulation of the traditional framework’s first two categories derives from Lord Selborne’s judgment in Barnes v. Addy. In conformity with a literal reading of that judgment, liability for assistance is confined to assistance in a ‘dishonest and fraudulent design’. Until comparatively recently, the small number of nineteenth-century cases concerning procurement or inducement in breach of trust had escaped much attention.³¹ Instead, scenarios involving procurement were dealt with within the ‘assistance’ category of liability.³² The cases are now recognised as a third category of liability under the traditional framework.³³

The traditional framework differs from the nineteenth-century case law in several respects relevant here. First, it applies Lord Selborne’s judgment in Barnes v. Addy regarding agents of trustees to all third parties, whether agents or not. Consequently, courts applying the traditional framework have applied the two limbs of Barnes v. Addy as if they were a comprehensive formula for liability and have tended to ignore the much broader range of circumstances in which the nineteenth- and early-twentieth-century courts imposed participatory liability for breach


³² The suggestion that a ‘tort of procuring breach of trust’ be recognised was nipped in the bud for this reason (as well as for others): Metall und Rohstoff AG v. Donalson Lufkin & Jenrette Inc [1990] 1 QB 391, 481.

of trust or fiduciary duty. Secondly, the nineteenth-century cases primarily concerned express trusts, but under the traditional framework the categories of assistance and procurement apply to breaches of fiduciary duty generally, regardless of whether trust property, even of an extended description, is involved [8.3.1.3]. Finally, while the nineteenth-century courts appear not to have been troubled in applying the knowledge requirement for liability, the modern case law is marked by attempts to pin down this requirement. Thus, a notable feature of the traditional framework is its use of the five-level ‘Baden scale’ of knowledge [8.3.4.3].

8.1.4.2 The reformed framework

Under the reformed framework, the three traditional categories (D’s receipt, assistance and procurement/inducement) are reshaped into two, conceptually distinct, forms of fault-based liability for breach of trust or fiduciary duty:

Dishonest procurement or assistance in a breach of trust or fiduciary duty;
Unconscionable receipt of trust property.

Some features of this new framework can only be described in tentative terms because it derives from two leading cases that are not entirely reconcilable in their approaches and because it is heavily influenced by academic scholarship and extrajudicial commentary that is yet to be fully considered by the courts. The reformed framework has been adopted in England and Wales, Singapore, Hong Kong and New

34 This applies even to Lord Selborne’s judgment itself, in that the comments regarding joint participation in ‘any fraudulent conduct of the trustee to the injury of the cestui que trust’ are largely ignored. Barnes v. Addy (1874) LR 9 Ch App 244, 251.


Zealand as well as in countries bound by the Privy Council. It is also broadly consistent with the Canadian common law.

In relation to the first (accessory) category, procurement and assistance are grouped together and the traditional framework’s requirement of assistance in a ‘dishonest and fraudulent design’ is discarded: the traditional framework’s two distinct categories are combined. The fault element here is ‘dishonesty’ [3.5.2]. A’s knowledge is an essential factor in determining whether A was dishonest, but is not the criterion for liability. Instead, there is an inquiry into first, the facts including A’s knowledge and, second, whether A was dishonest in all the circumstances. The liability is generally, but inaccurately, referred to as ‘dishonest assistance’. Although foreshadowed in earlier decisions, the formulation of this first category in substitution for the traditional framework’s second two categories was most authoritatively made in 1995 by Lord Nicholls of Birkenhead for the Privy Council in Royal Brunei Airlines.

The second category of the reformed framework – recipient liability – in its current form is very similar to that of the traditional framework, namely, knowing receipt of trust property in breach of trust or fiduciary

(unconscionability test for recipient liability stated in Bank of Credit and Commerce International (Overseas) Ltd v. Akindele [2001] Ch 437 (Akindele) assumed to apply in Hong Kong).


39 The Canadian Supreme Court adheres to the Barnes v. Addy two-limb formulation of knowing assistance and knowing receipt, but draws a strong conceptual distinction between the former (which is conscience-based and requires actual knowledge by A) and the latter (which is unjust enrichment-based, although not a strict liability, and which requires constructive knowledge by A). See Air Canada [1993] 3 SCR 787; 108 DLR (4th) 592 (SCC); Gold v. Rosenberg [1997] 3 SCR 767; 152 DLR (4th) 385 (SCC); Citadel General Assurance Co. v. Lloyds Bank Canada [1997] 3 SCR 805; 152 DLR (4th) 411 (SCC) (Citadel).

40 It is even sometimes referred to as ‘knowing assistance’: Jyske Bank (Gibraltar) Limited v. Spjeldnaes (CA, 29 July 1999).

duty. The recipient’s knowledge must be ‘such as to make it unconscionable for [the recipient] to retain the benefit of the receipt’. The liability is referred to interchangeably as ‘unconscionable receipt’, ‘knowing receipt’ and ‘recipient liability’. The reformed framework with respect to recipient liability, particularly whether the liability is fault-based, is not yet settled.

8.1.5 Equitable accessory liability is a secondary (‘derivative’) and independent liability

Equitable participatory (including accessory) liability is a ‘secondary’ liability in the sense that it is dependent upon the commission of a primary wrong by PW [2.3]. Nonetheless, A’s liability is in respect of his own wrongdoing. It has been suggested by others that the secondary nature of liability for procurement or assistance should be understood in a stronger sense of being duplicative of PW’s liability. Once a ‘causal nexus’ is established between A’s conduct and the principal wrong, it is argued, A is treated as though he were a primary wrongdoer. That is, A becomes the primary wrongdoer for remedial purposes.

42 See Akindele [2001] Ch 437 (CA). As with the traditional framework, the distinct liability of inconsistent dealing with trust property is included: see [7.3].
43 Ibid. 455; Charter plc v. City Index Ltd [2007] EWCA Civ 1382; [2008] Ch 313 (Charter).
44 Leave to appeal was refused by the Court of Appeal in Akindele [2001] Ch 437 (CA). The Supreme Court has not yet had the opportunity to fully consider recipient liability. But see Criterion Properties plc v. Straforf UK Properties LLC [2004] UKHL 28; [2004] 1 WLR 1846 [4]; (Criterion Properties); Twissestra [2002] UKHL 12; [2002] 2 AC 164 [105].
48 In equity, the causal nexus was said (in accordance with the prevailing fault element) to be A’s knowing procurement of, or assistance in, the primary wrong: Sales, ‘The Tort of Conspiracy’, 508 n. 58.
If considered purely in terms of loss-based remedies, the 'duplicative liability' thesis might explain why A is liable for all losses flowing from the primary wrong with no separate enquiry undertaken into whether A's conduct was a cause of those losses and why A is generally held to be jointly and severally liable with PW [8.8]. But there are other equally credible explanations for these principles. For example, a claimant-favouring approach to remedy that dispenses with a 'but for' causation inquiry is consistent with the pragmatic rationales underpinning accessory liability for breach of trust and fiduciary duty. It is only in relation to C that questions of causal responsibility for C's losses are ignored; as between A and PW such issues are relevant and go to the question of contribution [8.8.3]. Furthermore, the duplicative liability thesis does not explain why, if A's liability is duplicative of PW's liability, A should be liable for gain-based remedies in relation to A's own gain. Conversely, duplicative liability logically encompasses A's liability for PW's gains and yet the justice of this is not at all self-evident. Thus, equitable participatory (including accessory) liability is an independent wrong that is derivative in that it is dependent upon the commission of a primary wrong, but that is not duplicative of PW's liability; see further [2.6].

8.1.6 An equitable tort?

Perceived similarities between accessory liability for assisting breach of an equitable duty and some torts have led to suggestions that there is a

49 This was done in Sales' original article. The duplicative liability theory with respect to loss-based remedies has attracted some support. See, e.g., Graham Virgo, The Principles of Equity and Trusts (Oxford University Press, 2012) 697–699, 709–711.
50 It is also argued that the procedure of account can only be taken against a custodian of the trust fund, namely PW, and hence cannot be available against A unless A's liability is duplicative of PW's liability. A's liability 'duplicates the trustee's primary liability for substitutive performance of his custodial duties': Mitchell and Watterson, 'Remedies for Knowing Receipt', 153. But this view of account and its relationship to equitable compensation is disputed; see [8.7.2].
51 This was acknowledged by Elliott and Mitchell: 'Remedies for Dishonest Assistance', 40.
53 Michael Wilson ibid. See also, Lord Nicholls, 'Knowing Receipt: the Need for A New Landmark' in Cornish, Nolan, O'Sullivan and Virgo (eds.), Restitution, 231, 244.
general tort of knowing assistance that could subsume some of equitable accessory liability.\textsuperscript{54} These suggestions have been rejected.\textsuperscript{55}

8.1.7 The terminology of constructive trusts

Traditionally, the liability of an accessory or other third party to breach of an equitable duty is described as being that of a 'constructive trustee'. Although the term 'constructive trust' originated in the late seventeenth century,\textsuperscript{56} its use to describe the personal liability of an accessory who did not necessarily hold trust property (a 'constructive trusteeship') is harder to pin down. The change appears to have happened without express acknowledgement by the courts and as the logical consequence of finding that third-party participants should be treated in the same way as trustees for the purposes of liability.\textsuperscript{57} 'Constructive trustee' denoted that A was to be subject to the same liability as the express trustee even though not

\textsuperscript{54} See e.g., M. Jones (general ed.) Clerk \& Lindsell on Torts, 20th edn (London, Sweet \& Maxwell, 2010) 1623, but cf. 1621, and generally 1619–1624; in ORG v. Allen [2007] UKHL 21; [2008] 1 AC 1 [189], Lord Nicholls left open such a possibility. The tort is unnecessary, since equitable principles of accessory liability adequately cover the field. See, e.g., \textit{Metall und Rohstoff AG v. Donaldson Lufkin \& Jenrette Inc.} [1990] 1 QB 391 (\textit{Metall und Rohstoff}), and Robert Stevens, \textit{Torts and Rights} (Oxford University Press, 2007) 283. Such suggestions have been made for strategic reasons so as to come within the wording of court rules concerning service outside a jurisdiction (as in \textit{Metall und Rohstoff}) or to attract vicarious liability (\textit{Credit Lyonnaise Bank Nederland NV v. Export Credits Guarantee Department} [2000] 1 AC 486).

\textsuperscript{55} \textit{Metall und Rohstoff} [1990] 1 QB 391 (CA) 474; \textit{Credit Lyonnaise Bank Nederland NV v Export Credits Guarantee Department Bank} [1998] 1 Lloyd's Law Rep 19 (CA) 46. However, similarities between the fault-based nature, and compensatory remedies, of equitable liability and tort claims generally have been noted. See, e.g., \textit{Grupo Torras SA v. Al-Sabah} [2001] CLC 221 (CA) 255–256.

\textsuperscript{56} The use of the term is attributed to the influence of Lord Nottingham both in his judicial capacity and as draftsman of s. 8 of the Statute of Frauds 1677 (referring to trusts which 'arise or result by implication of construction of law'). Lionel Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 Cambridge Law Journal 294, 297–298. It referred to a trust construed from the circumstances and imposed upon property.

\textsuperscript{57} See, e.g., \textit{Fylor} (1841) 3 Beav 548, 561; 49 ER 216, 221, where Lord Langdale MR said of solicitors alleged to have procured a breach of trust for personal benefit, 'the Court ought to impute to them the duty of seeing to the due application of this trust money; in other words, will impute to them the character of trustees'. See also Rolfe v. Gregory [1865] 4 De G J \& S 576, 579; 46 ER 1042, 1043–1044. One explanation for the terminology is that it overcame the rule that trust beneficiaries could not sue anyone other than a trustee. Smith, 'Constructive Trusts', 300. A similar suggestion is that because equity did not generally award monetary remedies, it was necessary to draw upon an established source of such relief, namely the trustee's obligation to account: William Swadling, 'The Fiction of the Constructive Trust' (2011) \textit{Current Legal Problems} 399, 412.
8.2 The Scope of Accessory Liability

The frameworks of equitable accessory liability refer to breach of trust without further elaboration when describing the primary wrong in question. The liability also attaches to breaches of fiduciary duty by non-trustees, although the extent to which this is so is obscured by a lack of consensus as to the meaning of 'fiduciary duty'. [8.3.1.2]. For example, it is

58 Soar v. Ashwell [1893] 2 QB 390 (CA) 405 (Kay LJ): 'The stranger is not expressly appointed a trustee. He becomes bound by the trust by the construction which the law puts upon his dealings with the trust property.'
64 See, e.g., Barnes v. Addy (1874) LR 9 Ch App 244; Royal Brunei Airlines [1995] 2 AC 378 (PC).
unclear whether accessory liability attaches to breach of some of the
(possibly non-'fiduciary') equitable duties held by non-trustee fiduci-
aries; this is discussed below in relation to the duties that regulate the
exercise of a company director's discretionary powers [8.3.1.2].

Returning to the scope of accessory liability more generally, the
grounds for such liability in relation to any equitable duty are strongest
where A's involvement consists of procurement of the primary wrong.
Liability for procuring the violation of another's right is recognised across
private law [3.3.5]. Furthermore, the rationales for equitable liability
[8.1.3] have the greatest force here. This may be so even where the primary
wrong is breach of an equitable duty of care. For example, if a solicitor, A,
procures a breach of trust by advising a trustee client, PW, to make an
(imprudent) investment of trust funds that will benefit A, accessory
liability should arise given A's intentional exploitation of the trust re-
relationship for personal benefit. There is case law to support liability for
procurement of breach of trust, including non-fiduciary trust duties.65

The possibility of accessory liability that extends much beyond the
trust, agency and corporate contexts has received little attention, perhaps
because it is easier outside those contexts for a third party involved in
 equitable wrongdoing to become subject to the same principal liability as
the original wrongdoer [2.7], [8.4.1]. Hence, accessory liability has less
practical significance. The equitable duty of confidence is an example of
where accessory liability may arise [8.4], but will not often be necessary.66
The equitable duties of a mortgagee are another example of where
accessory liability is available in principle.67 There seems no reason
why accessory liability cannot apply to such duties.68 The doctrine of

65 See, e.g., Fyler (1841) 3 Beav 550; 49 ER 216; Alleyne (1854) 41 Ch R 199. See also City of
of Appeal), where it was claimed that a financial broker and adviser to a statutory invest-
ment trustee procured breaches of the trustee's duty to invest. The trustee engaged in a
highly imprudent investment programme. The claim for inducement or participation in
a breach of trust was recognised, although it was necessary that A acted 'for personal gain or
in furtherance of his or her own financial advantage'; this was satisfied on the alleged facts.
66 On whether the duty of confidence is fiduciary, cf. P. D. Finn, Fiduciary Obligations
(Sydney, Law Book Company, 1977); M. Conaglen, Fiduciary Loyalty (Oxford, Hart
Publishing, 2010) 236-244.
67 See Downview Nominees Ltd v. First City Corporation Ltd [1993] AC 295 (PC). See also
P. Young, C. Croft and M. Smith, On Equity (Sydney, Lawbook, 2009) [9.80], describing
the mortgagee as a 'quasi-fiduciary'.
68 R. P. Austin, 'Constructive Trusts' in P. D. Finn (ed.) Essays in Equity (Sydney, Law Book
Company, 1985) 196, 200 ("liability of a third party who benefits from an abuse of power
by a mortgagee"). But mortgagees may also attract core fiduciary duties, breach of which
undue influence and other doctrines that focus upon vitiation of transactions raise particular questions that are discussed in [8.5].

Instances of equitable duties, arising without there being a fiduciary or a fiduciary-like relationship, are limited. A clear example concerns the duties governing the exercise of a power of appointment over a trust fund by a non-trustee donee ('appointer') of the power. A fraud on the power renders an appointment of trust property invalid. A common instance of fraud on a power is where an appointer arranges with one of the objects of the power to appoint to that person who will then transfer some of the property back to the appointer or to a stranger.

The conduct of the object of the power here could be characterised as accessorial involvement (through assistance) in a primary wrong (the fraud on the power committed by the appointer), but is it necessary to do so? An appointment will still be invalid absent such involvement if a fraud on the power is committed. Nor is it necessary that the object know of the fraud: the usual requisite mental element for accessory liability is not required. In other words, all the elements of accessory liability may be factually present, but they are not legally necessary where it is possible to restore the subject matter of the invalid appointment to the trust.

Where it is not possible to restore the trust property, the remedial consequences of the fraud are visited upon the appointer (and, in some circumstances, upon a trustee who carried out the appointer’s instructions) on the current law, but not upon the object of the power. That is, the 'liability' of the object of the power appears to be limited by the extent to which rescission of the appointment is possible. It is here that accessory liability could, as a matter of principle, have a role to play.


See Vatcher v. Paull [1915] AC 372 (PC) 378 (Lord Parker) (Vatcher): the doctrine operates where 'the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power'. See generally, Thomas, Thomas on Powers, Ch. 9.

Ibid.

Ibid. See, e.g., Aley v. Belchier (1758) 1 Eden 132; 28 ER 634 (power of jointure); Daubeney v. Cockburn (1816) 1 Mer 626; 35 ER 801; Birley v. Birley (1858) 25 Beav 299; 53 ER 651. See also Young, Croft and Smith, On Equity, [8.880].


See Thomas, Thomas on Powers, [9.119], [9.121].
8.3 Accessory and recipient liability for breach of trust and fiduciary duties

8.3.1 The primary wrong

8.3.1.1 Breach of trust

Equitable accessory liability attaches to the breach of any express trust including charitable trusts. The liability also attaches to constructiv trusts and to so-called Quistclose trusts, whether considered to be express or resulting trusts. It has been suggested that constructiv trustees do not owe fiduciary duties where the trust is simply a remedia device for transferring title to property and, hence, accessory liability cannot attach to 'breach' of such a constructive trust, but this cannot be correct in relation to breaches of such a trust that involve the true property.

Practically speaking, it is difficult to envisage scenarios where A might be culpably involved in breach of any of a trustee’s duties of care, unless A has procured the trustee’s carelessness or has knowingly received trust property as a result of such carelessness. Accessory or recipient liability should apply in those instances, but otherwise – assuming such a scenario could arise at all – it is not immediately apparent why equitable liability should attach for assistance in PW’s carelessness given the contrary position at common law with respect to accessory liability for breach of duties of care. Such liability could be supported on the

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81 It probably cannot arise under the traditional framework given the requirement that assistance be in a 'dishonest and fraudulent design' by PW [8.3.1.4].
basis that all trust duties are fiduciary in nature, but this is not a widely
accepted view.\textsuperscript{81}

Property under the control of a fiduciary is treated as trust property for
the purposes of recipient liability.\textsuperscript{82} For example, breaches of fiduciary
duty by company directors in relation to company assets are considered
breaches of trust for the purpose of recipient liability on the basis that the
company’s property is analogised to trust property [8.3.2.3].

8.3.1.2 Breach of fiduciary duty

There has been a shift of emphasis in case law and commentaries since
the nineteenth century from ‘fiduciary’ as the descriptor of an office-
holder whose equitable\textsuperscript{83} duties were thereby all imbued with fiduciary
characteristics to ‘fiduciary’ as the descriptor of particular duties, most
notably the proscriptive duties not to engage in a conflict of interest and
not to profit from the fiduciary position.\textsuperscript{84} There is now a body of judicial
opinion that not all equitable duties held by a fiduciary are ‘fiduciary’
duties.\textsuperscript{85} There is also disagreement as to whether ‘fiduciary’ is the
appropriate descriptor of a relationship of confidence or of undue influence.\textsuperscript{86} Such questions, while beyond the scope of this book, are relevant
to it because it is sometimes assumed that only fiduciary duties (or,
alternatively, only trust and fiduciary duties) attract accessory liability,
a view with which we disagree.

Accessory liability clearly attaches to the fiduciary duties concerning
conflict of interest and profiting from the fiduciary position. It is not
as clear whether it attaches to other equitable duties that regulate
the exercise of a fiduciary’s discretionary powers. There is an immense
body of law governing the exercise of such powers by trustees, company
directors and other fiduciaries; consequently, it is dangerous to

\textsuperscript{81} See generally, Antony Goldfinch, "Trustee’s Duty to Exercise Reasonable Care: Fiduciary
Duty?" (2004) 78 Australian Law Journal 678. See also Thomas, Thomas on Powers,
[1.46]–[1.49].

\textsuperscript{82} Russell v. Wakefield Waterworks Co (1875) LR 20 Eq 474 (Ch). For a recent example, see

\textsuperscript{83} Of course, a fiduciary will generally hold common law duties as well.

\textsuperscript{84} See, e.g., Bristol and West Building Society v. Mothew [1998] Ch 1 (Bristol); Breen v.
Williams (1996) 186 CLR 71 (HCA).

\textsuperscript{85} See, e.g., LAC Minerals Ltd v. International Corona Resources Ltd (1989) 61 DLR (4th) 14
Trusts & Trustees 1006.

\textsuperscript{86} Cf. Finn, Fiduciary Obligations; Conaglen, Fiduciary Loyalty, 236–244. See also [8.5].
generalise.87 Broadly speaking, the duties encompass duties to exercise such powers in good faith and for proper purposes, as well as duties of care in relation to specific powers. Breach of such duties may involve a breach of the conflict or profit prohibitions88 (in which case, accessory liability attaches), but not necessarily. Generally, breach of a duty governing the exercise of a fiduciary’s discretionary power renders the exercise of the power voidable; that is, the relevant doctrines have a vitiating function and accessory liability questions simply do not arise.89 On the other hand, it tends to be assumed that accessory liability attaches to all breaches of duty by a trustee.90

The question of whether accessory liability may attach to the breach of duties regulating the exercise of fiduciary powers by company directors, not involving the conflict and profit rules, was raised, albeit not by the pleadings, in the Australian case of Westpac Banking Corporation v. Bell Group Ltd (in liq.).91 The issue was formulated as whether directors’ duties to act in the best interests of the company and for proper purposes were ‘fiduciary’ so as to attract accessory liability. Several lower court decisions had assumed this to be so.92 The case concerned refinancing transactions entered into between the appellant banks and the directors of the Bell group of companies at a time when the Bell group was insolvent. The banks thereby became secured, rather than unsecured, creditors of the group and obtained full repayment of their loans in the subsequent insolvencies of the group. The directors were held to have breached duties to act bona fides in the best interests of each company and to exercise their powers for proper purposes, but not to have breached the conflict and profit duties. The litigation focused upon whether the banks could be liable as accessories. A majority in the West Australian Court of Appeal held that the relevant duties were fiduciary and the banks were so liable; leave to appeal was

87 See generally, the specialist text, Thomas, *Thomas on Powers*, especially Chs. 9–10.
89 Cf. [8.2] (the doctrine of fraud on a power) and [8.5] (undue influence and similar doctrines).
90 Subject to the traditional framework’s ‘dishonest and fraudulent design’ requirement for knowing assistance: [8.3.1.4].
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granted by the High Court, but the parties settled before the hearing. The underlying question of principle that remains is whether accessory liability should attach to such duties, regardless of their labelling.

A principled approach is to determine whether accessory liability in relation to a particular duty is consistent with the equitable rationales for liability, coherent when viewed in the broader private law context, including analogous statutory regimes, and consistent with good policy. But even this approach is likely to yield different outcomes because the policy issues in the corporate context are contested. There is, however, a substantial consensus against equitable accessory liability for breach of an equitable duty of care, other than in cases of procurement [8.2].

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94 See, e.g., the Australian statutory regime in the Corporations Act 2001 (Cth) ss. 79, 180–183. The Act provides for accessory liability for ‘involvement’ (s. 79) in the breach of some duties of directors and company officers (e.g. the duty to ‘exercise their powers and discharge their duties (a) in good faith in the best interests of the corporation; and (b) for a proper purpose’: s. 181; see also ss. 182–183), but not for breach of the statutory duty of care and diligence (s. 180). This has been relied upon by analogy to support equitable accessory liability in relation to equitable duties other than the duty of care: Hon. W. Gummow, ‘The Equitable Duties of Company Directors’ (2013) 87 Australian Law Journal 753. See also Ridge, ‘Moving beyond Barnes v Addy’, 40–43. Contra J.D. Heydon, ‘Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?’ in Simone Degeling and James Edelman (eds), Equity in Commercial Law (Pymont, Lawbook Co, 2005) 185, 235, and ‘Modern fiduciary liability’, 1011–1012. The English statutory regime in the Companies Act 2006 (UK) does not as readily lend itself to this form of legal reasoning because the statutory duties replace a director’s equitable duties: s. 170(3). The statutory duties are to be ‘interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties’: s. 170(4). On the other hand, the duties contained in ss. 171–177, except the ‘duty to exercise reasonable care, skill and diligence’ in s. 174, are said to be ‘enforceable in the same way as any other fiduciary duty owed to a company by its directors’: s. 178(2). A literal reading of s. 178 suggests that accessory liability applies to all statutory duties regulating the exercise of directors’ fiduciary powers, other than the duty of care.
95 See, e.g., Bathurst and Merope, ‘It tolls for thee’, 834: limiting accessory liability to breach of the conflict and profit duties of company directors appropriately balanced ‘the right of the company and through it, its members and creditors, to be protected against improper and improvident transactions and the rights of third parties dealing with the company’. See also Westpac v Bell [2012] WASCA 157; (2012) 44 WAR 1 [3060]–[3066] (Carr AJA).
8.3.1.3 Must there be a misapplication of trust property?

Recipient liability obviously requires that there be a misapplication of trust property, but is this also a requirement for accessory liability? In Australia and Canada, knowing assistance liability for breach of trust or fiduciary duty can arise whether or not the primary wrong involves trust property.97 The law is not as clear in the English courts in relation to dishonest procurement or assistance in breach of trust or fiduciary duty. Judgments in the House of Lords and Supreme Court have implied, without direct consideration of the issue, that the primary wrong must involve a misapplication of trust property.98 The issue has been addressed in the English Court of Appeal on a number of occasions99 where the opposite view now prevails:

In a case for accessory liability there is no requirement for there to be trust property. Such a requirement wrongly associates accessory liability with trust concepts . . . Accessory liability does not involve a trust. It involves providing dishonest assistance to somebody else who is in a fiduciary capacity [and] has committed a breach of his fiduciary duties.100

This must be correct. It is the culpability of A’s knowing involvement in the primary wrong that grounds A’s liability. While the trust is the

97 Neither of the two leading cases on knowing assistance in Australia involved trust property; Consul Development (1975) 132 CLR 373; Farah Constructions [2007] HCA 20; [2007] 230 CLR 89. The Canadian courts do not appear to require a misapplication of trust property; see Waters and Gillen, Water’s Law of Trusts, 11.11.A(2) (c). Although there is no case on point, this must also be true of procurement liability in those jurisdictions. On the other hand, both jurisdictions require that the breach of trust be ‘dishonest and fraudulent’ for knowing assistance liability; [8.3.1.4].


99 See, e.g., Satnam Investments Ltd v Dunlop Heywood & Co Ltd [1999] 3 All ER 652 (CA) 671 (Satnam) (apparently of the view that for either dishonest accessory liability or recipient liability ‘there must be trust property or traceable proceeds of trust property’); Petrotrade Inc v Smith [2000] 1 Lloyd’s Rep 486 (dishonest assistance claim rejected for lack of a trust); Goose v Wilson Sandford & Co. [2001] Lloyd’s Rep PN 189 (CA) 867–868 [88] (querning Satnam).

paradigm of a relationship protected by equity, and hence the pragmatic rationales supporting accessory liability are very strong, these are not restricted to protection of C’s property interests [8.1.3].

8.3.1.4 Must there be a dishonest and fraudulent design?
An issue that differentiates the traditional and reformed frameworks for liability is whether an egregious breach of trust or fiduciary duty – 'a dishonest and fraudulent design' – is required if A’s accessory conduct is by way of assistance, rather than procurement.101 The 'dishonest and fraudulent design’ requirement was jettisoned by the Privy Council in Royal Brunei Airlines on the grounds that it had no basis in principle.102 Whether PW acted fraudulently was not a logical precondition for A to have acted culpably.103 Conversely, the High Court of Australia has retained the 'dishonest and fraudulent design’ requirement for the time being.104 The Court held that the phrase 'was to be understood by reference to equitable principles’, but did not elaborate further.105

In a comprehensive judgment in the NSW Court of Appeal, Leeming JA has explained that, when viewed in its historical context, Lord Selborne’s use of the words ‘dishonest and fraudulent’ was deliberate clarification that more (namely, dishonesty) was required than equitable, as opposed to common law, fraud.106 Such clarification was a necessary precaution as the meaning of ‘fraud’ was contested in the late nineteenth century. According to Leeming JA, a design will be dishonest and fraudulent where it transgresses ‘ordinary standards of honest behaviour’.107 The ‘dishonest and fraudulent design’ requirement has also been retained

101 Barnes v. Addy (1874) LR 9 Ch App 244, 251–252.
102 [1995] 2 AC 378 (PC). It was said to be the result of a formulaciplication of Lord Selborne’s fact-specific statement in Barnes v. Addy.
103 Lord Nicholls drew on the nineteenth-century cases concerning procurement of a breach of trust to support this position: in those cases any breach of trust sufficed. See Fyler (1841) 3 Beav 550, 49 ER 216; Eaves (1861) 30 Beav 136; 54 ER 840; Attorney-General v. Corporation of Leicester (1844), 7 Beav 176; 49 ER 1031.
105 Ibid. [181]. In Westpac v. Bell [2012] WASCA 157; (2012) 44 WAR 1 [2112]–[2125] (Drummond AJA), [1099] (Lee AJA), the majority interpreted Farah Constructions as requiring only that 'the breach of duty is more than a trivial breach and is also too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly to be excused' [2112]. This was rejected by the NSW CA as 'plainly wrong': Hasler [2014] NSWCA 266; (2014) 101 ACSR 167 [102] (Leeming JA). See also Nicholson [2013] WASC 110; 8 ASTLR 277, 292 [59]; Alexander v. Burne [2013] NSWSC 193 [18] (Young AJ): 'There must be a plan or intention to defraud the beneficiary.'
106 Hasler [2014] NSWCA 266; (2014) 101 ACSR 167 [122]–[125].
107 Ibid. [124].
by the Supreme Court of Canada\textsuperscript{108} and is interpreted to mean 'the taking of a risk to the prejudice of another’s rights, which risk is known to be one which there is no right to take'.\textsuperscript{109}

Lord Selborne’s objective in \textit{Barnes v. Addy} was to contain the liability of professional agents within reasonable limits. An egregious, premeditated breach of trust was required in that setting to counteract the fact that the agent was a mere assistant who did not benefit personally from the breach of trust.\textsuperscript{110} The culpability of an accessory who knowingly assists a dishonest trustee is of a greater magnitude and the rationale for accessory liability is strongly engaged. Whether there was a dishonest and fraudulent design is therefore a relevant consideration.\textsuperscript{111} It will be particularly relevant where the third party is an agent providing only professional services to the trustee or fiduciary. Consistently with Lord Nicholls’ legitimate concerns regarding the formulaic application of \textit{Barnes v. Addy}, dishonest and fraudulent conduct is better addressed by treating the egregiousness of the primary wrong as part of the factual context in which A’s culpability is assessed. This accords with the Federal Court of Australia’s methodology in \textit{Grimaldi} in which ‘the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant’ is identified as one of three elements to be weighed up in determining A’s liability.\textsuperscript{112}

8.3.2 The accessorial involvement or the receipt

8.3.2.1 Procurement and inducement

In scenarios of procurement and inducement, the accessory is a cause of PW’s decision to breach an equitable duty, rather than assisting or facilitating it [3.3.3]. This could be through A’s corporate control,\textsuperscript{113}

\textsuperscript{108} \textit{Air Canada} [1993] 3 SCR 787; 108 DLR (4th) 592 (SCC). Iacobucci J’s leading judgment canvassed the competing lines of Canadian case law and concluded that the requirement should be retained. McLachlin J in a separate judgment preferred not to deal with the issue until a suitable case came before the Court.

\textsuperscript{109} \textit{Ibid.} 618 (Iacobucci J).


\textsuperscript{111} See also, in the context of statutory limitation periods, \textit{Williams} [2014] UKSC 10; [2014] 2 WLR 355 [157] (Lord Mance JSC in dissent).

\textsuperscript{112} [2012] FCAFC 6; (2012) 200 FCR 296 [247]. See also 3.3.3.

\textsuperscript{113} See, e.g., \textit{Elders Trustee} (1987) 78 ALR 193, 238–239 (procurement not found); \textit{Australian Securities Commission v. AS Nominees Limited} (1995) 62 FCR 504 (FCA) 523 (procurement not found). See also the scenario discussed in \textit{Grimaldi} [2012] FCAFC 6; (2012) 200 FCR 296 [243]. Such scenarios have tended to be treated as assistance,
deception, manipulation, inducement (by bribery, secret commissions or otherwise), encouragement or simple request of PW. In such circumstances, A tends to be the main player with respect to the ensuing primary wrong, but this does not necessarily mean that PW was unwilling to be prevailed upon.

On the whole, 'procurement' and 'inducement' are used interchangeably by the courts. Lord Nicholls in Royal Brunei Airlines referred only to 'procurement' when describing this form of accessory conduct. On the other hand, the High Court of Australia appeared to recognise a distinction in its reference to 'knowingly induced or immediately procured'. 'Induce' is perhaps a more appropriate characterisation of A's conduct in situations requiring persuasion of PW on the part of A, whereas 'procure' is appropriate where A controls PW and simply causes PW to commit the principal wrong. These semantic considerations have no bearing on the applicable principles.

Nor is it relevant that A's conduct was not undertaken for personal gain. Finally, cases in which this form of accessory conduct is

rather than procurement: see, e.g., NCR Australia v. Credit Connection Pty Ltd [2004] NSWSC 1.

See, e.g., Eaves (1861) 30 Beav 136; 54 ER 840.

As where a solicitor engineers a breach of trust by an unsuspecting trustee for the solicitor's benefit: Fyler (1841) 3 Beav 550, 49 ER 216 (not made out on the facts); Alleyne (1854) 4 T Ch R 199.

See, e.g., Syrini v. Hinds (1996) 6 NTLR 1 (NTCA), where A offered PW options for units in a secret unit trust in return for the breach of fiduciary duty to C; Regnery v. Meyers, 679 NE2d 74, 223 Ill Dec 130, 248 Ill App3d 354, cert. denied, 686 NE2d 1173, 227 Ill Dec. 17, 174 Ill.2d 594 (1994), where A, a company executive, 'initiated the idea of the sale' at an under-value of voting trust shares in the family-controlled company to himself and his brother (a trustee of the voting trust and also executive of the company), 'proposed such sale' to the company's board and 'fully participated' in the sale.

See, e.g., Crawley Borough Council v. Ure [1996] QB 13 (CA): claim that a council 'advised and indeed encouraged' PW's alleged breach of trust in relation to the joint tenancy of a council flat.

See, e.g., the facts, but not the reasoning of George v. Webb [2011] NSWSC 1608 [283], where A instructed the trustees to distribute trust funds for his personal benefit.


But see Fiona Trust & Holding Corporation v. Yuri Privalov [2010] EWHC 3199 [61] (Comm), where Andrew Smith J describes procurement in terms of 'persuasion' of a fiduciary.

See, e.g., Eaves (1861) 30 Beav 136; 54 ER 840; Midgley v. Midgley [1893] 3 Ch 282 (CA). See also Harpum, 'The Stranger as Constructive Trustee: Part I', 142–143.
considered are relatively sparse; instead, facts suggesting procurement or induction more often are treated as assistance.

**8.3.2.2 Assistance**

Lord Selborne’s comments in *Barnes v. Addy* with respect to ‘knowing assistance’ concerned the provision of professional services that enabled trustees to commit breaches of trust. ‘Participation’ in a trustee’s fraudulent conduct was also described as a form of accessorial conduct. Participation is most apt to describe scenarios in which A and PW act in concert to design and implement the primary wrong. Nonetheless, ‘assistance’ is now the preferred descriptor of any facilitative actions of any third party involved in a breach of trust and fiduciary duty. This has led to unnecessary straining of the concept of assistance. It can also be noted that, as the receipt of trust property may constitute assistance in the primary wrong, the receipt and assistance categories of participatory liability overlap.

Whether there has been assistance is ‘a simple question of fact’ and has not greatly occupied the courts’ attention. Assistance generally connotes active, rather than passive, conduct; indeed, it has been suggested that this is essential:

\[
\text{[A]ssistance should 'make a difference' and forward or advance the primary breach or misconduct in some way. Mere passive acquiescence in the breach would not, in the ordinary case, suffice to establish liability.}
\]


125 A common scenario is where PW is employed by C and, in breach of PW’s fiduciary duty to C, PW and A divert C’s business or a business opportunity to a corporate entity created to compete in business with C. PW and A may also be in an intimate relationship. See, e.g., *Timber Engineering Co Pty Ltd v. Anderson* [1980] 2 NSWLR 488 (NSWSC); *Colour Control* (NSWSC, 24 July 1995); *Dyson Technology Ltd v. Curtis* [2010] EWHC 3289 (Ch).

126 Harpum’s observation in 1986 that ‘[s]ituations in which it is necessary to allege knowing assistance are in fact likely to be rare’ has not been borne out: ‘The stranger as constructive trustee: Part I’, 116.


129 *Baden* [1993] 1 WLR 509 (Ch) 574.

on the ground of assistance. Further, it appears clear that assistance must take the form of some activity or conduct over and above mere knowledge of the fiduciary’s breaches.  

But, in our view, if A has actual knowledge of the primary wrong and intends to assist, then mere presence during the commission of the primary wrong might be judged sufficient accessorial conduct for there to be liability: [3.3.6]. This is how the findings in *Brinks Ltd v. Abu-Saleh (No 3) (Brinks)* could be understood. A woman, A, accompanied her husband by car on his money-laundering trips to Switzerland. It was not proved to Rimer J’s satisfaction that either she or her husband had intended her presence to act as a cover to her husband’s illegal activities by giving the false appearance of a family holiday. But if she had intended her presence to divert suspicion from him, then her intentional presence alone could have constituted assistance. That is, passive conduct in intentional furtherance of PW’s wrong may constitute assistance in exceptional circumstances. This conclusion accords with our analytical framework for accessory liability: the weighting of the conduct and mental elements should be determined relative to each other and in relation to the primary wrong [3.5.3].

US case law in the context of claims against attorneys advising trustees supports the view that an omission to act will not be considered sufficient participation or assistance unless A was under a legal duty to act. Thus, where a firm of attorneys was hired to do specific, due diligence tasks in relation to a proposed investment by the trustees, there was no duty to ensure that the investment was prudent and hence the attorneys were not liable for aiding and abetting a breach of trust through their alleged omission to advise C that the investment was imprudent.

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132 [1996] CLC 133 (Ch).

133 The nature of the primary wrong is not spelt out in the judgment. It appears to have been breach of a constructive trust over gold bullion stolen in breach of a fiduciary duty by C’s employee. The assistance was argued to be in relation to a breach of ‘trust’. A separate issue in the case concerned the requisite mental element for accessory liability: [8.3.4.2].

134 See, e.g., *KPERS v. Kutak Rock* 44 P.3d 407, 273 Kan 481 (2002). See also *Bogert’s Trusts and Trustees*, §901 and the cases cited therein:

Mere knowledge by a third person that a breach of trust is in progress, coupled with a failure to notify the beneficiary or to interfere with the action of the trustee, does not amount to participation in a breach. Such conduct is inaction which may be reprehensible under the highest standards of ethics, but no legal duty has been violated.
8.3.2.3 Beneficial receipt of trust property

The requisite conduct for recipient liability is receipt of ‘trust’ property or its traceable proceeds for personal benefit by the recipient, A, as a consequence of PW’s breach of trust or fiduciary duty. It is not necessary that A continue to hold the property or its traceable proceeds. A’s receipt may also constitute assistance in, PW’s breach.

Property The concept of property is not immutable; its meaning is shaped by the legal context in which the concept operates. The characteristics identified by Lord Wilberforce in National Provincial Bank Ltd v. Hastings Car Mart Ltd have been relied upon in the context of recipient liability:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability.135

An example of the contextual nature of the property designation concerns information acquired in circumstances importing an equitable obligation of confidentiality. Clearly, information can be the subject of statutory or non-statutory proprietary rights and those rights can be the subject of a breach of trust and a recipient liability claim.136 But confidential information per se is not treated as property for the purposes of recipient liability.137

‘Trust’ property Recipient liability applies to property to which legal or equitable title is held on trust for another, whether express, resulting or constructive.138 ‘Trust property’ is a misnomer, however, for the liability extends to any property under the control of PW pursuant to a custodial relationship governed by equity.139 Accordingly, a company’s assets are

136 See generally, Smith Kline & French Laboratories (Aust.) Limited v. Secretary, Department of Community Services and Health (1990) 22 FCR 73 FCA 119–122 (Smith Kline).
138 See, e.g., Armstrong [2012] EWHC 10; [2013] Ch 156: property in electronic form stolen by PW is subjected to a constructive trust at the point of theft and is therefore received as trust property by A regardless of the speed of the respective transactions.
139 There may not be a true trust here: In Re Lands Allotment Company [1894] 1 Ch 616, 631.
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considered to be trust property in the hands of the company's directors.\(^{140}\) The principle extends to others in control of the company's assets if they owe fiduciary duties to the company.\(^ {141}\) Nor is the principle confined to company assets; it applies whenever a fiduciary has property of the principal under his or her control.\(^ {142}\)

If property held by A is a product of the breach of fiduciary duty, but cannot be traced from PW to A, recipient liability cannot apply.\(^ {143}\) For example, property acquired as a result of the disclosure of information, such as a business opportunity, by PW in breach of fiduciary duty is not trust property.

**Receipt** Trust property is received when there is a transfer of the legal title to, or an equitable interest in, the trust property from PW to A. Such transfer could be absolute (for example, by way of gift or contract of sale\(^ {144}\) or loan) or by way of security.\(^ {145}\) The transaction's 'mere form cannot stay the hand of equity'.\(^ {146}\) Recipient liability also applies to the receipt of the traceable proceeds of the trust property.\(^ {147}\) Whether A received property pursuant to a security transaction depends upon the terms of the transaction and the nature of the chose in action or other proprietary interest thereby created.\(^ {148}\) Even if there is no receipt of

\(^{140}\) Russell v. Wakefield Waterworks Co (1875) LR 20 Eq 474, 479; In Re Lands Allotment Company [1894] 1 Ch 616; Selanger [1968] 1 WLR 1555 (Ch) 1574–1577; Belmont Finance Corporation v. Williams Furniture Ltd [No. 2] [1980] 1 All ER 393 (CA) 405 (Belmont Finance [No. 2]).

\(^{141}\) Agip (Africa) Ltd v. Jackson [1990] Ch 265 (Ch) 290 (Agip).


\(^{143}\) Satnam [1999] 3 All ER 652 (CA) 671. See also Ultraframe [2005] EWHC 1638; [2006] FSR 17 [1525].

\(^{144}\) See, e.g., Sage [2010] 2 SLR 589 (SCA).


\(^{147}\) Ibid. [69].

\(^{148}\) See Westpac v. Bell (2012) 44 WAR 1 [2158]–[2162]. On whether a guarantee supported by a collateral mortgage is trust property, see the conflicting positions taken in Gold v. Rosenberg [1997] 3 SCR 767; 152 DLR (4th) 385 (SCC) [54] (Iacobucci J, dissenting) and [70]–[72] (Sopinka J).
property pursuant to the security transaction itself, there may be a subsequent receipt if and when the security is realised.  

There are conflicting authorities on whether contractual rights created by an executory contract for the transfer of property from PW to A constitute property received by A. Can the chose in action that is comprised of A's contractual rights, rather than the proprietary subject matter of the contract, that is yet to be transferred, constitute trust property received by A so as to satisfy a recipient liability claim where PW's contracting was in breach of duty to C? In our view, it cannot. Although the creation of an executory contract clearly confers contractual rights upon A and such rights are themselves property for certain purposes, they are not relevant 'trust property' because they do not effect a subtraction from the trust property under PW's control. It is only if the contract is performed by PW that there will be a transfer of the trust property in breach of trust.

Receipt, contracts and agents Difficult issues regarding 'receipt' arise at the intersection of the principles governing agency, contract and equity. If PW, acting as C's agent and in breach of PW's fiduciary duties, purports to secure a contract between C and A whereby trust property is transferred to A, does A 'receive' the trust property for the purposes of a recipient liability claim? There is a range of possible outcomes here depending upon the subject matter of the contract, whether PW had authority to contract on C's behalf and whether C brings a claim at common law or in equity. A further complication is that, while the common law looks to the time of contract formation to determine PW's authority to bind C to the contract, equity considers the time of receipt of the trust property in determining A's recipient liability. The effect of the contract might be to transfer the property immediately or at a later date.

152 Receipt of property pursuant to a contract with a breaching trustee, rather than a fiduciary agent, is also discussed in Matthew Conaglen and Richard Nolan, 'Contracts and Knowing Receipt: Principles and Application' (2013) 129 Law Quarterly Review 359, 360–363.
153 For the purposes of discussion, it does not matter whether such transfer is absolute or way of security.
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There is Australian authority that a breach of equitable duty by PW can still be within PW’s actual authority.\(^{154}\) If so, a contract for the transfer of property entered into between C and A in breach of PW’s duty to C is binding at common law, but not in equity. The contrary, perhaps preferable, view is that the breaching PW cannot have acted within her actual authority in entering the contract.\(^{155}\) According to this view, the contract is only valid if PW acted with ostensible authority. If PW acted with ostensible, rather than actual, authority as C’s agent in entering the contract, but was in breach of duty in so doing, the contract is valid at common law, but voidable in equity.\(^{156}\)

Property passes under a contract that is valid at common law, but voidable in equity; hence, there will be a receipt of the subject matter of the voidable contract when the contract is performed. A recipient liability claim is available in principle at that point.\(^{157}\) Where the property has been transferred immediately, scenarios in which A would not be put on inquiry as to PW’s lack of actual authority (and thus be able to rely on PW’s ostensible authority), yet have sufficient knowledge for recipient liability, must be rare if not non-existent, given that the requisite facts for establishing A’s recipient liability are the same as, or very similar to, the facts required to refute A’s reliance on PW’s actual or ostensible authority.\(^{158}\) Thus, although a recipient liability claim is available in principle when there has been an immediate receipt of trust assets pursuant to the contract, it is unlikely to succeed in practice.

Where the contract is performed at a later date, so that the dates of the contract’s formation and the receipt of trust property do not coincide, it


\(^{156}\) Richard Brady (1937) 58 CLR 112 (HCA) 142; Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [254]; Rolled Steel [1986] Ch 246. See also Peter Watts, ‘Authority and Miso

\(^{157}\) Contra., Conaglen and Nolan, ‘Contracts and Knowing Receipt’, 365, arguing that no recipient liability claim is possible here and that ‘the agent’s breach of duty is a matter solely between him and his principal’.

\(^{158}\) See Reynolds and Graziaidi, Bowstead [8–051]–[8–052] concerning the requisite notice for A not to be able to rely on PW’s apparent authority. Recipient liability clearly would not apply if the tests determining an agent’s ostensible authority and culpability under recipient liability respectively were to be assimilated as proposed in Akai Holdings [2011] 1 HKC 357 [135] (HKCFA).
is possible that PW may have had ostensible authority in relation to the contract's formation, but by the time of receipt of trust property, A has acquired sufficient knowledge of PW's breach of duty for recipient liability. C is not precluded, as a matter of principle, from relying on the equitable recipient liability claim, rather than upon common law rights arising from PW's lack of authority even where a valid contract governs the receipt of trust property and may found a counterclaim.  

Where A is precluded from relying upon either PW's actual or ostensible authority concerning the contract between C and A, the contract will be void at common law. Whether A receives property under a void contract depends upon the nature of the property and the terms of the contract, including whether it is executed or executory. If property has passed under the void contract, then there has been a 'receipt' for the purposes of recipient liability. The leading cases view a recipient liability claim and a common law claim as alternative vehicles by which C obtains redress against A in such scenarios.  

Finally, it may be possible on the facts of a particular case to argue that the purported contract entered into on behalf of C by PW was a fiction and that, in effect, the trust property was stolen rather than contractually transferred. Here, a receipt of the property can be established without reference to the contract.

**Beneficial receipt** The receipt of trust property must be for A's personal benefit. Accordingly, recipient liability is unlikely to apply to an agent who receives misappropriated trust property in the course of their agency. Millett J has explained the personal benefit requirement in normative terms as limiting A's liability to where 'the receipt is relevant

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160 The specific rules concerning the transfer of title are beyond the scope of this book, however, it cannot be assumed that property will never pass under a void contract. See further, Ji Lian Yap, 'Knowing Receipt and Apparent Authority' (2011) 127 Law Quarterly Review 350, 351; Lee and Ho, 'Reluctant Bedfellows'.  
161 See, e.g., Rolled Steel [1986] Ch 246, 297–298 (Slade LJ). See also, at 306–307 (Browne-Wilkinson LJ), although it is not clear whether his Lordship is referring to recipient liability or a 'persisting property' claim: [7.5].  
164 Agents who deal with the trust property inconsistently with the trust may be liable for 'knowing dealing': see [7.3]. Accessory liability for assistance may also arise.
to the loss’. It also goes to the heart of the rationale for participatory liability, namely, A’s exploitation for personal gain of a relationship governed by equity. In *Gray v. Johnston*, the requirement was seen by Lord Cairns LC as having probative value in helping to establish that ‘the bankers [A] are in privity with the breach of trust which is about to be committed’. Lord Westbury’s explanation in the same case reflects both the evidential and principled reasons for the requirement: ‘[A] has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit’.

Particular rules apply to beneficial receipt of trust funds by banks. Under the general law the banker—customer relationship is one of debtor—creditor, rather than agent—principal, and therefore ‘money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases’. This would suggest that a bank receiving funds from a PW customer always receives beneficially, but this is not so for recipient liability purposes. A bank receiving and paying out money in the ordinary course of business for its customer is treated as not receiving a personal benefit, instead acting in ‘the ministerial role of a “mere depository”’ or “channel”’. Spigelman CJ, in the NSW Court of Appeal, has speculated that ‘this special treatment of banks . . . may be an application of the maxim that equity looks to the intent not to the form’.

Conversely, there is a beneficial receipt where the bank uses the trust funds to reduce PW’s overdrawn account (other than where the account operates continuously in such fashion). This appears counter-intuitive, but perhaps is less so in circumstances

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168 *Foley v. Hill* (1848) 2 H.L. Cas 28, 36; 9 ER 1002, 1005-1006 (Lord Cottenham LC).
170 *Evans* [2004] NSWCA 82; [2004] 61 NSWLR 75 [175] (Spigelman CJ) quoting from *Cigna Life Insurance New Zealand Ltd v. Westpac Securities Ltd* [1996] 1 NZLR 80 (NZHC) 87 (Greig J). The law was explained by Millett J in *Agip* [1990] Ch 265 on the basis that the bank is acting as the customer’s agent, but this seems inconsistent with the general law position that agency and debt relationships can coexist. See Lionel Smith, ‘W (h)ither knowing receipt?’ (1998) 114 *Law Quarterly Review* 394, 397.
171 *Evans* [2004] NSWCA 82; [2004] 61 NSWLR 75 [166].
of impending insolvency, which may explain why equity assumes a beneficial receipt.\textsuperscript{174}

It has been suggested that 'a bank which culpably receives trust property should be potentially liable no matter the state of the account'.\textsuperscript{175} As is suggested by the judgments in \textit{Gray v. Johnston}, however, the rules perform a gatekeeper role in limiting claims to where there is most likely to be culpability.\textsuperscript{176} There is still uncertainty, however, as to which receipts other than reduction of overdrafts, could amount to personal receipt.\textsuperscript{177}

\textbf{Receipt in breach of trust or fiduciary duty} A’s receipt of the trust property or its traceable proceeds must occur in breach of the trust or fiduciary duty by PW.\textsuperscript{178} This distinguishes recipient liability from the persisting property claim [7.5]. The latter claim is founded upon C’s stronger proprietary entitlement to the trust property, not upon PW’s breach of duty as such, whereas recipient liability ‘responds to the mismanagement of property’.\textsuperscript{179} It is not necessary that PW’s breach of duty be fraudulent.\textsuperscript{180}

8.3.3 \textit{The causal or other link between A’s conduct and the primary wrong}

If A procured PW’s decision to breach, a causal nexus between A’s conduct and PW’s decision is embedded in the conduct itself. A’s conduct is, at the least, a factual cause of PW’s breach of duty because it contributed to that outcome.\textsuperscript{181} It should not matter whether PW had a propensity to act fraudulently and would have breached her duty in any

\textsuperscript{174} See, e.g., \textit{Westpac v. Savin} [1985] 2 NZLR 41 (NZCA); \textit{Citadel} [1997] 3 SCR 805; 152 DLR (4\textsuperscript{th}) 411 (SCC) 422–425.

\textsuperscript{175} Smith, ‘W[h]ither knowing receipt?’, 397. \textsuperscript{176} (1868) LR 3 HL 11.

\textsuperscript{177} See, e.g., \textit{Polly Peck International Plc v. Nadir (No 2)} [1992] 4 All ER 769 (CA) 777 (\textit{Polly Peck}) (currency exchange from Turkish lira to sterling by a bank on a fiduciary’s instructions held to be a receipt for personal benefit because the bank thereby ‘became entitled to the sterling not as banker . . . but in its own right’. But, with respect, this is not self-evident). See also \textit{Uzinterimpex JSC v. Standard Bank plc} [2008] EWCA Civ 819; [2008] 2 CLC 80 [40].

\textsuperscript{178} \textit{Akindele} [2001] Ch 437 (CA) 448. See further, \textit{Evans} [2004] NSWCA 82; [2004] 61 NSWLR 75 [160]–[161].

\textsuperscript{179} Conaglen and Nolan, ‘Contracts and Knowing Receipt, 378.

\textsuperscript{180} \textit{Agip} [1990] Ch 265 (CA) 292.

\textsuperscript{181} It is a ‘cause in fact’ in the sense of historical involvement in PW’s wrongdoing; Jane Stapleton, ‘Cause-in-fact and the Scope of Liability for Consequences’ (2003) 119 Law Quarterly Review 388.
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event. That is, while a 'but for' causal link will generally be present, it is sufficient that A's conduct is a contributing cause [3.3.3].

Where A has merely assisted PW in the primary wrong, it need not be shown that PW would not have, or could not have, gone ahead but for A's assistance. 182 Although the courts explicitly require that A's conduct have a 'causative effect', a 'but for' causal link is not necessary. 183 Such causal effect must be more than of 'minimal importance'. 184 It must 'make a difference' and forward or advance the primary breach or misconduct in some way. 185

Self-serving conduct by A, that takes advantage of a breach of duty by PW in which A was not involved, is not a cause of that breach and is therefore not assistance. 186 Where more than one breach of duty has been committed by PW in an ongoing course of conduct, A will only be liable for losses resulting from the particular breaches of duty in which he assisted. Thus, 'it is necessary to identify what breach of trust or duty was assisted and what loss may be said to have resulted from that breach of trust or duty'. 187

It is clear that A's involvement need not be a 'but for' cause of the breach of trust or fiduciary duty, or even a 'contributing' cause, with respect to recipient liability, in order to render A liable. 188 In relation to recipient liability, a strong proprietary link (established through following and tracing) between the trust property and A is required, but this is not expressed in terms of causation: 'causal questions do not arise. Where [A] has received trust property ... with notice, the cause of action is complete without having to examine causal questions.' 189 The link is

182 Grupo Torras SA v. Al-Sabah [2001] CLC 221 (CA) 255; endorsing Mance J at first instance: 'In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonesty in respect of either the breach of trust or fiduciary duty or the resulting loss.'


184 Baden [1993] 1 WLR 509 (Ch) 575 (Peter Gibson J). See also Harpum, 'The stranger as constructive trustee: Part I', 116 ('significant assistance'); Elliott and Mitchell, 'Remedies for Dishonest Assistance', 20, '[A] has dishonestly assisted ... in such a way that his actions or omissions have at least made the commission of the breach easier than it would otherwise have been ...'.


186 E.g., if Company A is created after PW's breach of duty, but benefits from the consequences of the breach by being able to buy C's business at an advantageous price, A has not assisted in the prior breach of duty: Brown v. Bennett [1999] 1 BCLR 649 (CA).

187 Grupo Torras SA v. Al-Sabah (No.5) [1999] C.L.C. 1469 (Ch) 1667 (Mance J); Grupo Torras SA v. Al-Sabah (No.5) [2001] CLC 221 (CA) 255.

188 The terminology is taken from Jane Stapleton, 'Unnecessary Causes' (2013) 129 Law Quarterly Review 39. See [3.3.3].

strengthened through the requirement that the receipt be for A's personal benefit. This is said to limit liability to situations where 'the receipt is relevant to the loss' and explains why A's receipt should be visited with legal liability.\footnote{Agip (Africa) Ltd v. Jackson [1990] Ch 265, 292 (Millett J.).}

In Brown v. Bennett, Morritt LJ held that the receipt of trust property must be 'the direct consequence of the alleged breach of trust or fiduciary duty of which [A] is said to have notice'.\footnote{Brown v. Bennett [1999] 1 BCLC 649 (CA) 655.} This is in addition to following or tracing the trust property into A's hands. To illustrate his point, Morritt LJ described a scenario involving a sale of trust property (a house) after it had fallen into disrepair due to previous trustees' breaches of trust. The purchaser is a neighbour who watched the property's decline and who paid a fair price. Morritt LJ concluded that there would be no recipient liability even though the neighbour knew of the previous breaches of trust because he 'was not in any way responsible for them and he paid the full value for what he received from the new trustees'.\footnote{Ibid.} This is clearly correct, but the 'direct consequence' requirement suggested by Morritt LJ is superfluous.\footnote{See Virgo, Principles of Equity and Trusts, 684.} The breaches of trust involved no misappropriation of the property to which the neighbour could have become a party through receipt. The neighbour's later receipt of the trust property is in pursuance of the lawful actions of the new trustees. It is not a receipt in breach of trust.

\section*{8.3.4 The mental state of the accessory or recipient}

\subsection*{8.3.4.1 Overview}

Accessory liability and recipient liability turn upon A's knowledge of the circumstances constituting the primary wrong coupled with A's accessorial conduct in relation to that wrong. Formulating the requisite knowledge has proved difficult. There is a broad consensus that actual knowledge of the primary wrong is desirable, given the personal, conscience-based nature of equity's jurisdiction, but minds differ as to which lesser degrees of 'knowledge' will suffice for liability.\footnote{The US commentaries describe the requisite mental element of knowledge in very broad terms. See, e.g., Bogert, §901: 'knowledge at the time that the transaction amounted to breach of trust, or the legal equivalent of such knowledge'; Restatement (Third) of Trust §108(1) (2012): 'knowledge or reason to know that the trustee is acting improperly'.}
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Courts using the traditional framework frame their inquiry in terms of A's knowledge but with reference to the equitable concept and terminology of 'notice'. Courts using the reformed framework instead consider a general descriptor of A's overall culpability to determine whether the requisite mental element is present. In relation to procurement and assistance liability, the question is whether in all the circumstances, including, but not limited to, A's knowledge of the primary wrong, A's conduct was 'dishonest'. In relation to recipient liability, the question is whether A's knowledge made A's conduct 'unconscionable'.

Policy considerations inform the content of the requisite mental element under both frameworks. Explicit concerns of the courts include the danger of disrupting the operation of commercial dealings by imposing impracticable, inefficient procedural burdens upon professional agents\(^\text{195}\) and financiers,\(^\text{196}\) the potential injustice of disproportionate liabilities being imposed upon such third parties,\(^\text{197}\) and the importance of ensuring coherence with statutory regulatory schemes, particularly in the corporate insolvency context.\(^\text{198}\)

The following discussion begins with some general questions concerning the content of A's knowledge. We then describe the current law according to the traditional and reformed frameworks for liability.

8.3.4.2 The content of A's knowledge

An aspect of the mental element that does not often receive attention concerns the requisite 'content' of A's knowledge.\(^\text{199}\) Recipient liability can be dealt with quickly; in relation to breach of an express trust: A must know that the property received is trust property and that its receipt is in breach of the trust.\(^\text{200}\) In relation to receipt of 'trust property' in the wider sense of property under the control of a fiduciary, A must know that the property is subject to the fiduciary duty and its receipt is in breach of the

\(^{195}\) E.g., through imposing a duty to inquire: *Royal Brunei Airlines* [1995] 2 AC 378 (PC) 387; *Akindele* [2001] Ch 437 (CA) 456.

\(^{196}\) See, e.g. *Baden* [1993] 1 WLR 509 (Ch) 585; *US International Marketing* [2004] 1 NZLR 589 (NZCA).

\(^{197}\) *Farah Constructions* [2007] HCA 22; (2007) 230 CLR 89 [179].


fiduciary duty.\textsuperscript{201} That is, A must know of the 'essential matters' that constitute the wrong and their legal complexion, see [3.4.2.2]–[3.4.2.3]. These requirements appear not to have been questioned.\textsuperscript{202}

The requisite content of A's knowledge in relation to accessory liability, however, is far less clear, as is now discussed.

Knowledge of the primary wrong and of C's identity For accessory liability, must A simply know the essential matters [3.4.2.2] (however determined) that constitute the primary wrong or must it also be shown that A appreciates their legal significance [3.4.2.3]? Furthermore, must A appreciate their precise legal significance?

The question arose in a simple form before the House of Lords in \textit{Twinsectra} in the context of a dishonest assistance claim against a solicitor, A, with respect to his client's breach of a 'Quistclose' trust.\textsuperscript{203} Was it 'sufficient that [A] was aware of the arrangements which created the trust or must he also have appreciated that they did so'?\textsuperscript{204} Lord Hoffmann in the majority held that that there need not be a 'full appreciation of the legal analysis of the transaction. A person may dishonestly assist in the commission of a breach of trust without any idea of what a trust means.\textsuperscript{205} 'This seems unexceptional; A must know of the facts constituting the trust or fiduciary relationship and the breach of duty, but cannot be expected to appreciate their precise legal significance.\textsuperscript{206} To hold otherwise would unduly limit liability to those with sufficient legal training.\textsuperscript{207} What is not clear, however, is whether there must still be some appreciation of the legal significance of the known facts. The Privy Council in \textit{Barlow Clowes} arguably required this in holding that A must know or suspect that he is 'assisting in a misappropriation of money'.\textsuperscript{208}

\textsuperscript{201} \textit{El Ajou v. Dollar Land Holdings plc} [1994] 2 All ER 685 (CA) 700.
\textsuperscript{202} Similar questions to those discussed next could be raised.
\textsuperscript{203} [2002] UKHL 12; [2002] 2 AC 164.
\textsuperscript{204} \textit{Ibid.} [52] (Lord Millett).
\textsuperscript{205} \textit{Ibid.} [24]. Lord Millett was in agreement on this point: [135].
\textsuperscript{206} \textit{Cf. Yoshiva Properties No. 1 Property Ltd v. Marshall} [2005] NSWCA 23; [2005] 219 ALR 112 [22] (Bryson JA) (\textit{Yoshiva Properties}), where the question is formulated in terms of objective knowledge [3.4.3.5]: 'it is not necessary that the fraudulent scheme or purpose of [PW] should be fully known, or should be understood in any detail at all; the test is complied with if the known facts would communicate to a reasonable person a general understanding that there was a fraud, breach of trust or breach of fiduciary duty.' \textit{Contra.}, \textit{United States Surgical Corporation v. Hospital Products International Pty Ltd} [1983] 2 NSWLR 157 (NSWCA) 253. See also \textit{Australian Super Developments Pty Ltd v. Marriner} [2014] VSC 464 [302] (Sloss J): '[A] must be aware of the nature of the funds in question: that is, that the funds are trust funds. . .'
\textsuperscript{207} Austin, 'Constructive Trusts', 236–237.
\textsuperscript{208} \textit{Barlow Clowes} [2005] UKPC 37; [2006] 1 WLR 1476 [28].
'Misappropriation' connotes wrongfulness; it is not a normatively neutral term.\textsuperscript{209}

The solicitor in Twinsectra knew facts (that funds borrowed for a property development were being paid out contrary to instructions) indicating the general nature (misappropriation of money) of the primary wrong (breach of trust) and that the victim was C. More difficult scenarios arise where A knows that PW's conduct is wrongful, but is mistaken as to the type of wrong and/or the identity of the victim. The cases so far turn upon their own facts. In Agip, for example, Millett J was unimpressed with an argument by two chartered accountants that they thought that they were assisting their clients to evade foreign exchange controls, rather than assisting in a dishonest and fraudulent breach of trust; that is, that they were involved in criminal wrongdoing and that the victim was the Revenue, rather than a private individual.\textsuperscript{210} His Honour held that, '[i]t is not necessary that [A] should have been aware of the precise nature of the fraud or even of the identity of [A's] victim.'\textsuperscript{211} The implication is that A must still have some general appreciation of the wrongfulness of his conduct.

The decision in Agip must be read in light of the fact that the case concerned professional agents providing 'the services of nominee companies for the purpose of enabling their clients to keep their activities secret'.\textsuperscript{212} Millett J made it quite clear that imposing liability upon these professionals performed an essential regulatory function in deterring future misconduct by professional agents and their clients and encouraging whistle-blowing.\textsuperscript{213}

It was also suggested in Agip that a third party who is mistaken as to the nature of the primary wrong and/or the intended victim has assumed the risk of liability for a wrong with more serious remedial consequences.\textsuperscript{214} But this must surely depend upon the nature of the primary wrong and the accessorital conduct in question. The consequences of equitable personal liability may be quite disproportionate to the penalty or remedy that A thought was at stake. It also does not necessarily follow that if A

\textsuperscript{209} There is a danger in placing too much weight on subtle nuances in language, however, and it must be conceded that the statement in Barlow Clowes \textit{ibid}. is perhaps ambiguous. Cf. Consul Development (1975) 132 CLR 373 (HCA) 397 (Gibbs J referring to knowledge of 'improper' conduct and 'impropriety').

\textsuperscript{210} [1990] 1 Ch 265. \textsuperscript{211} \textit{ibid}. 295. \textsuperscript{212} \textit{ibid}.


\textsuperscript{214} [1990] 1 Ch 265, 295. See also Mitchell, 'Assistance', 198.
was prepared to assist in a fraudulent activity such as tax evasion, A would equally have assisted in a breach of trust or fiduciary duty or even that A took the risk that this might be so. In some scenarios, such as those involving professional agents, it may be entirely appropriate to expect A to bear the costs of reckless conduct, but not in all. The accountants in Agip, for example,

were at best indifferent to the possibility of fraud [by PW]. They made no inquiries of [C] because they thought that it was none of their business.\footnote{Ibid. 295 (Millett J).} The evidence suggested that A believed her husband was assisting a friend’s tax evasion whereas he was involved in money laundering of funds stolen in breach of fiduciary duty and, consequently, impressed with a trust. Her misunderstandings as to the primary wrong and the identity of C were similar to those of the accountants in Agip, yet it is questionable whether her knowledge should suffice for liability. Rimer J held, inter alia, that A was not liable because she did not know the facts constituting the trust, that is, that the funds were stolen.\footnote{Ibid. 151.} The reasoning in Brinks has been doubted,\footnote{See, at first instance, Grupo Torras SA v. Al-Sabah (No.5) [1999] CLC 1469 (QB) (Mance J disagreeing with the reasoning, but not the outcome, in Brinks). In Mance J’s view, the question was whether A’s dishonesty was ‘towards [C] in relation to property held or potentially held on trust or constructive trust, rather than in the introduction of a separate criterion of knowledge of any such trust’. The CA in Grupo Torras SA v. Al-Sabah (No 5) [2001] CLC 221 indicated agreement with Rimer J in Brinks without reaching a conclusion on the question. The Privy Council in Barlow Clowes [2005] UKPC 37; [2006] 1 WLR 1476 [28] disagreed with the reasoning in Brinks, apparently on the basis that knowledge of the trust is not necessary where A knows or suspects that there is a misappropriation of property. It does not appear that the Privy Council engaged with the further complication in Brinks that A did not know or suspect any wrongdoing in relation to C.} but is correct in our view. The wife was not a professional agent to whom the policy considerations in Agip might apply, she had not assumed the risk of a breach of trust, and she was not aware of the essential matters constituting the primary wrong. Furthermore, her alleged involvement in the primary wrong was minimal \[8.3.2.2\]. What is still not clear, however, from these and other cases, is whether A must know the victim’s identity,\footnote{Cf. Agip [1990] 1 Ch 265, 295; Grupo Torras SA v. Al-Sabah (No.5) [1999] CLC 1469 (QB); Nicholson v. Morgan (No 3) [2013] WASC 110; 8 ASTLR 277 [62]–[65] (Edelman J): A must know the identity of the particular trust beneficiaries, rather than of ‘a breach of trust to a third party generally’ [64].} although in our view this is not essential and must be considered in
light of the nature of A’s involvement and ‘the extent of [A’s] knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by [PW].’

Knowledge of a claim by C If A knows only that C claims that PW is breaching an equitable duty to C, is this sufficient for A’s liability? In such scenarios the courts consider how A should have acted in response to C’s claim and, in particular, whether A should have taken further steps to ascertain its veracity; see also [9.4.3.2]. There is a legitimate reluctance to impose a duty to inquire upon professional agents such as solicitors and bankers. Outside these contexts, if C’s claim is detailed and consistent with the surrounding circumstances, there is time to make an informed decision as to the claim’s veracity before pursuing A’s own interests further, and A will not suffer any detriment from so doing. A may be fixed with knowledge of the primary wrong [3.4.2.5].

8.3.4.3 The necessary mental state under the traditional framework

The nineteenth-century courts considered the necessary mental element in terms of A’s ‘cognition’, ‘knowledge’, ‘suspicion’, ‘notice’ and the like, but with no particular emphasis or apparent difficulty. Particularly in the context of recipient liability, the courts looked beyond actual knowledge to what A could have learnt through inquiry. As is well known, Equity developed a concept of ‘notice’ to describe mental states and that operated largely in the context of conveyancing-related claims to equitable property interests in old

223 See, e.g., the facts of United States Surgical Corporation v. Hospital Products International Pty Ltd [1983] 2 NSWLR 157 (NSWCA) 258.
224 Lee v. Sankey (1873) LR 15 Eq 204, 211 (Sir James Bacon VC).
225 See, e.g., references to both knowledge and suspicion by Lord Selborne in Barnes v. Addy (1874) LR 9 Ch App 244 (CA). The ‘apparent tendency to unguarded language [in the earlier cases] was doubtless due to there often being no need upon the particular facts of the case under consideration either to distinguish between “notice” and “knowledge” or to examine their precise meaning in the context of those facts’: Carl Zeiss [1969] 2 Ch 276 CA 296 (Sachs LJ).
226 See, e.g., Mayor, Aldermen and Burgesses of the Borough of Berwick-Upon-Tweed v. Murray (1857) 7 De G M & G 497, 512–513; 44 ER 194 (Ch) 200–201; Selangor [1968] 1 WLR 1555 (Ch) 1584–1590.
framework.\textsuperscript{242} Level (v) does not suffice for either form of liability. A must have actual knowledge of the breach of trust or fiduciary duty – levels (i) to (ii), be recklessly indifferent as to whether it occurs – level (iii) – or, exceptionally, have actual knowledge of facts from which an honest and reasonable person would deduce the breach – level (iv).\textsuperscript{243} Level (iv) is said to capture the 'morally obtuse' third party who did not recognise 'an impropriety that would have been apparent to an ordinary person applying the standards of such persons'.\textsuperscript{244} The Federal Court of Australia has explained the link between level (iv) objective knowledge and actual knowledge thus:

It is, in essence, an understandable, objective, default rule designed to prevent a third party setting up his or her own "moral obtuseness" as the reason for not recognising an impropriety that would have been apparent to an ordinary person ... It is the surrogate of actual knowledge.\textsuperscript{245}

The mental element for procurement of a breach of trust or fiduciary duty is only beginning to receive attention.\textsuperscript{246} In recent cases, the courts have dealt with the question by analogy to the knowledge required for knowing assistance.\textsuperscript{247} The requisite mental state for procurement is discussed more generally in [3.4.3.6].

8.3.4.4 The necessary mental state under the reformed framework

Knowledge of the primary wrong remains at the core of the mental state for liability under the reformed framework. But, critically, this is expressed at a higher level of generality – 'dishonesty' and 'unconscionability' respectively – that involves a normative judgment upon A's conduct in all the circumstances, including A's knowledge.

\textsuperscript{242} Farah Constructions [2007] HCA 22; (2007) 230 CLR 89.
\textsuperscript{244} Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [177]. See also Consul Development (1975) 132 CLR 373, 398.
\textsuperscript{246} In Fyler (1841) 3 Beav 550, 668, 49 ER 216, 224 the mental element was framed in terms of actual knowledge.
The criterion of dishonesty in relation to liability for assistance and procurement Lord Nicholls’ judgment in *Royal Brunei Airlines* remains the most authoritative and helpful statement of the test for dishonesty. Lord Nicholls sets aside criminal law definitions of ‘dishonesty’ before explaining what the term meant in relation to accessory liability:

acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective.

The passage following made it clear that A’s knowledge is of crucial relevance to the dishonesty inquiry; this resonates with the traditional framework:

Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

Nonetheless, in his Lordship’s view, knowledge was ‘better avoided as a defining ingredient of the [dishonesty] principle, and in the context of this [dishonesty] principle the *Baden* scale of knowledge is best forgotten’. In addition to considering A’s knowledge, the court ‘will also have regard to personal attributes [of A], such as [A’s] experience and intelligence, and the reason why [A] acted as [A] did’.

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In further explaining the dishonesty test, Lord Nicholls identified two problematic scenarios as being where A’s conduct was either reckless or careless. The recklessness, or risk-taking, scenario was framed in terms of an agent assisting a trustee where there was doubt as to whether the trustee’s actions were in breach of trust. In such situations, the court’s inquiry must be framed broadly:

The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific.253

Where A’s lack of awareness of the breach of trust was due to, what Lord Nicholls termed, ‘negligence’ (A ‘would have become aware [of the breach of trust] had he exercised reasonable diligence’), this would not suffice for liability.254

After some initial confusion,255 it is now clear that dishonesty is determined according to an objective standard; it is not necessary that A appreciate that his conduct is dishonest according to ordinary standards.256 The dishonesty test laid down in Royal Brunei Airlines and subsequently reiterated by the Privy Council in Barlow Clowes257 has been adopted in England.258

253 Ibid. 390. The phrasing of the question in Cowan de Groot Properties Ltd v. Eagle Trust Plc [1992] 4 All ER 700 (Ch) 761 (Knox J) was referred to with approval: whether A was ‘guilty of commercially unacceptable conduct in the particular context involved . . .’. Royal Brunei Airlines [1995] 2 AC 378 (PC) 391–392.

254 Confusion was generated by Twinsestra [2002] UKHL 12; [2002] 2 AC 164. In a brief passage agreeing with Lord Hutton, Lord Hoffmann [20] considered that Royal Brunei Airlines required ‘a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour’. Similarly, Lord Hutton [27] viewed dishonesty as combining both objective and subjective features. Contra, Lord Millett.

255 Barlow Clowes [2005] UKPC 37; [2006] 1 WLR 1476 [15]–[16]. Any ‘ambiguity’ arising from Twinsestra was removed by holding that the dishonesty test ‘did not require that [A] should have had reflections about what [the] normally acceptable standards [of honest conduct] were’.

256 Ibid.

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There appears to be no significant uncertainty as to the content or methodology of the dishonesty test. It appears to work well in the context of non-agent accessories. In particular, the normative dimension of the dishonesty inquiry is well-accepted and that it may involve the court sending a message to the commercial community as to the propriety of certain common forms of conduct.

One scenario that continues to be challenging for courts is that of the agent whose professional services have assisted a (generally fraudulent) breach of trust or fiduciary duty, but who is not proved to have had actual knowledge of the primary wrong. Distinguishing between A turning a blind eye to suspicions of impropriety (dishonesty) and A simply failing, however incompetently, to see any impropriety (not dishonesty), has proved difficult. This is, of course, unsurprising. It is the question that has bedevilled the courts in various guises since the beginning of the modern cases. The merit of the reformed framework’s test of dishonesty is that it makes explicit the normative and contextual nature of the inquiry: dishonesty is determined by A’s mental state and conduct in all the circumstances. The remarks of Aldous LJ are apt in this context:

> Once the facts have been found, the judge has to decide, according to the standards of right thinking members of society, whether the act or omission was due merely to incompetence or to dishonesty... It may not be an easy question to answer, but it is the sort of question that judges and juries throughout the country answer every day without needing to analyse a large number of authorities.

12; [2002] 2 AC 164 [115]–[117] the criminal law conception of dishonesty is inappropriate. See also Virgo, Principles of Equity and Trusts, 708.

Royal Brunei Airlines, as a pre-2004 Privy Council decision, bound the New Zealand courts. The Privy Council’s clarification of the dishonesty test in Barlow Clowes [2005] UKPC 37; [2006] 1 WLR 1476 was followed in Westpac New Zealand Ltd v. MAP & Associates Ltd [2011] NZSC 89.


Ibid.


See, e.g., Solangor [1968] 1 WLR 1555 (Ch); Karak [1972] 1 WLR 602 (Ch).

It is an interesting question whether the difference in the requisite mental element of the traditional and reformed frameworks leads to different outcomes here. Certainly, there is consensus that the burden on professional agents to protect the interests of beneficiaries to fiduciary relationships should be restrained.\textsuperscript{267} Different outcomes are possible in the exceptionally difficult cases where it cannot be proved that A had actual knowledge or notice of the principal wrong and yet a reasonable person in A's position would have been alerted to that possibility. But in such cases, the line between preliminary fact-finding as opposed to a conclusory application of law becomes blurred and it is very difficult to predict how the differing fault elements will apply. Nonetheless, the automatic inclusion of situations of 'moral obtuseness' under the traditional framework may make liability more likely than under the reformed framework.

The criterion of unconscionability in relation to recipient liability The mental element for recipient liability under the reformed framework requires A's knowledge of the primary wrong to be, in all the circumstances, 'such as to make it unconscionable for [A] to retain the benefit of the receipt.'\textsuperscript{268} This test was laid down in 2000 by Nourse LJ for the English Court of Appeal in \textit{Akindele}.\textsuperscript{269} His Lordship endorsed a conscience-based approach to recipient liability,\textsuperscript{270} but rejected the \textit{Baden} scale of knowledge as unhelpful.\textsuperscript{271} Instead, a two-stage inquiry, similar to that for dishonest assistance, is undertaken. First, A's knowledge of the breach of trust is ascertained. Second, a normative judgment is made as to whether A's conduct, given A's knowledge, is unconscionable. His Lordship noted that this approach would enable 'commonsense decisions in the commercial context'\textsuperscript{272}

\textsuperscript{267} See also in the US, the 'modernized rule' in \textit{Restatement (Third) of Trusts} §108(3) (2012) and Comment d; and similarly, \textit{Uniform Trust Code} §1012(b). See also Scott, Frazier and Ascher, \textit{Scott & Ascher}, §30.6.6: 'It seems plainly inappropriate ... to compel third persons to supervise the fiduciary's conduct and to hold them liable for failing to do so. Indeed, the possibility of such liability over the years has made it dangerous to deal with trustees and interfered with proper administration.'

\textsuperscript{268} \textit{Akindele} [2001] Ch 437 (CA) 455.


\textsuperscript{270} \textit{Akindele} [2001] Ch 437 (CA) 452. See further [7.6.1].

\textsuperscript{271} \textit{Ibid.} [455] (although opining that the \textit{Baden} scale was helpful in determining dishonesty for knowing assistance).

\textsuperscript{272} \textit{Ibid.} 455 (Nourse LJ).
Extrapolating from the discussion in *Akindele* of the earlier case law, it seems that, generally, actual knowledge is required, but that 'there must be cases where there is no justification on the known facts for allowing a commercial man who has received funds paid to him in breach of trust to plead the shelter of the exigencies of commercial life'. The implication is that something less than actual knowledge may suffice, but perhaps does not go as far as the traditional framework for knowing receipt which assumes that the knowledge that an honest and reasonable person would deduce from A’s actual knowledge will *always* suffice for liability [8.3.4.3]. A contextual approach to the inquiry, which allows A to be liable with less than actual knowledge, has been supported in the Singapore Court of Appeal and by the English Court of Appeal.

Conversely, in the Hong Kong Court of Final Appeal decision, *Akai Holdings*, Lord Neuberger NPJ interpreted the *Akindele* test by reference to the common law principles for determining whether A could rely on the apparent authority of C’s agent, PW, in enforcing a contract made with C. ‘Equity should ‘follow the law’ in this respect.’ This led him to conclude that only actual knowledge suffices for recipient liability. This did not mean, however, that recipient liability could be assimilated with dishonest accessory liability, because the test for determining an agent’s apparent authority incorporated ‘irrationality’ as well as dishonesty.

With respect, the reasoning in *Akai Holdings* is difficult to follow. There is no necessary connection between an agent’s authority to enter

274 See Sage [2010] 3 SLR 589, 606 (SCA concluded that *Akindele*-type unconscionability was not limited to where A had actual knowledge. Instead, ‘[t]he test of unconscionability should be kept flexible and be fact centred’. The SCA approved of Cheung IA’s concurring judgment in *Akai Holdings Ltd (in liq) v. Thanakhan Kasikorn Thai Chamkat (Mahachon)* [2010] 3 HKC 153 (HKCA). Cheung IA concluded [266] that ‘it is precisely because of the broad approach when unconscionability is adopted as the underlining test of knowledge that one should not confine the examination only to the actual knowledge of the recipient and exclude constructive notice in its wider sense.’ But see Young Kheng Leong v. Panweld Trading Pte Ltd [2013] 1 SLR 173 [81]; SCA instead required ‘actual knowledge or the wilful avoidance of knowledge’. Similarly, the HKCFA in *Akai Holdings* [2011] 1 HKC 357 [134]–[137] required actual knowledge without addressing the view of Cheung IA in the CA.


Ibid. [134].
a contract and the receipt of trust property that would require the principles for determining liability to be the same. Nor does the maxim 'equity follows the law' apply. The finding that A must have actual knowledge for recipient liability is contrary to the reasoning and, we suggest, the spirit of, Akindele. Nor is it consistent with how other courts have interpreted the Akindele test.

The UK Supreme Court has not yet had the opportunity to consider the mental element for recipient liability. In 2012 the Privy Council in an appeal from the Turks and Caicos Islands Court of Appeal, in which the Akindele test was not challenged, equated unconscionability in the Akindele sense with 'equitable fraud' and noted that it was a classic example of lack of bona fides.

8.3.5 Shortcomings of the two frameworks and a preferred approach

The two dominant frameworks for equitable accessory and recipient liability both have shortcomings. Accessory liability is imposed in a broader range of circumstances and often in a less formulaic fashion than such frameworks concede. In particular, both frameworks are unwieldy in relation to corporate, rather than trust, breaches of duty. The leading cases take as their paradigm scenario A's involvement in breach of an express trust and formulate liability in those terms. Yet much of the modern case law concerns the corporate context, particularly breach of directors' fiduciary duties. Where, for example, A is the corporate vehicle for PW's breach of duty and is fully or substantially under PW's control, both frameworks prove cumbersome.
The formulation of the traditional framework may render it more prone to a rigid and formulaic application. The methodology of the reformed framework, whereby A’s conduct and mental state are considered contextually, is preferable in this respect, but the same result could be achieved without the complication of dishonesty or unconscionability labels. In our view, such labels are unnecessary, given an otherwise sufficient methodology; see also [3.5.2]. This is supported by Lord Millett’s dissenting comments in Twinsectra challenging the premise of Royal Brunei Airlines that ‘dishonesty’ provides a clearer criterion of fault than knowledge:

[T]he introduction of dishonesty is an unnecessary distraction, and conducive to error . . . If the condition of liability is intentional wrongdoing and not conscious dishonesty as understood in the criminal courts, I think that we should return to the traditional description of this head of equitable liability as arising from “knowing assistance”.288

Unfortunately, these concluding remarks have not received serious attention, perhaps because of the controversy generated by the majority’s distortion of the dishonesty test in that case.289

A further shortcoming of the reformed framework, in our view, is that while its differentiation of accessory liability and recipient liability is analytically correct, there is a danger that the very real commonalities between the two forms of liability are lost in the process.290 Given that recipient liability (and, sometimes, equitable vitiating doctrines [8.5]) share rationales and similar elements to liability for procurement or assistance in breach of equitable duties, it is questionable whether they should be separated by an exclusively accessorail classificatory scheme.

There is substantial support in equity jurisprudence for treating procurement, knowing assistance and recipient liability for breach of trust or fiduciary duty as one, participatory liability, regime, given the significant overlap and commonalities of the types of liability. On this approach, which courts sometimes treat as outside the two frameworks is where PW, a fiduciary, solicits a bribe or secret commission from A, or accepts one that is offered by A, to secure a transaction between C (PW’s principal) and A. See, e.g., Logicrope Ltd v. Southend United Football Club Ltd [1988] 1 WLR 1256 (Ch) 1261 (Logicrope) (Millett J noting the ‘close parallel with the cases on knowing assistance in a breach of trust . . . [T]he difference . . . lies not in the factual background but in the remedy sought . . . ’. See also Grimaldi [246] citing Grant v. Gold Exploration and Development Syndicate [1900] 1 QB 233 (CA) 249; Daraydan Holdings Ltd v. Solland International Ltd [2004] EWHC 622; [2005] Ch 119 [53].

290 The same can be said of undue influence and similar doctrines discussed at [8.5].
'receipt' after the primary wrong becomes merely another means of participation in the wrongdoing. This understanding reflects the law in Australia. It is also supported by high authority in England. In light of the shortcomings of the traditional framework specifically, the Federal Court of Australia in *Grimaldi* concluded that a flexible approach by which three broad elements determining liability are considered in a context-specific fashion and given varying weight accordingly, was to be preferred. The Court's conclusion is one that we share:

[Participatory liability as it evolved in equity in cases prior and subsequent to *Barnes v. Addy* was not based on inflexible formulae. Given the variety of circumstances in which, and bases on which, a third party could be characterised as a wrongdoer in equity... varying importance has been given to three matters: (i) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant; (ii) the nature of the third party's role and participation, e.g., as alter ego, inducer or procurer, dealer at arm's length, etc.; and (iii) the extent of the participant's knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.]

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291 *See Farah Constructions* [2007] HCA 22; (2007) 230 CLR 89, in which the High Court of Australia retained the traditional *Barnes v. Addy* liability framework of two limbs (knowing receipt of trust property and knowing assistance in a dishonest and fraudulent design by the trustee or fiduciary); *Grimaldi* [2012] FCAFC 6; (2012) 200 FCR 296. See also the extra-judicial writings of one member of the Court in *Grimaldi*: Paul D. Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan W. M. Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 195.

292 *See Williams* [2014] UKSC 10; [2014] 2 WLR 355 [9], Lord Sumption referring to:

persons who never assumed... the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was in breach of trust... These can conveniently be called cases of ancillary liability.


These ‘three matters’ and the accompanying methodology closely parallel our general framework for accessory liability [Chapter 3].

8.4 Accessory liability for breach of confidence

8.4.1 When does accessory liability arise?

A duty of confidentiality (‘confidence’) may arise in equity or pursuant to a contract. The two jurisdictions overlap as do the accompanying accessory liabilities.295 The equitable duty of confidence is more simply acquired than a trust or fiduciary duty and, hence, it is easier for A to become a primary wrongdoer in his own right. The question considered here is when equitable accessory – rather than primary – liability for breach of confidence arises.296 The question is of practical significance given that many breach of confidence claims are made against a third party to the original breach of confidence (for example, the publisher of confidential material acquired by another in breach of confidence) rather than against the original PW. Notwithstanding the prevalence of such claims, there is uncertainty as to when and why they are allowed.297 Three scenarios involving a third party, A, to an initial breach of confidence by PW must be distinguished when considering the possibility of accessory liability.

8.4.1.1 Scenario 1: A, knowing of a breach of confidence by PW, receives the confidential information

A may be liable as a primary wrongdoer for breach of confidence, even if A is not the original primary wrongdoer in the chain of events comprising an actionable breach of confidence, if A subsequently received and dealt with the confidential information.298 This will be

295 See, e.g., Printers & Finishers Ltd v Holloway [1965] RPC 239 (Ch).
298 Abernethy v. Hutchinson (1825) 1 H & TW 28, 39–40; 47 ER 1313, 1317–1318; Prince Albert v. Strange (1849) 1 Mac & G 25; 41 ER 1171; Attorney-General v. Guardian
so where A ‘knew or ought to have known’ of the confidential nature of the information. There is no need to resort to accessory liability here because the elements of breach of confidence (the primary wrong itself) can be met in relation to A. In some such cases, A will not be involved in the original breach of confidence by PW at all, in which case accessory liability cannot arise in any event. For example, if A seeks to take advantage of an earlier breach of confidence that A did not instigate or participate in, and that is not ongoing, A is not accessorily involved.

Nonetheless, there is commentary and case law that conceptualises scenario 1 in accessorial terms. In this respect the extrajudicial views of Lord Toulson have been influential. The English Court of Appeal in Thomas v. Pearce adopted the following passage from his text, Confidentiality:

> Where the third party receives information knowing that it has been disclosed by his informant in breach of confidence, he will himself owe a duty of confidence to the confider. This principle is derived from the doctrine that it is equitable fraud in a third party knowingly to assist in a breach of trust, confidence or contract by another.

This led the court to apply the dishonesty test used to determine accessory liability for breach of trust in order to determine primary liability for breach of confidence. The passage in Confidentiality conflates primary

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299 Campbell v. MGN Ltd [2004] UKHL 22; [2004] 2 AC 457 [14] (Lord Nicholls of Birkenhead); Lenah Game Meats [2001] HCA 63; (2001) 208 CLR 199 [39] (Gleeson CJ): ‘the manner in which the information was obtained’. Sometimes the criterion is formulated in terms of notice by A of the breach of confidence by PW (see, e.g., Force India Formula One Team Limited v. Malaysia Racing Team Sdn Bhd [2012] EWHC 616; [2012] RPC 29 (Ch) [224] (Force India).

300 Attorney-General v. Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 (HL) 281; Force India [2012] EWHC 616 (Ch) [248].

301 Attorney-General v. Guardian Newspapers Ltd [1987] 1 WLR 1248 (Ch) 1264 (newspapers sought to capitalise on a prior breach of confidence by the author and publishers of a book).


304 PW provided her new employer, A, with a confidential list of her former employer, C’s, clients. The CA determined A’s liability according to whether she was ‘dishonest’ in her
liability with accessory liability. It is not necessary to rely upon accessory liability where A possesses the relevant information and knows or ought to know that it is confidential, for A has thereby become a primary wrongdoer.\footnote{305} This is not to deny that C could plead accessory liability in the alternative where the facts are amenable to that analysis on the basis, for example, that A procured or assisted in PW’s breach of confidence.\footnote{306}

8.4.1.2 Scenario 2: A innocently receives confidential information from PW

Here, a bona fide third party innocently receives confidential information from PW (for example, pursuant to a contract with PW\footnote{307} or inadvertently from PW\footnote{308}) but subsequently learns of its confidential nature (most often through C bringing a claim for injunctive relief). It is generally accepted that (primary) liability will arise;\footnote{309} however, the courts differ as to the relevant considerations. The better view is that once the third party is put on notice of the breach of confidence by PW, C is prima facie entitled to relief, but that the court has a discretion as to the terms of such relief and whether it should be refused taking into account all the circumstances.\footnote{310}

receipt of the confidential information, applying the test in Royal Brunei Airlines [1995] 2 AC 378. Some cases have uncritically accepted this approach. See, e.g., Campbell v. MGN Ltd [2002] EWCA Civ 1373; [2003] QB 633 [66] (except that the dishonesty test was held to be inappropriate in a non-commercial context); this was not discussed on appeal: Campbell v. MGN Ltd [2004] UKHL 22; [2004] 2 AC 457.


\footnote{306} Stanley, Law of Confidentiality, 28 n. 20. But see [8.4.2] regarding differences in the requisite mental element that may make an accessory claim less attractive.

\footnote{307} See, e.g., Wheatley v. Bell [1982] 2 NSWLR 544 (NSWSC).

\footnote{308} See, e.g., Director of Public Prosecutions (Commonwealth) v. Kane (1997) 140 FLR 468 (NSWSC).


\footnote{310} Retractable Technologies v. Occupational and Medical Innovations [2007] FCA 545; (2007) 72 IPR 58 [70]–[87] (Retractable Technologies). See further, Aplin, Bently, Johnson and Malynicz, Gurry, [7.119]–[7.142]. If the third party was a bona fide purchaser for value without notice in entering a contract which involves a breach of confidence, this is a factor to be taken into account. The defence cannot operate directly
Some situations involving innocent recipients of confidential information are susceptible to a dual analysis of primary and accessory liability. On one view, the liability of A should then be analagised with knowing assistance for breach of trust and fiduciary duty. Thus, on appropriate facts, once A is given notice of the breach of confidence by PW, 'if he then persists in continuing [in a project with PW] he should be restrained as participating in a dishonest and fraudulent design in breach of a duty of confidence'.

The Queensland Supreme Court decision of Franklin v. Giddins provides an example. In that case, an orchardist stole budwood cuttings from C's nectarine trees and propagated them in breach of confidence. He was convicted of theft. From the time of this conviction, the orchardist's wife, A, knew of his breach of confidence. C sought orders against both the orchardist and A for delivery up of the wrongfully propagated trees. In relation to A, the court held that, given her subsequent notice of the breach, it was 'unconscionable for her to derive any benefit from the trees, and she too infringes C's rights'. This suggests that A became subject to her own duty of confidence. But the case has been subsequently explained in accessorrial terms:

Since [A] jointly conducted the orchard with her husband . . . and became after knowledge of her husband's conduct an active participant in the continued use of [C's] stolen trade secret, she became an accessory to the primary conduct and thus susceptible to an injunction . . . and delivery up of the trees.

The explanation of A's liability as accessorial is convincing given that there was an ongoing breach of confidence in which she participated.


Meagher, Heydon and Leeming. Equity, [41–110]. No analogy can be drawn with recipient liability for breach of trust or fiduciary duty because A's receipt of confidential information is not a receipt of property: Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [8.3.2.3],


314 Ibid. 81 (Dunn J).


See also Lancashire Fires Limited v. SA Lyons & Company Limited [1996] FSR 629, 677 (CA): 'Knowledge of the [confidential information] came to [A] by reason of what has been held to be a breach of confidence by [PW]. It came to her not as a third party new to the scene but as one who had been employed by the company whose confidence had been breached by [PW] and who was involved with him in setting up the rival business.' Injunctive relief was awarded against A.
And this suggests that sometimes the accessory liability analysis is a more accurate vehicle for pleading A’s liability. But the accessorial analysis cannot explain all situations in which a third party innocently receives confidential information, for that party will not always have been involved in the primary wrong, whereas it will always be possible to characterise the liability as primary once the third party has notice of the confidentiality of the information acquired innocently.

8.4.1.3 Scenario 3: A does not receive the confidential information at all

Accessory liability is only essential if A is involved in a breach of confidence by PW without becoming privy to the confidential information in circumstances imparts a duty of confidence. The clearest example is where A does not become privy to the confidential information at all. The facts of Vestergaard Frandsen A/S v. Bestnet Europe Ltd suggest how this might occur. Two ex-employees of C and a former consultant to C established a business in competition with C. In so doing, the consultant breached his obligation of confidentiality to C in relation to trade secrets concerning C’s products. One of the ex-employees, Mrs S, was never privy to the confidential information, but was nonetheless instrumental in establishing and managing the rival business. It was held that she could be accessorially liable for assisting in the breach of confidence if she knew that the consultant was misusing information that had been acquired by him in circumstances of confidence.

8.4.2 The elements of accessory liability for breach of confidence

Of the three broad elements required for accessory liability (a primary wrong, accessorial conduct and the requisite mental state) the first two are uncontentious. Clearly there must be a breach of confidence by PW in which A is accessorially involved by way of procurement or assistance.

317 See, e.g., the alleged facts in Vestwin Trading Pte Ltd v. Obei Melissa [2006] SGHC 107 (overturned on appeal for other reasons: Obei Melissa v. Vestwin Trading Pte Ltd [2008] 2 SLR 540 (SCA)). A, a judgment creditor of C, procured PW, a private investigator, to search for financial records in relation to C’s affairs. PW obtained the documentation in breach of confidence. A was liable for breach of confidence, but could have been treated as an accessoary to PW’s breach, having procured it.

318 Force India [2012] EWHC 616 (Ch) [248].


320 Ibid. [26]. The claim failed on the facts.

321 Receipt of confidential information is not a receipt of property and thus cannot in itself be accessorial conduct: Farah Constructions [2007] HCA 22; (2007) 230 CLR 89.
But there is considerable confusion in the cases and commentaries between the requisite mental elements for primary liability and for accessory liability.\footnote{322}

As a third party to an initial breach of confidence by another, A will come under a \textit{primary} duty of confidence if A ‘knew or ought to have known’ that the information was confidential.\footnote{323} This goes beyond A’s actual knowledge to notice ‘objectively assessed by reference to a reasonable person standing in [A’s] shoes’.\footnote{324} It is a form of objective knowledge [3.4.3.5] and its focus is upon the information in question. Conversely, equitable accessory liability requires that A know of the breach of duty by PW, rather than simply that the information is confidential. That is, the basis of A’s liability and the focus of the knowledge inquiry are different: it does not necessarily follow, therefore, that the requisite knowledge should be the same as for primary liability.

In \textit{Vestergaard}, Lord Neuberger applied the dishonesty standard used to determine accessory liability for breach of trust or fiduciary duty under the reformed framework.\footnote{325} He has been criticised for doing so on the basis that the dishonesty standard requires actual knowledge, whereas the knowledge test for primary liability for breach of confidence does not.\footnote{326} But such criticisms are misguided, given that the only possible basis for liability in \textit{Vestergaard} was accessoriel. The only relevant question is whether the primary wrongs in question – breach of trust, fiduciary duty and confidence – are sufficiently similar for accessory liability purposes that the same mental element should apply.\footnote{327} Of course, if

\footnote{322}{See also the discussion of \textit{Thomas v. Pearce} [2000] FSR 718 (CA) above [8.4.1.1].}
\footnote{324}{\textit{Force India} [2012] EWHC 616; [2012] RPC 29 (Ch) [224] (Arnold J). It is not necessary to explore more precisely here what is meant by ‘notice’.}
\footnote{327}{The authors of \textit{Gurry} argue that they are not: ‘the courts have developed a separate notion of confidence at the root of the breach of confidence action which is to be distinguished from equity’s other creation, the trust.’ Aplin, Bently, Johnson and Malynicz, \textit{Gurry} [7.110]. Of course, there is a further question as to which of the current tests (under the traditional and reformed frameworks) should be preferred if the analogy to trust and fiduciary obligations is considered appropriate.}
the requisite mental element for accessory liability is indeed set at a higher level than for primary liability this will effectively rule out such claims in scenarios 1 and 2. But accessory liability continues to be necessary wherever A is accessorily involved in another’s breach of confidence without becoming privy to the confidential information (scenario 3).

8.5 Undue influence and related doctrines

8.5.1 Introduction

Does accessory liability attach to equitable doctrines concerned primarily with the vitiation of transactions, such as undue influence, misrepresentation, the related *Etridge* doctrine or any residual category of 'equitable fraud'? Such doctrines will vitiate a gift or contract between C and a defendant, D, that resulted from wrongful (unconscionable) conduct by another person (X) (scenario 1). Is D’s liability accessorial to X’s wrongdoing here? Alternatively, could a non-transacting third party D be liable as an accessory for procuring or assisting X’s wrongful conduct (scenario 2)? The following discussion uses the doctrine of undue influence to explain why D’s liability in scenario 1 is not accessorial and to consider whether accessory liability might arise in scenario 2.

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329 Some forms of misrepresentation attract more extensive remedies at common law. The equitable doctrine encompasses innocent misrepresentation. In Australia, the common law and equitable doctrines are rendered less relevant by virtue of statute. See Seddon, Bigwood and Ellingham, *Cheshire and Fifoot*, Ch. 11.

330 *Royal Bank of Scotland plc v. Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 (Etridge). Conversely, neither the similar doctrine developed in Australia (see Garcia v. *National Australia Bank Ltd* (1998) 194 CLR 395 (HCA)), nor the related doctrine of unconscionable dealing (see, e.g., *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 CLR 447 (HCA)), are relevant here because neither requires wrongful conduct by X (although it may be present on the facts).

331 See Young, Croft and Smith, *On Equity* [5.10].

332 Vitiating doctrines such as mistake, accident and surprise cannot attract accessory liability for they do not require wrongful conduct by another person.
8.5.2 Undue influence

In bare outline, the doctrine of undue influence comprises two categories: actual and presumed undue influence. In the first category, it must be proved that the gift or contract made by C with X or D 'was the outcome of such an actual influence [by X] over the mind of [C] that it cannot be considered his free act.' In the second category, a court may presume, because of the nature of the relationship between C and X, that undue influence was exerted by X over C to secure a transaction between C and X, or C and D, where such a transaction would not normally be expected.

If the transaction is a gift from C to D and there is actual undue influence or the presumption of undue influence is not rebutted, D's liability is strict. If the transaction is a contract between C and D and there is actual undue influence or the presumption is not rebutted, D's liability turns on whether D had knowledge of the relationship of influence between X and C (or, less commonly, whether X acted as D's agent in the transaction). D must have actual knowledge of the features of the relationship between C and X that render it one of influence. If direct evidence of D's knowledge is unavailable, the court may infer actual knowledge from the facts known by D. Although reference is

333 See generally, Beale (gen. ed.), Chitty on Contracts, Ch. 7 (England); Seddon, Bigwood and Ellingham, Cheshire and Fifech Ch. 14 (Australia). The Australian courts treat actual undue influence and presumed undue influence as distinct categories with separate rationales. The English courts treat presumed undue influence as a 'forensic tool' for determining actual undue influence. See Etridge [2001] UKHL 44; [2002] 2 AC 773 [16] (Lord Nicholls). See also at [161] (Lord Scott). Such doctrinal variations do not affect the discussion in this section.


336 Bridgeman v. Green (1757) Wilm 56, 64–65; 97 ER 22 (HL) 25.


338 This is despite some references to 'constructive' notice: see, e.g., Etridge [2001] UKHL 44; [2002] 2 AC 773 [40]. Constructive notice in the strict, conveyancing law sense does not suffice: [145]; see also at [144]–[146]; Kakavas v. Crown Melbourne Limited [2013] HCA 25; (2013) 250 CLR 292 [152]–[155].

339 Bainbridge v. Browne (1881) 18 Ch D 188, 197. Cf. the 'essential matters' approach to content of knowledge: [3.4.2.2].

340 See, e.g., the facts of Bank of New South Wales v. Rogers (1941) 65 CLR 42 (HCA).

sometimes made to D not having made further inquiries (which is suggestive of objective knowledge [3.4.3.5]), this is only for the purpose of proving D's wilful ignorance (see [3.4.3.3]) and, hence, actual knowledge.

The remedies for undue influence, of which rescission is the most common, focus on the effect of the transaction upon C. Because of this, the remedies are generally directed towards the counterparty to the transaction. Whether remedies are available against X where the transaction is between C and D has received little attention.

8.5.3 Scenario 1: D is party to the transaction tainted by X's undue influence

Establishing the first element of accessory liability, namely a primary wrong [3.2], is problematic in scenario 1 because the rationale of undue influence and, specifically, whether it is wrong-based at all is contested. We consider that it is concerned with X's actual or presumed wrong-doing. Therefore, our starting point for analysis is that undue

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342 See, e.g., Maitland v. Irving (1846) 15 Sim 437; 60 ER 688; Bank of New South Wales v. Rogers (1941) 65 CLR 42 (HCA) 71–72.

343 See, e.g., Owen and Gutch v. Homan (1853) 4 H L Cas 997, 1035; 10 ER 752, 767.


347 We also incline to the view that the doctrine of undue influence is a fiduciary doctrine. See e.g., Tate v. Williamson (1866–67) LR 2 Ch App 55; Johnson v. Buttress (1936) 56
influence involves either an actual or presumed primary wrong in the sense of X’s breach of a pre-existing duty or primary wrongfulness in the broader equitable sense of unconscionable conduct by X [8.1.2].

The second element of accessory liability, namely involvement through conduct in X’s actual or presumed undue influence [3.3], is also problematic. Accessorial involvement may well be present on the particular facts, as is clear from the leading Australian authority concerning undue influence and contracts between C and D, Bank of NSW v. Rogers. A plausible reading of that case is that the bank (D) procured an insolvent debtor (X) who had no prospect of reversing his fortunes to exert undue influence over his adult niece to whom he was in loco parentis (C) in order to obtain a guarantee for his debts secured by her assets. The High Court of Australia held that the bank could not enforce the guarantee because it had knowledge of the relationship of influence.

It has been suggested that D’s liability in such instances contains the same elements as ‘participatory’ liability for breach of trust or fiduciary duty or ‘secondary liability based on knowing participation’. Nonetheless, such cases cannot be examples of accessory liability. In the surety undue influence cases exemplified by Bank of NSW v. Rogers, the courts’ concern was that creditors were indeed procuring debtors to abuse their influence over relatives, but proof of such procurement was never required, nor was it presumed. Deterrence of accessorial conduct is clearly one of several reasons why equity assumes a prophylactic role in relation to relationships of influence and third parties, but active involvement is never required. All that is necessary is that D has entered


the subject contract or, in the case of a gift, accepted the transfer.\footnote{In relation to contracts see, e.g., Khan v. Khan [2004] NSWSC 1189; (2004) 62 NSWLR 229 [18], citing Meagher, Heydon and Leeming, Equity [15–150]. In relation to gifts, see Bridgeman v. Green (1757) Wilm 56, 64–65; 97 ER 22 (HL) 25.} If the gift is by way of a deed of settlement, D need not even have been alive at the time of the settlement’s execution.\footnote{Cf. Gibbon v. Mitchell [1990] 1 WLR 1304 (Ch) (vitiating factor of mistake). See also Giarrantano v. Smith (1985) NSW Conv R 55267 (trust for X’s living grandchildren).} It could be argued that D’s entry into the contract or acceptance of the gift completes X’s wrong, so to speak, and therefore constitutes facilitative involvement in a weak sense. The argument perhaps has some weight given that undue influence is not actionable until a tainted transaction eventuates, although it strains the concept of accessory conduct. It is, however, more consistent with a participatory liability explanation for D’s liability.\footnote{Cf. the discussion of recipient liability at [7.6.2].}

The third element of accessory liability concerns D’s mental state. Here, it becomes clear that the liability of a volunteer D is most unlikely to be accessorrial because it is strict, rather than fault-based (see [3.4.1]).\footnote{Bridgeman v. Green (1757) Wilm 56, 64–65; 97 ER 22 (HL) 25.} Instead, D’s strict liability is explicable by a combination of factors, including the mild impact of rescission upon D compared with other equitable remedies, the lack of strong policy reasons for upholding gifts in circumstances where the gift is tainted by a vitiating factor, and because it is seen as against good conscience for D to retain the gift in such circumstances.\footnote{See further, Pauline Ridge, ‘Third Party Volunteers and Undue Influence’ (2014) 130 Law Quarterly Review 112.} Conversely, where D is the counterparty to a contract with C, D’s liability is fault-based, and the requisite mental element is the same as that required for both equitable accessory and participatory liability: knowledge of the relationship of influence [8.5.2]. Thus, D’s liability is not accessory liability in scenario 1. This is clearest if D is a donee because accessorial involvement is unnecessary and the liability is strict. If D is a contracting party, D’s liability may well be a form of participatory liability, but it is not accessorial because involvement in X’s wrongdoing is not required.

\subsection*{8.5.4 Scenario 2: D is not a party to the transaction tainted by X’s undue influence}

The second scenario in which accessory liability might arise is where C has entered a transaction with X or another party that is tainted by X’s
actual or presumed undue influence and where X's undue influence was procured or facilitated by D.

The same comments regarding the presence of a primary wrong by X apply as in scenario 1 [8.5.3], but A's accessorial involvement is much clearer here. The requisite mental element, by analogy with established categories of equitable accessory liability, would be actual knowledge of the primary wrong, although a limited form of objective knowledge might be countenanced [8.3.4.3].

There are no cases directly supporting such liability, although an embryonic form of accessory liability for undue influence did exist in the eighteenth and nineteenth centuries. Much depends upon one's understanding of the doctrine of undue influence and its purposes and values. Furthermore, if the doctrine's function is primarily to obviate the effects of the tainted transaction, then the need for relief against non-transacting parties is not great. The presumptive, prophylactic nature of the doctrine, in its traditional form at least, may also cast doubt on the wisdom of extending liability too far. If, however, undue influence is viewed as a subset of fiduciary law, then recognition of accessory liability would be principled.

8.6 Defences

8.6.1 Introduction

An accessory may rely upon any of the general equitable defences to defeat C's claim or to preclude the award of particular remedies.  

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358 See, e.g., Bennett v. Yade (1742) 2 Atk 324; 26 ER 597. See also Beadles v. Burch (1839) 10 Sim 332; 59 ER 642, and the cases referred to in that case. The cases concern whether a solicitor who prepared documents tainted by equitable fraud or undue influence should be liable for the costs of proceedings to set aside or rectify the tainted transaction. Liability was recognised where the solicitor personally benefited from the transaction (other than by way of legal fees: Maw v. Pearson (1860) 28 Beav 194; 54 ER 340) or was accessorially involved in PW's fraudulent conduct. See, e.g., Harvey v. Mount (1845) 8 Beav 439; 50 ER 172. The question for the court at 453; 178 (Lord Langdale MR) was whether A 'willfully and designedly conspired with [X]' or whether 'he was a willful partaker in any fraud intended to be practiced upon [the influenced party, C]'.

359 Broadly speaking, these defences are grounded in concepts of waiver, delay or unlawfulness on the part of C. They include statutory defences that apply directly or by analogy. See further, Michael Spence, 'Equitable Defences' in Patrick Parkinson (ed.), The Principles of Equity, 2nd edn (Sydney, Lawbook Co, 2003) 997. In Corporacion Nacional del Cobre de Chile v. Sogemín Metals Ltd [1997] 1 WLR 1396 (Ch) 1402, Carnwath J held that the common law defence of contributory negligence or 'its equivalent in equity' did not apply to a dishonest assistance claim. But at 1403 His
mental element required for accessory liability and recipient liability necessarily precludes the operation of defences that depend on lack of notice. For example, A cannot rely upon the defences of bona fide purchase or change of position in relation to recipient liability.\textsuperscript{360} The following discussion notes specific issues that have arisen regarding defences and accessory liability.

8.6.2 Is it a defence that PW is not liable?

Should A be liable for the primary wrong if, in the particular circumstances, PW has a defence? Examples of such a scenario are where C has undertaken not to sue PW, PW has been excused by the court pursuant to exculpatory legislation, or PW has been released from liability by C.

In all these scenarios, PW’s prima facie liability can be established; thus, it cannot be argued that a necessary element of A’s liability, namely the primary wrong, is not present. Conversely, where C has consented to, or acquiesced in,\textsuperscript{361} the primary wrong, PW is not even prima facie liable. If C has consented to, or acquiesced in, the primary wrong, this will therefore also preclude A’s accessory liability.\textsuperscript{362}

Where PW is prima facie liable, but has a defence personal to herself, is it inequitable for A to bear (perhaps sole) responsibility for the primary wrong, such that the undertaking, exculpation or release also constitutes a defence to A? The principles concerning joint and several liability and contribution have some bearing on these questions and are discussed further in [8.8].

Honour left open the possibility that C’s failure to protect its own interests might affect the measure of equitable compensation. See also 

\textit{Equitcorp Industries Group Ltd (in stat. man.) v. R (No 47)} [1998] 2 NZLR 481 (NZHC) 659–661, in which Smellie J reduced the amount of equitable compensation payable by A for knowing assistance by 2.5% due to C’s failure to discover the breaches of fiduciary duty and intervene.


\textit{Acquiescence} here means ‘the contemporaneous and informed (“knowing”) acceptance or standing by which is treated by equity as “assent” (i.e. consent) to what would otherwise be an infringement of rights…’: \textit{Orr v. Ford} (1989) 167 CLR 316 (HCA) 337 (Deane J). In most instances, consent is treated as a defence, rather than as precluding prima facie liability. See further, Young, Croft and Smith, \textit{On Equity} [17.150], [17.180].

\textit{Blackwood v. Borrowes} (1843) 4 Dr & War 441; 65 RR 729 (Blackwood). Affirmation of the primary wrong is also a defence: see \textit{Jyske Bank (Gibraltar) Limited v. Spjeldnæs} (CA, 29 July 1999). The same reasoning applies if PW relies upon an exemption clause in a trust deed or other foundational document, the primary wrong will not have been made out and A cannot be liable. This also precludes accessory liability for \textit{attempted} procurement or inducement of a primary wrong.
An undertaking not to sue PW does not extinguish the substantive liability of either PW or A.\(^{363}\) Thus, A has no defence here, but may still claim contribution against PW where that is otherwise available. Similarly, whether PW has been excused from liability by the court pursuant to exculpatory legislation has no necessary bearing upon A's liability and does not constitute a defence.\(^{364}\)

Whether A has a defence where C has released PW from liability is not as clear and is influenced by whether A's liability is several or joint and several [8.8]. Where A's liability is several only (for example, A has made a gain) then it should not be a defence that PW is released from liability in relation to the primary wrong. Thus, if C releases PW (who would otherwise be jointly and severally liable with A for C's losses), C may still claim against A in relation to A's gains for which A is severally liable.\(^{365}\)

If C has received valuable consideration through an accord and satisfaction with PW, this should be taken into account in assessing A’s liability and ensuring that C does not receive double recovery.\(^{366}\) Some such adjustment may be necessary even where the remedy that is sought is only available against A. For example, in *Yeshiva Properties* the issue was whether A, who made a short-term loan at high interest rates to Company C, could enforce the loan contract.\(^{367}\) Company C argued that its directors (the PWs) had breached fiduciary duties in entering the contract on its behalf and that A was an accessory. Company C had released the directors from liability.\(^{368}\) If A were liable, the obvious


\(^{364}\) *Farah Constructions* [2007] HCA 22; [2007] 230 CLR 89 [184] n. 264. E.g., where A procures an innocent breach of duty by PW, the court may well excuse PW, while finding A liable.

\(^{365}\) *Cf. Coulton v. Coulton* [2008] NSWSC 910. C and PW were in partnership. C released PW by deed from liability, but claimed that A, PW's wife, knowingly participated in a breach of fiduciary duty by PW and other partners. McLaughlin J at [51] rejected a strike-out application: 'I am far from being persuaded that the inevitable consequence of the release of [PW] is that [A] . . . is also thereby released from the consequences of her such knowing participation.'

\(^{366}\) See in the context of accessory liability, *Michael Wilson* [2011] HCA 48; [2011] 244 CLR 427 [100]–[110], and the cases cited at [101]. It is clear that A has an 'equity . . . to prevent enforcement of an award or judgment . . . where to do so would lead to double recovery': [101].


\(^{368}\) The directors were released from potential liabilities owed to the group of companies in question when the group was in provisional liquidation.
remedy was rescission of the loan contract, which would require Company C to repay the principal sum, plus an interest component (at market rates). A would not be able to enforce the contract provisions for default interest. Bryson JA considered that any value received by Company C pursuant to the deed of release should be taken into account in assessing the remedy available against A. This must be the correct outcome to avoid double recovery by Company C.

Where A is jointly and severally liable with PW the position is less clear because PW’s release from liability could mean that A bears the full remedial consequences of the primary wrong, depending upon whether any right to contribution from PW survives. The previous common law rule was that ‘a release given to, and an accord and satisfaction effected with, one of a number of parties jointly or jointly and severally liable, contractually discharges the others’.369 There are conflicting authorities on whether this rule should apply to co-trustees370 and further uncertainty as to whether it should apply as between trustees and accessories. The better view is that it does not apply in either scenario,371 thus, with respect to accessory liability, A remains liable.372 In a detailed study of this question, Alison Gurr has proposed in relation to loss-based remedies for breach of trust or fiduciary duty that the courts:

treat releases of [PW] as extinguishing their own liability and reducing [A's] liability by [PW's] share of the [compensation]. This ‘share’ would be the greater of:

(i) The amount paid by [PW] in settling with [C];

or

(ii) The amount that the court would otherwise have allowed the remaining wrongdoers [A] to recover from the released [PW]. 373

369 Thompson v. Australian Capital Television Pty Limited [1996] 186 CLR 574 (HCA) 608 (Gummow J). See also [3.6] and [5.6.2].
370 Ibid. 608–609. Gummow J referred to First & Merchants National Bank v. Bank of Waverley (1938) 197 SE 462, which held that a release of one co-trustee automatically discharges the other co-trustees by analogy with the rules governing joint tortfeasors, and contrasted this with the approach in the Irish case of Blackwood (1843) 4 Dr & War 441, 475; 65 RR 729, 745–744 (deciding that the release of one trustee may, but need not, discharge the other trustees depending upon the ‘substance and merits of the case’).
372 The reasoning in First & Merchants National Bank v. Bank of Waverley (1938) 197 SE 462 has been rejected on the basis that the liability of co-trustees is joint and several, rather than joint: Coulton v. Coulton [2008] NSWSC 910 [47]–[51]. See further, Gurr, 'Accessory Liability', 504–505.
373 Gurr, 'Accessory Liability', 507. If this proposal is not accepted, she suggests, at 508, that the courts '(i) take into account any advantage received by [C] in respect of the release;
8.6.3 Statutory limitation periods

Whether A can rely upon the expiry of a statutory limitation period as a defence is, of course, a question of statutory interpretation.\textsuperscript{374} Nonetheless, there are commonalities because limitation legislation in many jurisdictions is based upon the nineteenth-century seminal English legislation and its successors.\textsuperscript{375} It must therefore be interpreted in the context of that broader legislative history and the judicial interpretations thereof, as well as with equity’s understanding of participatory liability in mind. Complicating the matter is that the legislative history is contested, the nineteenth-century cases were not consistent in their treatment of ‘constructive trustees’,\textsuperscript{376} including accessories, and the leading cases\textsuperscript{377} on the application of statutory limitation periods to equitable accessories cannot all be and (ii) allow contribution’. Cf. Yeshiva Properties [2005] NSWCA 23; (2005) 219 ALR 112 [80].

\textsuperscript{374} The following discussion focuses upon common questions, using the English law as its focus; it does not purport to provide a specialist treatment. In other jurisdictions, see generally, Meagher, Heydon and Leeming, Equity, Ch. 34 (Australia); Waters and Gillen, Waters’ Law of Trusts, 25 IV.C. (Canada); Yong Kheng Leong v. Panweld Trading Pte Ltd [2012] SGCA 59 (Singapore); Andrew S. Butler (gen. ed.), Equity and Trusts in New Zealand, 2nd edn (Wellington, Thomson Reuters, 2009) [38.1.2]–[38.1.3] (New Zealand); Peconic [2009] HKCFA 17; [2009] 5 HKC 135 (Hong Kong).

\textsuperscript{376} trustee Act 1888, 51 & 52 Vict. c 59. Section 8(1) introduced a limitation period for claims against trustees except where: ‘founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy’ or ‘to recover trust property, or the proceeds therefor still retained by the trustee, or previously received by the trustee and converted to his use’. ‘Trustee’ included ‘a trustee whose trust arises by construction or implication of law’: s. 1(3). The English law is less relevant in much of Canada where there has been substantial reform of statutory limitation schemes: Waters and Gillen, Waters’ Law of Trusts, 25 IV.C.4. It is also necessary to be alert to jurisdiction-specific changes to the English statutory template. See, e.g., the wording of s.111(1) Limitation Act 1969 (NSW): ‘[t]rust includes express implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached…’. and NSW Law Reform Commission, First Report on the Limitation of Actions, October 1967 (LRC 3) [80]; Queensland Mines v. Hudson (1976) CLC 440–266 (NSWSC) [28709]–[28710].

\textsuperscript{377} Generally, the limitation period applied to third-party participants in breach of trust other than trustees de son tort, but this was not always so. See Austin, ‘Constructive Trusts’, 205 citing Wilson v. Moore (1834) 1 My & K 337; 39 ER 629; Bridgman v. Gilb. (1857) 24 Beav 302; 53 ER 374; Soar v. Ashwell [1893] 2 QB 390 (CA); Taylor v. Davies [1920] AC 636 (PC); Clarkson v. Davies [1925] AC 100 (PC); Selangor [1968] 1 WLR 1555 (Ch); Paragon Finance [1999] 1 All ER 400 (CA); Dubai Aluminimium [2002] UKHL 48; [2003] 2 AC 366.
reconciled.\textsuperscript{378} Although the topic of limitation periods may appear peripheral to a work on accessory liability, the legal questions involved have raised fundamental questions regarding the nature of A's liability.

The core question is whether A's liability as a 'constructive trustee' [8.1.7] should be equated with that of an express trustee for the purpose of determining which provisions of relevant limitation legislation apply to C's claim. This is important because in many jurisdictions no limitation period at all applies to claims against an express trustee involving fraudulent breach of trust or to recover trust property.\textsuperscript{379} There is also a subsidiary question concerning the ambit of the wording of such provisions.\textsuperscript{380} The UK Supreme Court in \textit{Williams} considered these two questions in relation to the application of s. 21(1)(a) of the Limitation Act 1980 (UK) to claims for dishonest assistance and knowing receipt in breach of trust.\textsuperscript{381} A majority of the Court answered both questions in the negative, namely: was A to be considered a 'trustee' and were claims against a dishonest assistant 'in respect of a trustee's fraud'.\textsuperscript{382} Thus, a 6-year limitation period applied and C's claim was barred.

\textit{Williams} cannot be regarded as settling these issues for other jurisdictions with similar legislation for several reasons.\textsuperscript{383} First, the majority in \textit{Williams} was persuaded by the reasoning in a series of twentieth-century cases that distinguished constructive trustees according to whether 'a trust arose before the occurrence of the transaction impeached' (for example, trustees de son tort) or 'only by reason of that transaction' (accessories).\textsuperscript{384}

\textsuperscript{378} The complexity of the statutory interpretation exercise is strikingly illustrated by the opposing judgments of Lord Sumption (majority) and Lord Mance (dissenting) in \textit{Williams} [2014] UKSC 10; [2014] 2 WLR 355.

\textsuperscript{379} See, e.g., Limitation Act 1980 c.58 (UK) s. 21(1).

\textsuperscript{380} See, e.g., Limitation Act 1980 c.58 (UK) s. 21(3): 'Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.'

\textsuperscript{381} [2014] UKSC 10; [2014] 2 WLR 355.

\textsuperscript{382} \textit{Ibid.} The majority consisted of Lord Sumption and Lord Neuberger (Lord Hughes agreed with both judgments). Lord Mance dissented; Lord Clarke dissented in relation to the second question.

\textsuperscript{383} But see in Hong Kong: \textit{Peconic} [2009] HKCFA 17; [2009] 5 HKC 135. Lord Hoffmann's leading judgment was approved by the majority in \textit{Williams} [2014] UKSC 10; [2014] 2 WLR 355 [28] (Lord Sumption [SC], [63]–[64] (Lord Neuberger), but was heavily criticised by Lord Mance [154] and Lord Clarke [180]–[181].

\textsuperscript{384} \textit{Taylor v. Davies} [1920] AC 636 (PC) 650–651, 653 (Viscount Cave); \textit{Clarkson} v. \textit{Davies} [1923] AC 100 (PC); \textit{Selangor} [1968] 1 WLR 1555 (Ch); \textit{Paragon Finance} [1999] 1 All ER 400 (CA); \textit{Dubai Aluminium} [2002] UKHL 48; [2003] 2 AC 366.
Statutory limitation periods applied to the latter form of trustee. This distinction was said to be based upon the nineteenth-century case law, but not all judges accept this interpretation of the nineteenth-century cases. Secondly, the outcome in Williams was said to reflect a principled distinction between fiduciaries on the one hand and dishonest assistants and knowing recipients on the other. But Lord Mance offered an alternative, plausible explanation for finding that a dishonest assistant should be grouped with a dishonest trustee for limitation purposes: 'to equate a third person, who dishonestly joins with a dishonest trustee to defraud the trust, with the dishonest trustee for limitation purposes is entirely natural.' This explanation particularly resonates with the traditional framework's knowing assistance in a dishonest and fraudulent design [8.3.1.4]. Finally, although all the judgments in Williams engaged with the complex legislative history of the Limitation Act 1980, it cannot be said that those of the majority were more persuasive than the dissentients.

In the unusual event that no statutory limitation period applies directly to an equitable accessibility liability claim, one may still apply by analogy.

8.6.4 Statutory indefeasibility of title

Questions arise as to whether it is a defence to recipient liability that A has registered title to the received trust property pursuant to a Torrens, or

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386 Williams [2014] UKSC 10; [2014] 2 WLR 355 [118]. Other rationales include that the evidential basis for establishing a constructive trusteeship may be more fragile (Soar v. Ashwell [1893] 2 QB 390 (CA) 400, citing Beckford v. Wade 17 Ves Jun 87, 34 ER 34) and that equity acts in its concurrent jurisdiction in cases of accessory liability and therefore the limitation period for a common law action for fraud should apply to the concurrent equitable action (Paragon Finance [1999] 1 All ER 400 (CA) 409–410).
387 Williams [2014] UKSC 10; [2014] 2 WLR 355 [157] (see also [129]).
other, system of land registration.\textsuperscript{390} The answer in any particular case must depend upon the terms and effect of the relevant registration scheme in question;\textsuperscript{391} the objective of the legislation, the rationale for recipient liability and the in personam nature of its remedies will also be relevant. The High Court of Australia has stated in obiter that a knowing recipient who has a registered interest in land pursuant to Torrens legislation may rely on statutory indefeasibility of title as a defence to C's claim except where (referring to interpretation of the specific legislation under consideration)\textsuperscript{392} there is 'actual fraud or moral turpitude'.\textsuperscript{393} That is, the in personam exception to indefeasibility of title did not apply to recipient liability.\textsuperscript{394} In the Court's view, this was because a knowing recipient was 'a party who merely had notice of an earlier interest or notice of third party fraud'.\textsuperscript{395}

The obiter comments in Farah Constructions were made in relation to a proprietary remedy for knowing receipt.\textsuperscript{396} It has been suggested, in the context of the English land registration system, that the same approach should apply to personal remedies for recipient liability; that is, a recipient liability claim is not available where the trust property is registered land.\textsuperscript{397} The suggestion relies upon the rationale for recipient liability being the vindication of C's property rights, rather than the redress of A's wrongdoing per se.\textsuperscript{398} Conversely, we would argue that it is precisely


\textsuperscript{391} Arthur [2012] UKPC 30 [15].

\textsuperscript{392} Real Property Act 1900 (NSW) s. 42(1).

\textsuperscript{393} Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [192].


\textsuperscript{396} Super 1000 [2008] NSWSC 1222; (2008) 221 FLR 427 [235] (White J considered that personal remedies were therefore available).

\textsuperscript{397} Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in Mitchell, Constructive and Resulting Trusts, 159. The authors acknowledge that their argument is contrary to the Law Commission report that led to the enactment of the relevant legislation: Law Commission, Land Registration for the Twenty-First Century (Law Com. No.254, 1998) [3.48]-[3.49].

\textsuperscript{398} This appears to have been rejected by the Privy Council, which instead emphasised that unconscionable receipt is 'not merely absence of notice but unconscionable conduct
because the rationale for recipient liability is the redress of A's wrongdoing, rather than the vindication of property rights, that personal remedies may persist against a registered owner of land [7.6.1]. It is only when the remedy sought is a trust over the land itself that the two schemes come into conflict. In the same way that registered title would not be a defence to a dishonest assistance claim where the assistance was in transferring registered title to trust property, personal remedies for recipient liability should not be precluded.399

8.7 Remedies

8.7.1 Introduction

A culpable third party to breach of an equitable duty, including an accessory, is exposed to the full range of equitable remedies available against an express trustee.400 While A's wrongdoing is different in kind to that of PW,401 it can be equally unmeritorious.402 Although parallels can be drawn with the tort of inducing breach of contract, for which gain-based remedies are not available,403 the nature of the primary wrongs in contract and equity that accessory liability is designed to protect are qualitatively different. It is entirely appropriate that more extensive remedies are available where necessary to meet the different objectives of the equitable liability.404 Gain-based remedies, for example, are easily justified if A has profited from culpable interference with a relationship amounting to equitable fraud. It is a classic example of lack of bona fides.' Arthur [2012] UKPC 30 [39]. See also at [38].

399 Conaglen and Goymour accept that a dishonest assistance claim will prevail against the registered proprietor because the rationale is redress of wrongdoing: 'Knowing Receipt and Registered Land', 177–181.


401 There is no pre-existing obligation of loyalty, for example.


between C and PW that is protected by equity.\footnote{Consul Development (1975) 132 CLR 373 (HCA) 397; Michael Wilson [2011] HCA 48; (2011) 244 CLR 427 [106]; Novoship [2014] EWCA Civ 908.} Further justifying the range of remedies for accessory liability is that equitable remedies are never available as of right. They are awarded at the court’s discretion and are fashioned to fit the particular factual and legal scenario.\footnote{See, e.g., Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 (constructive trust refused); Novoship [2014] EWCA Civ 908 [119] (account of profits refused if ‘disproportionate in relation to the particular form and extent of wrongdoing’).} Relevant factors in determining relief include the rationale for A’s liability, the nature of the primary wrong and the egregiousness of A’s conduct. In most instances, however, it is the consequences of PW and A’s wrongdoing for C and A, respectively, that will determine the remedy or remedies available against A.\footnote{Warman International Ltd v. Dwyer (1995) 182 CLR 544 (HCA) 559 (Warman v. Dwyer). Equitable remedies can be awarded on terms: see, e.g., Ninety Five Pty Ltd (in liq.) v. Banque Nationale de Paris [1988] WAR 132.}

There are jurisdictional differences concerning the availability of some equitable remedies, the principles by which they are determined and the permissible scope of judicial remedial discretion. Such questions are discussed here only where relevant to accessory liability. Most judicial discussion concerning remedies has occurred in the context of accessories to breach of trust and fiduciary duty; however, the same principles apply in relation to breach of confidence.

\subsection*{8.7.2 Loss-based remedies}

The loss-based remedy of equitable compensation is the most common remedy for accessory liability.\footnote{In relation to breach of confidence, see Vercoe v. Rutland Fund [2010] EWHC 424; (2010) Bus LR D [344].} A will be jointly and severally liable with PW for C’s losses resulting from the primary wrong (rather than from A’s accessory conduct directly) \footnote{‘It is the case that, in many instances and for many types of equitable wrong, the remedy that is most appropriate will self select absent unusual circumstances.’ Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [503] (Finn, Stone and Perram JJ).} [8.8.1]. In the case of recipient liability, on the other hand, the remedy focuses upon A’s culpable receipt and requires A
to compensate on a restorative basis in the same manner as for a custodial breach of trust.

No jurisdiction has yet established a comprehensive, coherent and settled jurisprudence concerning equitable compensatory remedies. This is unsurprising given that the availability of such remedies outside the context of trusts was not widely recognised until the twentieth century. Nonetheless it is clear that, as with the different measures of compensation available at common law, the calculation of C’s loss will vary according to the equitable wrong or wrongs in question. There are two bodies of law that inform loss-based remedies for accessory liability: that concerning compensation for breach of fiduciary duty and that concerning the monetary orders and procedures that accompany a custodial fiduciary’s duty to account (by way of either an account in common form or an account for wilful default). The interrelationship of these two bodies of law is not yet fully settled, although the UK Supreme Court has now held that the same compensatory principles apply whether the remedy eventuates from an account

611 Nocton v Lord Ashburton [1914] AC 932 (HL) (Nocton) is the landmark case. See also McKenzie v McDonald [1927] VLR 134 (VSC); Canson Enterprises Ltd v Boughton & Co [1991] 3 SCR 534; 85 DLR (4th) 129 (Canson). Unresolved questions include the weight to be given to common law principles for calculating compensation and the extent to which equity’s procedurally driven jurisdiction with respect to a trustee’s duty to account applies, either directly or indirectly, to the compensatory remedy for non-trustee wrongs.


613 Lord Cairns’ Act damages are not considered here, but according to some authorities may be awarded in relation to equitable wrongs: see, e.g., Giller v Procopets (No 2) [2009] VSCA 72; (2009) 24 VR 1.

614 See, e.g., Nocton [1914] AC 932 (HL); McKenzie v McDonald [1927] VLR 134 (VSC); Canson [1991] 3 SCR 534; 85 DLR (4th) 129.


616 The pace of the case law has not matched that of the commentaries, resulting in perplexing differences between judicial and scholarly explanations of relief for breach of trust. There is a reliance upon the nature of the traditional procedure of account in the secondary literature – and a consequent differentiation between wrong-based claims for compensation and claims to enforce primary, debt-like, obligations in the case of an account in common form (see, e.g., Charles Mitchell, ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) Current Legal Problems 1; Lionel Smith, The Measurement of Compensation Claims Against Trustees and Fiduciaries’ in Elise Bant and Matthew Harding (eds.), Exploring Private Law (Cambridge University Press, 2010) 16).
or a direct claim for compensation.\(^{417}\) ‘Equitable compensation’ is the more common description for equitable ‘loss’-based remedies, although ‘account’ is also used in this context.

In a scenario where neither the primary wrong nor A’s accessorial wrongdoing involves a breach of trust or a misappropriation of property,\(^{418}\) the remedy engaged is that of equitable compensation for losses resulting from the primary wrong and the relevant jurisprudence is that following the House of Lords decision in *Nocton v. Lord Ashburton*.\(^{419}\) There are some unresolved questions concerning the particular rules for assessing the compensation for which A and PW are then jointly and severally liable.\(^{420}\)

In a scenario where the primary wrong is a breach of trust that does not involve beneficial receipt of misappropriated trust property by A,\(^{421}\) a compensatory order may follow an account for wilful default against the trustee or compensation may be sought directly, depending upon the circumstances.\(^{422}\) Whatever procedure is followed, the same principles apply to assessment of the compensation for breach of trust.\(^{423}\) Again, A is liable for losses resulting from the primary wrong.

The principles for assessing compensation for breach of trust apply in relation to recipient liability. The courts use the language of ‘account’ here in the sense that A is liable to restore the value of the property at the time of its receipt, plus interest.\(^{424}\) Even where the remedy is described as ‘compensation’, the measure of such compensation is the amount

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\(^{417}\) *AIB Group* [2014] UKSC 58; [2014] 3 WLR 1367 [62] [Lord Toulson [SC]; [90]–[91], [133]–[135] [Lord Reed [SC]].

\(^{418}\) E.g., PW and A exploit a business opportunity in breach of PW’s fiduciary duty to C. C may seek compensation for the loss of business opportunity: *Colour Control* (NSWSC, 24 July, 1995).

\(^{419}\) (1914) AC 932.

\(^{420}\) Discussion of these questions is beyond the scope of this book. See, e.g., *Ramsay v. BigTinCan Pty Ltd* [2014] NSWCA 324; (2014) 101 ACSR 415. A knowingly assisted PW, a director of C, in PW’s breach of fiduciary duty. Matters in dispute regarding compensation included: the relevant causation test for breach of fiduciary duty, whether common law principles concerning damages for loss of a chance applied, and assessment of the value of a lost chance. Special leave to appeal to the HCA was refused.

\(^{421}\) E.g., where A assists in the money laundering of trust funds by a fiduciary.

\(^{422}\) *AIB Group* [2014] UKSC 58; [2014] 3 WLR 1367 [90]–[91]. See above n. 13 with respect to accessory liability attaching to an account for wilful default.


\(^{424}\) See, e.g., *Akinede* [2001] Ch 437 (CA); *Charter* [2007] EWCA Civ 1382; [2008] Ch 313; *Williams* [2014] UKSC 10; [2014] 2 WLR 355 [31] [Lord Sumption]: A may be accountable for ‘any profit that would have been made or any loss that would have been avoided
necessary to restore the trust fund. Compensation for recipient liability has been awarded in conjunction with a proprietary remedy where this was necessary to make up a shortfall between the value of the property received and the (lesser) value realised on sale of the property or its traceable product.

8.7.3 Gain-based remedies

8.7.3.1 Introduction

Relevant gain-based remedies include the account of profits, constructive trust and lien. The availability of proprietary relief depends upon whether the jurisdiction in question recognises the remedial constructive trust or lien. There are clear pragmatic justifications for gain-based remedies. The relationship between A and PW sometimes means that both will derive a benefit regardless of which party actually holds the gain in question. This will clearly be the case where A is the corporate alter ego of PW; see further [11.2.1]. Courts sometimes speak of the fiduciary obligation having been 'transmitted' to A here. What is meant is that the principled reasons that dictate the availability of relief in relation to PW apply equally to A because the two parties are indistinguishable in terms of their culpability. The same considerations may also apply where the interests of PW and A are closely intertwined even though PW does not 'control' A as such.

if the assets had remained in the hands of the true trustees and had been dealt with according to the trust'.

430 See, e.g., Bli Bli No 1 Pty Ltd v. Kimlin Investments Pty Ltd [2008] QSC 289 [48].
431 See, e.g., Timber Engineering Co Pty Ltd v. Anderson [1980] 2 NSWLR 488; Colour Control (NSWSC, 24 July, 1995). A common scenario is where PW, a fiduciary, and A, the intimate companion/s of PW, divert a business opportunity from C. See, e.g., Warman v. Dwyer
Pragmatic considerations of tax minimisation, insolvency protection, secrecy, convenience and the like, may mean that A, rather than PW, holds property referable to the breach of fiduciary duty. In these circumstances, if a gain-based remedy for PW’s equitable wrong is warranted at all, it can only be sought from A. Thus,

Equity avoids the inequitable result of a fiduciary retaining a profit (albeit indirectly through an accessory in which it has a shareholding) merely because it was shrewd enough to have a third party, rather than itself, obtain the profit.432

Gain-based remedies are not limited to such scenarios, however, and are available against an accessory who is completely independent of PW.433

8.7.3.2 Account of profits

An account of profits may be awarded against an accessory who procures or assists the primary wrong.434 Like all equitable remedies, it is not available as of right.435 The account may be secured by a lien over assets acquired by A through A’s accessory involvement.436 The account of profits is a highly utilised remedy for accessibility liability for breach of confidence.437 It is also available in relation to recipient


432 Club of the Clubs Pty Limited v. King Network Group Pty Limited (No 2) [2007] NSWSC 574 [58] (Bergin J).

433 See, e.g., Consal Development (1976) 132 CLR 373 (HCA); United States Surgical Corp v. Hospital Products International Pty Ltd [1983] 2 NSWLR 157 (overturned on appeal on other grounds); Fyffes [2000] 2 Lloyd’s Rep 643 (QB).

434 The remedy is more recognised in Australia (see, e.g., Michael Wilson [2011] HCA 48; [2011] 244 CLR 427 [106]), but has recently been recognised by the English Court of Appeal: Novoship [2014] EWCA Civ 908. See also Cook v. Deeks [1916] AC 554 (PC); Fyffes [2000] 2 Lloyd’s Rep 643; Ultraframe [2005] EWHC 1638 (Ch); [2006] ESR 17 [1589]–[1601].

435 See, e.g., Fyffes [2000] 2 Lloyd’s Rep 643 (account of profits available, in principle, against the briber, A, of PW, but refused because it was ‘highly probable’ that C would have entered the contract with A in any event. Any “ordinary” profit element was not caused by the bribery and, if the contract price was inflated due to the bribe, C was protected by damages or equitable compensation); Novoship [2014] EWCA Civ 908 [119] (account of profits refused if ‘disproportionate in relation to the particular form and extent of wrongdoing’).


437 See, e.g., Toulson J’s analysis of Attorney-General v. Guardian Newspapers (No 2) [1990] 1 AC 109 in Fyffes [2000] 2 Lloyd’s Rep 643 (QB) 670. At [8.4.1.1] we suggest that it is
liability, in which case, any increase in the value of the received property in A's hands may be taken into account.

The 'profits' must have been made by A, rather than PW. It must be shown that the profits are referable to A's wrongdoing. It has been suggested that common law rules of causation should apply by analogy here, although it is not clear which rules would apply given that the common law does not award gain-based remedies. Furthermore, in cases where A and PW are very closely linked (such as where the fiduciary obligation is said to be 'transmitted' to A), the courts are clearly applying the same causation approach to both A and PW.

Grimaldi provides an illustration of the fact-specific, discretionary process of determining an account of profits for participatory (here, recipient) liability. Simplifying the facts somewhat, the court was required to determine what proportion of the profits made, over seven years or so, by a large mining company, A, were attributable to an initial injection of capital (the trust property) received by A through PW's breach of fiduciary duty. The court indicated that the account should be determined in the following manner:

[T]he benefit/profit to which [C] was entitled was its proportionate share in the net profits (providing the proportion itself was identifiable) from ore found, extracted, transported and marketed and sold which had been, or would be, extracted over the life of the Project less the costs of finding, etc. that ore and, arguably, less any such allowance as [A] would be allowed for its skills and risk-taking and for its exertion in finding, etc., the ore. We merely suggest that that benefit, if [C] elects to pursue it, may best be reflected in a royalty-like payment on ore extracted.

unnecessary to resort to an accessory analysis here, but this does not affect the point concerning remedy.


See Virgo, Principles of Equity and Trusts, 689.

Grimaldi [2012] FCAC 6; [2012] 200 FCR 296 [609]–[614]; Michael Wilson [2011] HCA 48; [2011] 244 CLR 427 [106]. See also Restatement (Second) of Trusts §874 (1979) Comment c: '[A] is responsible only for harm caused or profits that he himself has made from the transaction, and he is not necessarily liable for the profits that the fiduciary has made nor for those that he should have made.'


See Novoship [2014] EWCA Civ 908 [94]–[115].


Ibid. [740] (Finn, Stone and Perram JJ). The Court drew upon the judgment of Learned Hand J in Primeau v. Graefield 184 F 480 (1911).
In reaching this conclusion, the court exercised its discretion not to award a constructive trust over a proportionate share of the mining tenements held by company A and also emphasised that the profits of A and a related company that acquired shares in A, also an accessory defendant in the proceedings, should be distinguished for the purposes of the account.

8.7.3.3 Gain-based proprietary remedies

Some jurisdictions, such as Australia and Canada, recognise the courts’ discretion to impose a remedial constructive trust where appropriate and according to settled principles. On this approach, proprietary relief may – but need not – be awarded in relation to any form of equitable accessory wrongdoing.\(^445\) English courts are averse to the judicial alteration of property rights by way of discretionary proprietary relief, including in relation to dishonest accessory liability.\(^446\) Proprietary relief is generally only permissible if an ‘institutional’, as opposed to a ‘remedial’, constructive trust arises.\(^447\) There is, however, English authority that a discretionary constructive trust is available for procuring an equitable breach of confidence.\(^448\)

\(^445\) There is Australian case law and commentary recognising a remedial constructive trust even where property is not traceable from C to A. See, e.g., DPC Estates Pty Ltd v. Grey [1974] 1 NSWLR 443 (NSWCA) 459–461; 469–472 (knowing assistance) (overturned on appeal on other grounds); Timber Engineering Co Pty Ltd v. Anderson [1980] 2 NSWLR 488 (NSWSC) (approved by Mason J in Hospital Products Ltd v. United States Surgical Corp [1984] 156 CLR 41 (HCA) 115–116); United States Surgical Corp v. Hospital Products International Pty Ltd [1983] 2 NSWLR 157 (overturned on appeal on other grounds); Distronics Ltd v. Edmonds [2002] VSC 454. See also Say-Dee Pty Ltd v. Forah Constructions Pty Ltd [2005] NSWCA 309: overturned by the High Court without querying the availability in principle of a constructive trust for knowing receipt. See also, Heydon and Leeming, Jacobs Law of Trusts, [1338]. See, perhaps contra, Giuelli v. Giuelli (1999) 196 CLR 1010 (HCA) 112 [4]: ‘some constructive trusts create or recognise no proprietary interest . . . An example of a constructive trust in this sense is the imposition of personal liability upon one “who dishonestly procures or assists in a breach of trust or fiduciary duty”’. The Federal Court has noted that there is no presumptive rule that a (non-recipient) assistant is liable to proprietary relief: Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [516] (Finn, Stone and Perram JJ). For an evaluation of the Canadian law, see Clapton, ‘Gain-Based Remedies’.


\(^448\) Ocular Sciences Ltd v. Aspect Vision Care Ltd [1997] RPC 289, 411–416 (Laddie J). His Honour refused this relief for practical reasons, including the difficulty of determining how decisions relating to the property would then be made. See also United Pan-Europe
We support the availability of discretionary proprietary relief for equitable accessory liability. It allows for transparent judicial reasoning that addresses both principled and policy-driven rationales for the liability as well as fact-specific matters such as the interests of innocent third parties, and it allows for relief tailored to the particular circumstances. The discretionary nature of such relief and the fact that it appears to be quite difficult to obtain in practice makes it a preferable solution to recognising institutional constructive trusts. The all or nothing aspect of the latter approach, while superficially more 'certain' than that of the former approach, is a blunt instrument that does little to meet the concerns of those opposed to judicial alteration of property rights.

Proprietary relief for recipient liability is less controversial in England because a proprietary link between C and property held by A is established through following or tracing. Thus, irrespective of whether a persisting property claim is also available [7.5] (as is generally the case), the custodial nature of A's recipient liability is said to require A to restore the trust property in specie if possible.

As discussed in [7.5], in Australia, C cannot rely on a persisting property claim to received property or its traceable product in A's hands if C's original interest was legal, rather than equitable, even though such property is treated as traceable trust property for the purposes of establishing a receipt of property. Proprietary relief is available for recipient liability here, but on a discretionary basis only. In Grimaldi, the Federal Court decided that a constructive trust for knowing receipt should not be awarded automatically on the basis of a persistent property/tracing claim over certain assets of a corporation, noting that the culpability of the corporate accessory was different in kind to the fiduciary on the particular facts. One relevan


449 See further, Ridge, 'Constructive Trusts, Accessory Liability and Judicial Discretion'.


451 Mitchell and Watson, 'Remedies for Knowing Receipt', 132. On this view, as depending on whether the trust is ongoing or not, A must either reconstitute the trust fund or transfer it to the fully entitled beneficiaries. This has also been accepted by the Privy Council in relation to property subject to a non-trust, custodial fiduciary deed.

factor was that the corporate accessory had changed significantly in composition and wealth base since the receipt of trust property. Thus, ‘[t]his is not a simple case of wrongdoers continuing knowingly to perpetuate their own wrongs to their own advantage behind a corporate form’. It would be inappropriate to visit the consequences of proprietary liability upon subsequent investors in the company who had not been responsible for the accessory conduct. This was so even though property was traceable to the accessory.

A complication in the Australian law on recipient liability concerns the relevance of a valid, but voidable, contract that governs the subject matter of the claimed proprietary relief and is inconsistent with it. Must any such contract be rescinded before a constructive trust is imposed? Any such contract is voidable because of the primary wrong and A’s culpable involvement in it; however, rescission may not always be possible given the lapse of time. As a matter of principle and assuming that proprietary relief may be awarded on terms, rescission should not be a necessary requirement for a discretionary constructive trust. The court takes the contract into account in fashioning the proprietary remedy; the functions of rescission in ensuring third-party rights are protected and future enforcement of the contract is precluded are thereby accommodated in other ways. What appears to have caused the confusion is that there are, in fact, two alternative means by which a constructive trust may arise in such scenarios. The first is where a constructive trust arises as an automatic ‘consequence of the effective avoidance or rescission of the transaction’ so that A holds the property as constructive trustee ‘ab initio’. The second, more recently

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453 ibid. [675] (Finn, Stone and Perram JJ).

454 Ibid. [677].

455 The contract may be void, rather than voidable, due to statutory contraventions: see Belmont Finance [No 2] [1980] 1 All ER 393, discussed in Hancock Family Memorial Foundation Ltd v. Porteous [2000] WASCA 29; (2000) 22 WAR 198 [198]–[201]. Alternatively, the contract may be a sham: Robins [2003] NSWC 71; (2003) 175 FLR 286, 303 [83].


457 A’s culpability tends to be a given in such scenarios because A will be PW’s corporate alter ego.


recognised, means to a constructive trust is by way of a discretionary remedy. In the latter scenario, rescission is not required if justice can otherwise be done by the imposition of terms. Importantly, even if rescission is not available, the second means to a constructive trust may still apply.

8.7.4 Other remedies

Pre-judgment interest at compound rates is available for recipient liability where that would better reflect either an actual loss to the trust fund or a gain made by A.\(^{460}\) The trust property must have been used in the course of A’s business for commercial, profit-making purposes.\(^{461}\) Compound interest can be capped to avoid the possibility that A might indirectly benefit from the interest award.\(^{462}\) Little needs to be said regarding other forms of equitable relief, other than to note their availability where appropriate.\(^{463}\) Specific relief may be especially appropriate in relation to breach of confidence where C’s objective is to ensure that exploitation of the confidential material ceases.\(^{464}\) If A’s accessorial involvement results in C entering a contract with A, then C is entitled to rescind.\(^{465}\) If rescission is unavailable, then C may still treat the contract as at an end as to the future.

\(^{460}\) Belmont Finance (No 2) [1980] 1 All ER 393, 419; Grimaldi [2012] FCA 1129; (2012) FCR 296 [547]–[552]; [755].

\(^{461}\) Belmont Finance (No 2) [1980] 1 All ER 393, 419.


\(^{463}\) In relation to ongoing accessorial conduct see, Prudential Assurance Co Ltd v. Lorenz (1971) 11 KIR 78 (Ch), in which interlocutory relief was given to restrain a trade union from inducing its members to breach a non-contractual duty to account to their employer, C.

\(^{464}\) E.g., A may be ordered to deliver up for destruction property in which the confidential material resides as well as being enjoined from further breaches. See, e.g., Prince Albert v. Strange (1849) 2 De G & Sm 651; 64 ER 293; 1 Mac & G 25; 41 ER 1171; Franklin v. Giddins [1978] QR 72.

\(^{465}\) Panama and South Pacific Telegraph Co v. India Rubber, Gutta Percha, and Telegraph Works Co (1875) LR 10 Ch App 515; Grant v. Gold Exploration and Development Syndicate Limited [1900] 1 QB 233; Logicrose [1988] 1 WLR 1256. In accounting for benefits received under the contract, C need not return any money paid to A that was recovered by C: Logicrose 1264 (Millett J.). If C elects not to rescind, C can recover any ‘specific sum over and above what must be taken as between the parties to be the real [consideration]’ by a claim for money had and received: Grant 249 (Collins J); Logicrose 1263.
8.8 Apportioning Liability

8.8.1 Joint and several liability for losses

An accessory who assists in the primary wrong is jointly and severally liable with PW for C's losses. Conversely, one might have assumed that A would be liable only for losses caused by A's own wrong, but this is not the case with respect to loss-based remedies for knowing or dishonest assistance at least. Instead, A's liability is determined on exactly the same basis as that of PW once a connection between A's conduct and the primary wrong, rather than between A's conduct and C's loss, is established [8.3.3].

Concerns that A's liability might be disproportionate to the extent of A's culpable involvement are most likely to arise where A has merely assisted PW (for example, through the provision of professional services). But joint and several liability for C's losses flowing from the primary wrong is still consistent with the strong rationales for equitable accessory liability [8.1.3]. Crucially, it is only in relation to C that questions of relative responsibility are ignored; as between A and PW such issues are relevant and go to the questions of apportionment. In this way, the risks associated with a potentially difficult evidential inquiry into relative responsibility are shifted from C to the two wrongdoers, A and PW. Nevertheless, the potentially onerous and disproportionate consequences of joint and several liability for losses to a knowing or dishonest assistant are a reason for caution in finding A liable in the first place. This is especially the case when liability is sought to be imposed upon 'strangers' to the relationship between C and PW, such as professional agents.

Whether an accessory who procures the primary wrong is jointly and severally liable is not as clear due to the paucity of case law. There are two possibilities apparent in the cases. First, A could be severally liable for the full losses resulting from the primary wrong and PW would be liable for whatever could not be recovered from A or through other means. This would be appropriate, for example, where PW was duped by A into

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467 Target Holdings Ltd v. Redfern [1996] 1 AC 421 (HL) 432.

468 Graham Virgo argues that A, a dishonest accessory, and PW should never be jointly and severally liable for C's losses: Principles of Equity and Trusts, 710–711.

469 See, e.g., Eaves (1861) 30 Beav 136; 54 ER 840.
committing the primary wrong.\footnote{Although presumably PW may be excused in such circumstances.} Alternatively, where A and PW jointly participate in a primary wrong that was instigated by A, liability should be joint and several.\footnote{See further Alison Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34 Melbourne University Law Review 481, 486 n. 30. Cf. George v. Webb [2011] NSWSC 1608 [331]-[332] (Ward J considering apportionment of liability).} If, for example, A is intimately related to PW and engaged in a common enterprise constituting PW's wrong or has procured the primary wrong, then it seems appropriate for A to be visited with the full losses referable to that wrong.

It is also not clear whether a knowing recipient is jointly and severally liable with PW or simply severally liable to restore the trust fund by way of compensation plus interest. In Grimaldi, the Full Federal Court of Australia intimated that the liability was several, without deciding the point.\footnote{Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [559].} Early authorities suggest that the liability is joint and several with that of the trustee.\footnote{Wilson v. Moore (1833) 1 My & K 125,142–143; 39 ER 629, 635; Rolfe v. Gregory (1865) 4 De GJ & S 576; 46 ER 1042; Cowper v. Stoneham (1893) 68 LT 18. See also Glanville L. Williams, Joint Obligations (London, Butterworth & Co, 1949) 159.}

8.8.2 Joint and several liability for gains

It is often said that A and PW should not be jointly and severally liable for each other's gains resulting from the primary wrong.\footnote{See, e.g., Ultraframe [2005] EWHC 1638 (Ch); [2006] FSR 17 [600]. See also, in Australia, Glandon Pty Ltd v. Tilmunda Pastoral Company Pty Ltd [2008] NSWSC 218; [2008] ASAL 55–186 [108]. See generally in relation to joint and several liability for gains, Ridge, 'Justifying the Remedies for Dishonest Assistance', 459–460.} This is sometimes explained on the basis that equity's jurisdiction is not penal.\footnote{Ultraframe [2005] EWHC1638 (Ch); [2006] FSR 17.} It also follows from the fact that A's liability is grounded in A's own, independently wrongful, conduct: the remedies available against A should be directed to the consequences of A's wrongdoing.\footnote{Michael Wilson [2011] HCA 48; (2011) 244 CLR 427 [106].} Where, however, the facts suggest that the gains made by one party in fact will benefit both parties, a principled case may be made for joint and several liability. Thus, if PW is simply the vehicle for A's enrichment and A is the instigator of the primary wrong, joint and several liability for PW's gains is appropriate.\footnote{Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [556], citing Green & Clara Pty Ltd v. Bestobell Industries Pty Ltd (No 2) [1984] WAR 32, 40; Gencor ACP Ltd v. Dulby [2000] 2 BCLC 734 (Ch).} There may sometimes be other ways to deal with such
8.8 APPORTIONING LIABILITY

scenarios. For example, in a corporate setting, where A has a substantial interest in PW Co, removing the gains of PW Co may have the indirect consequence of withholding or removing gains from A.478

A further scenario in which joint and several liability for gains is justified is where A and PW have jointly participated in the primary wrong. The court in *Grimaldi* suggested, without needing to decide the question, that

If [PW] and the third party assistant or recipient act in concert to secure a mutual benefit . . . they are jointly and severally liable to [C] to restore the trust or to account for the profits made . . . One can readily understand why, when wrongdoers so entangle their affairs, that the law as a matter of legal policy might wish to make it their responsibility – and not [C's] – to untangle them for accountability purposes.479

8.8.3 Contribution

Because PW and A bear joint and several liability for C's losses resulting from the primary wrong, C may sue either wrongdoer for the full sum. As between PW and A, however, the party who discharged the liability may seek contribution from the other.480 A detailed treatment of the equitable and statutory contribution rules in relation to accessory

478 See, e.g., *Warman v. Dwyer* (1995) 182 CLR 544 (HCA) 563–564. The Court noted that an account of profits against Co A would indirectly achieve a similar result to an account of profits or constructive trust in relation to PW's shareholding in Co A.


480 Arden LJ has suggested that equitable contribution should also be available in relation to an account of profits: *Charter* [2007] EWCA 1382; [2008] Ch 313 [71].
liability is not attempted here; however, the following general points can be noted. Where equity’s contribution rules continue to apply, the rules concerning contribution by co-trustees should not necessarily apply to accessories, although this is sometimes assumed to be the case. Instead, the general rules for equitable contribution should apply. There is an open question in Australia as to whether the general rules allow for proportionate, rather than equal contribution to be ordered. The better view is that proportionate contribution is permissible. The strongest case for this is where A procured PW’s breach: here, PW may have a right of indemnity under the general rules.

In some jurisdictions, statutory contribution schemes also apply to equitable claims. In England, for example, section 2(1) of the Civil Liability (Contribution) Act 1978 has been held to apply to claims for dishonest assistance and unconscionable receipt and provides that ‘... the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question’.

Finally, a controversial development in relation to apportioning liability has been the introduction in some jurisdictions of statutory proportionate liability. Such schemes remove joint and several liability and allow a party to be made liable only for the proportion of the

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486 But see Mitchell, Law of Contribution, [1.32].
489 See Mitchell, Law of Contribution, [8.34]–[8.35].
loss caused by that party. The application of such legislation to equitable accessorial claims is still unclear.490

490 See, e.g., George v. Webb [2011] NSWSC 1608: Ward J considered the application of the Civil Liability Act 2002 (NSW) to A’s liability for knowing assistance and knowing receipt in breach of trust. The Act applies to ‘(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care…’: s. 34(1). Ward J concluded at [325] that the particular breach of trust (payment out contrary to the terms of the trust) was not ‘predicated on or arising from a failure to take reasonable care’ and, hence, the Act did not apply. See further, Gurr, ‘Accessory Liability and Contribution, Release and Apportionment’, 511–517. See generally on the undesirability of proportionate liability, Mitchell, Law of Contribution, [8.36]–[8.37].
CHAPTER THREE
Infringement of equitable property rights

7.1 Introduction

This chapter considers five doctrines that protect equitable property rights against interference by third parties and explains why they are not accessory liabilities, despite often being conceptually linked to accessory liability for procuring or assisting in a breach of trust. Each claim concerns the (often, but not always, wrongful) involvement, broadly speaking, of a third party, in a custodial relationship between a beneficiary and a trustee or fiduciary where that involvement relates to the property that is the subject of the trust or fiduciary relationship. Nearly all of these doctrines have at some time been grouped under the ubiquitous 'constructive trust' label [8.1.7].¹ It is challenging to disentangle them from accessory liability because they share similar rationales and elements to those of true equitable accessory liability and because none of them were necessarily conceived of with such classificatory concepts in mind. In particular, this chapter is concerned with one of the five doctrines considered, that is, equitable recipient liability: the personal fault-based liability that attaches to the recipient of property that is subject to a custodial fiduciary relationship and which has been received in breach of trust or fiduciary duty. Of the five doctrines, recipient liability is the one most closely related to accessory liability for procuring or assisting in a breach of trust. For that reason, its substantive content is discussed in Chapter 8 along with those accessory liabilities. Recipient liability is a contested doctrine; accordingly this chapter prepares the groundwork for Chapter 8 by explaining our understanding of recipient liability and why it should be considered in tandem with accessory liability.

¹ See, e.g., Barnes v. Addy (1874) LR 9 Ch App 244, 251–252, where trustees de son tort and those who 'receive and become chargeable with some part of the trust property' (now treated as inconsistent dealing and recipient liability, respectively) are described as 'constructive trustees'.
7.2 Trustee de son tort

A third party to a trust who has trust property vested in him or her, or has control over the trust property, and who purports to act as a trustee in relation to that property, rather than as an agent or in a personal capacity, is accountable as though properly appointed as trustee. The so-called 'trustee de son tort' is a fiduciary who is subject to the usual duties of an express trustee and will hold all usual trustee powers. The trusteeship arises prior to any breach of the trust. As with express trustees, the trustee de son tort's liability for any ensuing breach of trust is strict; it is irrelevant whether he or she acted in good faith and without knowledge of the breach. There are few reported instances of successful trustee de son tort claims.

Trustee de son tort liability reflects an 'ancient common law principle that a person who assumes an office or function which is not his, will be liable as if he had been properly appointed'. Another, less convincing,

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3 In re Barney [1892] 2 Ch 265, 273.

5 The term appears in Barnes v. Addy (1874) LR 9 Ch App 244, 251, but had been coined earlier. It was borrowed from the common law concerning 'executors de son tort', although it did not mirror that liability. See Pearce v. Pearce (1856) 22 Beav 248, 251; 52 ER 1103, 1104; In re Barney [1892] 2 Ch 265, 272. Perhaps for that reason the term was not invariably used by the nineteenth-century lawyers.

6 A trustee de son tort will not necessarily hold further duties and powers conferred by any relevant trust instrument: Jasmine Trustees Ltd v. Wells & Hind [2007] EWHC 38; [2008] Ch 194, 213 (Jasmine Trustees).

7 Selanger [1968] 1 WLR 1555 (Ch) 1579.

8 Liability is most likely in relation to invalidly appointed express trustees who have acted in the mistaken belief that their appointment was valid (see, e.g., Pearce v. Pearce (1856) 22 Beav 248; 52 ER 1103; Jasmine Trustees [2007] EWHC 38; [2008] Ch 194 (Ch)) or in relation to laypersons assuming control over a deceased estate: see, e.g., National Trustees Executors and Agency Co of Australasia Ltd v. Biffin [1940] VLR 395 (VSC).

explanation is that the third party’s conduct in purporting to act as trustee amounts to a declaration of trust, the absence of any requisite writing being compensated for by the conduct in question.\textsuperscript{9}

Historically, the liabilities of trustees de son tort, recipients, knowing dealers and accessories were intertwined in judicial discussion, the defendant was generally described as a ‘constructive trustee’ and was liable to account as though a trustee.\textsuperscript{10} Despite these commonalities, however, trustees de son tort were always equated with express trustees for limitations purposes [8.6.3]. Trustee de son tort liability is now recognised as a distinct, non-accessorial liability.\textsuperscript{11} It does not require a breach of duty by another (a primary wrong); indeed, there may be no properly appointed trustee at the relevant time.\textsuperscript{12} The trusteeship arises prior to any breach of trust by the purported trustee, whereas an accessory becomes liable by virtue of his accessorial involvement in the breach of trust itself. Nor does it depend upon knowledge by the third party that he or she is in breach of the trust.\textsuperscript{13} The trustee de son tort is a ‘true trustee’\textsuperscript{14} and, therefore, liability is primary.

\textsuperscript{9} Life Association of Scotland v. Siddal (1861) 3 De G F & J. 58, 72; 45 ER 800 (CA in Ch) 805.

\textsuperscript{10} The predominant nineteenth-century scenario concerned solicitors acting for trustees of family settlements and deceased estates who were involved in a breach of trust. Negligence claims were subject to the statutory limitations period and so were not always available. See, e.g., Mara v. Browne [1896] 1 Ch 199 (CA). A claim against the solicitors as ‘mere’ agents could not be brought by the cestui que trust. See, e.g., Morgan v. Stephens [1861] 3 Giff 226; 66 ER 392; Lee v. Sankey [1873] LR 15 Eq 204, 211. To avoid these procedural hurdles, it was often expedient to argue that the solicitors had exceeded their powers as agents and instead were ‘assuming the position or duty of trustees’ (trustee de son tort liability) and/or wrongfully intermeddling with the trust (accessory and recipient liability). See, e.g., Morgan v. Stephens; Brinsden v. Williams [1894] 3 Ch 185. The courts, however, were concerned to prevent solicitors from being unfairly saddled with the liabilities of impecunious trustee clients. See, e.g., Morgan v. Stephens at 236; 397; Barnes v. Addy (1874) LR 9 Ch App 244, 252 (Lord Selborne), 255 (James LJ); Mara v. Browne at 210.


\textsuperscript{12} See, e.g., Belth v. Fawdgate [1891] 1 Ch 337. See also, Lyell v. Kennedy (1889) 14 App Cas 437 (HL).

\textsuperscript{13} In re Barney [1892] 2 Ch 265, 272.

7.3 Dealing inconsistently with trust property

An agent or other person who receives trust property in a 'ministerial' capacity, rather than for personal benefit, but then knowingly deals with it in a manner that is contrary to the trust, will be liable to account in equity. This is so whether the knowing dealer misappropriates the property for personal benefit or otherwise deals inconsistently with it and whether or not the dealer acts in good faith. Although knowing dealing has been authoritatively recognised as a distinct category of liability, the cases are sparse.

Inconsistent dealing liability extends to anyone holding trust property who knows at the time of receipt that it is trust property or later acquires such knowledge and who then deals with the property contrary to the trust or fiduciary obligation. An example is a person who receives trust property as an innocent volunteer, but then learns of the trust and deals with the property inconsistently with that trust.

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15 Authorities are scarce, but it seems that, as with recipient liability, 'trust' property encompasses any property held pursuant to a custodial relationship governed by equity, whether or not it is subject to an express trust. See, e.g., Locke v. Prescott (1863) 32 Beav 261; 55 ER 103. On the meaning of trust property, see further [8.3.2.3].


17 Morgan v. Stuphens (1861) 3 Giff 226, 237; 66 ER 393, 397. This is clear in Millett J's statement of principle in Agip (1990) Ch 265, 391–392, referring to a third party who 'receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust' (emphasis added).

18 Williams v. Williams (1881) 17 Ch D 437.


20 The leading nineteenth-century decision is Lee v. Sankey (1873) LR 15 Eq 204. In agency cases that consider inconsistent dealing, there is a concern not to unduly compromise an agent's contractual and statutory obligations to follow client instructions. Hence, the requisite culpability is high. See Adams v. Bank of New South Wales (1984) 1 NSWLR 285 (although the NSWCA did not explicitly address inconsistent dealing, the facts are most consistent with that doctrine); Williams v. Williams (1881) 17 Ch D 437; Carl Zeiss Siftung v. Herbert Smith & Co (No 2) [1969] 2 Ch 276 (CA) 304.

21 See e.g., Locke v. Prescott (1863) 32 Beav 261; 55 ER 103; bankers held railway stock as security for a loan of £300. It was held that once the bankers received a letter from their customers referring to 'our principal' they were on notice that the stock belonged to another and they could not then use the secured property to satisfy amounts owed by their customers above the original loan of £300.
Inconsistent dealing is often coupled with recipient liability in the case law. But although it involves a receipt of ‘trust’ property in the same sense as used for recipient liability [8.3.2.3], it is a conceptually distinct liability. In particular, it is the subsequent dealing, rather than the receipt of property, that founds liability. Inconsistent dealing is also not an accessory liability because the dealer’s liability is not dependent upon another’s breach of duty (a primary wrong), even though sometimes the dealing may be in response to such a breach. In other words, the inconsistent dealing with the trust property need not have involved the trustee or fiduciary.

It has been argued by Charles Harpum that where the dealing is not for personal benefit, the dealer’s liability is accessory (‘secondary’) because ‘[t]he primary liability is . . . that of the trustee who instructed [the dealer], and who thereby commits a breach of trust.’ But does this follow? It is the dealer’s inconsistent dealing that generates liability: whether or not there is also a breach of duty by the trustee or fiduciary is immaterial. Harpum acknowledges that the dealer’s dealing may have been on his or her own initiative, rather than at the behest of the trustee or fiduciary, but says that in this case the dealer is a trustee de son tort. But this does not necessarily follow either because the dealer’s inconsistent dealing may not have been as a purported trustee.

Conversely, where the dealer’s inconsistent dealing is for personal benefit, Harpum considers that this is ‘not secondary because [the dealer]


23 Reynolds and Grazidei, Bowstead and Reynolds [9–134].


26 Cf. Reynolds and Grazidei, Bowstead and Reynolds; [9–134].


28 E.g., assume that D is an agent of a trustee and has control over the trust property in that capacity. D transfers the trust property to her son, S, knowing that S is not a trust beneficiary. The trustee did not instruct D to act in this way and was unaware of the distribution to S. D clearly is liable for inconsistent dealing in this situation, but it can only be a primary liability because there is no breach of duty by the trustee.
takes the property as his own. He does not merely deal with it on the
instructions of his principal or bailor. 29 This is consistent with our own
analysis that the dealer's liability for inconsistent dealing is always a
primary liability because liability rests on the dealing, rather than on
another's primary wrong. It is 'the independent liability of a knowing
"converter" of another's property'. 30

7.4 The Diplock claim

Brief mention should be made of the strict liability personal claim against
the recipient of a wrongful distribution from a deceased estate. 31 The
'Diplock' claim has assumed significance beyond its specific context, and
hence is discussed here, because it has been used to argue that strict
personal receipt-based liability for breach of trust or fiduciary duty would
not be unprincipled. 32 Indeed, the presence within equity of both the
strict Diplock claim and fault-based recipient liability is argued (incorrectly, in our view: [7.6.4]) to be anomalous.

An unpaid creditor of the estate, a rightful beneficiary under the will or
a rightfully entitled person under intestacy rules, may claim against the
innocent recipient of a wrongful distribution where the distribution
precluded the claimant (C) receiving their full entitlement. 33 The recip-
ient will be strictly liable for the amount of the wrongly paid distribu-
tion, but only to the extent that the loss cannot be met by the personal
representatives of the estate. 34 The liability is an example of a defendant's
conscience being affected without knowledge of the flawed nature of the
receipt. 35 The Court of Appeal in Re Diplock concluded that the claim, as

30 Finn, 'The Liability of Third Parties', 209.
a distribution may be wrongful in part or in full.
32 Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W. R. Cornish,
Hart Publishing, 1998) 231; Peter Birks, 'Receipt' in Peter Birks and Arianno Pretto,
33 Re Diplock [1948] 1 Ch 465 (CA). Lionel Smith, 'Unjust Enrichment, Property, and the
34 Re Diplock [1948] 1 Ch 465 (CA). See also Hagan v. Waterhouse (1992) 34 NSWLR 308
(NSWSC) 369–370. The historical support for this limitation has been questioned:
S. J. Whittaker, 'An Historical Perspective to the "Special Equitable Action" in Re
35 Cf. Bridgeman v. Green (1757) Wilm 56; 97 ER 22. See also, Pauline Ridge, 'Third Party
7.5 The persisting property claim

Where a trustee misappropriates trust property and it or its traceable proceeds thereby comes into the hands of a third party who is not a bona fide purchaser for value of the legal interest, the beneficiaries of the trust may assert their prior, ‘persisting’ equitable interest in the property held by the recipient third party by using the priorities rules and, if

[488] 1 Ch 465 CA 488. See also, at 489, 492 and 503. The rationale and elements of the claim were attributed to the practice of the ecclesiastical courts’ jurisdiction that was gradually taken over by Chancery. The former jurisdiction’s practice of requiring legatees to provide security was reflected in Chancery’s recognition of the weakness of the recipient’s right to retain the distribution.

A change of position defence should be recognised. There seems no reason to accord Re Diplock recipients a lesser status to that of other volunteer recipients of incorrectly paid funds. The defence seems particularly appropriate if formulated in equitable terms. See, e.g., Australian Financial Services and Leasing Pty Limited v. Hills Industries Limited [2014] HCA 14; (2014) 88 ALJR 552 (Hills Industries).


E.g., if the trust property is shares and, in breach of trust, the trustee uses the shares as security for a loan by D, the priority rules determine whether C or D has better title to the shares. Phillips v. Phillips (1861) 4 De G F & J 206; 45 ER 1164, 1166; Macmillan Inc v. Bishopsgate Investment Trust plc [No 2] [1995] 3 All ER 747; Kooreang [1998] 3 VR 16 (VSC). See generally, R. Meagher, D. Heydon and M. Leeming (eds.), Meagher Gummow and Lehane’s Equity: Doctrine and Remedies, 4th edn (Chatswood, Butterworths LexisNexis, 2002) Ch. 8. The rules of following may be needed to identify D, see Sarah Worthington, Equity, 2nd edn (Oxford University Press, 2006) Ch. 4. It is assumed here that no registration system overrides the operation of the equitable rules.
necessary, the tracing rules. The persisting property claim is defeated by the defence of bona fide purchaser of the legal interest for value without notice. The provision of consideration and the absence of notice at the time of the receipt means that the recipient’s conscience is not affected and there is nothing else to attract equity’s jurisdiction if the recipient holds a legal interest. ‘Notice’ encompasses actual knowledge, constructive notice (the knowledge that would have been gained by a reasonable person from reasonable and proper enquiries), and imputed notice. Thus, the beneficiaries’ rights will prevail against a


41 The claim is more pithily described in the Restatement (Third) of Trusts (2012) §108 (2): ‘A third party who acquires an interest in trust property through a breach of trust is entitled to retain or enforce the interest to the extent the third party is protected as a bona fide purchaser.’


44 This includes ‘wilful blindness’ and ‘contrived ignorance’. Macmillan Inc v. Bishopsgate Trust Plc [No 3] [1995] 3 All ER 747, 769 (Millett J) and [3.4.3.3].


46 Imputed notice is the actual or constructive notice acquired in the course of an agency by an agent acting for D where the information acquired is material to the transaction and the agent has a duty to pass it on. See Espin v. Pemberton (1859) 3 De G & J, 547, 554; 44 ER 1380, 1383; Kooroorang [1998] 3 VR 16 (VSC) 115, discussing Sargent v. ASL Developments Ltd (1974) 131 CLR 634, 658. See also Re Montagu’s Settlement Trusts [1987] Ch 264, 277. See also [11.2.2].
merely careless purchaser of the legal interest. This is a much more extreme and far-reaching mental state than that generally required for accessory liability [3.4.3.5].

Despite the beguiling logic underpinning the persisting property claim ('that is my property; give it back!'), its impact upon a defendant is particularly severe where he or she is a volunteer recipient of the trust property without notice, or a bona fide purchaser of an equitable interest in the trust property without notice, who still holds the trust property or its traceable proceeds, but who has changed position in reliance on its receipt. The claim is probably not subject to a change of position defence, but in our view it should be. Its harsh impact is exacerbated by the reach of the concept of constructive notice in this context. The persisting property claim thus exhibits a strong property protection objective based upon the defendant’s retention of the trust property.

Unlike recipient liability [8.3.2.3], the application of a persisting property claim is limited to property that is the subject of a trust, rather than extending to property that is the subject of a non-trust, custodial fiduciary relationship. There are authorities to the contrary, but they contain little discussion of this point. In recent Australian cases involving breach of fiduciary duty and misappropriated company assets, the persisting property claim has been limited to where 'trust property in the strict sense' was received by the defendant. Limiting the scope of the persisting property claim in this way makes sense given its potentially severe impact upon recipients other than bona fide purchasers for value of a legal interest without notice. The persisting property and recipient

47 Cf. Foskett v. McKeown [2001] 1 AC 102 (HL) 109 (Lord Browne-Wilkinson referring to 'hard-nosed property rights').
49 Cf. the test of objective knowledge used in the context of equitable accessory liability [3.4.3.5]; [8.3.4.3].
50 This includes property impressed with a constructive trust. See, e.g., United States Surgical Corporation v. Hospital Products International Pty Ltd [1983] 2 NSWLR 157 (NSWCA) 247; Grimaldi v. Chameleon Mining NL (No 2) [2012] FCAFC 6; (2012) 200 FCR 296 (Grimaldi). See also, Heydon and Leeming, Equity, [2705]. See also Black v. S Freedman & Co (1910) 12 CLR 105; Attorney-General for Hong Kong v. Reid [1994] 1 AC 324 (PC) (constructive trust imposed over fiduciary’s proceeds of bribery and traced into real properties held by fiduciary’s wife and solicitor as volunteers).
liability claims have different requirements in terms of knowledge and onus of proof. The wider scope of recipient liability is justified because it is fault-based and the relief is discretionary.

The persisting property claim is not an accessory liability even though it is triggered by another’s primary wrong (the breach of trust). The holder of persisting property is not liable for ‘involvement’ [3.3] in that wrong (whether or not factually there was such involvement) but because C’s property rights have priority. Further, the liability of the holder of persisting property is not dependent upon a particular mental state [3.4] except in a weak sense where he or she is a purchaser of a legal interest in the trust property who cannot prove bona fides or absence of notice. Instead, the rationale for liability is overwhelmingly concerned with the protection of C’s equitable property rights.

7.6 Recipient liability

7.6.1 The dual character of recipient liability

Recipient liability is a personal fault-based liability that attaches to the recipient of property subject to a custodial fiduciary relationship that was knowingly received in breach of trust or fiduciary duty [Chapter 8]. Recipient liability incorporates both personal characteristics (the liability is not dependent upon retention of the subject property and does not usually attach to that property) and proprietary characteristics (the recipient defendant, D, must have received trust property to which C has a claim and the remedies relate to the value of that property). The claim operates at the intersection of personal and proprietary obligations and is amenable to different explanations according to where on a spectrum, ranging from personal to proprietary liability, it is positioned. Historically, its dual character was clear. Nineteenth-century cases often bundled it together with the property-related claims involving trustees de son tort, inconsistent dealing and tracing of persisting property rights, but it was also coupled with the personal claim of knowing assistance.

53 Contra Crédit Agricole Corporation and Investment Bank v Papadimitriou [2015] UKPC 13 [33]. See further, [8.3.4.4].

54 In relation to the persisting property claim, D must prove absence of notice of the trust, whereas in relation to equitable recipient liability, C must prove that D had the requisite knowledge: Michael Bryan, ‘The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?’ in Simone Degeling and James Edelman (eds.), Equity in Commercial Law (Pyrmont, Lawbook Co, 2005) 331.

55 See, e.g., Barnes v. Addy (1874) LR 9 Ch App 244.
The dominant rationale for recipient liability is D's culpable conduct (determined according to D's knowledge of the primary wrong), rather than the protection of C's property rights.\(^{56}\) For this reason, in most jurisdictions a higher level of knowledge than for the persisting property claim is required.\(^ {57}\) A property-protection rationale is also present, but it does not determine the fault element for D's personal liability and cannot justify D's liability by itself.

7.6.2 The relationship of recipient liability and accessory liability

One of the most challenging aspects of our endeavour to identify and describe an organising principle of accessory liability that operates across private law has been the need to accommodate and respect the fact that equity traditionally did not organise the relevant law in terms of accessory and non-accessory liabilities (although there have been some moves in this direction\(^ {58}\)). It can be problematic to 're-classify' according to a concept that was not traditionally dominant in this area of law. The concept of accessory liability used in this book [Chapter 2] is influenced by common law notions of accessory liability. These focus upon A's accessorial 'involvement' in the wrong, that is A's conduct before or at the time of the commission of the primary wrong that contributes to it;

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\(^{56}\) Sir Robert Megarry VC's judgment in \textit{Re Montagu's Settlement Trusts} [1987] Ch 264 is the leading authority. See \textit{Bank of Credit and Commerce International (Overseas) Ltd v. Akindele} [2001] Ch 437 (CA); \textit{Grimaldi} [2012] FCAFC 6; (2012) 200 FCR 296 [356]–[369]. See further, Dietrich and Ridge, 'The Receipt of What?', 58–60. Two lines of case law had developed during the twentieth century. The first characterised recipient liability as the personal liability companion of a persisting property claim by C; both were concerned with 'rights of priority in relation to property': \textit{Agip} [1990] 1 Ch 265, 292–293. That is, the rationale for intervention is property-protection. See also \textit{El Ajou v. Dollar Land Holdings plc} [1993] 3 All ER 717, 738. According to this approach, liability depended on whether D made reasonable and appropriate enquiries to verify D's entitlement to the property; that is, objective notice, in the sense used in conveyancing-related claims, sufficed for liability \([3.4.3.5]\). Similarly, if D used an agent to do what was necessary on D's behalf, then the agent's actual or constructive notice would be imputed to D: see, e.g., \textit{Powell v. Thompson} [1991] 1 NZLR 597. This approach was rejected in \textit{Re Montagu's Settlement Trusts} where Megarry V-C preferred a fault-based rationale.


\(^{58}\) See \textit{Royal Brunei Airlines Sdn Bhd v. Tan} [1995] 2 AC 378 (PC) (\textit{Royal Brunei Airlines}); [8.1.4.2].
[3.3], especially [3.3.4]. Equity, on the other hand, focuses not on the timing of D’s conduct, but upon its fault-based and derivative nature.

The first and third elements of the analytical framework for accessory liability set out in Chapter 3 are also present in recipient liability. Recipient liability requires there to be a breach of trust or fiduciary duty by another (the primary wrong). Liability turns upon the recipient’s knowledge of the primary wrong (the mental element). But the requisite conduct – the receipt of misappropriated property or its traceable product – occurs after, and potentially independently of, the commission of the primary wrong (the breach of trust or fiduciary duty). Hence, according to our explanation of the conduct element for accessory liability [3.3], recipient liability is not accessorial. D need not have been involved in the commission of the primary wrong: any subsequent recipient in a chain of recipients of trust property that remains traceable to that recipient, and who receives with knowledge of the breach of trust, is personally liable to C [8.3.3].

Factually speaking, of course, given that D must know of the primary wrong, it is possible, indeed quite likely, that the knowing receipt will be pursuant to a scheme that encompasses the primary wrong. If D has agreed to participate in a wrongful scheme, then the timing of D’s receipt is by the way. D’s agreement alone has facilitated the wrong. That is, D’s receipt may well constitute accessorial involvement in the primary wrong by the primary wrongdoer (PW) and even suffice for a knowing assistance claim [3.3.4]. The closer D is in time and physical connection to the primary wrong, the more accessorial his or her behaviour becomes. Nonetheless, accessorial conduct is not an essential element of recipient liability and therefore it is not accessorial liability.59

There is, however, an overlap in the rationale and objectives of recipient liability and equitable accessory liability. The rationale for recipient liability is that it is wrongful to knowingly interfere in the equitable relationship between C and PW for personal gain.60 This is the most

59 Another possible objection to treating recipient liability as accessorial concerns whether purely passive conduct suffices for accessory liability. See, e.g., Zage [2010] 2 SLR 589 (SCA) 608, where the two forms of liability were distinguished on this basis. See further, Pauline Ridge, 'Equitable Accessory and Recipient Liability in Singapore' (2013) Singapore Journal of Legal Studies 361, 375–376. If D’s passive receipt occurred with the deliberate intention of furthering PW’s breach of duty, then passive conduct in itself should not be a bar to accessory liability [3.3.6].

60 See Akindele [2001] Ch 437 (CA) 455 (Nourse LJ): 'the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt'. It is difficult to find unambiguous statements in the case law because the persisting property claim, recipient liability and accessory liability are often not distinguished when courts
7.6 Recipient Liability

pervasive rationale for personal, fault-based equitable third-party liabilities in general [8.1.3]. The same fault-based rationale applies to accessory liability, but is expressed more broadly; it is wrongful to knowingly interfere (whether for gain or otherwise) with a relationship between C and PW that is governed by equity [8.1.3].61 A factual scenario may satisfy the elements of knowing assistance in breach of fiduciary duty, for example, without the assistant having participated for personal gain.62 On the other hand, advantage-taking does appear to be an essential rationale of recipient liability: D is liable because he or she has knowingly taken advantage of the primary wrong for personal gain; if there is no receipt for personal benefit, there is no recipient liability [8.3.2.3].

Until quite recently, courts applying equitable doctrine have not used 'accessory' terminology, instead grouping third-party personal fault-based liabilities more broadly. What is apparent from the commonalities in the elements of liability and rationales for both recipient liability and accessory liability is that the two can sensibly be grouped conceptually as distinct, but related, forms of liability for wrongful participation63 in another's breach of equitable duty. There is support in equity jurisprudence for treating accessory liability and recipient liability for breach of trust or fiduciary duty as one, 'participatory liability' [8.3.5]. Accordingly, although recipient liability is not an accessory liability according to our analytical framework, we conclude that it nonetheless shares fundamental features with equitable accessory liability and should be considered in combination with it. Hence, we discuss the substantive principles of recipient liability in Chapter 8.

discuss the rationales for liability. See also Consul Development Pty Ltd v. DPC Estates Pty Ltd (1975) 132 CLR 373 (HCA) 397 (Gibbs J) (Consul Development) (where the comments were not specifically directed to recipient liability). In Zhu v. Treasurer (NSW) [2004] HCA 56; (2004) 218 CLR 530 [121], the Court referred to a property-protection rationale in relation to a 'third party who obtains trust property from a trustee in breach of trust' and a benefit-based rationale in relation to accessory liability. But a property-protection rationale cannot by itself justify recipient liability, nor is it clear whether the Court's comments were even directed to recipient liability, rather than the persisting property claim.


62 E.g., accessory liability is imposed upon agents providing professional services regardless of whether a benefit (beyond professional remuneration) was received.

63 'Participation' here is not meant to imply involvement in the wrong as an accessory linked to the commission of the wrong [3.3.4]; it is intended to encompass liability that goes beyond 'involvement' before or during the commission of the primary wrong.
7.6.3 Recipient liability as a primary custodial liability

An alternative explanation of recipient liability is that it is a fault-based and 'distinctive, primary, custodial liability, which closely resembles the liability of express trustees to account for the trust property with which they are charged'.\(^{64}\) On this view, the initial wrongful receipt operates to constitute the recipient a trustee of the received property; therefore, the remedies flow from the consequent trusteeship, rather than directly from the wrongful receipt.\(^{65}\)

This explanation of recipient liability shifts attention away from the recipient’s initial wrongdoing that generates liability, but why does that initial fault alone not justify and explain the imposition of liability? And why does the specific wrongdoing in question, namely knowing (unconscionable) receipt of misappropriated property, not explain the imposition of remedies that focus upon the loss of that property and the advantages gained by the recipient?\(^{66}\) More simply, it could be argued that the recipient culpably received trust property in breach of trust or fiduciary duty and therefore is liable for the consequences. The explanation of recipient liability as a stand-alone, custodial liability is unnecessarily convoluted, given that an obvious rationale for liability – culpable receipt for personal gain – already exists.\(^{67}\)

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\(^{65}\) This is rather like the liability of a trustee de son tort whose liability flows not from the assumption of trusteeship, but from a breach of the assumed duties [7.2]. Mitchell and Watterson, 'Remedies for Knowing Receipt', has been cited by the Privy Council (Arthur v. Attorney General of the Turks and Caicos Islands [2012] UKPC 30) and by the Federal Court of Australia (Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296) in relation to the remedies for recipient liability, although these citations do not necessarily indicate endorsement of the overall thesis of that work.

\(^{66}\) The additional step of subjecting D to a trusteeship appears to be considered necessary in order to justify the availability of accounting procedures and liabilities that, in Mitchell and Watterson’s view, flow only from a trustee’s duty to account for the trust fund. But even if this remedial view is correct (cf. [8.7.2]), could one not equally justify an accounting standard for assessing monetary remedies being available against D as culpable participant in PW’s misappropriation of trust property? This, after all, seems to be the point of the historical labelling of a recipient or accessory as a ‘constructive trustee’. namely, that D is then liable to the full range of remedies available against an express trustee. See further [8.7].

\(^{67}\) The persuasiveness of the custodial liability explanation is also undermined by its premise that true accessory liability must duplicate the primary wrongdoer’s liability. Accessory liability is not a duplicative, but a derivative, liability. See further, Pauline Ridge,
7.6.4 Recipient liability and unjust enrichment liability

A more radical reimagining of recipient liability proposes unjust enrichment as the preferred explanation. On this approach, fault-based recipient liability is an historical anomaly at odds with the common law’s approach to receipt-based liabilities and with some equitable liabilities. The original resolution to this supposed anomaly, proposed by Peter Birks, was that recipient liability in its current form should be replaced by strict liability. Specifically, the fault element of knowledge would be abolished, the remedy would be confined to restitution of the received ‘enrichment’, and the defence of change of position would be added to the bona fide purchaser defence. This requires a radical change to the existing law and has not occurred.

A second proposed resolution is a modified version of the first whereby the current recipient liability claim (with its fault requirement and greater range of remedies) is retained, but a strict liability claim is also recognised. The modified approach also requires radical changes to the current law. Notable proponents are Lord Nicholls and Lord Millett. In Lord Nicholls’ view, a strict liability equitable personal

'Justifying the Remedies for Dishonest Assistance’ (2008) 124 Law Quarterly Review 445: [2.6], [8.1.5].

68 'Unjust enrichment’ is used here in the Birksonian sense: if D was enriched at the expense of (by subtraction from) C and a legally recognised ‘unjust factor’ (e.g., a mistake by C) exists, D must restore the value of the enrichment to C unless the change of position defence applies or D is a bona fide purchaser for value without notice from C. It is a strict liability. See P. Birks, An Introduction to the Law of Restitution (Oxford, Clarendon Press, 1985). Contra Citadel [1997] 3 SCR 805; (1997) 152 DLR (4th) 411, where the Supreme Court of Canada accepted an unjust enrichment rationale for recipient liability, but held that D’s enrichment is only unjust if D has constructive notice of PW’s breach of duty. That is, the liability is fault-based.


71 This was accepted by Birks: ibid.


claim is not anomalous and the *Re Diplock* claim [7.4] could be used as a starting point for developing the law. Other scholars have pointed to the strict liability of an innocent donee of a gift tainted by the undue influence of a third person to make the same point.74

Neither of these approaches has been adopted in ratio by the highest court in any jurisdiction.75 The Supreme Court of Canada has noted that an 'enrichment' of D at the expense of C, by itself shows only that C has been unjustly deprived of the enrichment, but not necessarily that it is unjust for D to retain the enrichment. Accordingly, something more was required to show D's unjust enrichment, namely D's knowledge of the breach of duty by PW.76 In 2000, Nourse LJ, giving judgment for the English Court of Appeal, cautioned against the acceptance of a strict liability unjust enrichment claim, suggesting that it would be 'commercially unworkable'.77 He also actively discouraged any such move by preferring a higher threshold for fault than 'constructive knowledge' [8.3.4.4]. The High Court of Australia has emphatically rejected the unjust enrichment explanation of recipient liability. The Court noted that it would 'cut down traditional equitable protection' of D, and questioned 'how there was any justice in permitting restitution against a [D] who received trust property without notice of that fact'.78

It should also be noted that the analogies drawn with existing strict liabilities in equity are not compelling. The *Re Diplock* claim [7.4] is controversial and only explicable on historical grounds. The other equitable strict liability relied upon, namely, the liability of an innocent donee of a gift tainted by the undue influence of another, although


75 In some jurisdictions this may be because a suitable claim has yet to arise. For judicial support, see Grupo Torras SA v. Al Sabah [2001] CLC 221 [122]-[123]; Dubai Aluminium [2002] UKHL 48; [2003] 2 AC 366 [87]; *Woo Chiaw See Anna v. Ng Li-Ann Genevieve* [2013] SGCA 36 (SCA). The conceptual reasoning of much unjust enrichment scholarship – that eschews consideration of policy – also impedes its judicial acceptance: *Woo Chiaw See Anna* [144].


77 *Akindele* [2001] Ch 437 (CA) 456. For reasons of stare decisis the court could not adjudicate on the issue. Cf. the obiter comments by the Court of Appeal in *Grupo Torras SA v. Al Sabah* [2001] CLC 221 [122]-[123].

78 *Farah Constructions* [2007] HCA 22; (2007) 230 CLR 89 [153], [155]. The court also noted at [156] that there is no recognised 'unjust factor' justifying restitution in such circumstances.
7.6 RECIPIENT LIABILITY

uncontroversial, is explicable by way of a combination of factors that do not all apply to the quite different scenario of receipt of trust property. 79

In our view, a strict liability unjust enrichment claim, as presently conceived, should not be recognised. 80 It unfairly shifts the risks and burdens of litigation from C to D, an innocent recipient who partakes of none of the benefits of the trust relationship between C and PW, and who has no opportunity to ‘vet’ PW’s suitability as a trustee or fiduciary. It renders an innocent third party the unintentional insurer of C, yet offers no convincing explanation for why personal liability should be imposed in the absence of fault. Scenarios in which D could be an innocent volunteer who receives an indisputable windfall at C’s expense are difficult to envisage and involve extreme circumstances. 81 A great deal of faith is placed in the ability of the change of position defence to remove any possible injustice to D from the consequences of a strict liability claim. But it is not possible to be confident that the change of position defence as currently formulated in some jurisdictions will adequately protect all innocent recipients. 82 Even where the defence is formulated more in accordance with equitable notions so as to accommodate a greater degree of judicial discretion, the vagaries of litigation mean that there still remains the risk that D will unjustly bear the liability.

An unjust enrichment strict liability claim would overly protect equitable property interests which, by their nature, are often less apparent to third parties and do not generally receive as strong protection as legal property rights. 83 A strong property-protection rationale exists where D retains true trust property or its traceable proceeds [7.5], but where D does not retain the property or it is not true ‘trust’ property [8.3.2.3], this rationale becomes far less persuasive. Instead, the most pervasive

79 Bridgeman v. Green (1757) Wilm 56; 97 ER 22 (HL). See Ridge, ‘Third Party Volunteers’. Strict liability is justified by a combination of factors, including the relatively mild impact of the remedy of rescission, absence of strong policy reasons for upholding D’s security of receipt and the need to deter parties with influence from circumventing equitable protections.

80 See Dietrich and Ridge, "The Receipt of What?" 81 Ibid. 82–85.

82 Competing formulations of the defence are discussed in Hills Industries [2014] HCA 14; (2014) 88 ALJR 552 [78]. The inquiry under Australian law ‘is directed to who should properly bear the loss and why. That inquiry is conducted by reference to equitable principles.’ Cf. Restatement (Third), Restitution and Unjust Enrichment, §65 (American Law Institute Publishers, St Paul, 2011).

rationale for equitable personal third-party liability comes into play namely, that it is wrong to knowingly take advantage of another's wrongdoing. A strict personal liability, based only upon a property-protection rationale, is far less defensible.

The unjust enrichment explanation for recipient liability, whether in substitution for, or in addition to, fault-based liability therefore cannot be accepted as it is currently formulated. Nonetheless, it is an important subtext in the modern case law that helps explain why recipient liability is so often conceptually distinguished from other participatory liabilities and why a lower standard of fault is sometimes accepted.

7.7 Conclusion

The infringement of equitable property rights by third parties in the context of fiduciary custodial relationships gives rise to primary liabilities (trustee de son tort and knowing dealing) and derivative liabilities (the Re Diplock, persisting property and recipient liability claims). Of the derivative liabilities, recipient liability is most closely related to equitable accessory liability for procurement and assistance in breach of equitable duties. Because of its positioning between property-based claims and fault-based claims, recipient liability is amenable to more than one plausible explanation. We argue that the best explanation is that it is a fault-based liability that prevents the recipient taking advantage of the primary wrong.
Justifying the Remedies for Dishonest Assistance

By
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Reprinted from
Law Quarterly Review
July 2008
JUSTIFYING THE REMEDIES FOR DISHONEST ASSISTANCE

I. INTRODUCTION

DETERMINING when a third party accessory to a breach of trust or breach of fiduciary duty should be liable in equity has preoccupied judges and commentators since the advantages of such liability in relation to corporate mismanagement and fraud became apparent in the late 1960s.\(^1\) It is now settled that dishonesty is the test for such liability (apart from where the basis of the claim is that the third party has received trust property).\(^2\) The third party’s conduct must breach the standards of an honest person with his or her attributes and in those circumstances.\(^3\) Hence, it is an opportune time to consider a topic that has not received as much attention: the remedy for the “dishonest assistance” claim. If a third party (D) dishonestly assists in a breach of duty by a trustee or other fiduciary (F), what remedies should be available to the claimant beneficiary or claimant principal (C)?

Little attention has been given in the case law to this question, other than to debate whether the liability is appropriately described as being that of a “constructive trustee”.\(^4\) Generally, it is assumed that the remedy is compensatory. Surprisingly, given the volume of case law, the possibility of gain-based remedies has arisen only recently in England, and only at first instance\(^5\); however, scenarios in which a gain-based remedy for dishonest assistance may be appropriate can readily be envisaged. When, for example, if ever, will D who, at F’s invitation, exploits a business opportunity that should first have been offered to C, be liable to account for a resulting profit? And, if both F and D share the resulting profits, can D be liable for F’s profits as well? And, more controversially, can that

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1 See, e.g. Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 W.L.R. 1555. “Accessory” encompasses a third party who procures, participates or assists in the breach of duty. Breach of trust, as well as breach of fiduciary duty, is referred to in order to emphasise that a misapplication of property need not be involved.


gain-based liability ever be proprietary in nature? Nor has much attention been given, until recently, to the relationship between the nature of liability and the appropriate remedy. Yet I argue that the remedy available against a dishonest assistant should depend upon the justification for awarding a remedy at all. Answering the question, why is a remedy warranted, will, in large measure, suggest the appropriate remedy and how it is to be assessed.

II. The Rationales and Nature of Dishonest Assistance Liability

(a) The principled and pragmatic rationales

The rationale for dishonest assistance liability has both principled and pragmatic features. The principled basis of the rationale is that Equity intervenes because there is "wrongful conduct". The relevance of this for determining the remedy, including whose wrongful conduct is in issue, that of F or D, will be discussed more fully below. There are also two pragmatic reasons why Equity imposes liability upon dishonest assistants:

(i) to provide C with an alternative means of recourse thereby increasing C’s chances of a successful claim in the event that F is impecunious or has absconded; and

(ii) to deter third party participation in breach of trust or fiduciary duty, thereby restricting the opportunities for wrongdoing by trustees and fiduciaries.

These pragmatic features of the rationale for liability reflect the strongly prophylactic nature of the fiduciary obligation and the high value placed on the rights of principals. In short, this form of third party liability is used to bolster the protection given to the principals of fiduciary relationships.

How, then, might these pragmatic grounds for dishonest assistance liability influence the available remedies? One could argue that they justify the same remedies being available against the dishonest assistant as are available against a defaulting trustee or other fiduciary; that is, both loss-based and gain-based remedies. This would ensure that C is fully protected in the event of breach and would provide a strong deterrence to third parties. Relying on the pragmatic rationale alone to justify a range of remedies, however, requires an expansive view to be taken of the rights of beneficiaries and principals. There is no doubt that, historically, trust beneficiaries and the principals of other fiduciary relationships were very

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7Royal Brunei Airlines [1995] 2 A.C. 378 at 386-387, per Lord Nicholls of Birkenhead; Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 at 397, per Gibbs J.  
8Royal Brunei Airlines [1995] 2 A.C. 378 at 386-387, per Lord Nicholls of Birkenhead; Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 at 397, per Gibbs J.
well protected by Equity.9 Thus, it is not inconsistent with the doctrinal
time and balances on both fiduciaries and third parties nowadays (through
the evolution of negligence law and through legislative regulation, for
example), and that there are clear signs of judicial disquiet with the
stringency of some principal-favouring rules in fiduciary law,10 a sound
basis for justifying any remedy for dishonest assistance should address
more directly the balance of the rights of C with those of D, and therefore
should be found in the principled (wrong-based) aspect of the rationale.
The remedy available, in other words, should depend upon the nature of
the wrongdoing that Equity intervenes to address.

This is not to say that the pragmatic aspect of the rationale will
never be of assistance with respect to remedy. It is of relevance in,
first, strengthening any justification given by the principled rationale; and
secondly, in settling the bounds of any remedy justified by the principled
rationale. So if the principled aspect of the rationale justifies a loss-
based remedy (compensation) being available, the pragmatic aspect of the
rationale may influence how compensation is to be assessed. For example,
the pragmatic rationale would support a generous, claimant-favouring,
approach to determining the limits of liability for losses flowing, as a
matter of fact, from the dishonest assistance.11 Thus, it is necessary to
consider the principled, wrong-based, aspect of the rationale and this raises
the question of the nature of the liability: is it primary or secondary or,
in other words, whose wrongdoing grounds the liability?

(b) Primary or secondary liability?

Two models of dishonest assistance liability can be drawn out of the
substantial body of recent commentary and case law concerning dishonest
assistance. Each model links the nature of the liability to the remedies
consequently available. Model A is taken from an influential Modern
Law Review article by Steven Elliott and Charles Mitchell.12 Model B is

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9Finn, “The Liability of Third Parties for Knowing Receipt or Assistance” in Waters (ed.), Equity,
11Such as applies to breach of fiduciary duty claims: Re Dawson (1966) 84 W.N. (Pt I) (N.S.W.) 399;
applying the notion of secondary civil liability to equitable third party liability is Sales, “The Tort of
Conspiracy and Civil Secondary Liability” [1990] C.L.J. 491. Sales’ thesis was adopted by Charles
Harpum although Harpum does not discuss its implications with respect to remedy: see, e.g. Harpum,
most comprehensive discussion of Sales’ thesis in relation to the remedies for dishonest assistance
is given by Elliott and Mitchell. See also Mitchell, “Assistance” in Birks and Pretto (eds), Breach of Trust
(2002), at p.139.

implicit in much of the English case law and commentary on dishonest assistance.

According to Model A, D’s liability is a form of civil secondary liability analogous to common law (and even criminal law) secondary liability, the tort of interference with contract being an example of the same form of liability:

(i) D becomes liable for the breach of a duty owed by F by reason of D’s involvement (dishonest assistance) in the breach. The “wrongful conduct” which grounds the principled rationale for equitable intervention is the breach of trust or fiduciary duty itself; D thus assumes the same liability in relation to the same wrong as F.

(ii) Liability is triggered if D’s conduct was dishonest.

(iii) Because D’s liability is secondarily linked to F’s wrong it duplicates the liability of F. This suggests that both loss-based and gain-based remedies (including those in proprietary form) are available; however, the remedy can be only whatever is actually available against F.

Conversely, Model B focuses directly upon D’s conduct:

(i) D’s liability is a primary liability. The relevant “wrongful conduct”, therefore, is D’s own conduct in procuring or assisting with the breach of trust or fiduciary duty.

(ii) Liability is triggered if D’s conduct was dishonest.

(iii) The remedy is loss-based. D must compensate C for losses resulting from the breach of trust or fiduciary duty.

Models A and B are two extremes; there are, of course, permutations of these models and not all commentators necessarily adhere to each element as presented here. For example, one permutation would be secondary liability (Model A, element 1) with equitable compensation as the only remedy (Model B, element 3). Conversely, Lord Nicholls of

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14This form of civil secondary liability is to be distinguished from vicarious liability: Sales, fn.12 above, at 502.


16This is more consistent with common law forms of secondary liability. It may be that the English case law’s focus upon equitable compensation as the only remedy for dishonest assistance has obscured the full implications of Sales’ thesis; indeed, this is what Elliott and Mitchell argue in “Remedies for Dishonest Assistance” (2004) 67 M.L.R. 16.
Birkenhead, writing extra-judicially, appears to accept primary liability, with the remedy of account of profits being available in appropriate cases.\textsuperscript{17} Nonetheless, Models A and B represent two extreme versions of the equitable liability that are clearly presented in the current commentary and/or implicit in the case law.\textsuperscript{18}

(c) Model A (secondary liability)

The secondary liability model does not withstand close scrutiny. The problem is in understanding why a dishonest third party’s conduct should not be characterised as wrongful in itself; that is, why is it not a justiciable wrong, and therefore a primary liability, in and of itself, to procure or assist in another’s breach of a legal duty? Primary liability appears to be the most straightforward analysis of the equitable claim; D’s conduct is wrongful and leads to a primary liability which is joint and several with that of F.\textsuperscript{19} Patricia Loughlin explains the wrongfulness of D’s conduct as D’s exploitation of C’s vulnerability resulting from the fiduciary relationship; that is, there is “an increased risk of improper advantage-taking by the third person by reason of the initial fiduciary relationship”.\textsuperscript{20} Similarly, the High Court of Australia in several cases has referred to the inequitable character of a third party with knowledge of the breach of trust or fiduciary duty retaining a benefit resulting from that breach of duty.\textsuperscript{21} Again, the reasoning is that it is wrongful in equity to exploit the vulnerability of C (on the High Court’s formulation, by making a gain from the breach of F’s duty). This can be seen as the expression of a tort theme in equity; equity intervenes here “to protect persons in positions of vulnerability from exploitation or manipulation at the hands of another with whom the former is in a close ‘neighbourhood’ relationship”.\textsuperscript{22} On all these approaches, D’s wrongdoing is in his or her exploitation of the fiduciary relationship.

There are other reasons why Model A’s characterisation of the liability as secondary is not compelling. If D’s liability is secondary to F’s liability,

\textsuperscript{17}“Knowing Receipt: the Need for a New Landmark” in Cornish, Nolan, O’Sullivan and Virgo (eds), Restitution: Past Present and Future (1998), p.231 at 244.

\textsuperscript{18}It is misleading, however, to take at face value references in the case law to “primary” or “secondary” liability as there are few, if any, substantive discussions of the point. For example, Elliott and Mitchell, “Remedies for Dishonest Assistance” (2004) 67 M.L.R. 16 at 20 cite two Australian cases for the proposition that “liability for dishonest assistance is a secondary, derivative liability”. The cases cited are Australian Securities Commission v AS Nominees Ltd (1995) 62 F.C.R. 504 and Capital Investments Corp Pty Ltd v Classic Trading Pty Ltd [2001] FCA 1385 at [330], per Weinberg J. With respect, neither case provides unequivocal support for their position.

\textsuperscript{19}Cowper v Stoneham (1893) 68 L.T. 18. The reasons for imposing joint and several liability are discussed in Part III.

\textsuperscript{20}Loughlin, fn.15 above, at 263.

\textsuperscript{21}Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 at 397, per Gibbs J; Zhu v Treasurer (NSW) (2004) 218 C.L.R. 530 at 571, per Gleson C.J., Gummow, Kirby, Callinan and Heydon JJ.

\textsuperscript{22}Finn, “Equitable Doctrine and Discretion in Remedies” in Cornish et al., fn.17 above, p.17 at 259.
Logically entails that D cannot be liable where F is not liable; but what of a breach of trust by an honest trustee who is able to rely on an exclusion of liability clause in the trust deed; that is, a trustee who never incurs liability? There is no reason why a dishonest D should be able to avoid liability because he or she dealt with an honest trustee yet Model A suggests this outcome. Similar questions arise in relation to fiduciaries.23 The secondary liability model downplays D’s role in the breach of F’s duty yet D may be the instigator of the breach and F merely D’s innocent tool in that enterprise. Given that the extent of wrongdoing by F and D can vary greatly it is preferable to consider D’s conduct directly rather than through the lens of F’s wrongdoing. A model of liability is needed that can differentiate between the two; and Model A does not do this. Thus, whilst D’s liability is “secondary” in the weak sense that one element of the liability is proof of another’s breach of trust or other fiduciary duty, D’s liability should not depend upon a remedy being available against F: D is liable because of his or her own independently wrongful conduct and, hence, the liability is primary in nature as suggested by Model B. In Lord Nicholls’ words, writing extrajudicially, “breach of trust and dishonest participation in a breach of trust are two species of equitable wrongs”.24

(d) Model B (primary liability leading only to compensatory remedy)

Under Model B the remedy for dishonest assistance is limited to equitable compensation on the basis that the equitable claim is analogous to the common law tort of interference with contract.25 It is assumed that the nature of D’s wrongdoing, exploitation of C’s vulnerability, is adequately addressed by awarding compensation for any resulting harm.26 It is fallacious, the argument goes, to equate D’s wrongdoing with that of F, and therefore as warranting gain-based remedies, because D has not undertaken the same loyalty obligation as F and does not owe a fiduciary duty. Accordingly, it is said that gain-based remedies are only warranted in relation to a trustee or fiduciary because they have undertaken not to profit from their positions without the informed consent of C. The third party who profits from his or her involvement in the breach of trust or fiduciary duty has not breached any such undertaking.27 Thus, according to Model B, the primary liability of D is different in kind to the primary liability of F, and warrants less extensive remedies.

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23See, e.g. Yeshiva Properties No.1 Pty Ltd v Marshall (2005) 219 A.L.R. 112 (F secured waiver of liability from C who then sued D).
24fn.17 above, at p.244.
27See, e.g. the defendant’s argument in Fyffes Group Ltd v Templeman [2000] 2 Lloyd’s Rep. 643 at 669, per Toulson J. See also Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2007] EWHC 915; [2007] 2 All ER (Comm) 993 at [124]–[125], per Rimer J.
Of course, a loss-based remedy for dishonest assistance is easily justified given the principled rationale for liability. At the very least, D should compensate C for loss resulting from D’s wrongful conduct. If any further support is needed for this proposition it can be found in the remedy available for the common law tort of interference with contract. It must be at least as wrongful to interfere with a fiduciary relationship as it is to interfere with a contractual relationship.28 There is a separate issue regarding how that loss should be quantified; as will be discussed below, the current rules for assessing equitable compensation in relation to third parties mean that the loss-based remedy can be onerous. Nonetheless, the availability of a loss-based remedy, in principle, is uncontroversial.

However, if the liability is considered primary in nature, is a gain-based remedy equally justifiable? The proposition that so long as C is compensated for loss then D may keep any additional profits resulting from his or her wrongful conduct is not self-evident.29 It is true that D has not given an undertaking of loyalty; but nonetheless, if he or she has dishonestly interfered with the trust or fiduciary relationship for profit, thereby exploiting C’s vulnerability, this constitutes significant equitable wrongdoing for which a gain-based remedy might be available. Gibbs J. in *Consul Development Pty Ltd v DPC Estates Pty Ltd* took this approach:

“... the [fiduciary conflict of interest] rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that he had gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom.”

On this approach, the wrongdoing of F and D, whilst separate and distinct, are equally unmeritorious and exploitative of the vulnerable; and, arguably, both warrant a gain-based remedy when appropriate.

Nonetheless, does the similarity of equitable dishonest assistance liability with the common law tort of interference with contract warrant confining the equitable remedy to compensation as Model B suggests? A problem with Model B is that in seeking consistency with the tort of interference with contract insufficient attention is given to the differences between the equitable liability and the common law liability. Under the equitable liability D exploits a duty of undivided loyalty rather than the duty to perform a contract; there is a qualitative difference between these two duties which justifies a greater range of remedies being available.

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29 Lord Nicholls fn.17 above, at p.244.
30 (1975) 132 C.L.R. 373 at 397. See also *Zhu v Treasurer (NSW)* (2004) 218 C.L.R. 530 at 571, per Gleeson C.J., Gummow, Kirby, Callinan and Heydon JJ. See also Lord Nicholls fn.17 above.
in relation to interference with the former duty. The duty to perform one’s contractual obligations is qualified in several ways in order to accommodate, for example, the efficient operation of the market and the protection of the contracting parties’ respective autonomies. Therefore, it will not necessarily be regarded as wrongful for a third party to retain an economic benefit resulting from the wrongful interference with another’s contractual obligations, so long as the innocent party is compensated for any loss. Conversely, the liability of a fiduciary is strict; F can only escape liability if C gives fully informed consent to the breach. The function of the fiduciary obligation is to ensure that F is loyal to C in a relationship of inequality; there are no competing economic or autonomy considerations to be balanced with this obligation and which might justify D retaining benefits resulting from dishonest assistance in the breach of fiduciary duty.31

In any event, it is a mistake to assume that the common law necessarily has “got it right” in relation to its remedial scheme. The debate over whether gain-based remedies should be available in relation to breach of some common law duties shows that the need for equitable wrongs to be remedially consistent with common law wrongs has to be carefully thought through.32

(e) Further justifying gain-based remedies

The pragmatic aspects of the rationale for dishonest assistance liability, particularly the second ground of deterrence, add weight to allowing gain-based remedies. If third party liability is effectively to deter breaches of trust and fiduciary obligation then it must be possible to require D to give up profits derived from the dishonest assistance. The pragmatic rationale is especially weighty where F and D are not independent actors; for example, if both are likely to derive benefit from the gain regardless of who receives it. So, for example, if D is closely related to F, or is a company controlled by F, or vice versa, it makes little sense to limit the availability of gain-based remedies to F. An early authority illustrating this point is the Privy Council case of Cook v Deeks.33 D was a company formed by F to take over the contract entered into by F in breach of fiduciary duty to C. Lord Buckmaster L.C., on behalf of the Privy Council, held that as D had full

31A similar argument is made by Worthington, “Reconsidering Disgorgement for Wrongs” (1999) 62 M.L.R. 218 at 236–237. Worthington argues gain-based remedies are justified in relation to breach of fiduciary duty because of the social value attached to the fiduciary relationship; and thus the object of the remedies is to prevent breaches occurring at all, rather than simply to remedy resulting harm. Her arguments apply equally to third parties.


knowledge of the breach of duty (F was D’s controlling mind and will), an account must be directed against it.

It might be argued that such cases are simply instances of piercing the corporate veil; that is, the fiduciary and corporate third party are treated as interchangeable entities where the former is the controlling mind and will of the latter.34 On this interpretation of the cases, gain-based remedies are not necessarily available for dishonest assistance per se but will be available where D is treated as indistinguishable from F. But such an interpretation does not explain all of the authorities where a gain-based remedy against D has been recognised. For instance, several Australian cases have involved fiduciaries poaching business from their respective employers with the dishonest assistance of their wives or friends as well as, or instead of, companies created to conduct the new businesses; and gain-based remedies have been awarded against the third parties whether or not controlled by F.35

There are also Australian authorities where a gain-based remedy was awarded (or would have been available had all the elements of the action been found) against a completely independent third party. In Consul Development Pty Ltd v DPC Estates Pty Ltd, for example, the relationship between F and the controlling mind of D (Clowes) was that of fellow employees of C (Clowes as an articled clerk and F as a real estate adviser and manager).36 F and D were independent actors and not likely to benefit from each other’s separate and distinct profit; thus there was no implication that they were being treated interchangeably for the purposes of remedy. And in United States Surgical Corp v Hospital Products International Pty Ltd, overturned on appeal on other grounds, a constructive trust was imposed over the assets of D, a public company unrelated to F.37 Similarly, in the English case of Fyffes Group Ltd v Templeman, D was an independent company, seeking to do business with C, who bribed F in order to secure contracts with C.38 Toulson J. held that, in principle, a gain-based remedy was available against C. These authorities, from Cook v Deeks onwards, suggest that D’s liability, although separate and distinct from that of F, warrants gain-based remedies.

The strongest case for a gain-based remedy being available is where the gain is one that could have been made by C; for example, where D

34See, e.g. Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2007] EWHC 915; [2007] 2 All ER (Comm) 993 at [104] and [132]–[133], per Rimer J. Such an argument (made in relation to Cook v Deeks [1916] 1 A.C. 554) was rejected in Fyffes Group Ltd v Templeman [2000] 2 Lloyd’s Rep. 643 at 669–670, per Toulson J.
36(1975) 132 C.L.R. 373.
exploits a business opportunity that should have been offered by F to C. In a very loose sense there is a causal nexus between D’s gain and C’s loss, even if the two are not identical, and even though it is not possible to trace from C to D. C has missed out on the opportunity to exploit the business opportunity which D has exploited; and in that sense, assuming that C would have exploited the opportunity at least as well as D, then C’s loss can be equated with D’s gain. Indeed, it may be that the distinction in such cases between a gain-based, and loss-based, remedy is sometimes overlooked and “compensation” equating with the third party’s gain is awarded.

The New South Wales Supreme Court decision of Colour Control Centre Pty Ltd v Ty explicitly recognised the distinction between the loss-based and gain-based remedy for D’s exploitation of a business opportunity that should have been offered to C; and provides a helpful model for assessing a gain-based remedy in loss of business opportunity cases. In that case, Santow J. assessed C’s losses resulting from the breach of fiduciary duty as

“the profits [C] would have made if [C] had secured and retained the [business opportunity]. . .multiplied by the chance that the work would have been obtained, which I have estimated at 30%.”

And he assessed Ds’ profits for which they should account as being the total profit made from the business opportunity discounted by 20 per cent to reflect D’s “time, energy, skill, and financial contribution”. He assumed that C would elect the latter, higher, sum.

Is it possible to go further, however, and argue that a gain-based remedy against D is justifiable, given the primary nature of D’s liability, even where C has suffered no loss at all? Clearly, a fiduciary is liable to account for profits resulting from a breach of fiduciary duty, regardless of whether C suffered a loss; but does the nature of D’s separate wrongdoing (dishonest exploitation of C’s vulnerability) justify the same approach being taken? Would that be to cast D as a fiduciary even though he or she has undertaken no obligation of loyalty? To some extent this question is obscured by the fact that the rules for assessing equitable compensation are so favourable to principals that it is only in extreme cases that C will be unable to demonstrate any loss; nonetheless, circumstances can be envisaged where D should still account for his or her gains. One example is where D actively encourages F to make certain investments, knowing that this will constitute a breach of the trust or fiduciary duties (due to

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40At 22.
41At 24.
42Boardman v Phipps [1967] 2 A.C. 46.
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a conflict of interest, say) and where D’s conduct is motivated by the receipt of generous commissions for securing these investments. Even if, fortuitously, C suffers no loss from the investments, it seems perfectly appropriate that D be made to account for his or her gain (assuming all other conditions for liability are met). Such a result can be justified by the principled aspect of the rationale (D’s wrongdoing) and is further strengthened by the pragmatic aspect: requiring third parties to disgorge wrongfully acquired gains has a deterrent effect on such conduct, thereby preventing potential breaches of the fiduciary obligation by other trustees and fiduciaries.

(f) Limitations on gain-based remedies

To argue that the principled aspect of the rationale for third party liability justifies a gain-based remedy, however, does not mean that D’s liability must be synonymous with that of F; in other words, D need not be treated as though he or she were a trustee or fiduciary. The fact that F has given an undertaking of loyalty whereas D has not is still relevant. Nor is the argument that in all cases where D makes a gain from dishonest assistance in a breach of trust or fiduciary duty, but C suffers no loss, a gain-based remedy should be awarded; simply that this should be an available remedial option where the degree of D’s culpability, or close relationship with F, warrants it. In the example given above, D actively and deliberately encouraged the breach of duty by F in order to secure the investment commission; the remedial scope might be different where D was approached for investment advice and gave it in circumstances that still constituted dishonest conduct but not of the same degree of culpability (for example, if D behaved recklessly rather than fraudulently).

This helps to explain the decision not to award a gain-based remedy in Fyffes Group Ltd v Templeman. In that case D bribed F in order to secure contracts with C. Whilst Toulson J. held that the profits made by D on the resulting contracts were recoverable in principle, on the facts of the case, no profit remedy was awarded because it was found that C still would have entered the contracts with D absent any wrongdoing. The profits that D made from the contracts were “not caused by the bribery” but were an “‘ordinary’ profit element” that would have been earned irrespective of the breach of duty.45 D was liable simply to compensate C for losses resulting from the bribery (including, but not limited to, the amount of the bribes). Thus, compensation was awarded to reflect the extent to which

the agreed contractual terms were more favourable to D than would have
been the case without the breach of duty by F.

Whilst Toulson J. in *Fyffes Group Ltd v Templeman* apparently saw
his reasoning as applying equally to fiduciaries,\(^{46}\) the Court of Appeal in
*Murad v Al-Saraj* disagreed.\(^{47}\) In that case, a fiduciary was not permitted
to argue that because C would have entered the impugned transaction even
if there had been no breach of fiduciary duty, and hence, F would have
legitimately earned at least some profits, he should only be liable for a
proportion of the profits resulting from the transaction. That is, the same
argument, used successfully by a dishonest assistant in *Fyffes Group Ltd
v Templeman*, failed when used by a fiduciary in *Murad v Al-Saraj*.

The decision in *Murad v Al-Saraj* is consistent with established
principles of fiduciary law.\(^ {48}\) Arden and Jonathon Parker L.J.J., in the
majority, apparently assumed that the liability of a fiduciary and a
dishonest assistant are based upon the same principles and on this basis
expressed doubt as to the correctness of Toulson J.’s decision in *Fyffes
Group Ltd v Templeman*. With respect, the two decisions are consistent
if one accepts that the nature of D’s wrongdoing (exploitation of C’s
vulnerability) and the nature of F’s wrongdoing (breaching an undertaking
of loyalty) are different; F’s duties are of a more absolute, prophylactic,
nature and warrant more stringent remedies.

(g) Case law support for “Model C”

There are some cases to support a model of primary liability leading to
both loss-based and gain-based remedies and which I will call “Model C”.
As well as the early decision of *Cook v Deeks*, and the later Australian
cases, most recently in *Fyffes Group Ltd v Templeman*, Toulson J. rejected
the defendants’ Model B argument and preferred the approaches of Gibbs
J. in *Consul Development Pty Ltd v DPC Estates Pty Ltd* and the Privy
Council in *Cook v Deeks*.\(^ {49}\) He concluded that a dishonest assistant was
personally liable to account due to his or her implication in F’s fraud and
if, in fact, extra profits resulting from the bribe alone could be identified
(they could not). Toulson J.’s reasoning was confirmed by Lewison J.
in *Ultraframe (UK) Ltd v Fielding* as applying wherever a dishonest
assistant makes a personal gain resulting from the dishonest assistance
or consequent breach of trust or fiduciary duty; that is, the finding in

\(^{46}\) He cited the leading Australian authority on account of profits for breach of fiduciary duty: *Warman
International Ltd v Dwyer* (1995) 182 C.L.R. 544 at 561, per Mason C.J., Brennan, Deane, Dawson and
Gaudron J.J.


\(^{49}\) [2000] 2 Lloyd’s Rep. 643 at 670. Toulson J. also drew support from the analogous position of a
third party procuring or assisting in a breach of confidence.

Fyffes Group Ltd v Templeman did not depend upon special public policy concerns with respect to bribes.\(^{50}\)

### III. JOINT AND SEVERAL LIABILITY

Having justified, in broad terms, a model of primary liability for the equitable wrong of dishonest assistance that allows both loss-based and gain-based remedies, Model C, does this help in answering two subsidiary questions concerning the remedy; namely:

(i) should D and F be jointly and severally liable for C’s losses; and

(ii) should D and F be jointly and severally liable for their gains?

(a) **Joint and several liability for losses\(^{51}\)**

If D’s liability is to be characterised as a primary liability, as argued above, it follows in principle that D should be liable only for losses “caused” by D’s own wrongdoing; that is, once D’s dishonest assistance is determined to be a cause-in-fact of C’s losses, the court should consider, as a normative question, the appropriate scope of D’s liability for those losses.\(^{52}\) In fact, however, once D is found to have dishonestly assisted F in the breach of trust or other fiduciary duty, D is held jointly and severally liable with F for all of C’s losses for which F is liable and which result from the breach of duty.\(^{53}\) That is, D takes on F’s liability for C’s losses. Thus, in relation to C’s claim, there is no separate inquiry as to the scope of D’s liability.\(^{54}\) This can result in D being liable to compensate for extensive losses suffered by C even though D’s contribution to the breach of trust or fiduciary duty was relatively minor when compared with that of F (and vice versa).


\(^{51}\) An issue that will not be dealt with here is whether the assessment of equitable compensation for dishonest assistance should be the same for all breaches of trust, whether breach of a fiduciary duty or not. See Bristol & West Building Society v Mothew [1998] Ch. 1; Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 C.L.R. 484. See also Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 L.Q.R. 452 at 479.

\(^{52}\)“Under both systems [common law and equity] liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong.” Target Holdings Ltd v Redfemis [1996] 1 A.C. 421 at 432, per Lord Browne-Wilkinson. The terminology of “cause-in-fact” and “appropriate scope of liability” is taken from Stapleton, “Cause-in-fact and the Scope of Liability for Consequences” (2003) 119 L.Q.R. 388. It was adopted by the Court of Appeal in Corr v IBC Vehicles Ltd [2006] EWCA Civ 331; [2007] Q.B. 46 at [15], per Ward L.J. and by the House of Lords in Kuwait Airways Corp v Iraqi Airways Co (No.3) [2002] UKHL 19; [2002] 3 All E.R. 209 at 228, per Lord Nicholls.


The absence of a separate inquiry into the scope of D’s liability for C’s losses appears to favour Model A (secondary liability); indeed, the few authorities that specifically address the question of causation in relation to dishonest assistance are relied upon by Elliott and Mitchell as conclusive evidence that the English courts support a secondary liability model of dishonest assistance.\textsuperscript{55} If the relevant wrongdoing is that of F, D becoming liable for that wrongdoing through accessorial conduct, then the remedial focus must be on the consequences of that primary wrongdoing. On this analysis, the scope of liability inquiry concerns F’s breach of duty, rather than D’s accessorial conduct. Indeed, according to Elliott and Mitchell, on the secondary liability, Model A, approach, all that is necessary is that D’s “acts or omissions have at least made the commission of the breach easier than it would otherwise have been . . .”\textsuperscript{56} D’s dishonest assistance constitutes a “complicity nexus” which substitutes for the scope of liability inquiry.\textsuperscript{57}

There are two alternative justifications for the joint and several liability of F and D which are compatible with a primary liability analysis of dishonest assistance. First, the courts take a generous, claimant-favouring, approach to the scope of F’s liability when assessing compensation for losses caused by a fiduciary.\textsuperscript{58} This is consistent with the prophylactic characteristics of fiduciary law generally. The pragmatic aspects of the rationale for third party liability (particularly that of providing C with an alternative means of recourse) suggest that the same approach be taken when assessing D’s liability for C’s losses. Thus, whilst as a matter of principle, a normative inquiry should be conducted in relation to D’s wrongdoing and the consequent scope of D’s liability, because such issues can be complex, even on equity’s more claimant-favouring rules, all that C needs to establish is that loss was “caused” by F’s breach of trust or fiduciary duty (that is, F’s conduct was a cause-in-fact of C’s losses and the losses were within the scope of his or her liability); and secondly, that D dishonestly assisted in the breach and was also a cause-in-fact of C’s losses. Indeed, it can be argued that the far-reaching consequences of joint and several liability have been a factor in the English courts’ endorsement of a high threshold (dishonesty) for liability; that is, the sort of conduct by a third party that would lead to a finding of dishonesty warrants that party bearing the risk of full liability for the loss caused to C.

A second justification for the apparent anomaly of D being held responsible for F’s liability to C is that it is only in relation to C that


\textsuperscript{56}At 20.

\textsuperscript{57}At 17–18 quoting from Cooper, Secondary Liability for Civil Wrongs (Ph.D. thesis, University of Cambridge, 1996). See also Sales, fn.12 above, at 510.

questions of relative responsibility are ignored; as between D and F such issues are relevant, and go to the question of contribution.59 The fact that F is liable to pay contribution to D if D meets C’s claim for compensation bears out the argument that the reasons for joint and several liability are pragmatic and prophylactic rather than a logical consequence of D’s liability being secondary to that of F. Thus, even on the model of primary liability argued for in this paper, Model C, D’s joint and several liability C’s losses can be justified.

(b) Joint and several liability for F’s gains

According to my proposed model of primary liability, Model C, the remedy available against D should be directed towards D’s wrongdoing; and therefore it follows that D should not be liable for gains made by F. Nonetheless, it is possible to conceive of circumstances where liability for F’s gains might be justified given the degree of D’s culpability. For example, where F is simply the vehicle for D’s enrichment, and D is the instigator of the breach of duty, such as where F is a company controlled by D, it could be argued that D should account for the gains made by F. Of course, such a claim would only be necessary where F was unable to meet its liabilities and if it were not possible to trace F’s gains into D’s hands (thereby activating either recipient liability or proprietary liability). On the other hand, it may be that such scenarios can be accommodated in other ways; for example in a corporate setting, where F is a company in which D has a substantial interest, removing the gains of F may have the indirect consequence of withholding or removing gains from D.60 Alternatively, if F’s function is solely to be the vehicle for D’s enrichment then there may be a case for piercing the corporate veil.61

Characterising D’s liability as secondary, under Model A, on the other hand, would lead to D being liable for F’s gains because under this model D assumes F’s liability to C. Conversely, if it is D who makes a gain from the breach of trust or fiduciary duty, this gain would not be recoverable, even from D, because it is not a gain for which F is accountable. Elliott and Mitchell do not endorse these aspects of Model A. In particular, they consider that holding D jointly and severally liable for gains made by

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59See Finn, fn.9 above, at p.217; Mitchell, fn.53 above, and Mitchell, fn.12 above, at p.157; Gurr, Beyond the Dishonesty Test: Accessory Liability and Contribution, Release and Apportionment (Honours thesis, Australian National University, 2006).

60See, e.g. Warman International Pty Ltd v Dwyer (1995) 182 C.L.R. 544 at 563–564, per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ. The court noted that an account of profits directed against the third party company would indirectly achieve a similar result to an account of profits, or constructive trust, in relation to F’s shareholding in the company.

61See Trustor AB v Smallbone (No.2) [2001] 1 W.L.R. 1177; Gencor ACP Ltd v Dalby [2000] 2 B.C.L.C. 734; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638; [2006] F.S.R. 17 at [561]–[576]. The discussion in these cases concerns the opposite scenario; that is, where D is the corporate entity.

F goes beyond what is necessary to fulfil the pragmatic and principled rationales of liability and thus amounts to a punitive measure.

There is a line of Canadian cases supporting joint and several liability on D for F’s gains on the basis that D is to be treated as though he or she were a co-trustee or fiduciary. Those cases, however, contain no discussion of principle and the very difficult questions of law concerning the contribution rules between co-trustees are not elaborated upon; that is, whether or not co-trustees are always jointly and severally liable for each others’ gains. Most recently, Lewison J. in Ultraframe (UK) Ltd v Fielding adopted the view of Elliott and Mitchell and held that joint and several liability for gains was not justified as a matter of principle and, having penal consequences, it went beyond the court’s jurisdiction as a court of equity. For the moment then, the English courts seem unlikely to endorse joint and several liability for gains except where a case can be made for piercing the corporate veil. Such an approach is consistent with a model of primary liability.

IV. PROPRIETARY REMEDIES

If the arguments so far are accepted, then according to Model C, D should be subject to a primary liability to C based upon D’s dishonest exploitation of C’s vulnerability arising from the fiduciary relationship with F. D is potentially liable for both loss-based and gain-based remedies; but can this extend to a proprietary gain-based remedy? The remedies in question are the constructive trust and the equitable lien. Model A and Model B cannot accommodate these remedies; and, since these models have also proved inadequate in relation to the remedies discussed so far, will not be considered further.

(a) When is a proprietary remedy warranted?

A worthwhile exercise is to consider why a proprietary remedy in relation to D’s profits would ever be warranted given that the pragmatic and principled rationales of dishonest assistance liability (namely, deterrence of other dishonest assistants, provision of alternative means of recourse to

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C, and redress of D’s wrongdoing) all appear to be met by the personal remedies of equitable compensation and account of profits. A proprietary remedy clearly bolsters the alternative means of recourse given to C, most obviously by enabling C to secure priority over unsecured creditors of D in the event of D’s insolvency. Prioritising C’s rights over those of D’s unsecured creditors has no deterrent effect upon D, however, nor upon other potential dishonest assistants.64 Furthermore, awarding a proprietary remedy against an insolvent D disrupts the operation of statutory insolvency regimes and disadvantages unsecured creditors not implicated in the dishonest assistance.65 Thus, a proprietary remedy is not warranted where D is unable to meet all of his liabilities. This may be difficult to determine in practice, however, for the ability of D to satisfy his or her unsecured liabilities does not necessarily correlate with D’s insolvency.66

In fact, insolvency protection has not been a relevant factor in Australian dishonest assistance cases that have contemplated or awarded a proprietary remedy.67 In each instance, the remedy was directed towards effectively redressing D’s wrong vis-à-vis C, rather than in ensuring C’s priority in the event of an inadequate pool of assets. These cases demonstrate that there are motivations, other than insolvency protection, as to why a proprietary remedy might be sought and these are consistent with the principled rationale for liability.68

First, a proprietary remedy may be the most straightforward means of ensuring that C is not disadvantaged by D’s wrongdoing. In other words, although an accurate compensatory award will, in principle, achieve the same result, a constructive trust will most effectively redress D’s wrongdoing. An example is where D dishonestly uses non-confidential information, imparted by F in breach of fiduciary duty, to exploit a property redevelopment opportunity that should have been offered to C.69 A court may order D to account for his profits; however, this may not reflect the gain that C could have made if given the opportunity by F to exploit the information, particularly where the opportunity is not yet fully

65 Re Polly Peck International Plc (No.2) [1998] 3 All E.R. 812.
69 See, e.g. _Consul Development Pty Ltd v DPC Estates Pty Ltd_ (1975) 132 C.L.R. 373 (proprietary remedy sought but elements of claim not found); see also _Say-Dee Pty Ltd v Farah Constructions Pty Ltd_ [2005] NSWCA 309; where, on similar facts, the NSW Court of Appeal granted a constructive trust for recipient liability. The finding of a breach of fiduciary duty was overturned on appeal: _Farah Constructions Pty Ltd v Say-Dee Pty Ltd_ (2007) 230 C.L.R. 89.

realised by D. Similarly, C could seek equitable compensation for the loss of profits discounted by the possibility that C would not have taken up the opportunity; however, C may be disadvantaged by the difficulty of accurately assessing such compensation. If a constructive trust is imposed over the property acquired by D, with appropriate allowances for D’s expenditure and efforts to date, C can pursue the property development opportunity. For example, in Consul Development Pty Ltd v DPC Estates Pty Ltd C sought a constructive trust over the real properties acquired through D’s exploitation of an opportunity which F should have disclosed to C.70 The elements of the claim were not made out in the High Court of Australia and so the remedy sought was not in issue; however, none of the judges appeared concerned about the constructive trust order made by the New South Wales Court of Appeal. Thus, if D has usurped C’s commercial opportunity C should be able, by means of a constructive trust, to step into D’s shoes and complete the venture. Similarly, as in the New South Wales Supreme Court decision of Timber Engineering Co Pty Ltd v Anderson, if company D is created in order dishonestly to assist F (the manager of C) to divert C’s business to D, the most effective remedy from C’s point of view may be a constructive trust over the assets of D to reflect the fact that D’s business is wholly referable to equitable wrongdoing by F and D.71 Just allowances can be made for D’s expenses, efforts and skill.

In Ultraframe (UK) Ltd v Fielding Lewison J. held that Timber Engineering Co Pty Ltd v Anderson was inconsistent with the Australian High Court decision of Warman v Dwyer72; with respect, however, this is not so. A proprietary remedy is not as appropriate when, as in Warman v Dwyer, although a competing business is set up by D and F in breach of F’s fiduciary duties to C, the success of the endeavour substantially reflects the skill and efforts of D and F, and the business opportunity would not have been pursued by C. In Warman v Dwyer a constructive trust was not sought because it was not a proportionate response to the degree of F and D’s wrongdoing, not because it was unavailable as a remedial option. An account of D’s profits for the first two years of operation, with appropriate allowances, better reflected the extent to which D had gained by the breach of fiduciary duty in that a large proportion of the continuing success of...
F and D’s enterprise was referable to F’s own skill and efforts. Timber Engineering Co Pty Ltd v Anderson and Warman v Dwyer are perfectly consistent decisions that illustrate when a proprietary remedy is, or is not, appropriate. In fact, the remedies awarded in Warman v Dwyer were equitable charges over the assets of the two third party companies to secure accounts of profits of the respective companies; that is a, lesser proprietary remedy was still given.

A further situation, again unrelated to D’s insolvency, where it might be desirable for C to seek a constructive trust over property representing D’s gain from dishonest assistance is if the property is no longer identifiable in D’s hands but the value inherent in it can be traced to property held by a third party who is not a bona fides purchaser for value. C is limited to a personal gain-based remedy against D, but also may assert his proprietary interest in property held by the third party.

Thus, there are motivations other than insolvency protection for considering a proprietary remedy for dishonest assistance. Such scenarios occur where, as between C and D, C has the better claim to the assets held by D; conversely, where D is insolvent, and the competition is between C and D’s creditors, C does not have a superior claim. The difficulty of determining whether the competition will be between C and D, or C and D’s unsecured creditors, may be a practical obstacle to allowing proprietary remedies; but leaving that to one side for the moment, are there principled reasons for refusing a proprietary remedy even where D is not insolvent or likely to become so? Here, an illuminating contrast can be noted between the law in England and Australia.

(b) Proprietary remedies in England

According to orthodox principles of English law, a proprietary remedy is only available if C can assert a pre-existing proprietary interest in D’s property (if necessary, by tracing the value inherent in C’s original property into substitute property held by D); or, alternatively, if C can establish an ‘institutional’ constructive trust over property held by D. An institutional constructive trust arises automatically upon the occurrence of specified events and does not involve the ex post facto exercise of

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73 Hospital Products Ltd v United States Surgical Corp (1984) 156 C.L.R. 41 at 110, per Mason J., citing Re Jarvis [1958] 1 W.L.R. 815 at 820, per Upjohn J.
74 Warman International Ltd v Dwyer (1995) 182 C.L.R. 544 at 570 per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ.
75 An analogous example is Attn-Gen (Hong Kong) v Reid [1994] 1 A.C. 324 (C claimed proprietary rights to constructive trust property traced from F to D).
77 The third option of a resulting trust is not relevant in a dishonest assistance scenario. See Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669 at 714, per Lord Browne-Wilkinson.
judicial discretion. The former situation does not depend upon dishonest assistance liability, for C simply asserts pre-existing proprietary rights. The question, then, is whether C can claim proprietary rights to property in D’s hands purely on the basis of D’s dishonest assistance where there is no proprietary “link”, through tracing, between C and D. The debate in England has focused upon constructive trusts rather than equitable liens.

Accepting, for now, the terminology of “institutional” constructive trusts, dishonest assistance is not a recognised category in which such trusts arise in England. The closest analogy is that an institutional constructive trust is said to arise when F acquires property in breach of trust or fiduciary duty. Pursuant to the equitable maxim that Equity looks on that as done which ought to be done, Equity treats the property as having been obtained for C, and thus, as belonging to C from the moment it was received by F. Therefore, it is said, the court recognises a proprietary interest rather than creating one. The same reasoning could be used to justify an institutional constructive trust arising when, as a result of F’s breach of duty, D acquires property that should have been acquired, if at all, for C; however, this has not been the case. Furthermore, the institutional constructive trust arising upon breach of fiduciary duty is controversial: particularly where the subject-matter of the constructive trust would never have been received legitimately by C (for example, where F takes a bribe and converts it to property). Critics of the institutional constructive trust in this context argue, inter alia, that there is no principled justification for prioritising C’s rights over other unsecured creditors of D where the property could never have been legitimately received by C and that, in any event, proprietary relief is not necessary in order to meet the rationale for F’s liability. Given the contested status of the institutional constructive trust for breach of fiduciary duty, it is unlikely to be extended by analogy to dishonest assistants.

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78 e.g. the constructive trust which arises upon a contract for the sale of land: Pettit, Equity and the Law of Trusts, 10th edn (2006), at p.163.
80 Keech v Sandford (1726) Sel. Cas. Ch. 61; Boardman v Phipps [1967] 2 A.C. 46; Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324
81 Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324 at 331, per Lord Templeman.
82 Millett, “Proprietary Restitution” in Degeling and Edelman (eds), Equity in Commercial Law (2005), at p.324.
Justifying the Remedies for Dishonest Assistance

A proprietary remedy for dishonest assistance is said to involve a “remedial” constructive trust and the English courts do not recognise such trusts.86 A remedial constructive trust is “an order of the court granting, by way of remedy, a proprietary right to someone who, beforehand, had no proprietary right”; that is, it allows the court to vary proprietary rights at the court’s discretion.87 The primary concerns of those who oppose remedial constructive trusts are that they contravene the principles of insolvency law, they violate the rule of law by allowing courts to create proprietary rights, and they create uncertainty in the law.88

(c) Proprietary remedies in Australia

The institutional/remedial dichotomy is puzzling to an Australian lawyer. As was recognised by Deane J. in Muchinski v Dodds, institutional constructive trusts derive that status simply through repeated judicial recognition; that is, all recognised trusts began life as remedial responses to particular instances of equitable wrongdoing and became institutional through repeated usage.89 There will always be some element of discretion involved in recognising a constructive trust because such trusts, unlike express and resulting trusts, are not referable to the parties’ intentions and depend for their enforcement wholly upon the court’s recognition.90 Furthermore, although in a developing category of law greater judicial discretion will be necessary to determine whether the remedy is warranted, it is a constrained discretion; that is, the principles for its exercise can be worked out. Whilst some categories of constructive trust are well-established and require very little discretion on the court’s part, others are still evolving. Thus, in Australia the notion that a legitimate constructive trust involves no element of discretion has been rejected; and, furthermore, the institutional/remedial distinction is seen as a connoting a remedial spectrum rather than a remedial dichotomy.

In Australia, proprietary remedies for breach of fiduciary duty are available at the court’s discretion;91 and, as noted above, the constructive trust and equitable lien have also been awarded for dishonest assistance.92

87 Re Polly Peck International Plc (No.2) fn.86 above, at 830, per Nourse L.J.
92 Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373; Timber Engineering Co Pty Ltd v Anderson [1980] 2 N.S.W.L.R. 488 (approved by Mason J. in Hospital Products Ltd v United...
On the other hand, in one of its recent references to dishonest assistance liability, the Australian High Court appeared to suggest that the remedy is not proprietary: “Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee.”93 When this passage is read in context, however, it seems that the court was emphasising that the language of constructive trusteeship applies to dishonest assistance liability regardless of whether any trust property is involved. With respect, this obiter dictum was not directed to the separate question of whether later acquired property may be impressed with a trust or lien.

The case for the Australian approach to proprietary remedies, whilst attractive, is not yet overwhelming, however, because there is uncertainty as to how the court’s discretion may be exercised in relation to breach of fiduciary duty and dishonest assistance, albeit that this uncertainty is due to the evolving nature of the jurisdiction, rather than an unwillingness to set boundaries to the remedial discretion.94 It is possible to glean from the current authorities on discretionary proprietary remedies in Australia the following, possibly overlapping, general principles:

(i) The least intrusive proprietary remedy should be awarded; that is, the first question is “whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust.”95

(ii) The interests of innocent third parties, including unsecured creditors, must be protected.96 It is not clear how such exercise is to be undertaken; although, where such interests are affected, two options are to refuse a proprietary remedy altogether or to award only future security.97

(iii) The court always has a residual discretion to withhold the proprietary remedy on established grounds such as laches.98

93 Giumelli v Guimelli (1999) 196 C.L.R. 101 at 112, per Gleeson C.J., McHugh, Gummow and Callinan JJ.
97 Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373; Timber Engineering Co Pty Ltd v Anderson (1980) 2 N.S.W.L.R. 488 (approved by Mason J. in Hospital Products Pty Ltd v United States Surgical Corp (1984) 156 C.L.R. 41 at 115-116); United States Surgical Corp v Hospital Products International Pty Ltd [1983] 2 N.S.W.L.R. 157 (overturned on appeal on other grounds); Muschinski v Dodds (1985) 160 C.L.R. 583 at 623, per Deane J.; Warman v Dwyer (1995) 182 C.L.R. 544.
98 See, e.g. Chan v Zacharia (1984) 154 C.L.R. 178 at 204-205, per Deane J. referring to “other doctrines of equity such as laches and equitable estoppel”; Warman International Ltd v Dwyer (1995) 182 C.L.R. 544 at 559, per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ: “estoppel, laches, acquiescence and delay”.

With respect, the careful manner in which the Australian High Court has so far viewed the discretion to award a constructive trust, and the absence of glaring examples of injustice to third parties consequent on such remedies being awarded, casts doubt on the claims of some commentators that a discretionary imposition of proprietary remedies is always and intrinsically “repugnant alike to legal certainty, the sanctity of property and the rule of law”.99 Whilst the lack of certainty, as yet, makes the Australian model less appealing, it has the virtue of explicitly confronting the normative questions involved (particularly with respect to D’s insolvency).

A consideration of the Australian law suggests that a constructive trust may be imposed, and should only be imposed, as a remedy for dishonest assistance where

(i) A proprietary remedy will be the most effective way to redress D’s wrongdoing and would not be otherwise available. This will generally occur where the whole of D’s gain is referable to D’s dishonest assistance, and either a constructive trust is the best means of placing C in the position that C would have been in had F’s breach of duty not occurred; and/or, where a business opportunity can still be pursued to fruition by C.100

(ii) The proprietary remedy can be framed so as to protect the interests of third parties.101 This means that if D is insolvent, or unable to meet his liabilities so that the contest is really between C and D’s unsecured creditors, a constructive trust should not be awarded.

Alternatively, even where an account of profits is deemed more suitable, and so long as condition (ii) can be met, an equitable lien may be imposed to secure the future payment by D of the account of profits.102

V. CONCLUSION

Although early cases awarding gain-based remedies did not explicitly distinguish F and D’s liability, dishonest assistance is best seen as a primary liability based upon D’s exploitation of C’s vulnerability (Model C). The nature of D’s wrongdoing is distinct from that of F who breaches an obligation of loyalty. The rationale for dishonest assistance liability has both pragmatic and principled features; these support the availability of gain-based remedies as well as loss-based remedies. Thus, neither of the models for dishonest assistance liability that are currently predominant in the case law and/or commentaries is satisfactory.

100See also Goode, “Proprietary Restitutionary Claims” in Cornish et al., fn.17 above, at p.74.
101Muschinski v Dodds (1985) C.L.R. 583 at 623, per Deane J.
In most cases the remedy for dishonest assistance will be equitable compensation (breach of fiduciary duty most often resulting in loss rather than gain); however, this does not preclude the court awarding an account of profits when appropriate. D’s joint and several liability for C’s losses resulting from F’s breach of duty is compatible with a model of primary liability if resort is had to the pragmatic rationales for liability; however, joint and several liability for F’s gains generally is not.

A proprietary remedy for dishonest assistance is justifiable only where D’s solvency is not in question. The Australian discretionary approach to awarding proprietary remedies can only be countenanced if it is accepted that, in equity, courts have a controlled remedial discretion. If this is accepted then a proprietary remedy may be awarded where it does not create injustice for innocent third parties and so as to allow C the most effective remedy. The scenario of D’s dishonest assistance in F’s diversion of a business opportunity from C shows that a proprietary remedy is sometimes the most appropriate means of redressing D’s wrongdoing. The Australian cases suggest a way forward in this regard.

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* Australian National University. I thank Jane Stapleton, Peter Cane, Joachim Dietrich and Michael Bryan for their constructive criticism of earlier drafts. A version of this article was presented at the Obligations III conference, Brisbane, July 2006.
CHAPTER FIVE
CHAPTER SIX
This article considers three possible directions for the development of equitable accessorial and recipient liability in Singapore. These are suggested by leading cases in Singapore, Hong Kong and Australia concerning recipient liability. The first direction is closest to the status quo. It involves a contextual inquiry into dishonesty or unconscionability and exceptionally allows constructive notice to suffice for recipient liability. The second possibility is to treat the two forms of liability as involving the same participatory liability for breach of trust or fiduciary duty. The third possible direction is to maintain a distinction between the two forms of liability and to minimise the operation of recipient liability where there is a concurrent common law claim. The final part of the article considers whether it is possible to achieve autochthony in this area of law, given the various non-legal considerations that may influence the direction taken.

1. Introduction

There have been calls for the development of an ‘autochthonous’ legal system in Singapore since the early 1990s; that is, for an indigenous system that is suited to Singapore’s circumstances. Yet the Singapore courts readily accept English and Privy Council cases as stating the applicable law with respect to the equitable liability of third parties to breach of trust and breach of fiduciary duty and look to them and their own jurisprudence in equal measure, without much reference to other common law jurisdictions. This is explicable on a number of grounds, not least because full independence from England and the Privy Council in relation to equitable doctrine was achieved comparatively recently. Yet, as Andrew Phang Boon Leong J.A. of

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EQUITABLE ACCESSORIAL AND RECIPIENT LIABILITY IN SINGAPORE

PAULINE RIDGE

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1 See especially Andrew Phang Boon Leong, The Development of Singapore Law: Historical and Socio-Legal Perspectives (Singapore: Butterworths, 1990) [Phang, Development of Singapore Law].

the Singapore Court of Appeal has noted, this area of law “has been, and continues
to be, rife with conceptual as well as practical difficulties”.

The Singapore courts do, on occasion, look to other jurisdictions for guidance in
relation to the development of equitable doctrine. For example, in relation to fiduciary
law itself, rather than its accessorial liability, the High Court of Australia’s decision in
_Hospital Products Ltd v. United States Surgical Corporation_ has been influential, as
has the extra-judicial fiduciary scholarship of Professor Paul Finn. Furthermore, the
Singapore courts’ independent and affirmative answer to the controversial question
of whether a fiduciary holds a bribe taken in breach of fiduciary duty, or its proceeds,
on constructive trust for his or her principal has been noted with respect around the
common law world. On this occasion, at least, Singapore did not follow English
law.

Given that the principles in relation to equitable third party liability, specifically
accessorial and recipient liability, are unsettled, how should Singapore’s jurispru-
dence in this area develop? The question is particularly topical because of recent
decisions on equitable recipient liability in Singapore, Hong Kong and Australia.
In this article, I identify in broad terms three directions that the Singapore Court of
Appeal could take in relation to accessorial liability and recipient liability in light of
these cases and speculate as to what factors might influence the choice of direction.

The first part of the article describes the current law in Singapore on equitable
accessorial liability and recipient liability for breach of trust and fiduciary duty. The
second part of the article identifies and evaluates three possible directions for the law.
These focus upon recipient liability. The article concludes by asking whether legal
or non-legal considerations relevant to Singapore specifically, or that apply across
the common law world generally, should influence the direction which is taken.

A caveat is necessary before going further. The article is written from the perspec-
tive of an Australian lawyer who, until recently, was ignorant as to the local case law
of Asian common law jurisdictions. Such parochialism is, perhaps, not uncommon.
This is so even though the volume and size of commercial transactions in Singapore
and Hong Kong, in particular, generate important legal questions that depend upon
a Chancery law heritage that is shared with other common law jurisdictions. Thus,
this article’s objectives are modest. The first objective is simply to draw attention
to a body of case law of which lawyers outside Singapore and Hong Kong may
be unaware. Secondly, it uses Singapore as a case study to suggest non-doctrinal
considerations that may influence the development of equitable principle within a
jurisdiction.


_Sumitomo Bank_ infra note 38, referred to with approval by the Privy Council in _A.G. for Hong Kong
v. Reid_ [1994] 1 A.C. 324 at 337, by the Federal Court of Australia in _Grimaldi_, infra note 115 at
paras. 576, 582, and by Lord Peter Millett in “Bribes and Secret Commissions Again” [2012] Cambridge
L.J. 583 at 611.

7 As distinct from Privy Council decisions.
II. EQUITABLE ACCESSORIAL AND RECIPIENT LIABILITY IN SINGAPORE

A. The Core Scenario: Participation, Assistance, or Procurement in Breach of Trust

Equitable accessorial liability attaches to a defendant, D, who is involved in an equitable wrong committed against the claimant, C, by the principal wrongdoer, PW. D is liable to provide some redress to C because of D’s involvement in, or association with, the principal wrong, although D has not committed the principal wrong itself. The core of the liability, in the sense of the original and most litigated scenario, involves situations where a non-trustee participates in, or assists, or procures, a breach of trust by a trustee and thereby becomes liable to provide redress to the victim of the breach of trust. Such liability was established by the mid-19th century and entered Singapore law by virtue of the application of the Second Charter of Justice of 1826.

B. The Role of Barnes v. Addy

By the mid-20th century, the attractions of extending such liability to professional agents of fiduciaries in corporate settings became clear. In that context, part of Lord Selborne’s 1874 statement of principle in Barnes v. Addy in relation to the professional agents of trustees became widely accepted as the template for third party liability in relation to breach of fiduciary duty generally:

[S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

Although contemporaneous cases encompassed a wider range of participatory conduct and Lord Selborne himself also referred to those “actually participating in any fraudulent conduct of the trustee”, the courts’ reliance on this passage from Barnes v. Addy meant that the focus narrowed to claims for what became known as ‘knowing

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8 In relation to procurement of breach of trust, see Fyler v. Fyler (1841) 3 Bean 550, 49 E.R. 216 (Ch.) [Fyler]; Alleyne v. Davey (1854), 4 L. Ch. R. 199; Eaves v. Hickson (1861) 30 Beav. 136, 54 E.R. 840 (Ch.) [Eaves]; and A.G. v. Corporation of Leicester (1844) 7 Beav. 176, 49 E.R. 1031 (Ch.) [Leicester]. In relation to participation, assistance and receipt of trust property, see M’Gachen v. Dew (1851) 15 Beav. 84, 51 E.R. 468 (Ch.); Lockwood v. Aody (1845) 14 Sim. 440 at 441, 60 E.R. 428 at 429 (Ch.); Barnes v. Aody, infra note 11. The same concepts of procurement, participation and assistance were present in the Indian Penal Code, 1860 (Central Act 45 of 1860) which came into force in what is now Singapore in 1872. See Stanley Yeo, Neil Morgan & Chan Wing Cheong, Criminal Law in Malaysia and Singapore (Singapore: LexisNexis, 2012) at 9, 10.


10 See e.g. Selangor United Rubber Estates Ltd v. Cradock (No. 3) [1968] 1 W.L.R. 1555 (Ch.).

11 (1874) L.R. 9 Ch. App. 244 at 251, 252 (C.A.).

12 Ibid. at 251.
receipt’ and ‘knowing assistance’. D’s culpability turned on whether D had acted with ‘knowledge’ of the breach of trust or, now, breach of fiduciary duty.

Actual knowledge clearly sufficed for liability and was taken to include “willfully shutting one’s eyes to the obvious and willfully and recklessly failing to make such inquiries as an honest and reasonable man would make”. But, also during the 20th century, the question arose whether the equitable concept of notice that was used to determine priority of interests in the context of land transactions, more specifically ‘constructive notice’ or some variation thereon, could suffice. Constructive notice in the context of priorities rules refers to the notice that the defendant would have obtained had he or she made reasonable and proper enquiries. In the Barnes v. Addy context, however, constructive notice acquired a slightly different meaning. The vexed issue was whether D could be liable with “knowledge of circumstances which would indicate [the facts] to an ‘honest and reasonable [person]’” (so-called ‘constructive knowledge’) or “knowledge of circumstances… which would put [an honest and reasonable person] on inquiry” (so-called ‘constructive notice’). That is, could D be liable if all that could fairly be said was that D had been either obtuse or careless? A further complication was whether the same standard of ‘knowledge’ applied to both knowing assistance and knowing receipt.

C. The Current Law in Singapore

1. Accessorial Liability: Royal Brunei Airlines

The leading modern case on accessorial liability for breach of trust and breach of fiduciary duty is the Privy Council decision of Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming, decided in 1995 on appeal from the Court of Appeal of Brunei Darussalam. Lord Nicholls’ judgment for the Privy Council was widely lauded for bringing certainty and consistency to a confused area of law. The case was followed in Singapore, although it was not binding.

In Royal Brunei Airlines, a company conducting business as a travel agency and holding money received for airline tickets on trust for the appellant breached the trust through careless mismanagement of the trust fund. The airline claimed against the company’s controlling director for the breach of trust by his corporate alter ego. The case went to the Privy Council on the question of whether the breach of trust must be “dishonest and fraudulent”, as per the wording in Barnes v. Addy, in order for an assistant to be liable.

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13 On the label of ‘knowing receipt’, see Farah Constructions, infra note 112 at 140, 141.
15 Macmillan Inc. v. Bishopsgate Investment Trust plc. (No. 3) [1995] 3 All E.R. 747 at 769 (Ch.) (Millett J.).
16 See Royal Brunei Airlines, infra note 17 at 387, 388.
17 [1995] 2 A.C. 378 (P.C.) [Royal Brunei Airlines].
Lord Nicholls criticised the attention that had been given to the phrasing of Lord Selborne’s judgment at the expense of principled reasoning. He drew from 19th century cases, including *Barnes v. Addy*, a general principle that liability attached to “a person who dishonestly procures or assists in a breach of trust or fiduciary obligation”. In so doing, his Lordship switched the focus from the nature of the trustee’s breach, which no longer needed to be dishonest and fraudulent, to the accessory’s culpability which was now to be measured against a standard of dishonesty.

Dishonesty was preferred to ‘unconscionability’ here despite ‘unconscionability’ being the traditional moniker of equitable liability. D’s state of knowledge was relevant in determining whether D acted dishonestly, but was not the sole determinant of liability. Furthermore, the so-called ‘Baden scale’ of five levels of knowledge ranging from actual knowledge to constructive notice was rejected. Finally, separate conceptual bases were attributed to the two limbs of *Barnes v. Addy*. Recipient liability was differentiated from the reformulated ‘knowing assistance’ liability, now to be known as ‘accessory liability’, because “[r]ecipient liability is restitution-based; accessory liability is not.” Here, the company director was found to have dishonestly assisted in the breaches of trust by the corporate trustee that he controlled and was thus personally liable to Royal Brunei Airlines.

2. Questions following Royal Brunei Airlines

Although widely praised, Lord Nicholls’ judgment was not comprehensive. One question concerned whether the reformulated accessory liability principle extended to breach of fiduciary duty generally, or was limited to where there was a misappropriation of property. This may have been because the judgment was framed in terms of the facts which involved an express trust. Although Lord Nicholls referred to ‘breach of fiduciary duty’ as well as breach of trust in formulating his general principle, subsequent English Court of Appeal decisions queried whether there still had to be a misappropriation of property involved.

The better view is that equitable accessorial liability extends to breach of fiduciary duty generally; that is, there need not be misappropriation of property for liability to arise. But the question is still open in Singapore. In *Banque Nationale De Paris*...
v. Hew Keong Chan Gary, Lai Kew Chai J. concluded that as a matter of principle as well as on the wording of Lord Nicholls’ judgment in *Royal Brunei Airlines*, accessory liability was not premised upon the misappropriation of trust property or its proceeds, but upon D’s dishonest involvement in a breach of fiduciary duty. Therefore, it was unnecessary for there to be any misappropriation of property. Nonetheless, in *Caltong (Australia) Pty Ltd v. Tong Tien See Construction Pte Ltd (in liquidation)*, on facts involving a breach of fiduciary duty by company directors rather than a breach of an express trust, the Singapore Court of Appeal explicitly stated as a requirement of dishonest assistance that “there has been a disposal of [C’s] assets in breach of trust or fiduciary duty”. There was, however, no substantive consideration of the issue and on the facts this requirement did not preclude liability. Subsequent formulations of the liability by the Singapore Court of Appeal have been framed in breach of trust terms, but equally, the particular issue has not been raised. The danger is that a trust will be artificially manufactured in order to meet this unprincipled requirement.

A further difficulty following *Royal Brunei Airlines* was that the apparent clarity of the new test of ‘dishonesty’ was clouded by its subsequent interpretation in the House of Lords and reinterpretation by the Privy Council. It is now clear that the test of dishonesty in *Royal Brunei Airlines* is objective in the sense that the defendant is to be judged by the standards of ‘ordinary honest people’ with knowledge of the same facts. The Singapore courts followed the progression of English law on this. The current law is as stated by V.K. Rajah J.A. for the Court of Appeal in *George Raymond Zage III v. Ho Chi Kwong*:

> [F]or a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

Interestingly, his Honour’s description of the liability as ‘knowing assistance’ and the English courts’ tendency to refer to ‘dishonest assistance’ illustrate an ongoing problem with terminology. Both descriptions imply that liability is restricted to those who assist in the breach of trust or fiduciary duty, whereas, as *Royal Brunei Airlines* makes clear, it includes procurement in a breach and, impliedly, joint participation in...

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31 *Zage*, infra note 35 at para. 20; *Yong Kheng Leong v. Panweld Trading Pte Ltd* [2013] 1 S.L.R. 173 at para. 79 (C.A.) [*Yong Kheng Leong*].
32 This is similar to what appears to have occurred in *Govindprasad*, supra note 18. See further, Tan Sook Yee & Kelvin Low Fatt Kin, “Equity and Trust” (2003) Sing. Ac. L. Ann. Rev. 225 at 233.
35 [2010] 2 S.L.R. 589 at para. 22 (C.A.) [*Zage*].
a breach. On the other hand, the emphasis on assistance reflects the overwhelming majority of the case scenarios.

The remedies for equitable accessorial liability have not been discussed in Singapore. As in *Royal Brunei Airlines*, it is generally assumed that the remedy is loss-based. In Australia, gain-based personal remedies are also available for knowing assistance and this would seem to be the case in England as well, although there are few examples. The possibility of gain-based proprietary relief has, however, been raised in Singapore. In *Sumitomo Bank Ltd v. Thahir Kartika Ratna*, Lai Kew Chai J., at the end of a long judgment, briefly referred to knowing assistance liability pursuant to *Barnes v. Addy* as an alternative route by which the wife of a defaulting fiduciary could be subjected to a constructive trust over assets she held with her husband. His Honour’s view that a gain-based proprietary remedy was available on the facts would be considered erroneous in England, but the issue remains open in Singapore.

D. The Recipient Liability Claim

When describing equitable accessorial liability, it is also necessary to distinguish it from equity’s jurisdiction in relation to the enforcement of equitable proprietary rights. If we assume that C is the beneficiary of a fixed trust and that D participated in a breach of the trust by receiving trust property from the trustee, there are at least three potential equitable claims. First, depending on the nature of D’s involvement, C may have a procurement, participation or assistance claim as discussed above. Secondly, C, as the beneficiary of the trust, has an equitable interest in the trust property which can be asserted against anyone who receives the trust property except a *bona fide* purchaser of the legal interest for value without notice, over whom equity has no jurisdiction. C can use the tracing rules if necessary to identify what has happened to C’s equitable interest. This has been described as a “persisting property claim” based upon the priorities and tracing rules. It is not accessorial liability as it does not depend on D being at fault except in the negative sense of D not being a *bona fide* purchaser without notice. Rather, it recognises and enforces C’s pre-existing property-related rights.

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36 In *Royal Brunei Airlines*, supra note 17, Lord Nicholls simply reinstated the order of Roberts C.J. at first instance. Roberts C.J. held that the accessory to the breach of trust was “liable, as constructive trustee, for the debts which [the trustee] owes to [the airline]”: *Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming* [1993] BNHC 56.


42 This claim is also available in relation to property subject to a constructive trust as a result of a breach of fiduciary duty and which is now in the hands of any third party who is not a *bona fide* purchaser for value without notice: *Sumitomo Bank*, supra note 38 at para. 191.
Interposed between these two distinct forms of liability is a fault-based equitable claim against D for receiving, for personal benefit, ‘trust property’ in consequence of a breach of a trust or fiduciary duty, irrespective of whether D still holds that property or its traceable form. This is the recipient liability claim referred to in *Barnes v. Addy*. Recipient liability extends to C’s property that is under the control of a fiduciary, although not held on trust. An example is company assets under the control of a director.\(^43\) That is, ‘trust property’ for the purposes of recipient liability includes any property that is subject to a fiduciary duty. According to the Singapore Court of Appeal in *Zage*, recipient liability requires:\(^44\)

(a) a disposal of the plaintiff’s assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty…

The courts in Singapore have adopted as the test for recipient liability Nourse L.J.’s formulation in *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele*, namely, that D’s “state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.”\(^45\)

So far, courts have rejected arguments that recipient liability should either be recast as a strict liability unjust enrichment claim or that a strict liability claim should exist alongside an equitable fault-based claim. The former argument was made by Professor Birks\(^46\) and has been supported extra-judicially by influential judges such as Lord Nicholls,\(^47\) who made the latter argument, and Lord Millett.\(^48\) On this approach, there is a fundamental difference between dishonest accessorial liability, based upon D’s fault, and recipient liability, which should be grounded in D’s enrichment through the receipt of the trust property at C’s expense. Courts in England, Singapore, Hong Kong and Australia have rejected the unjust enrichment explanation of recipient liability as placing too great a burden on recipients of trust property in commercial settings.\(^49\)

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\(^44\) *Zage*, supra note 35 at para. 23, citing *Caltong*, supra note 29 at para. 31, and *El Ajou v. Dollar Land Holdings plc* [1994] 2 All E.R. 685 at 700 (C.A.). It seems unclear whether “trust property” includes property subject to a constructive trust in Singapore: see *Sumitomo Bank*, supra note 38, where Lai Kew Chai J. found that the widow of a fiduciary who had accepted bribes in breach of duty was subject to a persisting property claim in relation to the bribe proceeds held by her as a volunteer and was liable as a knowing assistant, but did not consider whether she was also liable as a knowing recipient.

\(^45\) ([2001] Ch. 437 at 455 (C.A.) [Akindele]; *Zage*, supra note 35 at para. 23.


\(^48\) *Twinsectra*, supra note 33 at 194 (Lord Millett).

\(^49\) *Akindele*, supra note 45 at 455, 456 (Nourse L.J.; *Zage*, supra note 35 at para. 27 (the Court of Appeal noted Lord Nicholls’ extra-judicial arguments in favour of strict liability, but applied the fault-based test in *Akindele*); *Akai (First Instance)*, infra note 67 at paras. 463-468 (Stone J.); Thanakharn Kasikorn
Nonetheless, the idea that recipient liability is somehow different in nature from dishonest accessorial liability, being receipt-based rather than fault-based, persists. For example, Lord Nicholls’ statement in *Royal Brunei Airlines* has been enormously influential: “Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not.”

This view is also present in the Singapore case law on recipient liability, even though the courts have followed *Akindele* and confirmed that recipient liability is fault-based. Indeed, there are recent indications that the unjust enrichment explanation for recipient liability may yet be accepted by the Singapore Court of Appeal. In *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve*, Andrew Phang Boon Leong J.A., delivering judgment for the Court of Appeal, noted that “for the moment at least, the doctrine of knowing receipt as an *equitable wrong* is clearly part of the legal landscape in the Singapore context.” His Honour read the Court of Appeal’s decision in *Zage* as only precluding acceptance of the unjust enrichment claim as the sole basis of recipient liability. That is, it could not “displace or subsume the doctrine of knowing receipt.” His Honour also noted that “the law in this area is still in a state of flux.” These comments were *obiter* as recipient liability was not in issue. Nonetheless, the clear implication is that the Court of Appeal is willing to hear arguments on whether to accept a strict unjust enrichment recipient liability claim in addition to fault-based equitable recipient liability. Hence, there continues to be a strong division drawn between accessorial liability and recipient liability even though both continue, for now, to be grounded in D’s equitable wrongdoing.

The requisite nature of D’s awareness of the breach of trust or fiduciary duty has been the main focus of recipient liability cases in Singapore. Although Nourse L.J. in *Akindele* framed the question in terms of D’s unconscionability, as will be discussed below, the courts continue to debate over what level of knowledge suffices and, in particular, whether constructive notice (that is, knowledge of circumstances that would put a reasonable and honest person on inquiry) can ever suffice.

Once recipient liability is shown, D must account for the property received as though he or she were a trustee. Thus, unlike accessorial liability where D is liable for all the consequences flowing from PW’s equitable wrong, the focus of the recipient liability remedy is on accounting for the property actually received by D. Generally, D no longer holds the property, so only a personal, loss-based remedy is given. An account of profits is available in principle. In Australia, a remedial constructive

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50 Supra note 17 at 386.
51 See e.g., *Banque Nationale*, supra note 27 at para. 157.
52 [2013] 3 S.L.R. 801 (C.A.) [Wee Chiaw Sek Anna]
53 Ibid. at para. 146 [emphasis in original].
54 Ibid.
55 Ibid. at para. 143.
56 Ibid. at para. 144 [emphasis in original].
57 See Part III below.
58 Mitchell & Watterson, supra note 41.
trust is possible if D still holds the property or its traceable proceeds. This is not the case in England or, so far, Singapore. As with accessorial liability, the nature and significance of the remedy for recipient liability are contested, but such issues have not yet arisen in Singapore. Other significant questions concerning recipient liability have also yet to be considered in Singapore.

To summarise the discussion so far, the Singapore courts have overwhelmingly followed the Privy Council and the English courts in relation to accessorial and recipient liability. However, perhaps due to the relatively small number of local cases, there has been little or no discussion of the subtleties of the requirements of the two forms of liability and of their remedies.

III. POSSIBLE DIRECTIONS

The Singapore courts have at least the following three options for future development of the law concerning accessorial and recipient liability. These are suggested by recent decisions on recipient liability in Singapore, Hong Kong and Australia.

A. The Status Quo

The first and most obvious option is to maintain and refine the status quo by continuing to distinguish accessorial and recipient liability and by fleshing out the elements of each claim as new cases arise. Dishonesty and unconscionability would remain the respective determinants of liability. If this approach is taken then, with respect, Cheung J.A.’s concurring judgment in the Hong Kong Court of Appeal case of *Akai Holdings Ltd (in liquidation) v. Thanakhorn Kasikorn Thai Chamkat (Machan)* and V.K. Rajah J.A.’s judgment for the Singapore Court of Appeal in *Zage* are textbook examples of how to undertake a contextual inquiry into liability. Both judgments focused upon recipient liability and the question of D’s knowledge, but also referred to dishonest accessorial liability. Cheung J.A. did not give the leading judgment in *Akai (Appeal)*, however, it is important for Singapore because six months later it was cited with approval in *Zage*.

The facts of *Akai (Appeal)* in simplified form, are as follows. In 1998, the respondent Bank, which had been badly affected by the Asian Financial Crisis, sought to salvage a losing loan by substituting the appellant, Akai Holdings Ltd. (“Akai”), as the borrower in place of the original borrower, Singer Co. N.V., a company related to Akai. The new loan was secured by a pledge of shares in a subsidiary company of Akai. The effect of this ‘switch transaction’ was to shore up the Bank’s security to
the manifest detriment of Akai. The switch transaction was enormously important to the Bank as the loan of US$30 million “represented nearly twice its annual profits for the previous year”.64 It “clearly was a gift from heaven”.65

The relevant transactions were entered into on behalf of Akai by its Chief Executive Officer, James Ting, who also had controlling interests in the original borrower, Singer Co. N.V. The chairman of the Bank was also the chairman of Singer Thailand, in which Singer Co. N.V. had a “substantial interest” and of which Ting was a director.66 The Bank also had an interest in Singer Thailand. In breach of his fiduciary duty to Akai, Ting fraudulently represented to the Bank that he was authorised to enter the transaction on behalf of Akai. When Akai defaulted on the loan, the Bank sold the pledged shares and sought to recover the outstanding balance of the loan in Akai’s insolvency. In response, Akai’s liquidators claimed that the Bank was liable at common law for the tort of conversion and in equity for unconscionable (knowing) receipt.

At first instance, Stone J. found in favour of the Bank primarily on the ground that Ting had apparent authority to enter the switch transaction on Akai’s behalf. Even if recipient liability was relevant (he found that it was not), actual knowledge of Ting’s breach of fiduciary duty was necessary for a finding that the Bank was unconscionable and this was not shown.67 Akai successfully appealed to the Hong Kong Court of Appeal. Tang V.P. delivered a comprehensive judgment with which Le Pichon and Cheung J.J.A. agreed. In his concurring judgment, Cheung J.A. considered only the knowing receipt claim and, specifically, whether constructive notice could ever amount to unconscionability.

Cheung J.A. reviewed the English case law and also noted the position in Canada, New Zealand and Singapore.68 He then emphasised the contextual nature of the inquiry into recipient liability and that:

[I]t is precisely because of the broad approach when unconscionability is adopted as the underlining test of knowledge that one should not confine the examination only to the actual knowledge of the recipient and exclude constructive notice in its wider sense.

His Honour went on to conclude that “[w]hether there should be inquiry [by D] and the extent of the inquiry will depend on the facts of the case. The standard must be what a reasonable person in the circumstances of the case would have done.”70

Furthermore, in his view, the contextual nature of the inquiry is the same whether one is considering recipient or accessorial liability even though the respective thresholds for liability are different.71 His Honour accepted counsel for Akai’s suggestion

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64 Akai (Final Appeal), supra note 49 at para. 95.
65 Akai (Appeal), supra note 63 at para. 269 (Cheung J.A.).
66 Ibid.
67 Akai Holdings Limited (in liquidation) v. Thanakharn Kasikorn Thai Chamkat (Mahachon) [2008] HKCFI 431 at para. 460 [Akai (First Instance)].
68 A surprising omission is Farah Constructions, infra note 112, which was referred to at first instance by Stone J.
69 Akai (Appeal), supra note 63 at para. 266.
70 Ibid.
71 Ibid. at para. 267.
that the factors relevant to dishonest assistance, as described in *Royal Brunei Airlines*, are also relevant to unconscionable receipt.\(^72\) Here, the Bank had not behaved as a reasonable banker and was therefore unconscionable.\(^73\)

The Singapore case of *Zage* concerned the liability of third parties for a breach of trust by a local lawyer, David Rasif, who misappropriated over S$11 million from his firm’s client trust account and then absconded.\(^74\) Most of the misappropriated funds belonged to the appellants on whose behalf Rasif was acting in a conveyancing matter. The sole issue\(^75\) in the Court of Appeal was whether a retail jewellery business, Jewels DeFred Pte. Ltd. (“DeFred”), that sold a large quantity of diamonds and jewellery to Rasif in two separate transactions was liable for unconscionably receiving trust property or for dishonest assistance in a breach of trust. Rasif paid for both purchases from his firm’s trust account in breach of trust.

On the first purchase, Rasif negotiated a price of S$1,618,000, but then paid S$1,818,000 by way of telegraphic transfer to DeFred’s bank account. The telegraphic transfer slip included the words “David Rasif & Partners—Client’s Accounts” on it, but was not seen at close hand by the sales assistants to whom it was shown. The jewellery was delivered in a hotel lobby once the funds transfer had been effected. A second purchase of a sapphire was negotiated on this occasion and Rasif paid DeFred’s staff by way of a cash cheque. The words “David Rasif & Partners—Client’s Accounts” were clearly visible on the cheque. The cheque was handed to DeFred’s manager, the second respondent Ho, the following morning. He banked it and authorised delivery of the remaining jewels to Rasif’s home. At all times, Rasif dealt with sales assistants; however, Ho, who was also a director and shareholder of DeFred, was fully briefed on the transactions and instrumental behind the scenes in securing suitable merchandise and authorising delivery. The two sales boosted DeFred’s annual turnover considerably.\(^76\)

Rajah J.A. framed the question for the court as being whether DeFred had sufficient knowledge for liability under “dishonest assistance or knowing receipt”.\(^77\) The former liability was found not to apply because DeFred’s participation “was more in the way of passive receipt than active assistance.”\(^78\)

In his discussion of recipient liability, Rajah J.A. cited Cheung J.A.’s judgment in *Akai (Appeal)* and agreed that unconscionability for the purposes of knowing receipt

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\(^{72}\) *Ibid.* at para. 244:

1. The nature and importance of the proposed transaction to the parties and the nature and importance of their respective roles.
2. Whether the proposed transaction was within the ordinary course of business and the ordinary course of the parties’ business.
3. The position, conduct, knowledge, experience, personal characteristics, understanding and motives of the parties.
4. The benefit to be derived from each of the parties from the transaction.
5. Their ability to investigate and make checks as to the validity and propriety of the transaction.
6. The practicability of proceeding otherwise.
7. The seriousness of the adverse consequences to the beneficiaries.
8. Whether there is a customary practice of making routine inquiries, and
9. Whether and to the extent those inquiries were made.

\(^{73}\) *Ibid.* at para. 269.

\(^{74}\) *Zage*, *supra* note 35.

\(^{75}\) A dishonest assistance finding at first instance in relation to a friend who carried trust funds out of the country for the trustee was not appealed against.

\(^{76}\) *Zage*, *supra* note 35 at 608.

\(^{77}\) *Ibid.* at 597.

\(^{78}\) *Ibid.* at 608.
was not limited to actual knowledge of a breach of trust, stating that “[t]he test of unconscionability should be kept flexible and be fact centred.” When considering recipient liability in commercial contexts, it was important to bear in mind customary practices in the particular context.79

Consequently, Rajah J.A. found no liability in relation to the first transaction. When one considered the usual practices of jewellers in Singapore,80 the context of retail jewellery transactions generally, and these particular transactions specifically, there was nothing to alert DeFred’s staff to Rasif’s wrongdoing and no obligation upon them to have made further inquiries as to the source of Rasif’s funds. Importance was attached to the fact that “there was no fixed pattern or manner of conducting this particular type of commercial transaction…”81

DeFred was liable in relation to the second transaction. This was because Ho must have seen that the cash cheque was drawn on the clients’ trust account and therefore, as a sophisticated businessman with a good command of English, he should have realised that Rasif was apparently acting improperly:82

Whether or not Rasif’s withdrawal in fact turned out to be justified, Ho… possessed all the facts necessary for him to conclude that Rasif had prima facie made an improper withdrawal of funds belonging to third parties to pay for the particular transaction.

In these circumstances it was unconscionable for Ho to conclude the sale. DeFred’s liability was to account as trustee for receipt of the cash cheque.83

Thus, for both Cheung J.A. and Rajah J.A. respectively, recipient liability involves a fact-specific, contextual inquiry into unconscionability. Something less than actual knowledge of the principal wrong may suffice depending upon the particular circumstances. Both judges maintain the distinction between dishonest accessory liability and recipient liability, yet the nature of the inquiry into liability is remarkably similar.

It is not clear that this approach will be followed in Singapore and it has been ruled out altogether in Hong Kong. A recent Singapore Court of Appeal decision appears to overlook the considered finding in Zage that constructive knowledge may suffice for recipient liability and instead required “actual knowledge or the wilful avoidance of knowledge”.84 Furthermore, Lord Neuberger of Abbotsbury N.P.J., who delivered judgment for the Hong Kong Court of Final Appeal in the Akai litigation, required actual knowledge for recipient liability without addressing the contrary view put forward by Cheung J.A.85 A further ‘wildcard’ is the Singapore Court of Appeal’s recent signalling of interest in the unjust enrichment explanation for recipient liability.86

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79 Ibid. at 606.
80 It was noted that anti-money laundering regulation did not apply to jewellers in Singapore as opposed to jewellers in the United States and the United Kingdom: ibid. at 609.
81 Ibid. at 610.
82 Ibid. at 611.
83 Ibid. at 612.
84 Yong Kheng Leong, supra note 31 at para. 81.
85 Akai (Final Appeal), supra note 49 at paras. 134-137.
86 Wee Chiau Sek Anna, supra note 52.
B. Recipient Liability as a Subset of Accessorial Liability

The second possible direction for the law in Singapore is to pursue the logical implications of Cheung J.A.’s methodology in *Akai (Appeal)*, as reflected in *Zage*, and accept that receiving trust property is but one manifestation of participation in a breach of trust or fiduciary duty. As will now be argued, D’s liability for either receipt or accessorial conduct is informed by the same policy concerns and is determined by the same contextual inquiry and, essentially, the same test for liability. On this approach, receipt *is* accessorial conduct: that is, it is one way in which D might procure, participate in, assist in or, more passively facilitate, a breach of trust or fiduciary duty. It is true that the remedial outcomes are different, but this is because the remedy for recipient liability is better able to be tailored to what has occurred. The challenge, of course, is to settle on a formulation of the test for liability that accurately captures what is required for participatory liability, whatever the form of participation involved.

1. Same Policy Concerns

The main policy objectives for accessorial and recipient liability appear to be first, to discourage and forestall breaches of trust and fiduciary duty and, secondly, to increase C’s chances of redress by expanding the pool of possible defendants. Regardless of which claim is in play, the weight of these objectives varies according to the relationship between D and PW. For example, with respect to commercial third parties who are ‘strangers’ to the trust or fiduciary relationship, the first objective predominates. There is an appreciation that commercial and/or professional strangers may be very well-placed to detect and prevent fraudulent activity, such as money-laundering and the like, sometimes without significant transaction costs. That is, this form of civil liability is a useful adjunct to legislative regulation of commercial dealings. On the other hand, courts are concerned not to demand costly, impracticable standards of conduct that would impede commerce.

With respect to third parties who are closely related to the trustee or fiduciary, the second objective of increasing a victim’s chance of redress has more weight. Thus, liability is readily imposed upon company controllers and their spouses/families and courts give short shrift to arguments that spouses who were appointed as nominal directors or employees of a company, for example, do not have sufficient knowledge to be either dishonest or unconscionable.

2. Same Methodology

Irrespective of differences in nomenclature and formulation, both accessorial liability and recipient liability turn on an assessment of D’s conduct in all the circumstances,

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87 See e.g., *Royal Brunei Airlines*, supra note 17 at 386, 387; *Consul Development*, supra note 26 at 397 (Gibbs J.).
88 This is the term used by Lord Selborne in *Barnes v. Addy*, supra note 11 at 251, 252.
90 See e.g., *Zage*, supra note 35 at 612.
91 See e.g., *Yong Kheng Leong*, supra note 31. But see *Banque Nationale*, supra note 27.
including what D knew or ought reasonably to have known of the breach of trust or fiduciary duty. That is, the contextual inquiry is the same. Even if one returns to the seminal cases, this is so: Lord Nicholls in *Royal Brunei Airlines* and Nourse L.J. in *Akindele* both emphasised the contextual nature of the inquiry in which D’s awareness of PW’s wrong was an important, but not sole, factor in determining whether D should be liable. To exaggerate somewhat, the only difference between the two liabilities is that in one instance the standard was set as dishonesty, and in the other it was set as unconscionability, but this seems to be due to a difference of opinion on the utility and specificity of equity’s traditional nomenclature of conscience.

3. *Are There Conceptual Differences Between Accessorial Conduct and Receipt?*

Having outlined the argument in favour of a general principle of participatory liability, what objections can be made to it? First and most obviously, the courts in Singapore and elsewhere, except Australia, repeatedly emphasise the conceptual difference between accessorial liability and recipient liability, even in judgments that appear most clearly to combine the liabilities. It is said that accessorial liability is fault-based (and requires dishonesty), whereas recipient liability is receipt-based (and therefore does not require dishonesty). Such statements hark back to the debate over whether recipient liability should be reformulated as an unjust enrichment claim. Given that the current law is that both accessorial liability and recipient liability are fault-based, further justification is necessary as to why D’s receipt differentiates the two claims.

Leaving aside the strict liability thesis, is there something inherently different in a claim that D received trust property? This is where care must be taken to differentiate the persisting property claim discussed in Part II above from the recipient liability claim. The former claim is conceptually different because it is grounded in the assertion of C’s proprietary rights and applies regardless of fault. But the recipient liability claim applies irrespective of whether D retains C’s property and is grounded in D’s equitable wrongdoing. The overlap with the persisting property claim has clouded the fact that recipient liability belongs with accessorial liability in general.

In *Zage*, the two claims of accessorial and recipient liability were distinguished on the basis that dishonesty connotes active conduct, whereas receipt of trust property is passive behaviour for which ‘dishonest’ is an inappropriate adjective. But receipt can fall at any point on a spectrum of conduct ranging from active involvement to

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92 See e.g., *Akai (Appeal)*, supra note 63 at para. 266. See also *Tang Hsiu Lan v. Pua Ai Seok* [2000] SGHC 163 at para. 12 (Lai Kew Chai J.); *Banque Nationale*, supra note 27 at para. 157 (Lai Kew Chai J.). I have found only one judicial statement in Singapore to the effect that recipient liability is accessorial, but the comment was brief and *obiter*: *Zim Integrated Shipping Services Ltd v. Dafni Igal* [2010] 2 S.L.R. 426 at 438 (H.C.) (Lai Siu Chiu J.).


94 *Ibid.* at 59, 60.

95 *Zage*, supra note 35 at 608.
passive facilitation of another’s wrongdoing and, in any event, ‘dishonesty’ applies to D’s state of mind as well as D’s conduct. Why is it not possible to ‘dishonestly’, yet passively, receive trust property if one is well aware that it has been misappropriated? The Court in Zage cited a case note by Professor Richard Nolan in support of this point, but Nolan’s arguments were made as part of his broader thesis that recipient liability should be strict.96 That is, they rest on the unjust enrichment explanation which does not reflect the current law.

4. Primary and Secondary Liability

A second objection to combining accessorial liability with recipient liability relates to the nature of the two liabilities and their remedial outcomes. It is said that accessorial liability is a ‘secondary’ liability in the sense that once its elements are proved, D is treated as though he or she were the trustee or fiduciary. That is, D takes on PW’s liability and is jointly and severally liable with PW.97 Thus, the argument goes, because no inquiry is undertaken into D’s causal responsibility for the consequences of the breach of trust or fiduciary duty, D is not liable for his or her own wrongdoing but for PW’s wrongdoing. Conversely, with respect to recipient liability, D is liable only in relation to the trust property D received. In relation to that property, D is treated as if D had been an express trustee of that property. That is, the remedy is quantified with respect to D’s primary liability.98

The argument that dishonest assistance is a secondary liability, whereas recipient liability is a primary liability, is popular in the academic literature.99 It has received strong support in Singapore,100 but in my view it is flawed.101 D’s liability is ‘secondary’ only in the sense that it arises if the primary wrong of a breach of trust or fiduciary duty is committed; once that is shown, D is liable because of his or her own wrongdoing. It is wrong, ‘unconscionable’ in equitable terms, to interfere with a fiduciary obligation. A primary liability model of dishonest accessorial liability is consistent with Lord Nicholls’ opening remarks in Royal Brunei Airlines.102 To similar effect, the High Court of Australia has described knowing assistance liability (the precursor to accessorial liability) as a primary liability:103

The reference to the liability of a knowing assistant as an “accessorial” liability does no more than recognise that the assistant’s liability depends upon

97 See Mitchell & Watterson, supra note 41 at 129.
99 See Yeo, “Right and Wrong”, supra note 97.
100 Yeo, supra note 97.
102 Royal Brunei Airlines, supra note 17 at 382:
   Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in the sense that it only arises where there has been a breach of trust.
103 Michael Wilson, supra note 37 at para. 106.
establishing, among other things, that there has been a breach of fiduciary duty by another. It follows… that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum.

This is not to downplay the differences in remedial outcome. Recipient liability clearly is focused upon the direct consequences of D’s wrongful conduct in receiving trust property for personal benefit. Nonetheless, in appropriate instances a dishonest accessory may be similarly liable for the direct consequences of his or her wrongful conduct such as where an account of profits is awarded against D.104 It is only in relation to the more common remedy of equitable compensation that the courts have been reluctant to consider what losses flowed directly from D’s participation and this appears to be for good pragmatic reasons.105

5. Can Dishonesty be Equated with Unconscionability or Vice Versa?

A third objection to recognising a general principle of equitable participatory liability in Singapore is that the courts consistently state that the threshold for liability is higher in relation to accessorial liability than it is for recipient liability.106 The former is dishonesty which is said to require actual knowledge; the latter is unconscionability, which, according to Zage at least, may include constructive notice.107 Given that recipient liability is fault-based, yet encompasses purely passive conduct, it could be argued that the threshold for liability should be at least as high, if not higher, than that for accessorial liability which requires active involvement in the breach of trust or fiduciary duty.108 On the latest Court of Appeal formulation of recipient liability, actual knowledge is required, so the differences may not be as great as if the reasoning of Zage was pursued.109 Nonetheless, dishonesty has clearer links to criminal law and common law notions of culpability and connotes a higher threshold than unconscionability.

Lord Nicholls’ dishonesty test has been influential in Singapore and is applied beyond accessorial liability.110 It is highly unlikely that it would be discarded in favour of unconscionability. But does this really matter? Both touchstones have the same function and involve the same methodology. Whether D has received trust property and/or participated in some other way in PW’s breach, the question is still whether D is at fault and the outcome will depend on the factual matrix, including whether there is a receipt of property involved. The dishonesty nomenclature is too well-established and popular in Singapore to be easily discarded and it encapsulates policy decisions that have been made to restrict the circumstances

104 Fyffes Group, supra note 37 at 670; Ultraframe (UK) Ltd v. Fielding [2005] EWHC 1638 (Ch) at para. 1600.
105 For example, to avoid a complex causation inquiry. See further, Ridge, supra note 37 at 458, 459.
106 For a recent illustration, see Relfo Ltd, supra note 43 at 677.
107 For a different approach, see Akai (Final Appeal), supra note 49 at para.134.
108 I am grateful to the anonymous referee for this insight.
109 Yong Kheng Leong, supra note 31.
in which third parties should bear the consequences of another’s breach of equitable duty. Dishonesty could be adopted as the threshold for recipient liability so long as it is recognised that this is not necessarily limited to where D has actual knowledge of the misappropriation of trust property. Where D is a purely passive recipient, however, the higher threshold may be more appropriate.

Support by analogy for this argument can be found in the Australian case law. Unlike Singapore, the High Court of Australia has not embraced the Royal Brunei Airlines principle of accessorial liability, although it has not ruled out its acceptance yet. In Farah Constructions Pty Ltd v. Say-Dee Pty Ltd, the Court retained the Barnes v. Addy framework of knowing receipt and knowing assistance in a dishonest and fraudulent design by a trustee or fiduciary. In addition, the Court endorsed a line of authority concerning procurement or inducement of (any) breach of trust. The Court affirmed the Baden scale of knowledge and held that levels (i) to (iv) of that scale (actual knowledge to constructive knowledge) suffice for knowing assistance liability. Although the Court did not explicitly state the requisite knowledge for knowing receipt, it appears that the same knowledge standard will apply to knowing receipt and knowing assistance.

Importantly, the Full Federal Court of Australia in Grimaldi v. Chameleon Mining NL (No 2) has emphasised the contextual nature of the inquiry:

\[\text{[P]articipatory liability as it evolved in equity in cases prior and subsequent to Barnes v. Addy was not based on inflexible formulae. Given the variety of circumstances in which, and bases on which, a third party could be characterised as a wrongdoer in equity… varying importance has been given to three matters: (i) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant; (ii) the nature of the third party’s role and participation, e.g. as alter ago, inducer or procurer, dealer at arm’s length, etc.; and (iii) the extent of the participant’s knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.}\]

Thus, in Australia, the interplay of (at least) three factors will determine liability and the level of requisite knowledge may vary depending upon the specific facts (with the proviso that anything up to level (iv) on the Baden scale may suffice). This reflects, albeit more explicitly, the approach taken in Akai (Appeal) by Cheung J.A. and in Zage.

C. Reduce the Attractions of Recipient Liability

A third possible approach to recipient liability and accessorial liability is implicit in Lord Neuberger’s judgment for the Hong Kong Court of Final Appeal in Akai

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111 See also Emmanuel Duncan Chua, “Knowing, Dishonest or Plain Unjust?—A Commentary on the Past, Present and Future of Knowing Receipt” (2007) 25 Sing. L. Rev. 53.
112 230 C.L.R. 89 (H.C.A.) [Farah Constructions].
113 Ibid. at 163, 164.
114 See Grimaldi, infra note 115 at para. 267.
The effect of this judgment is to remove the attractions and distinctiveness of the recipient liability claim by way of a fusion-style methodology that constrains the requirements and remedy for the equitable claim to those of the common law conversion claim pleaded alongside it. Effectively, Lord Neuberger’s approach is to make the equitable liability redundant where there is a concurrent common law liability. There is nothing in Lord Neuberger’s reasoning to suggest that this approach could not also be taken for equitable accessorial liability.

Lord Neuberger accepted Akai’s common law claim based on its C.E.O.’s lack of authority to enter the loan contract on its behalf. As the contract was void, it followed that the Bank committed conversion by selling the pledged shares and Akai was entitled to common law damages assessed by the value of the shares at the time of sale.117 Akai, however, also argued that the Bank was subject to recipient liability and that this would yield a greater remedy by way of ‘equitable compensation’. The remedy for recipient liability is generally explained in terms of the recipient’s liability to account, rather than equitable compensation per se, but this point was not pursued.118

The issue which is of most interest here was whether, applying the test in Akindele which Lord Neuberger was prepared to assume was correct, the Bank had acted unconscionably.119 Lord Neuberger held that the same test should apply to determine both whether the C.E.O. had authority to bind Akai to the contract and to determine whether the Bank was unconscionable in taking the shares. Equity should “follow the law” in this respect. In his view, the test for liability in knowing receipt is “effectively identical” to that for whether there was reasonable reliance on an agent’s apparent authority. This led him to conclude that only actual knowledge is sufficient for knowing receipt liability.120 Nonetheless, this did not mean that recipient liability could be assimilated with accessorial liability as a whole because unconscionability incorporated “irrationality” as well as dishonesty.121 Here, the Bank had been irrational in its belief that the C.E.O. had authority.122

As for the remedy, Lord Neuberger again assimilated the common law and equitable claims, finding that the measure of equitable compensation should not exceed the measure of common law damages.123 Presumably, there should be no inducement to plead the equitable claim. Conversely, the Court of Appeal’s award of the (equitable) remedy of compound interest calculated on the common law damages award was not overturned, but this was primarily on the basis that the Bank had left

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116 Supra note 49.
117 Ibid. at para. 123. There was no consideration of when title to property might still pass under a void contract. See further Ji Lian Yap, “Knowing Receipt and Apparent Authority” (2011) 127 Law Q. Rev. 350.
118 But see Yeo, “Restitution”, supra note 61 at para. 21.35, noting that if compensation is an available remedy for knowing receipt it “will be very difficult to distinguish conceptually between the basis of liability for knowing receipt and that for dishonest assistance.”
119 Akai (Final Appeal), supra note 49 at para. 128. A further question was whether there had been a beneficial receipt of property at all. See further Yap, supra note 117.
120 Akai (Final Appeal), ibid. at paras. 134-137.
121 Ibid. at para. 134.
122 Ibid.
123 Ibid. at para. 155. This aspect of the judgment is not discussed further here.
it too late to object. Thus, it would appear that in Hong Kong, equitable recipient liability is to be assimilated as far as possible with any overlapping common law claim.

With respect, Lord Neuberger’s reasoning is difficult to follow. There is no necessary connection between the principles determining an agent’s authority to enter a contract and the test for recipient liability that would require the principles to be the same.124 Nor does the maxim ‘equity follows the law’ apply here.125 His Lordship’s finding that only actual notice sufficed for recipient liability is also contrary to Cheung J.A.’s reasoning in Akai (Appeal) and, it is suggested, the spirit of Nourse L.J.’s judgment in Akindele. Nonetheless, Lord Neuberger’s judgment is binding in Hong Kong and is of wider import due to his Lordship’s position as President of the Supreme Court of the United Kingdom.

IV. THE WAY FORWARD

Andrew Phang Boon Leong, now a member of the Court of Appeal, has argued strongly for the development of an ‘autochthonous’ Singapore legal system.126 The calls for autochthony have coincided with the highly successful reform of the judicial system in Singapore127 and with the achievement of full legal independence from English law.128 Undoubtedly the Singapore courts are now well-equipped to pursue legal autochthony. But what does this entail with respect to the development of equitable third party liability for breach of trust and fiduciary duty? The following discussion is necessarily speculative.

Singapore is a relatively young jurisdiction. Consequently, it will take time for the local courts to generate a comprehensive local jurisprudence. Pragmatically speaking, it makes sense to ‘piggyback’ on the case law of larger jurisdictions which share a common equity heritage. England and Wales is the obvious choice in this respect for a number of reasons.129 For example, Singapore has a strong historical connection to English law which means that the bulk of its jurisprudence is grounded in English case law and which makes it natural to turn to current English cases for guidance.130 This makes sense as the high volume of commercial litigation in England means that finer points of doctrine are more likely to arise.

124 Yap, supra note 117.
126 See e.g., Phang, Development of Singapore Law, supra note 1; Andrew B.L. Phang, “The Reception of English Law” in Tan, Singapore Legal System, supra note 2 at 7 [Phang, “Reception of English Law”].
128 Tan Kiam Peng, supra note 3.
129 Subsequent references to ‘England’ should be taken to refer to the jurisdiction of England and Wales. For suggestions (as at 1999) as to why the courts in Singapore rely heavily on English cases, see Woon, “The Applicability of English Law in Singapore”, supra note 9 at 240-242. See Phang, Development of Singapore Law, supra note 1.
130 Phang, Development of Singapore Law, ibid. at 37-51.
This natural inclination to rely upon the English law is bolstered by the fact that many, perhaps most, Singaporean lawyers, including academics, receive their postgraduate training at English universities. A significant number also undertake undergraduate legal studies in England.\textsuperscript{131} It follows that they become most familiar with the English cases and academic literature. This affects the arguments put to local courts as well as the reading lists of the local university law courses.\textsuperscript{132} This may change as other countries seek to increase their intake of Singaporean undergraduate students.

The jurisdiction of England and Wales also has a distinct advantage over common law countries such as Australia and Canada that are organised along federal lines. In Australia, for example, questions concerning equitable third party liability may arise at appellate level in any one of a number of State and Federal courts of equal standing. Although the High Court of Australia has reinforced strict guidelines for the development of the “Australian common law”,\textsuperscript{133} it may be more difficult for a non-Australian lawyer seeking insights to aid the development of their own jurisprudence to discern the law in Australia, than it is to determine the law in England. The number of relevant courts in Australia also dilutes the development of principle and may delay the progression of unresolved questions of law to the High Court. This helps explain the gap of nearly 30 years between the two leading High Court authorities on equitable third party liability.\textsuperscript{134} On the other hand, England is not immune nowadays from European, federal-style constraints which may make its local case law less ‘transportable’ to other jurisdictions.\textsuperscript{135}

The adoption of \textit{Royal Brunei Airlines} in Singapore also makes the Australian law of less relevance, although the High Court of Australia’s reasoned rejection of strict unjust enrichment recipient liability in \textit{Farah Constructions} may become more noteworthy following the recent revival of that debate in Singapore.\textsuperscript{136} \textit{Farah Constructions} was only cited at first instance in the Hong Kong \textit{Akai} litigation\textsuperscript{137} and was not mentioned at all in \textit{Zage}. The Lawnet database shows no ‘hits’ for \textit{Farah Constructions} in the Singapore cases. Perhaps the Full Federal Court decision in \textit{Grimaldi} will have more influence, particularly as it is being taken note of by the English courts.\textsuperscript{138}

It is crucial to Singapore’s continued economic success that it be attractive to global investors. This is naturally a concern in all common law jurisdictions, but it may be more pronounced in Singapore which rightly prides itself on its reputation

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\textsuperscript{131} As of 2012, there were 729 Singaporean students studying law at U.K. universities. By way of comparison, approximately 360 students graduated in law from National University of Singapore and Singapore Management University combined: Singapore Ministry of Law, \textit{Report of the 4th Committee on the Supply of Lawyers} (Singapore: May 2013) at para. 3.4, online: Ministry of Law <http://www.mlaw.gov.sg/content/dam/mlaw/corp/News/4th%20Committee%20Report.pdf>.

\textsuperscript{132} See \textit{e.g.}, Mindy Chen-Wishart, “Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?” (2013) 62 I.C.L.Q. 1 at 11.

\textsuperscript{133} \textit{Farah Constructions}, supra note 112 at 152.

\textsuperscript{134} \textit{Consul Development}, supra note 26; \textit{Farah Constructions}, ibid.

\textsuperscript{135} Phang, “Reception of English Law”, \textit{ibid}.

\textsuperscript{136} \textit{Wee Chiaw Sek Anna}, supra note 52.

\textsuperscript{137} \textit{Akai (First Instance)}, supra note 67.

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as a global commercial hub. Whilst comprehensive legislative schemes and strategic initiatives to attract wealthy individuals are important in this regard, there must also be stability and clarity in the fundamental common law principles that undergird the private law framework. Singapore’s important trading links with the United Kingdom further suggests that there should be harmony with English commercial law wherever possible. This militates against anything other than cautious and incremental development of the law.

Professor Chambers has argued that common law jurisdictions must take a united stand on doctrines such as equitable recipient liability in order to combat global-scale fraud and corruption. Unless the law is consistent across jurisdictions, he argues, there is greater scope for money laundering and the loss of trust assets. It has also been suggested that the rapid increase in multi-jurisdictional litigation alone requires that courts strive for consistency. This would suggest that the development of Singapore’s equitable third party liability principles should keep in step with mainstream jurisdictions such as England. The force of this argument is weakened somewhat by the fact that much of the world is not regulated by the common law. Nonetheless, it is clear that common law jurisdictions have a responsibility as ‘good global citizens’ to minimise the opportunities for money laundering and the like in their own jurisdictions as well as to improve the efficacy of legitimate cross-border transactions. Uniformity of equitable principle is therefore desirable, at least where this is not at the expense of conceptually coherent law.

V. Conclusion

There is not one ‘correct’ response to the questions besetting equitable accessorial and recipient liability. In particular, the law concerning recipient liability is “still in a state of flux” and the option of a concurrent strict unjust enrichment recipient liability claim is yet to be squarely addressed in Singapore. From a purely doctrinal perspective, there is much to be said for the argument that accessorial liability and recipient liability involve the same contextual, fact-specific inquiry into whether D’s conduct and state of mind justify equitable liability and should be determined by the same standard, whether that be labelled ‘dishonesty’ or ‘unconscionability’.


Regarding the importance of trusts law to the promotion of Singapore as a wealth management centre from the early 2000s, see Tang Hang Wu, “Teaching Trust Law in the Twenty-First Century” in Elise Bant & Matthew Harding, eds., Exploring Private Law (Cambridge: Cambridge University Press, 2010) 125 at 134, 135. See also, the extra-judicial comments of Yong Pung How C.J. in 1995, as reported in Phang, “Reception of English Law”, supra note 126 at 21.

See Menon C.J., supra note 139.


Menon C.J., supra note 139 at 18.

Phang, “Reception of English Law”, supra note 126 at 22.

See Chiaw Sek Anna, supra note 52 [emphasis omitted].
A unified notion of participatory liability seems to be emerging in Australia, whereas this is less likely in jurisdictions that follow the law in England and Wales. On the other hand, the seeds for a similar development in Singapore are present in the approach taken in Zage. Cheung J.A.’s judgment in Akai (Appeal) is also relevant in this respect even though it does not represent the law in Hong Kong itself. This would be in line with Australian developments and would assimilate recipient liability into a broader principle of equitable participatory liability. But the development of equitable doctrine in a particular jurisdiction is not determined solely by doctrinal considerations: the interplay of legal and non-legal considerations in Singapore must also be taken into account. This suggests that the courts are unlikely to make radical changes to accessorial and recipient liability for breaches of trust and fiduciary duty: autochthony does not mean discarding functional and reasonably certain commercial law doctrines.\textsuperscript{147} Thus, the first option suggested in Part III above, namely that of finessing the status quo, is the most obvious course to take. Nonetheless, the second option, recognising a general principle of participatory liability, is also principled. With respect, the third option of reading down the equitable claims would require radical change to long-standing equitable doctrines and remedies and has little to recommend it. This conclusion is not inconsistent with the pursuit of legal autochthony in Singapore. A contextual inquiry into whether D was at fault in equity, as modelled by Cheung J.A. in Akai (Appeal) and Rajah J.A. in Zage, is admirably suited to autochthonous outcomes, that is, outcomes that reflect an appropriate balance in the context of Singaporean society between deterring fraud and corruption on the one hand and facilitating efficient commerce on the other.

\textsuperscript{147} Ibid.
CHAPTER SEVEN
THIRD PARTY VOLUNTEERS AND UNDUE INFLUENCE

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Introduction

If a claimant, C, gives property to the defendant, D, as a result of actual or presumed undue influence over C by another, X, why is D liable to have the gift rescinded? A common misconception, given Equity’s ubiquitous concern with conscience, is that D’s liability must be based upon fault and that this will be established if D was aware of the relationship of influence between C and X. 1 Recently this misconception has been challenged by scholars relying upon 18th and 19th century authorities involving third party volunteers to relationships of influence. At issue in these early undue influence cases tended to be whether liability to return a gift to C by way of rescission could be avoided if C had made the gift to X’s innocent spouse or children, rather than directly to X. The courts were adamant that it could not. This suggests that D is subject to strict liability, meaning a liability not dependent upon fault. Some scholars use this to argue that the true basis of the undue influence doctrine is unjust enrichment flowing from C’s impaired autonomy, rather than wrongdoing on the part of D, or, presumably, X. 2 In a similar vein, other scholars use the apparent strict liability of D to argue that different forms of equitable third party liability, such as recipient liability for breach of trust, should also be strict, subject to defences, in relation to volunteers. 3 Hence, the nature of the liability of an innocent recipient of a gift tainted by undue influence has assumed importance far beyond its immediate application.

The objective of this article is to explore why D must return the gift irrespective of whether he or she was aware of the relationship of influence between C and X. Are there explanations for the cases that would support the orthodox understanding of equitable third party liability as being grounded in the third party’s equitable wrongdoing? Or is this truly an example of strict liability in equity that casts light on the nature of undue influence or that could be applied to other instances of equitable third party liability?

Three preliminary points should be noted. The doctrines of actual undue influence and presumed undue influence are not distinguished for the purposes of this article, although in the modern law they are conceptually distinct. 4 Historically, the courts did not make this distinction and most of the case law relevant to third party volunteer liability arose in the 19th century. Secondly, undue influence is one of

1 Earlier versions of this paper were presented at the Australian National University and the Obligations VI conference, University of Western Ontario. I thank Mark Lunney, Joachim Dietrich and the participants at those events for their helpful comments.
several vitiating factors in equity that allow for rescission of a gift or contract; from time to time reference will be made to other grounds for rescission in equity and at common law, but this article does not purport to explain third party volunteer liability for all such doctrines. Thirdly, although in the example posited above, D is a direct recipient from C, it may be helpful to consider the related position of a “remote recipient” from C, that is, where a volunteer, D, receives the gift from X who received it as a gift from C.5

The Case Law

It is clear from as early as the eighteenth century that an innocent D who receives an inter vivos gift through the actual or presumed undue influence of X over the donor, C, cannot retain the gift. It does not matter whether the gift is made by way of deed nor whether it is made directly or by way of a trust. The leading case is Bridgeman v Green decided at first instance in 1755 and, on a rehearing by way of appeal, in 1757.6 At issue was the validity of various gifts totaling £5,000 made by Henry Bridgeman due to the undue influence of his “artful servant”, George Green.7 The gifts were made to George himself (£2,600), George’s wife (£400), George’s brother, Thomas (£1,000) and to a lawyer, William Lock, in trust for William’s son (£1,000). At first instance, Lord Hardwicke L.C. treated the brother and the lawyer as clearly implicated in a fraud.8 As to the fact that William Lock received the gift on trust for his son, Lord Hardwicke considered the trust a sham and treated the gift as made to Lock himself.9 Relief was given for the full £5,000 with no separate mention of Green’s wife.

On the rehearing before the Lord Commissioners, Lord Wilmot, with whom the other Lord Commissioners agreed, affirmed Lord Hardwicke’s decree.10 But in doing so, Lord Wilmot considered whether it was necessary to show that Green’s wife and brother were implicated in the undue influence. His colourful conclusion was that it was not:

“There is no pretence that Green’s brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it …”11

6 (1755) 2 Ves Sen 627; 28 E.R. 399 Ch.; (1757) Wilm 56; 97 E.R. 22 HL. The plaintiff’s name is spelt as “Bridgeman” at first instance and “Bridgeman” on the rehearing.
7 George Green is variously described as footman, valet and butler, which may indicate the rise in his master’s esteem. On the meaning of “artful”, see C. Spivack, “Why the Testamentary Doctrine of Undue Influence Should Be Abolished” (2010) 58 Kansas L.R. 245 at 257–258.
8 Bridgeman v Green (1755) 2 Ves. Sen. 627 at 628; 28 E.R. 399 Ch at 400.
9 Bridgeman (1755) 2 Ves. Sen. 627 at 629; 28 E.R. 399 Ch at 401.
10 Bridgeman v Green (1757) Wilm. 56. 97 E.R. 22 HL.
11 Bridgeman (1757) Wilm. 56 at 64–65; 97 E.R. 22 HL at 25.

Lord Wilmot shared Lord Hardwicke’s view that the trust for the benefit of Lock’s son was a sham, but even if it were a genuine trust, the court should not enforce it:

“But if it was given to the son, we cannot execute the trust reposed in us for his benefit more faithfully, than by throwing such a poisonous weed out of his fortune ...”

Thus, even where D is the volunteer beneficiary of a trust tainted by actual or presumed undue influence exercised over the settlor, the trust will be set aside by the court.

The robust attitude in Bridgeman v Green was endorsed by Lord Eldon L.C. in the early 19th century case of Huguenin v Baseley concerning deeds of settlement made by C that benefitted not only C’s spiritual adviser, a clergyman, but also the clergyman’s wife and children. It was argued before Lord Eldon that the public policy that precluded the clergyman from receiving a gift from the person with whom he stood in a relation of confidence, should not extend to “the disappointment of the children”. Lord Eldon disagreed:

“And I should regret, that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence, of others.”

Bridgeman v Green and Huguenin v Baseley have always been considered correct when cited in subsequent cases involving undue influence and third parties.

The treatment of third party volunteers in Bridgeman v Green is also consistent with Chancery’s treatment of remote recipients of the benefit of a transaction able to be rescinded on some equitable ground. So, for example, D, who is given property by X that was the subject of a transaction tainted by undue influence between C and X, or by misrepresentation or fraud, is also liable to rescission. In the older cases D tended to be X’s heir. Thus, D is liable to restore the property to C whether the property was received directly from C or indirectly from X.

The principle in Bridgeman v Green has been affirmed in the 20th and 21st centuries, but rarely applied. Instead, the strict liability of third party volunteers appears to have been glossed over by courts more accustomed to dealing with third party financiers of transactions tainted by the undue influence of another. This may be due to the explosion in the 20th century of litigation concerning the enforceability by financial institutions, D, of securities tainted by the

12 Bridgeman (1757) Wilm 56 at 73; 97 ER 22 HL at 28.
13 (1807) 14 Ves Jun 273; 33 E.R. 526 Ch.
14 Huguenin v Baseley (1807) 14 Ves Jun 273 at 281; 33 E.R. 526 Ch at 529.
15 Huguenin (1807) 14 Ves Jun 273 at 289; 33 E.R. 526 Ch at 532.
16 Cooke v Lamotte (1851) 15 Beav. 234 at 250; 51 E.R. 527 Ch at 533; Bainbrigge v Browne (1881) 18 Ch. D. 188 Ch at 196–197; Morley v Loughman (1893) 1 Ch. 736 at 757; Barron v Willis [1899] Ch. D. 378 at 385; Barron v Willis [1900] 2 Ch. 121 CA at 133; Wright v Carter [1903] 1 Ch 27 CA; Bullock v Lloyds Bank Ltd [1955] 1 Ch. 317 Ch. O’Sullivan v Management Agency & Music Ltd [1985] 1 Q.B. 428 CA at 464.
misrepresentation or undue influence of the debtor, X, where the surety, C, and X are intimately related. The sheer number and significance of such cases has meant that the liability of third parties to undue influence in modern cases is often stated in terms applicable only to third parties who give value. A striking example is Lord Browne-Wilkinson’s judgment in *Barclays Bank Plc v O’Brien* in which, with respect, his Lordship gave the misleading impression that the liability of third parties to undue influence or misrepresentation depended entirely on notice:

“The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice).”

The reasoning employed in twentieth century Australian undue influence cases also suggests that the differences between a third party volunteer and a third party purchaser are sometimes overlooked or glossed over by the courts. In cases involving volunteer spouses, either the fact that D is a volunteer has been noted, but the court goes on to consider D’s notice, or D’s liability has been couched solely in terms of whether D had notice. In other cases involving gifts to members of X’s family courts in effect have treated the facts as involving only C and X. Nonetheless, and notwithstanding its lack of prominence in modern cases, the principle in *Bridgeman v Green* has not been challenged and indisputably remains good law.

**Rationales for D’s Liability**

There are a number of possible rationales for D’s strict liability. None is conclusive on its own, but in combination they help to justify the liability.

**Pragmatism**

The rationale that is most evident in the early cases is purely pragmatic: it would be too easy for X to perpetrate a fraud and divest C of his or her rights if a gift tainted by undue influence were beyond recall once placed in the hands of an innocent D. Bolstering this concern was the fact that Chancery’s only available remedy was to set aside the gift against D: X was not personally liable for C’s loss of the subject matter of the gift. In this vein, Lord Eldon in *Huguenin v Baseley* approved of Lord Hardwicke’s reasoning in *Bridgeman v Green*:

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22 See, e.g. *Quek v Beggs* (1990) 5 B.P.R. [97405] NSWSC.

23 See, e.g. *McCulloch v Fern* [2001] NSWSC 406 at [77] and [80].


25 *Bridgeman v Green* (1755) 2 Ves. Sen. 627 at 629; 28 E.R. 399 Ch at 401.

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"Lord Hardwicke observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud."26

It remains the case today that, generally, C’s only remedy is to rescind the gift to D. Courts have countenanced equitable compensation against D where rescission is impossible,27 but the question whether such a remedy could be awarded against X, rather than D, has not received direct attention.28

Such pragmatism is most compelling when D and X are closely related. Thus, in the early cases, the courts treated gifts to X’s wife and children as having been made to X himself and ignored the tripartite nature of the transaction.29 Underpinning this approach is the notion of a family being one interdependent and homogenous entity. On this reasoning, so long as D and X are closely related, X will benefit from a gift to D just as much as if the gift were made to X. The reasoning was explicitly stated in 1895 in relation to gifts made to a wife as a result of actual or presumed undue influence by her husband, a solicitor, over C:

"No distinction can be recognized between a gift made to a solicitor himself and one made to his wife. It is obvious that a solicitor might benefit largely by a gift to his wife, and there would be a similar temptation to exercise undue influence in respect of such a gift. The wife might make over the property to him the day after it had been given to her."30

A further, perhaps more speculative, factor underpinning the pragmatic rationale is that sometimes it is more likely than not that a D who is a close relative of X will actually know, or have reason to suspect, that the gift was tainted by the relationship of influence between X and C. Thus, on the facts of Bridgeman v Green, it seems highly unlikely that George Green’s wife and brother did not suspect anything was amiss. Strict liability removes the need to prove notice in situations where notice is, more likely than not, present.31 But this does not explain D’s strict liability where there is no intimate connection at all between D and X.

It is questionable how far the pragmatic rationale is justifiable today. A modern court is most unlikely to treat a family as one entity for equitable liability purposes32 or to assume that a wife is under her husband’s direction. On the other hand, the lack of alternative remedial options remains relevant.

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29 See, e.g. Bridgeman v Green (1757) Wilm. 56 at 64-65; 97 E.R. 2211 at 25. In the context of remote recipients, see Vane v Vane (1873) 8 Ch. App. 383 CA at 397 per James J.
31 See, e.g. Gregg v Kidd [1956] I.R. 183 HC.
The nature of rescission

The standard remedy for undue influence is rescission of the gift, that is, the reversal of the process by which the gift was made and the re-vesting in C, with any necessary adjustments and allowances, of the subject matter of the gift. C’s entitlement to rescission arises immediately the gift is made, although the court’s order is necessary to effectuate the rescission as well as to make any consequential orders. It is not necessary to show that the parties can be restored exactly to their previous positions so long as “the court can achieve practical justice between” them. This is accomplished, where necessary, through the power to “take account of profits and ... direct inquiries as to allowances proper to be made for deterioration ...”. The court will consider what is practically just for both parties, not just C, and will apply the maxim “he who seeks equity must do equity”. Particularly where D is innocent, which is the case here, the court will be alert to avoid a harsh outcome to D. A court has considerable discretion in moulding the remedy.

Rescission is possibly one of the mildest of equitable remedies in terms of its impact upon a defendant and rescission of a gift made to D should be a relatively straightforward instance of the remedy. Unlike some other equitable remedies, the impact of rescission is limited in scope by the terms of the original transaction between C and D. That is, D is not subjected to an unbounded and potentially onerous liability. Although the mildness of rescission is not always viewed as a strength, it is in this context as it means that D’s liability can be more easily justified. Given that the primary remedy for undue influence is bounded in its impact, restitutionary in focus and sensitive to changes in D’s position since the gift was made, one can understand why even an innocent D would be liable. The subject of the gift is restored to C; D is returned to his or her original position. The status quo resumes. Of course, this rationale for D’s liability is weakened to the extent that remedies other than rescission and with a more onerous impact upon D are countenanced.

The fragility of gifts

The voluntary nature of the transaction between C and D has been used to explain D’s liability in three ways, not all of which are convincing.

First, it is argued that gifts are more easily overturned than contracts because there are strong policy arguments against undoing a bargain which do not apply to a gift. These include the need to respect contracting parties’ allocation of risk.

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35 O’Sullivan v Management Agency and Music Ltd [1985] 1 Q.B. 428 at 458 per Dunn L.J., 466 per Fox L.J.
36 Alati v Kruger (1955) 94 C.L.R. 216 HCA at 223.
40 Rescission as such is unnecessary if the gift was a direct payment of money for there is no inconsistent legal instrument to be set aside: O’Sullivan et al, Law of Rescission (2008), at paras 29.34–29.35.
and the importance in commercial dealings of certainty and security of receipt. Therefore, gifts lack the normative backing of the principle of *pacta sunt servanda*. Thus, the argument goes, if C contracted with D, it must be shown that D was aware of the relationship of influence; that is, that D was personally at fault. Whereas, if C made a gift to D, no personal fault on the part of D is necessary.

The suggestion that gifts are more vulnerable to legal intervention than contracts must be treated with caution. It has been argued that gifts have an important role in the "moral economy" similar in significance to that of contracts in the market economy and therefore should not be too readily overturned. This argument finds support in the law of mistake. Stricter tests apply to rescind a mistaken deed of gift or trust in equity than to recover a mistaken non-contractual, non-gift, payment at common law. What is apparent from the different approaches to mistake in these different contexts is a hierarchy of transactions: contracts being the most difficult to overturn and direct payments made under a mistaken belief as to legal liability being the easiest to overturn. Gifts fall somewhere in the middle, depending upon whether equitable intervention is necessary to effect recovery.

Nonetheless, even accepting that there are policy reasons why courts should not be too ready to overturn gifts, these may not be as compelling in the undue influence context and they have not been generally recognised by the courts. Thus, the stronger policy reasons in favour of upholding contracts may still be a relevant factor in explaining D's strict liability as the donee of a gift. Security of receipt aside, which is accommodated by the requirements for rescission, there would seem to be fewer policy constraints on overturning gifts than for contracts.

A second version of the fragility of gifts rationale is that large gifts naturally cry out for explanation and must be defended. An extreme version of this notion was propounded by Sir John Romilly during his long office as Master of the Rolls in the mid-19th century. In Romilly M.R.'s view, even if a relationship of influence was not shown on the facts, the donee of a large gift must justify the propriety of the gift. But even at the time this was doubted by other judges and legal commentators and it has been subsequently discredited altogether as a legal principle.

A third version of the fragility of gifts rationale explains *Bridgeman v Green* on the basis of the equitable maxim that "Equity will not assist a volunteer". But that maxim describes equity's strong reluctance to bind a donor in relation to an

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46 There is some uncertainty as to the test for recovery at common law of a mistaken direct gift of money: *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 A.C. 558 HL at [87] per Lord Scott of Foscote; *Pitt v Holt* [2011] EWCA Civ 197; [2012] Ch. 132 at [166] per Lloyd L.J.


incomplete voluntary transaction" whereas, in our scenario, all necessary formalities have been complied with. In any event, recent courts have been more generous in their treatment of incomplete gifts. Further undermining this argument is the presence of other instances where equity indubitably assists volunteers to enforce their equitable rights, most strikingly in the case of beneficiaries of a trust who have not given consideration for their interests.

D “left everything to” X

The next possible rationale involves a loose conception of agency. On this explanation, X is considered to be D’s agent and hence D is liable for the equitable wrongdoing of X. The agency explanation emerged in the twentieth century in relation to surety cases in which C gave a security to D in relation to the debts of X. Often, X was C’s husband. It was said that if D had left it to X to obtain the security, D would be bound by any equitable wrongdoing of X in performing that task. Although D has given consideration to X in the form of a loan, “in substance” and in relation to C, D is analogous to a volunteer. Hence, these surety cases may have some relevance to the liability of D in our scenario.

The agency basis for D’s liability was explicitly linked to Bridgeman v Green in the 1902 Privy Council case of Turnbull v Duwall. D and X agreed that X would procure the signature of his wife, C, to a security over X’s debts in favour of D and prepared by D. X persuaded her to sign. C did not read the security document and had no advice or information about it. Lord Lindley, delivering the Privy Council’s judgment, considered that:

“It is impossible to hold that [the Ds] are unaffected by such pressure [by X] and ignorance [of C]. They left everything to [X], and must abide by the consequences ... The well-known case of Bridgeman v Green is conclusive to shew that [D] can obtain no benefit from it.”

A true agency relationship does not arise here because X does not have actual or ostensible authority to bind D. Furthermore, in surety cases it is more likely that X is acting on his or her own behalf and therefore is not acting as agent for the creditor, D. It is now accepted in England in relation to surety cases that, true agency arrangements apart, the statements in Turnbull v Duwall must be explained on some other basis.

It is questionable in any event whether the analogy between the surety cases and our scenario is convincing. If there is an actual agent/principal relationship

51 See, e.g. T Choudhram International SA v Pagaran [2001] 1 W.L.R. 1 PC.
52 See, e.g. Bank of New South Wales v Rogers (1941) 65 C.L.R. 42 HCA at 55 per Starke J.
53 Jerkey v Jones (1939) 63 C.L.R. 649 HCA at 685 per Dixon J. See also Bank of New South Wales v Rogers (1941) 65 C.L.R. 42 HCA at 54 per Starke J.
55 The fact that D’s agent was also the trustee of a trust for C constituted a separate ground for the decision.
56 Turnbull v Duwall [1902] A.C. 429 PC at 435. See also Chaplin & Co Ltd v Brammall (1908) 1 KB 233; Jerkey v Jones (1939) 63 C.L.R. 649 HCA at 681.
between X and D, then that suffices to explain D’s liability whether D is a volunteer or not, but this is not likely in scenarios involving volunteers even if D and X are closely related. It is more likely that D is simply the passive recipient of benefits arising from, or presumed to arise from, X’s relationship to C. Thus, even a loose conception of agency does not provide a convincing explanation for D’s liability.

**D’s conscience is affected**

Historically, D’s liability was explained in the language of conscience. An innocent volunteer’s conscience was affected when he or she sought to retain a gift now found to be tainted by undue influence. It was “against conscience, that one person should hold a benefit, which he derived through the fraud of another”.

This principle applied to all equitable triggers for rescission of a gift and reflected a “broad principle that no one can avail himself of fraud.”

That is, D need not be a participant in the equitable fraud of X in order for his conscience to be affected.

As Sir William Page Wood V.-C. explained in *Scholefield v Temple*: 

> “The truth is that, in all cases of this kind, where a fraud has been committed, and a third person is concerned, who was ignorant of the fraud, and from whom no consideration moves, such third person is innocent of the fraud only so long as he does not insist on deriving any benefit from it; but when once he seeks to derive any benefit from it he becomes a party to the fraud.”

Given that Equity had no problem in fastening liability onto the post-gift conscience of D in this way, why was the conscience of a bona fide purchaser for value of the legal estate from C who subsequently received notice of X’s presumed or actual undue influence over C not similarly affected? The reason is jurisdictional. The presence of consideration plus the absence of notice at the time of the transaction meant that there was nothing to attract the Court of Chancery’s jurisdiction.

Nor did an innocent bona fide purchaser of the legal estate require Chancery’s assistance to enforce his or her rights if they held a legal estate in the subject matter of the transaction. The plea of bona fide purchaser for value without notice of the legal estate was regarded as

> “an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court.”

Thus, Chancery could only interfere with transactions on the basis of conscience or where enforcement of equitable rights was sought. The bona fide purchaser of the legal estate without notice of X’s influence over C did not require the court’s assistance to enforce his legal right and the presence of consideration combined

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60 Huguenin v Baseley (1807) 14 Ves. Jun. 273 at 290; 33 E.R. 526 Ch at 532 per Lord Eldon. Lord Eldon relied upon Bridgeman v Green (1757) Wilm. 56; 97 E.R. 22 HL and upon the judgment of Lord Thurlow in litigation concerning the will of Lord Waltham. Lord Thurlow held that an innocent heir at law could not take advantage of her husband’s fraud in order to benefit under a will that the testator had been wrongly prevented from changing. See Dixon v Olmias (1877) 1 Cox. 414; 29 E.R. 1227 Ch; Latrell v Olmias (referred to in Meetaer v Gillespie (1805) 11 Ves. Jun. 622 at 638; 32 E.R. 1220 Ch at 1236 per Lord Eldon).

61 Scholefield v Temple (1859) 76 Ch. App. 259 at 269.


63 Scholefield (1859) Johns. 154 at 165; 70 E.R. 377 Ch at 381. See also Lloyd v Passingham (1809) 16 Ves. Jun. 59; 33 E.R. 906 Ch.

64 Re Nisbet and Potts’ Contract [1905] 1 Ch. 391 at 398.


66 Fulcher v Rawlins (1872) 7 Ch. App. 259 at 269.
with absence of notice meant that it was not unconscionable to retain the benefit of the contract with C even once aware of the influence.

The conscience rationale for D’s liability survived the fusion of the common law courts and Chancery. The High Court of Australia, for example, has made clear its understanding of conscience as being sufficiently unlimited in time to attach subsequently to a D who is innocent at the time of a tainted transaction and as not limited to conduct

“to speak of ‘unconscionable conduct’ as if it were all that need be shown may suggest that it is all that can be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time … However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired.”

Furthermore, even if the jurisdiction to set aside transactions for undue influence is seen as based solely upon the vitiation of C’s intention rather than any wrongdoing by X, as is the view of some scholars,66 the conscience rationale still holds good. This has been made clear in recent decisions concerning the equitable jurisdiction to rescind trusts and deeds of gift on the ground of a spontaneous mistake by C. The cases usually involve deeds of gift under which the disponer, C, has mistakenly conferred benefits on innocent volunteers, D. Here, the basis of recovery can only relate to C’s vitiated intention because D is not responsible in any way for C’s mistake and nor is any third party. Furthermore, D has given no consideration to C and thus can be equated with the innocent D receiving a gift tainted by undue influence.67 But D’s liability is still explained in the language of conscience. For example, in Gibbon v Mitchell the claimant, acting on incorrect legal advice, mistakenly executed a deed which had a contrary effect to that which he had intended.68 In so doing, he created a new class of beneficiaries under a discretionary trust. In Millett J’s view, the new beneficiaries’ consciences were bound:

“Equity acts on the conscience. The parties whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of the discretionary trust to arise on forfeiture…They are all volunteers. In my judgment they could not conscionably insist on their legal rights under the deed once they had become aware of the circumstances in which they had acquired them.”

With respect, this statement requires some qualification. It appears to suggest that rescission of the deed is still grounded in D’s eventual awareness of C’s mistake, albeit that this will not necessarily have occurred at the date the matter comes to

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69 [1990] 1 W.L.R. 1304 Ch.
court given that D may be an unborn, potential beneficiary. The older authorities
discussed above do not suggest that D’s awareness is necessary at all and this
seems the preferable view. Awareness that the gift is tainted, if shown, clearly
satisfies the conscience requirement, but is not a pre-requisite for liability.

This is supported by the Court of Appeal’s reasoning in the infamous case of
Re Diplock which involved personal claims against the innocent recipients of an
invalid testamentary bequest.71 Recovery was sought of the invalid distributions
to the extent that the loss to the estate could not otherwise be made good. On the
question of whether the recipients’ consciences could be affected without
knowledge, the court concluded after reviewing the case law:

“We have failed to observe any justification, in the judgments cited, for the
suggestion that the state of the defendant’s conscience depends upon his
knowledge or assumed knowledge that his title to the money paid to him may
or may not be defeasible in favour of other interested persons. The test as
regards conscience seems rather to be whether at the time when the payment
was made the legatee received anything more than, at the time, he was properly
titled to receive.”72

Similarly, in our scenario, it is against conscience for D to retain a benefit to which
he or she was not “properly entitled”. D’s awareness of the relationship of influence
does not enter into the analysis at all because conscience need not connote personal
wrongdoing on the part of D:

“‘unconscionable’ does not mean ‘culpable’ but only liable: the heir or the
good faith donee is caught by this principle, and his ‘conscience is affected’,
even though he may have no knowledge or notice and so not be guilty of any
kind of wrongdoing.”73

This analysis is also supported by Professor Klinck’s identification of five “lower
level concepts” inherent in the equitable concept of conscience.74 Of most interest
here are the concepts of “mutuality” and “awareness”. Mutuality concerns whether
there was reciprocity between the parties involved. Professor Klinck notes:

“the importance that equity—specifically as a matter of conscience—attributes
to one party’s having or not having received something for what is claimed.”75

The significance of mutuality is illustrated by the bona fide purchaser for value
without notice doctrine. Because the purchaser has reciprocated C’s actions by
giving consideration, something more, such as his or her awareness of the
relationship of influence, is required in order for the purchaser’s conscience to be
affected. Conversely, D has given nothing to C in return for the gift; there is no
mutuality and so it is against good conscience to retain that to which D was not
properly entitled.

71 [1948] 1 Ch. 465 CA.
72 Re Diplock [1948] 1 Ch. 465 CA at 488. See also at 492 and 503.
at 33.

The lower level concept of “awareness” is pervasive in equity jurisprudence and often interacts with the other lower-level concepts to justify an outcome being against conscience. But it is not an absolute pre-requisite and, exceptionally, mutuality alone can suffice for equity’s conscience to be attracted. Crucially, however, where mutuality is the only meaning of conscience in play, the cases suggest that “conscience is engaged differently and less intensely than in cases where other factors are present.” This suggests that an essential rationale for D’s liability is the mild nature of rescission. Where the only reason for liability is that D did not give value for a gift tainted by the vitiating factor of undue influence, the remedy should not go beyond restoring both parties to their pre-gift positions where that is still possible.

It has been argued that the concept of conscience in equity is a shorthand representation for distinctive judge-made legal norms underlying equitable doctrine. If so, the legal norm at play in relation to D appears to be that of lack of mutuality plus the ability to substantially return the parties to the pre-gift situation. D cannot keep a gift to which he or she was not entitled if C and D can be restored substantially to their original positions. D’s liability in Bridgeman v Green exemplifies this norm.

Some commentators strongly dispute the utility of a conscience explanation for D’s liability. Conscience is seen as a conclusory, and therefore redundant, statement. Thus, for example, the liability of the third parties in Bridgeman v Green has been explained solely in unjust enrichment terms:

“As they were not bona fide purchasers for value without notice, there was no justification for their being enriched at the expense of the claimant who did not truly mean them to have the money.”

On this approach, to say that D is acting unconscionably adds nothing to an already sufficient analysis.

The unjust enrichment explanation for undue influence will be discussed further below, but at this point it can be noted that to some extent the criticism is semantic: both the conscience and unjust enrichment descriptive labels rely upon the same factors in this context, namely, that D was a volunteer and the transaction was tainted by actual or presumed undue influence. For D to retain the gift when it could be returned to C without undue hardship to D is both an “unjust enrichment” and “unconscionable”: both are valid, conclusory descriptions. This is not to suggest that there are not important differences in emphasis in the detail of either explanation. For example, the enrichment is considered unjust because of the vitiation of C’s consent alone; the fact that D is a volunteer goes to the absence of a defence based on the provision of consideration. Conversely, on the conscience approach, D’s status as volunteer is not a defence, but an essential element in

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establishing C’s claim. Thus, both unjust enrichment and conscience require some unpacking before they can be viewed as more than conclusory statements.

A further criticism of the conscience explanation that is sometimes made is that it does not explain why C’s right to rescind arises immediately the gift is made.\textsuperscript{81} This is easily refuted once one understands how conscience operates in this context: the conscience rationale is not personal to D, that is, it is not necessary to wait until D becomes aware of the undue influence. This is graphically illustrated by the mistaken gift cases in which the concept of conscience is applied to the unborn beneficiaries of a trust. Rather, conscience here reflects the court’s view of what is right and proper in the circumstances and is strongest at the time of the gift when it will be most feasible to restore the subject matter of the gift to C.

\textit{C’s property rights trump D’s property rights}

The final possible rationale for D’s strict liability draws upon the legal rules that determine whose rights prevail in a competition between inconsistent claims to the same property: specifically, the priority rules and the defence of bona fide purchaser for value without notice of the legal estate. Could D’s liability be explained simply on the basis that C’s property rights to the subject-matter of the gift trump D’s property rights? If so, the role of conscience in explaining D’s liability is minimal.\textsuperscript{82}

This rationale can only apply if the subject matter of the gift is an enduring asset so that rescission will involve the re-transfer of the asset to C and hence generate property rights. Although more complex scenarios may be envisaged, for the sake of simplicity the following discussion will assume that C’s gift to D transferred either equitable or legal title to the property that was the subject matter of the gift and that the property is still identifiable in D’s hands. It will also be assumed that statutory registration schemes and statutory modifications of the general law rules do not apply as our question concerns a possible historical rationale for D’s liability, rather than depending upon the current law.

Because a transaction tainted by undue influence is voidable, rather than void, it will pass title in its subject matter to D. Depending on what interest C had and the form of the gift, D obtains a legal or equitable interest in the subject matter of the gift. The gift to D divests C of his or her existing proprietary interest in the subject matter of the gift, but because C has the right to challenge the transaction on the basis of undue influence, C can be said to have an inchoate interest in the subject matter of the gift. This is itself a proprietary interest, albeit a much more fragile one than C’s original interest.\textsuperscript{83} Thus, C is said to have a “mere equity” for the purpose of determining priority claims.\textsuperscript{84} That being so, can the scenario be conceptualised as a contest between C and D’s property rights to the subject matter of the gift?

The priorities rules cannot be applied directly to the contest between C and D because C’s mere equity and D’s legal or equitable right arise out of the same


\textsuperscript{83} See, e.g. Lane Investments Ltd v Hotel Terrigal Pty Ltd (as legis) (1965) 113 C.L.R. 265.

transaction, rather than from subsequent transactions. The priorities rules are strongly dependent upon the point in time at which interests were gained and on whether the holder of a later acquired interest had notice of an earlier interest in the property. For this reason, it is simplest to explain first how the priorities rules would apply if D is a remote recipient, rather than a direct recipient from C, that is, where D gains the property interest, via X, at a later point in time. The priority rules clearly apply in this context.

If C gives an asset to X by way of a gift tainted by X’s undue influence and X then gives the same asset to D, the primary priorities rule is that the first interest created will prevail. C’s mere equity is first in time and will prevail over D’s later legal or equitable interest in the subject matter of the gift because D is not a bona fide purchaser for value without notice. Although C’s mere equity is extremely vulnerable, D suffers from equal disabilities in being later in time and a volunteer. Thus, C’s property rights will generally trump D’s property rights where D is a remote recipient and a volunteer.

Can the rules applicable to C and a remote D apply by analogy when C and D’s rights arise out of the same transaction? The case law suggests that they can. The 1881 case of Bainbrigg v Browne involved an assignment by C, the wife and children of X, of property to D, the creditors of X, to secure the payment of debts owed by X to D. That is, D was the direct recipient of a benefit from C in a transaction tainted by the undue influence of X. Fry J. described D’s liability as follows:

“[the inference of undue influence] operates against the person who is able to exercise the influence ... and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the Court infers the equity.”

Although the wording here suggests that D was a remote recipient, Fry J. applied the principle to the facts of the case before him which involved a direct transaction between C and D, rather than between C and X and then X and D.

The application of the priority rules in such a context relies on the one transaction between C and D being recast as two transactions: a gift or contract between C and X and then a gift or contract between X and D. Fry J.’s approach in Bainbrigg v Browne was followed by the High Court of Australia in Bank of NSW v Rogers in relation to a similar fact situation where the court also drew no distinction between the situation of a direct D and a remote D. The same approach of recasting one transaction as two transactions is also taken by Lord Browne-Wilkinson in Barclays Bank Plc v O’Brien.
There appears nothing particularly controversial in Fry J.'s approach in Bainbrigge v Browne at least as applied to volunteers. Overall, however, the property rights contest rationale for D's liability does not add much to our understanding of D's liability. It only applies when the gift generates property rights so cannot be a comprehensive rationale. Furthermore, it seems rather implausible to say that C's mere equity is first in time when created simultaneously with D's property right. Given that the weakness of D's competing claim to the property derives from D's status as a volunteer, this brings us in a full circle back to the more comprehensive explanation of conscience discussed above.

Thus, the most plausible and enduring rationales for D's strict liability concern the nature of rescission, the absence of sufficiently strong policy reasons for upholding the gift and the notion of conscience in equity. These three rationales were underpinned historically by a strong pragmatism that sought to protect C from too easily losing the only available remedy. What, then, are the wider implications of this analysis?

**The Basis of Undue Influence**

Does D's strict liability, as exemplified by Bridgeman v Green, cast any light on the rationale for the doctrine of undue influence? It is argued by some scholars that if the liability is not founded upon D's wrongdoing, then the only possible justification for equitable intervention is that C's consent to the impugned gift was vitiated by the actual or presumed undue influence of X. According to this analysis, an undue influence claim therefore is properly conceptualised as an unjust enrichment claim: D is unjustly enriched at the expense of C because C's consent to the gift was vitiated. Such reliance upon Bridgeman v Green is not limited to where D is an innocent third party, but extends to where the transaction is between C and X and there is no innocent third party volunteer involved.

This is not the place to enter into a lengthy critique of the unjust enrichment explanation of undue influence. Even if that explanation is accepted on its own terms, the nature of D's liability in Bridgeman v Green does not support it. As explained above, there are a number of rationales that, in combination, justify D's liability and these are not necessarily concerned with the vitiation of C's consent. D's vulnerable status as a volunteer and the mild nature of rescission, for example, are significant factors which have nothing to do with the vitiation of C's consent. Furthermore, to say that D's liability is not fault-based does not necessarily entail that X's liability, if the gift were instead made to X, is also not fault-based. The liabilities of D and X are separate, primary, liabilities for which there may be separate and distinct rationales. D's strict liability as the innocent recipient of a gift tainted by the actual or presumed undue influence of X takes, as given, the

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tainted nature of the gift; it does not explain why the law regards that gift as tainted in the first place.

**Equitable Recipient Liability**

*Bridgeman v Green* is also relied upon to argue that a strict liability approach should apply to the volunteer recipient of trust property received in breach of the trust. Recipient liability involves an equitable personal claim against a third party to a trust or other fiduciary relationship who received trust property in breach of the trust or fiduciary duty. Liability turns on the recipient’s awareness of the breach of trust or fiduciary duty: it “must be such as to make it unconscionable for him to retain the benefit of the receipt.” It has been suggested by Professor Burrows that there is some incoherence within equity itself, let alone when comparing recipient liability with analogous common law liabilities, if recipient liability is fault-based and D’s liability in *Bridgeman v Green* is not. The suggestion is made as part of a wider campaign for recipient liability either to be recast as a strict liability unjust enrichment claim or for a strict liability claim to be developed alongside the existing fault-based equitable claim.

There are at least three steps in such an argument. The first is that recipient liability and *Bridgeman v Green* liability are inherently similar claims such that the latter strict liability claim can be used as a template for the former, fault-based, claim. The second step in the argument is that both the *Bridgeman v Green* liability and a reformulated strict recipient liability are unjust enrichment claims. The Birksian unjust enrichment framework is applied:

1. Was D enriched?
2. Was the enrichment at the expense of C?
3. Was the enrichment unjust?
4. Are there any defences?

The second step in the argument necessitates a radical reformulation of the law in order to accommodate the unjust enrichment framework either as a substitute for, or addition to, fault-based recipient liability. Specifically, it means abolishing the requirement of unconscionability on the part of D, limiting the remedy to restitution of the enrichment received by D, and inserting a change of position defence. Hence, the third step in the argument is normative: recipient liability

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89 Company assets are regarded as trust property in the hands of the company directors for these purposes. *Russell v Wakefield Waterworks Co* (1875) L.R. 20 Eq. 474 Ch at 479; *Belmont Finance Corporation v Williams Furniture Ltd* [No 2] [1980] 1 All E.R. 393 CA at 405 per Buckley L.J. The doctrine also applies to any fiduciary in control of property belonging to his or her principal: *Foley v Hill* (1848) 2 H.L. Cas. 28 QB at 35–36.
90 *Bank of Credit and Commerce International (Overseas) Ltd v Akande* [2001] Ch. 437 CA at 455 per Nourse L.J.
93 *Birks, Unjust Enrichment* (2005), at p.39.
should be recast in this way. It is beyond the scope of this article to consider all three steps in the argument, but some thoughts are now offered on the first step, namely, that recipient liability and the Bridgeman v Green liability are inherently similar claims. Do any of the rationales for the liability of an innocent recipient of a gift tainted by undue influence apply to the innocent volunteer recipient of misappropriated trust property?

Pragmatism

The pragmatic rationale is not convincing when applied to the innocent recipient of misappropriated trust property. Recipient liability offers a range of remedies and is not C’s sole remedial avenue in relation to the breach of trust or fiduciary duty. The remedy for recipient liability is generally equitable compensation, but can be a gain-based remedy. Recipient liability exists alongside possible claims using the priorities doctrine or tracing rules to assert C’s right to any trust property or its traceable substitute remaining in the recipient’s hands. Recipient liability also exists alongside accessory liability if D or any other implicated third party is shown to have acted dishonestly. Clearly, C also has a claim against the defaulting trustee or fiduciary for which more than one remedy is potentially available. There may also be common law claims available. Conversely, a strong motivation for the pragmatic attitude in the undue influence cases was that C had no alternative remedy at all to rescission of the gift to D. Strict liability ensured that C was not too easily deprived of his or her sole remedy. This cannot be a concern when C has a plethora of possible remedies and alternative claims.

The nature of rescission

The nature of rescission in equity’s auxiliary jurisdiction is crucial to justifying D’s strict liability, but the current remedy for recipient liability is more likely to be equitable compensation. Reformulating recipient liability as a strict liability unjust enrichment claim involves making restitution the only remedy and including a change of position defence. The operation of equitable rescission and the operation of the change of position defence as currently formulated in the common law, even recognizing that the latter is an evolving defence, are different. If recipient liability were to be recast as an unjust enrichment strict liability claim, then the change of position defence would need to reflect more closely than is presently the case the operation of the equitable remedy of rescission. This would involve considering the conduct of both parties and requiring C to “do equity”. If this were achieved, then the rescission rationale for Bridgeman v Green liability would apply equally to a strict recipient liability claim.

The fragility of gifts

The argument that there are fewer policy constraints on overturning gifts than contracts applies equally to recipients of misappropriated trust property where, by definition, there is no valid contract governing the transfer. Security of receipt concerns could be dealt with by the change of position defence, subject to the comments above.

D’s conscience

There is a clear resonance between the conscience rationale for D’s strict liability in Bridgeman v Green and the situation of an innocent recipient of misappropriated trust property. This is the strongest aspect of the argument that the latter liability should also be strict. Under the former liability, the lack of mutuality means that it is against good conscience for D to retain a gift to which he or she is not properly entitled, because of the taint of undue influence, to the extent that it can be returned without hardship to D. This reasoning is equally applicable to the innocent recipient of misappropriated trust property: there is a lack of mutuality because D is a volunteer and the breach of trust is an equitable wrong which taints the transaction. But, as already noted, if mutuality is the only factor at play, “conscience is engaged differently and less intensely than in cases where other factors are present.” Thus, what must be addressed is whether the conscience rationale is sufficiently bolstered by the other rationales in this context, including rationales that apply only to recipient liability and that have not been considered here. The analysis in this article suggests that whilst the liability in Bridgeman v Green is strict, this is an exceptional liability which modern courts have been somewhat reluctant to impose. Furthermore, the victim of a breach of trust has other claims and remedies which weaken the case for pursuing D to the extent of strict liability.

Conclusion

The liability of an innocent recipient of a gift from C that is tainted by the actual or presumed undue influence of X is not based on fault. As Lord Wilmot’s evocative statement of principle in Bridgeman v Green suggests, it is a strict liability: “Let the hand receiving [the gift] be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it”. There are four clear and persuasive rationales for D’s strict liability, but these are cumulative. The dominant rationale is that of conscience in the equitable sense of that term. Conscience here is based upon the lack of mutuality between C and D combined with the tainted nature of the gift and the fact that the parties can be returned substantially to their original positions. Conscience in this context does not at any time require awareness by D of the relationship of influence between C and X. The conscience rationale draws strength from, and is dependent upon, the nature of equitable rescission and the lack of any strong policy concerns against disrupting gifts in this context. The rescission rationale and the fragility of gifts rationale also interact with each other: concerns about protecting security of receipt are

112 (1757) Wilm. 56 at 64-65; 97 E.R. 22 at 25.
accommodated by the sensitive, discretionary application of the remedy of rescission when dealing with two innocent parties. Underpinning these rationales historically was a strong pragmatism. Courts were loath to countenance X’s equitable fraud or to leave C without a remedy simply because the benefit had instead gone to a close relative or associate of X. Rather than an alternative remedy being made available against X, D was made strictly liable to return the gift to C where that was still possible. The remaining two rationales considered in this article, depending respectively on a loose conception of agency and a contest between C and D’s property rights, turn out to be unconvincing.

Turning to the ways in which D’s strict liability has been harnessed in support of wider claims, the argument that it supports the characterisation of undue influence as an unjust enrichment claim is unpersuasive, but at least some of the rationales that explain D’s strict liability in Bridgeman v Green could apply to the innocent volunteer recipient of misappropriated trust property. The conscience rationale seems readily applicable given that D is a volunteer who was not properly entitled and assuming that restoration of the parties to the pre-transfer position is possible without hardship. But this rationale is dependent upon the nature of equitable rescission and draws on the fact that no other remedy is available to C. This is not so in relation to the victim of a breach of trust or fiduciary duty and the cogency of the argument in favour of strict liability is accordingly weakened. Hence, the liability in Bridgeman v Green does not provide a compelling case for reformulating equitable fault-based claims, such as recipient liability for breach of trust or fiduciary duty, as strict liability claims.

Equitable remedies; Gifts; Rescission; Strict liability; Undue influence

CHAPTER EIGHT
I. Introduction

Participatory liability concerns personal, fault-based liability that is contingent upon the commission of another’s equitable wrongdoing. It includes accessory liability (for procuring, assisting or otherwise facilitating an equitable wrong) and recipient liability (for knowing receipt of trust property for personal benefit in breach of trust or fiduciary duty).\(^1\) A distinguishing feature of participatory liability is that, although the culpable accessory or recipient is liable because of his or her own wrongdoing, that liability is ancillary, or secondary, in that it depends upon wrongdoing by another (the primary wrong).

Until relatively recently, the remedies available for participatory liability have escaped scrutiny.\(^2\) In the most commonly litigated scenarios – those concerning participation in a breach of trust or fiduciary duty – the remedy for participatory liability has usually been dealt with in a few lines towards the end of judgments that focus upon the remedies available against the defaulting trustee or fiduciary. The most that could be said was that the culpable participant was liable as a constructive trustee or, more broadly speaking, ‘accountable in equity’. Generally this meant that the participant was liable for the same remedy as that ordered against the trustee or fiduciary.\(^3\) In the last ten years or so, however, this has changed as the remedies available for various forms of equitable participatory liability have been relied upon to support competing theories as to the

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\(^3\) *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [142] (‘*Dubai Aluminium*’).
rationale/s for liability. As well as academic commentary, there have been important judgments explicitly addressing the question of remedy.

The purpose of this Chapter is to address three questions concerning the monetary remedies for equitable participatory liability that have crystallised as a result of the recent commentary and case law. It is difficult to resolve such questions by resort to consistent case law that is directly on point because the principles concerning both participatory liability and its remedies are still evolving. Accordingly, the approach taken here is first to identify general principles that are of particular relevance to the remedies for participatory liability (Part II) and then, after a brief outline of accounting and compensatory remedies for breach of trust and fiduciary duty (Part III), to discuss the three questions with reference to the general principles (Part IV).

By ‘general principles’ I mean informing and fundamental principles that are consistently stated or implicit in the case law over time. ‘Monetary remedies’ refers to the court orders that result in a personal liability to pay a monetary sum and that flow from either:

(i) the procedure available against an accounting party for an account in relation to property;
(ii) a loss-based claim for equitable compensation in response to equitable wrongdoing; or,
(iii) a claim for an account of profits in response to equitable wrongdoing.

These remedies are explained in more depth in Parts III and IV.

‘Participatory liability’ is used in this Chapter as a generic label because of its usage in recent Australian cases and because it captures the essential common denominator in accessory liability and recipient liability of culpable association with the primary wrong. Jurisdictional differences concerning the formulation of participatory causes of action (for example, a requirement of knowledge in Australia and dishonesty in England, for accessory liability) do not affect the remedial focus of this Chapter and are not commented upon. A distinction between accessory liability and recipient liability that should be noted, however, is that, in the case of recipient liability, the third party’s ‘participation’ is not restricted to the time of commission of the primary wrong, whereas

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6 Monetary orders accompanying an order for rescission of a transaction between the claimant and the third party defendant as a consequence of the defendant’s participatory liability are not discussed in this Chapter.
7 See, eg, Grimaldi (n 1).
the concept of accessory liability requires involvement by the accessory before or during the commission of the primary wrong. But for the purposes of this Chapter, it will be assumed that it is appropriate to conceptually group recipient liability with accessory liability in this way. This grouping reflects the current Australian law; the English courts also appear to be reverting to such a conceptual grouping by emphasising the similarities between accessory liability and recipient liability. But in any event the conclusions reached here in relation to remedy are equally justified even if accessory and recipient liabilities are not conceptually grouped in this way.

From now on, the participant defendant will be referred to as ‘D’, the party who commits the primary wrong as the ‘primary wrongdoer’ or ‘PW’, and the victim of that wrongdoing as the claimant, ‘C’. Whilst the law to be discussed here concerns the primary wrongs of breach of trust and breach of fiduciary duty, the same principles apply where participatory liability attaches to other equitable wrongs such as, for example, breach of confidence. The Chapter’s focus is upon Australian and English law, although jurisdictional differences and the nature of the subject matter make it dangerous to generalise. Consequently, the Chapter’s conclusions may have more or less weight depending on the supporting cases in each jurisdiction.

II General Principles of Relevance to the Remedies for Equitable Participatory Liability

A The Rationale and Purposes of Participatory Liability Determine Which Remedies May Be Considered

The rationale and purpose, or purposes, of a cause of action determine which remedies are available in principle, how they are to be selected and how they are to be calculated where calculation is necessary. Furthermore, an inquiry into the purpose of a cause of action necessitates judicial consideration of policy matters. This fundamental principle is not confined to equity, of course.

Often such an inquiry is unnecessary because the law is settled as to the cause of action and associated remedies. But even then there will be instances where, although a remedy is clearly available, its mode of calculation in relation to a particular cause of action is uncertain. The remedy of equitable compensation is a case in point. An award

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9 See also, Dietrich and Ridge, Accessories (n 1) ch 7.
10 Farah Constructions (n 1); Grimaldi (n 1). But see Hasler (n 8) [75]-[76].
12 It could be said that ‘purposes’ and ‘rationales’ are the same thing. The meaning I intend to convey by ‘purpose’ is a rationale that has a pragmatic objective. Cf Pauline Ridge, ‘Justifying the Remedies for Dishonest Assistance’ (2008) 124 Law Quarterly Review 445, 447.
14 AIB Group (UK) plc v Mark Redler & Co [2014] UKSC 58, [2014] 3 WLR 1367 [92] (Lord Reed JSC) (‘AIB’).
15 Grimaldi (n 1) [503].
of equitable compensation must reflect the character of the obligation that is breached\(^\text{16}\) but, as current controversy surrounding its availability and calculation in relation to breaches of trust shows, it is not yet settled as to what this entails.\(^\text{17}\) Hence, it may still be necessary to consider the purpose and rationale of the cause of action in order to finesse a remedy that is clearly available.

What, then, are the rationale and purpose/s of equitable participatory liability?\(^\text{18}\) The rationale is simple: equity intervenes because of D’s culpable (unconscionable) association with the primary wrong. The combination of D’s conduct and D’s mental state (generally, knowledge of the primary wrong) renders D’s conduct culpable and creates a link to the primary wrong that justifies making D legally responsible for that primary wrong. The most pervasive formulation of this rationale across different forms of equitable participatory liability refers to interference for personal gain: it is unconscionable for D knowingly to interfere for personal gain with a relationship between C and PW that is governed by equity.\(^\text{19}\) So, for example, in *Fyffes Group Ltd v Templeman*, it was said:

> although [D] owes no personal obligation of loyalty to [C], it is unconscionable for him dishonestly to suborn the loyalty of the agent [PW] and equally unconscionable for him to keep benefits which he has obtained by dishonestly abusing to his own advantage the position of [PW] whose duty was to [C].\(^\text{20}\)

This gain-based, exploitation, rationale resonates particularly with recipient liability: the knowing recipient of trust property has taken advantage of a breach of trust for personal gain. In relation to the accessory form of participatory liability, however, the rationale for D’s liability is sometimes phrased more broadly and without the emphasis upon personal gain.\(^\text{21}\) For example, in relation to the English form of equitable accessory liability (dishonest procurement or assistance), it has been said that trust beneficiaries ‘are entitled to expect that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship…’.\(^\text{22}\) Here, the gravamen of D’s participatory liability concerns the knowing interference with, or disruption of, the trust or fiduciary relationship between C and PW that is protected in equity, regardless of whether this was for gain.

The purposes of participatory liability are reflected in its fault-based rationale and demonstrate the importance attached by equity to relationships of trust and confidence, particularly trust and fiduciary relationships. Thus, one purpose of participatory liability is to deter third parties from culpable participation and hence to make it more difficult for trustees and fiduciaries to commit equitable wrongs.\(^\text{23}\) Another is to increase the chances

\(^{16}\) AIB (n 14) [138].

\(^{17}\) See below, Part III.

\(^{18}\) See generally, Dietrich and Ridge, *Accessories* (n 1) [8.1.3].


\(^{20}\) *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd’s Rep 643 (QB) 669 (‘*Fyffes Group’*).

\(^{21}\) This is not to suggest, however, that the gain-based rationale does not also apply.

\(^{22}\) *Royal Brunei Airlines* (n 1) 386-387.

\(^{23}\) See, eg, *Consul Development* (n 19) 397; *Zhu* (n 19) [121].
of a successful claim for C by increasing the number of possible defendants. Another is to encourage de facto regulation of trustee and fiduciary conduct by professional agents who may be able to detect and expose equitable wrongdoing. Thus, by various means, participatory liability protects the integrity of trust and fiduciary relationships. Policy concerns are important here and may militate for, or against, the imposition of liability. For example, the courts may be concerned not unduly to restrict legitimate commercial dealings, not overly to burden professional agents, or not to outflank concurrent statutory regulatory regimes.

The current law concerning remedies for participatory liability accords with the rationale and purposes of the liability: D is potentially liable to the complete range of equitable remedies. This is what is meant by saying that D is ‘accountable in equity’ or a ‘constructive trustee’. Gain-based remedies are clearly consistent with the most pervasive formulation of the rationale for participatory liability, and their availability is supported by the case law. This is discussed further in Part IV C. Loss based remedies are also clearly available and readily justified given the rationale and purposes of participatory liability. They are also coherent with the common law’s most common remedial response to culpable interference with legal relationships. But it should not be forgotten that a loss-based remedy may be extremely onerous – more so than a gain-based remedy – because D is made jointly and severally liable with PW for all of C’s losses that result from the primary wrong. That is, as discussed below in Part IV B, D assumes the same compensatory liability as PW. This fact must surely temper a court’s readiness to impose liability.

B The Rationale and Purpose/s of the Primary Wrong Are Also Relevant

What is clear from the foregoing discussion of the rationale and purposes of participatory liability is that their ascertainment also requires an inquiry into the rationale and purposes of the primary wrong with which D is culpably associated. The ancillary nature of participatory liability makes this inevitable. The inquiry with respect to the primary wrong, however, has an indirect, more nuanced, relevance to the remedies available against D, as will now be explained.

Most obviously, D is not the primary wrongdoer: he or she is not a trustee or fiduciary and hence the rationale and purposes underpinning PW’s liability cannot automatically apply to D. Furthermore, whilst D’s liability is derivative in the sense that the primary wrong is a precondition for D’s liability, D’s liability does not necessarily

24 See, eg, Royal Brunei Airlines (n 1) 386-387.
25 ibid.
26 See, eg, Dubai Aluminium (n 3) [142].
27 Consul Development (n 19) 397; Michael Wilson (n 5) [106]; Novoship (n 5). See also, Ridge, ‘Justifying the Remedies’ (n 12) 451-457. The extent to which gain-based proprietary remedies are allowed depends upon the jurisdiction in question and is beyond this chapter’s scope.
28 See generally, Dietrich and Ridge, Accessories (n 1) [5.7] (Torts).
29 Blyth v Fladgate [1891] 1 Ch 337; Cowper v Stoneham (1893) 68 LT 18; Trustor AB v Smallbone (No 3) (CA, 9 May 2000) [97]; Ultraframe (UK) v Fielding [2005] EWCH 1638, [2006] FSR 17 [600] (‘Ultraframe’). In Australia, see Grimaldi (n 1) [558].
30 Novoship (n 5).
duplicate that of PW.\textsuperscript{31} D is liable for D’s own wrongdoing. Thus, it is not necessarily the case that the full range of remedies available against a trustee or fiduciary must be available against PW, nor that they should necessarily be measured in the same way.

Nonetheless, whilst D’s wrongdoing is of a different nature to that of PW, this does not mean that it cannot be equally egregious. Although the rationale and purposes of the two wrongs are clearly different, it does not follow that a lesser range of remedies must apply to D. The remedies available against PW and D may differ because they are liable in relation to different wrongs and because different consequences may ensue in relation to each, not because the nature of D’s wrongdoing is of lesser consequence in the eyes of equity.

Because D is not a trustee or fiduciary, policy considerations that influence the claimant-friendly determination of remedy in relation to a trustee or fiduciary do not automatically apply to D;\textsuperscript{32} however, this cannot be a hard and fast rule. One way in which the rationale and purposes of fiduciary law do influence participatory liability is in relation to the former’s well-established prophylactic character. The purposes of participatory liability ensure, in pragmatic ways, that the particular trust or fiduciary relationship between C and PW is vindicated and that other such relationships are also protected. Accordingly, a prophylactic spirit infuses participatory liability as well as trust and fiduciary law.

The rationale and purposes of fiduciary law may also be applicable to PW directly where the nature of the relationship between PW and D renders their wrongdoing virtually indistinguishable. This appears to be what is happening in those cases where the court refers to D having a ‘transmitted fiduciary obligation’.\textsuperscript{33} Such reasoning has most weight where D and PW are closely related, most obviously where one is the corporate alter ego of the other, or where D and PW are in an intimate relationship.\textsuperscript{34} But even when D and PW are not closely related, if they are nonetheless essentially of one mind and purpose in their commission of the primary wrong, a court might exceptionally find that they should be jointly and severally liable for each other’s gains.\textsuperscript{35} In such a case, it would seem, the mode of calculation and imposition of the remedy should be the same, regardless of whether D or PW’s liability is in question, and the rationale and purposes of fiduciary law would apply directly.

Similarly, equitable remedies may have vindicatory and deterrence functions. This is most clearly seen in relation to trustee and fiduciary wrongdoing:

\textsuperscript{31} Michael Wilson (n 5) [106]. See also, Dietrich and Ridge, Accessories (n 1) [8.1.5].

\textsuperscript{32} Novoship (n 5). See also, Part IV C below.

\textsuperscript{33} See, eg, Bli Bli No 1 Pty Ltd v Kimlin Investments Pty Ltd [2008] QSC 289 [48]. See also, Club of the Clubs Pty Ltd v King Network Group Pty Ltd (No 2) [2007] NSWSC 574 [58] (Bergin J citing Queensland Mines Ltd v Hudson (1975-76) CLC 40-266 (NSWSC) 28,709; Timber Engineering Co Pty Ltd v Anderson [1980] 2 NSWLR 488 (NSWSC) 495; Natural Extracts Pty Ltd v Stotter (1997) 24 ACSR 110 (FCA) 138).

\textsuperscript{34} See, eg, Warman International Ltd v Dwyer (1995) 182 CLR 544 (‘Warman’).

\textsuperscript{35} Grimaldi (n 1) [558] citing inter alia CMS Dolphin Ltd v Simonet [2001] 2 BCLC 704 (Ch) (‘CMS Dolphin’); Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2) [1984] WAR 32 (WASC) (‘Green & Clara’).
[t]he fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged…[E]quity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.36

The goals of vindication and deterrence can also be pursued against D, but generally this would only be where a close relationship between D and PW warrants the transmission of the fiduciary relationship. It is clear that the jurisdiction is not penal.37 Hence, the courts have warned against automatically rendering D liable for PW’s profits.38 Similarly, ‘a third party participant, is not to be punished for misconduct by making him or her account for more than what was actually received by him or her as a result of [the participation].’39

C Equitable Remedies Are Discretionary

A third general principle governing the remedies for participatory liability is that equitable remedies are not available as of right, but are subject to the court’s discretion which is exercised according to ‘settled principles’.40 These principles include recognised defences ‘such as estoppel, laches, acquiescence and delay’, but also allow a court to refuse a remedy ‘where it would be unconscientious [for C] to assert it’41 or if it would be ‘disproportionate in relation to the particular form and extent of wrongdoing’.42

This feature of equity’s remedial jurisdiction is extremely valuable because it allows a greater range of remedies to be potentially available, whilst precluding or moderating outcomes that do not accord with the rationale and purpose of the liability. Necessarily, the exercise of remedial discretion may require that painstaking attention be paid to the particular facts of a case.43 A recent example of the value of remedial discretion is the Federal Court’s decision in Grimaldi v Chameleon Mining NL (No 2).44 In this case an inquiry was conducted into whether the sought-after remedy of remedial constructive trust was commensurate with the rationale and purposes of participatory liability on the specific facts in question. The Court refused, as a matter of discretion, to impose a constructive trust over certain assets of D Company, as a remedy for recipient liability; instead, an account of profits was ordered. The Court considered that the rationale and purposes of recipient liability did not warrant the imposition of an onerous proprietary remedy upon D on these facts. The arms-length relationship of PW and D meant that the rationale and purposes of fiduciary duty were not directly applicable; the egregiousness of D’s wrongdoing and significant changes in the composition of D’s investors over time,

36 Canson (n 13) 154. Quoted with approval in Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15, (2003) 212 CLR 484 [40] (‘Youyang’).
37 See, eg, Grimaldi (n 1) [680].
38 See Ultraframe (n 29) [1600].
39 Grimaldi (n 1) [748] (citations omitted).
40 Warman (n 34) 559 (in the context of an account of profits for breach of fiduciary duty).
42 Novoship (n 5) [119]. See also, Grimaldi (n 1) [674].
43 See The ‘Juliana’ (1822) 2 Dods 504, 521; 165 ER 1560, 167 (Lord Stowell): ‘A Court of law works its way to short issues, and confines its views to them. A Court of Equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.’
44 Grimaldi (n 1).
as well as pragmatic concerns as to the feasibility of such remedy, were additional factors in the Court’s exercise of discretion.  

D The Remedy will be Moulded To the Particular Facts

In Warman International Ltd v Dwyer, a case involving the calculation of an account of profits against a fiduciary and his corporate alter egos, the High Court of Australia referred to the ‘cardinal principle of equity’ that ‘the remedy must be fashioned to fit the nature of the case and the particular facts.’ This means, for example, that equitable remedies against D may be awarded on terms or otherwise limited so as to prevent unjust enrichment by either party. As with the previous general principle, this principle emphasises the fact-centred nature of the court’s remedial inquiry.

In summary, the rationale and purposes of participatory liability justify the full range of remedies available against trustees being available in principle against D. The basis of D’s liability is not the same as that of PW and so the principles governing the award of remedies against a defaulting trustee or fiduciary do not automatically apply. Nevertheless, they must always be indirectly relevant given that the purposes of participatory liability are to protect the trust or fiduciary relationship. Furthermore, their relevance may increase according to the nature of the relationship between D and PW such that, in some instances, the remedial objectives become indistinguishable. The court has a discretion both to withhold a remedy on general equitable principles or because the remedy is not commensurate with the rationale and purposes of liability. The court may also mould a remedy to suit the specific facts.

A brief digression is now necessary in order to explain the remedial context in which questions concerning monetary remedies for participatory liability arise.

III The Current State of the Law Concerning Monetary Remedies for Breach of Trust and Fiduciary Duty

As will be evident from a perusal of other chapters in this book, there are many questions concerning the characterisation and assessment of monetary remedies for breach of trust and fiduciary duty. The answers to these questions are relevant to the choice and measure of the monetary remedies available against D. This is because, first, D is said to be liable to the full range of equitable remedies – those available against a trustee – and secondly, as discussed above, the remedial objectives of the two forms of liability – primary and participatory – are closely related and may be indistinguishable in some scenarios. A third reason is that, in relation to accessory liability, D will be jointly and severally liable with the trustee or fiduciary PW for whatever monetary order is awarded against PW excluding, generally, gain-based orders. Hence, it is necessary to give a brief outline of the monetary remedies for breach of trust and fiduciary duty before exploring, in greater

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45 See generally, Pauline Ridge, ‘Constructive Trusts, Accessorial Liability and Judicial Discretion’ in Elise Bant and Michael Bryan (eds), Principles of Proprietary Remedies (Sydney, LawBook Co, 2013) 73.
46 Warman v Dwyer (n 34) 559.
depth, their application to D. In doing so, it must be acknowledged that there are conflicting authorities and inconsistent uses of terminology: the law is in a state of flux.

There are at least three sources of law that inform the modern remedial jurisdiction concerning personal monetary remedies for breach of trust and fiduciary duty and that consequently inform the remedies available against D:

(i) the jurisdiction concerning the monetary orders and procedures that accompany a trustee or other custodial fiduciary’s duty to account by way of an account of administration in common form or an account of administration on the basis of wilful default;
(ii) the compensatory jurisdiction for breach of fiduciary duty recognised by the House of Lords in Nocton v Lord Ashburton and as subsequently developed by the courts; and,
(iii) the jurisdiction informing a trustee or fiduciary’s liability to account for profits made through a breach of duty (whether or not a misapplication of property was involved).

The term ‘equitable compensation’ is often used indiscriminately to describe the remedy awarded pursuant to (i) and (ii) regardless of the particular source of the principles applied. It does not have a consistent and reliable meaning. In general terms, equitable compensation is a remedy that is available wherever a defendant has acted ‘against the dictates of conscience as defined by the Court.’ But the term can be used in a narrower sense to refer to the loss-based personal remedy that is available for a claim grounded in breach of an equitable duty. The term sometimes is used more broadly to refer to the money order that follows an account in common form or for wilful default taken against a trustee in relation to his or her stewardship of the trust property (category (i) above) and to the money orders accompanying or substituting for equitable rescission. Those orders may be distinguished from equitable compensation in the narrower sense because – although this is not wholly accepted – they are not necessarily loss-based even though they may have the effect of compensating for losses suffered by C.

A helpful way of describing equitable compensation is to say that it is available for wrongs that either do not depend upon there being a misapplication of property in a fiduciary’s custody (non-custodial equitable wrongdoing) and hence that do not attract restitution or accounting orders or for custodial equitable wrongdoing where those remedies are no longer appropriate. In other words, equitable compensation is the appropriate monetary remedy when there is no fund to be accounted for at all or the fund is no longer subsisting.

48 Nocton v Lord Ashburton [1914] AC 932 (HL) (‘Nocton’).
49 ibid 952.
50 See, eg, Libertarian Investments Limited v Hall [2013] HKCU 2562 [167]-[170] (‘Libertarian Investments’).
51 Canson (n 13) 163. See also, Youyang (n 36) [37] citing Maguire v Makaronis (1997) 188 CLR 449 (HCA) 473.
The jurisdiction governing equitable compensation for non-custodial fiduciary breaches is relatively young. Conversely, although the accounts jurisdiction is older, much of its operation has occurred ‘off-stage’, as it were, being undertaken by court officers following judgment and not detailed in the law reports. Hence, substantive discussion of the jurisdiction is rare. Moreover, nowadays courts often refer in general terms to a trustee or fiduciary’s obligation ‘to account’ without necessarily invoking the technical account procedures and sometimes as a way of calculating an award of equitable compensation. Thus, questions arise as to the modern application and reach of the accounts jurisdiction. Other unresolved questions include the extent to which the approach of the accounts jurisdiction, which is procedurally-driven, applies, either directly or indirectly, to the calculation of equitable compensation for equitable wrongs not involving misapplication of property. The precise relationship of equitable compensation to the money orders following an account is unclear. A further question is how a monetary order made for an equitable wrong that does involve a misapplication of property is to be assessed, whether or not following an account. Clearly a ‘one size fits all’ approach is not to be taken. Indeed, speaking of the ‘money remedy for breach of an express trust’, the High Court of Australia has said that the ‘nature of that remedy may vary to reflect the terms of the trust, and the breach of which complaint is made. Generalisations may mislead.’ It also unclear how much weight, if any, should be given to common law principles for calculating compensatory damages awards.

This Chapter does not attempt to resolve these questions. In particular, it does not consider the calculation of an account or the calculation of equitable compensation for breach of trust or fiduciary duty. Instead, with this context by way of background, Part IV now discusses three particular questions relating to the account, compensatory and gain-based jurisdictions as they apply to a culpable participant in trust or fiduciary wrongdoing.

IV Three Questions Concerning The Monetary Remedies For Participatory Liability

A When and How Do Equity’s Account Procedures and Consequent Monetary Remedies Apply to Participatory Liability for Breach of Trust or Fiduciary Duty?

There are two ways in which account-related remedies may be available for participatory liability. The first is where an account is taken directly against D in relation to D’s own control and use of custodial property that is the subject of PW’s trust or fiduciary duties.

52 Nocton (n 48) is generally regarded as the seminal decision.
53 But see Glazier Holdings Pty Ltd v Australian Men’s Health Pty Ltd (No 2) [2001] NSWSC 6 (‘Glazier Holdings’); Libertarian Investments (n 50); Agricultural Land Management Ltd v Jackson [No 2] [2014] WASC 102.
This may occur in relation to both recipient and accessorijl forms of participatory liability, but appears to be uncommon. The second arises only in relation to accessory liability and is indirect: D is jointly and severally liable for the ‘compensation’ awarded against PW for PW’s equitable wrong and, as explained above, such label may refer to the monetary order consequent upon an accounting taken against PW. Whether an account is available directly or indirectly, it can only be an account by wilful default – or, expressed more generally, an account based upon wrongdoing by D or PW – as will now be explained.

The account in common form is available against a custodial fiduciary. If a deficiency in the trust fund is thereby revealed, the resulting order is that the trustee or fiduciary make good the deficiency by restoring the fund. Logically, the account in common form procedure cannot apply to participatory liability because the procedure is not premised upon wrongdoing by the accounting party. Hence it cannot apply directly to D (for D’s liability is fault-based) or indirectly to D (for there is no primary wrong pleaded, to which a participatory liability claim can attach). The account in common form can be put to one side for present purposes, whilst noting that it is possible that its informing principles may nevertheless have an indirect influence on the direct claim for equitable compensation that is available against a defaulting trustee or fiduciary (a primary wrongdoer) and hence upon D’s liability.

The account by wilful default that is available against a custodial fiduciary in relation to a misapplication of property, conversely, does require a primary wrong to be pleaded, namely, the wilful default by trustee or custodial fiduciary: a breach of duty which has caused something to be lost to the fund or not received by the fund when it should have been received. Accordingly accessory liability can attach to a claim for an account by wilful default, although it appears unusual for accessory liability claims to be pleaded in this fashion.

Recipient liability is the clearest instance of where an account can be taken directly against D in relation to D’s own control and use of custodial property that is the subject of PW’s trust or fiduciary duties. Recipient liability, as opposed to accessory liability, has a more obvious affinity with the account procedures and orders given that, at some point, D must have held the trust property for personal benefit. The determination of C’s remedy for recipient liability focuses squarely upon D’s wrong: the culpable receipt of misappropriated trust property for personal benefit. The cases use the language of ‘account’ in the sense that A is liable for the value of the property at receipt, plus interest,

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57 British America Elevator Co Ltd v Bank of British North America [1919] AC 650 (‘British America’).
58 Contra Mitchell and Watterson, ‘Remedies for Knowing Receipt’ (n 4).
59 For the view that it is relevant, see Canson (n 13). Contra Mitchell, ‘Equitable Compensation’ (n 54).
60 As to the meaning of ‘wilful default’ see Meehan v Glazier Holdings Pty Ltd [2002] NSWCA 22, (2002) 54 NSWLR 146 [65]-[66] (Giles JA) (‘Meehan’); cited with approval in Byrnes v Kendle [2011] HCA 26, (2011) 243 CLR 253 [43]. See also, Bartlett v Barclays Trust Co Ltd (No 2) [1980] 1 Ch 515 (Ch) 546 as discussed in Glazier Holdings (n 53) [49]-[56].
61 But see Glazier Holdings (n 53) [8]; Meehan (n 60) [11].
and for an account of profits made with the trust property.\(^{62}\) Where the remedy is more broadly described as ‘compensation’, the measure of such compensation is still the amount necessary to restore the trust fund; that is the label is being used to describe an account, debt-like liability, rather than a loss-based remedy, although the cases, on the whole, appear not to have explicitly recognised that distinction.\(^{63}\) Thus, in *Grimaldi* the Federal Court of Australia stated that ‘the knowing recipient is obliged (no less than the wrongdoing trustee) to restore the trust fund by way of monetary compensation for the assets which have been lost…’\(^{64}\) In other words, the objective of the remedy for recipient liability is to provide a substitute for the trust fund received by D, even though D is only treated as a trustee of the trust fund for remedial purposes and although D’s liability, unlike that of a true trustee, can only be wrong-based.\(^{65}\) This suggests that the accountability remedies available against an express trustee and those available against a knowing recipient will not necessarily be identical. It is also doubtful whether a further loss-based compensation remedy in relation to consequential losses should be available given the rationale and purposes of the liability.\(^{66}\)

An account may also be taken directly against an accessory D in relation to D’s own control and use of custodial property that is the subject of PW’s trust or fiduciary duties. Viscount Haldane’s judgment for the Privy Council in 1919 in an appeal from the Court of Appeal of Manitoba, *British America Elevator Co Ltd v Bank of British North America*, is an authority for this proposition.\(^{67}\) The case involved both assistance in breach of a custodial fiduciary duty by PW and receipt for personal benefit, yet the remedial approach taken was the same: an account for the trust money that passed through D’s hands irrespective of whether there was any receipt for personal benefit.

The case concerned the liability of D Bank for knowingly participating in breaches of fiduciary duty by C’s agent, PW (who was not a party to the proceedings). The breaches by PW concerned the misapplication of C’s funds. D’s culpable participation encompassed both knowing assistance and knowing receipt for personal benefit,\(^{68}\) although the Privy Council did not use that terminology. The Privy Council instead described the Bank, through its manager, as ‘being party to a misapplication of trust funds,”

\(^{62}\) See, eg, *Akindele* (n 1) where this was assumed to be the appropriate remedy if liability was found. See also, *Williams* (n 8) [31] (Lord Sumption JSC).


\(^{64}\) *Grimaldi* (n 1) [559]. See also, *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30, [2012] All ER (D) 164 [37]: ‘[t]he recipient’s personal liability to account as a constructive trustee by virtue of knowing receipt means that the recipient is subject to custodial duties which are the same as those voluntarily assumed by express trustees…The recipient’s core duty is to restore the misapplied trust property.’

\(^{65}\) See Dietrich and Ridge, *Accessories* (n 1) 7.6.3.

\(^{66}\) But see recent academic speculation upon the import of the reasoning in *Novoship* (n 5) [107]: Jamie Glister, ‘Breach of Trust and Consequential Loss’ (2014) 8 Journal of Equity 235, 255 (suggesting that the way has been left open for recipient liability for compensation in relation to consequential loss).


\(^{68}\) A proportion of the funds were paid into overdrawn accounts with the Bank.
which they must restore to [C].\(^{69}\) The proper procedure, according to Viscount Haldane, was for C to claim:

> on the ground of breach of trust, and for an account to be taken of all the sums so received, in which case the result of the account, after any proper deductions had been claimed and established on the initiative of the [Bank], would have been followed by a judgment on further consideration for the balance found due…'.\(^{70}\)

Instead, in the lower courts, C had claimed for specific amounts. Accordingly, the Privy Council intimated that additional proceedings might be taken by D against C to recoup some of the money that had in fact been paid out by D on C’s account and that had not been properly accounted for.

More commonly, a claim for equitable compensation for breach of trust or breach of fiduciary duty is made against PW with an ancillary claim for accessory liability in the same measure against D; that is, D’s account-based liability is indirect. D is jointly and severally liable with PW for the same sum.\(^{71}\) The form of the order against D where the primary wrong involves misapplication of property controlled in a fiduciary capacity, depends upon whether there is an ongoing trust or not, that is, the order is fashioned to the particular facts:

> in some circumstances the remedy to be granted [against D] will be an order for the restitution of the trust fund in respect of an amount abstracted, whereas in other circumstances it will be an award of equitable compensation to the beneficiary in respect of the beneficiary’s personal loss.\(^{72}\)

In principle, the amount ordered to be paid by D on either approach should be the same.\(^{73}\)

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\(^{69}\) *British America* (n 57) 663.

\(^{70}\) Ibid 664.

\(^{71}\) See above, (n 29). Contra Heydon, Leeming and Turner, *Meagher, Gummow & Lehane’s Equity* (n 67) [23-555] fn 419: ‘[i]n Australia, the liability of a knowing participant for loss suffered by the principal is now severally only’. The authors cite *Michael Wilson* (n 5) [106], but the case does not support their position. See also on this point, Jamie Gliner, ‘Knowing Assistance and *Michael Wilson & Partners v Nicholls*’ (Paper presented at Obligations Group Conference: Equity, University of Melbourne, 3 December 2015).

\(^{72}\) *Lewis v Nortex* (n 2) [30] (Hamilton J). As to the various remedies given in this case, see at [42] in relation to accessory liability: ‘appropriate orders need to be made against [D], who has been found to have accessorial liability for these breaches of trust, in order to remedy the situation. But, as the trust is subsisting, the order should not be in favour of [C] for payment to it of its 40% share, but should be, at its suit, an order for the reconstitution of the unit trust fund by the payment of the above sums by [D] to that fund. See also, at [39] ‘In the circumstances, there is no point in reconstituting the long disbursed bare trust fund. [C] is therefore entitled to an order for compensation in its favour, provided there can now be regarded as being a loss which [C] has suffered by reason of this breach of trust.’ The facts are given in *Lewis v Nortex Pty Ltd (in liq)* [2004] NSWSC 1143.

\(^{73}\) *AIB* (n 14) [90]-[91]. For an example of an Australian judge referring to an account on the basis of wilful default to confirm his assessment in relation to PW and D’s liability for equitable compensation for breach of fiduciary duty by a non-custodial PW, see *Hasler* (n 8) [152] (Leeming JA).
B Why is an Accessory Liable for Losses Resulting From the Primary Wrong, Rather Than From the Accessory’s Own Wrong?

As already noted, where D is an accessory to a breach of trust or fiduciary duty, D is jointly and severally liable with PW for all losses flowing from the primary wrong. As discussed above, such liability is generally described as equitable compensation, whether it results from a direct claim for such remedy or is ordered following an account against either PW or D. This is consistent with accessory liability under Anglo-Australian tort law: joint tortfeasors are liable for damages for the full losses caused to C by a joint endeavour, even where distinct torts were committed as a part of that joint endeavour.

D’s loss-based accessory liability is assessed in relation to the primary wrong, rather than in relation to D’s own, accessorial, wrongdoing. Furthermore, the measure of C’s loss is calculated according to the (possibly stricter) rules governing the loss-based liability of the trustee or fiduciary, PW.

We can quickly dismiss one suggested explanation for this situation, namely, that secondary liabilities, such as equitable accessory liability, must necessarily duplicate the primary liability. That explanation is conceptually flawed, inconsistent with the availability of gain-based relief in relation to D’s gains, and not accepted by the courts.

D is clearly liable because of D’s own wrongdoing. But one might assume from this that D should only be liable for the losses caused by that wrongdoing:

[under [both common law and equity] liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay way of compensation more than the loss suffered from such wrong.]

This raises the question whether an accessory must necessarily be liable in the same measure as PW for a loss-related remedy. Paul Davies has proposed, for example, that consistently with the rationale for participatory liability, an accessory D ‘should only be liable for losses suffered as a result of the accessory’s participation in the breach of trust or fiduciary duty.’ It is difficult to see how the cases cited by Davies support that proposition. The first case cited by Davies, Aerostar Maintenance International Ltd v Wilson, is a straightforward example of compensation for C’s lost opportunity to secure a contract that was instead secured by one of the accessory defendants pursuant to a breach of fiduciary duty by PW (the director of C). There is no suggestion by Morgan J that the award of compensation was calculated in relation to D’s wrongdoing, rather than

74 See above, n 29. See generally, Dietrich and Ridge, Accessories (n 1) [8.8.1].
75 Part IVA.
76 See, eg, Smithson v Garth (1691) 3 Lev 323, 324; 83 ER 711, 712. See further Dietrich and Ridge, Accessories (n 8) [5.7.1].
77 See, eg, Michael Wilson (n 5) [106]. See generally, Ridge, ‘Justifying the Remedies’, (n 12).
78 See Part II A.
81 Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032 (Ch) [209]-[216].
the primary wrong and it is implicit that PW and the two defendants were made liable for the same amount.\(^\text{82}\) The second case cited by Davies is *Goldtrail Travel Ltd v Aydin*.\(^\text{83}\) In that case the two defendants were made liable only in relation to the specific fiduciary breaches that they had facilitated. PW’s liability was discussed only briefly as he was impecunious: he was ‘liable to account’ to C for the sums he received that should have gone to C.\(^\text{84}\) But there is no suggestion that the equitable compensation awarded against the two accessories was assessed upon a different basis, nor was this a case of breach of trust where the language of ‘account’ might have had a more specific meaning that could not apply to the accessories.

Putting concerns about the cases used by Davies to support his proposition to one side, however, does the current law reflect only its nascent state (and hence is amenable to further development) or is it consistent with general principle? How can this apparent anomaly be explained and is there a case for change?

D’s joint and several liability with PW is consistent with the fundamental rationale of accessory liability, namely, that D has culpably interfered with C’s rights through D’s involvement in the breach of PW’s duties to C. The combination of the requisite elements of accessory liability (the primary wrong, involvement through conduct by D in that wrong and a requisite mental state) create a ‘participation’ link between D and the primary wrong, the purpose of which is to justify making D liable for the primary wrong. ‘When such a link exists, the risk of wrongdoing is enhanced and [D] ought not to be able to hide behind the fact that he did not himself, commit the primary wrong.’\(^\text{85}\) In other words, the nature and degree of D’s wrongdoing justifies D’s liability for the primary wrong.

For this reason, all jurisdictions set a high culpability threshold for D’s accessory liability. In Australia, D must have had actual knowledge or have been morally obtuse in relation to the primary wrong. In England, D must have actual knowledge and be dishonest in all the circumstances. That is, the degree of D’s culpability – the combination of the requisite conduct and mental elements that creates a participation link to the primary wrong – indeed warrant D becoming fully liable for losses resulting from the primary wrong. It is precisely because D’s loss-based liability will mirror that of PW that the culpability threshold is set high. Where D’s accessorail involvement is through procurement of the primary wrong, making D liable for the primary wrong itself is even more justified, given the extremely strong participation link to the primary wrong and D rightly is made responsible in relation to losses flowing from that wrong.\(^\text{86}\)

The purposes of equitable participatory liability discussed in Part II are also relevant here. The pragmatic objectives of deterrence, increasing C’s chance of recourse, encouraging de facto regulation of trustee and fiduciary behaviour by third parties and vindication of relationships of trust and confidence, all support the imposition upon a

\(^{82}\) Cf *Colour Control Centre Pty Ltd v Ty* (NSWSC, July 24 1995).
\(^{83}\) *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch) [174]-[178] (on appeal at the time of writing).
\(^{84}\) Ibid [158].
\(^{85}\) Dietrich and Ridge, *Accessories* (n 1) [2.4.2].
\(^{86}\) It could be argued here, however, that even if D were to be made liable in relation to his or own wrong of procurement, the relevant losses would still be those resulting from the (procured) primary wrong.
culpable accessory of joint and several liability for the primary wrong.\(^{87}\) A further pragmatic consideration is that it may be extremely difficult to determine the relative responsibility of D and PW where D has assisted, rather than procured, the primary wrong. It is appropriate that the risks inherent in such an evidential task are shifted from C to the wrongdoers via the rules of contribution:

One can readily understand why, when wrongdoers so entangle their affairs, that the law as a matter of legal policy might wish to make it their responsibility – and not [C’s] – to untangle them for accountability purposes.\(^{88}\)

Thus, it is only in relation to C, that D and PW’s relative responsibility for the primary wrong is ignored. D may claim contribution from PW and the preferred view is that such contribution may be ordered on a proportionate basis that reflects each party’s responsibility for the loss.\(^{89}\) Of course, this is of small comfort to D where PW has absconded or is impecunious, but this is precisely why D is made liable and such outcomes accord with the purposes of the liability.\(^{90}\)

Thus, the current law makes most sense where D has procured the primary wrong, but is still justified in relation to liability for assistance by the pragmatic purposes of participatory liability and – assuming the culpability threshold is set at an appropriate level – is also supported by the principled rationale for liability. The case for change is not yet made out.

C When is an Account of Profits Available Against an Accessory and How is it Assessed?

Two questions have recently come to the fore in England in relation to equitable accessory liability, but have caused little or no angst in Australia: is an account of profits an available remedy against an accessory and, if it is, when should it be awarded?\(^{91}\)

I will not dwell on the first question here.\(^{92}\) Gain-based relief is clearly consistent with, indeed, is a perfect match for, the most pervasive formulation of the rationale for all forms of equitable participatory liability.\(^{93}\) Gain-based relief is the most easily justified: to require D to disgorge personal gains obtained through exploitative interference with a trust or fiduciary relationship is surely less contentious than requiring D to compensate C for all losses flowing from the primary wrong, irrespective of D’s

\(^{87}\) See generally, Dietrich and Ridge, *Accessories* (n 1) [2.4], [8.1.3].

\(^{88}\) *Grimaldi* (n 1) [558] (citing *inter alia* CMS *Dolphin* (n 35); *Green & Clara* (n 35));


\(^{90}\) See *Royal Brunei Airlines* (n 1) 386-387. The application of proportionate liability legislative schemes to participatory liability is unclear: see Gurr, ‘Accessory Liability’ (n 89) 511-517.

\(^{91}\) There appear to be no such concerns regarding the availability of an account of profits for recipient liability. See *Charter plc v City Index Ltd* [2007] EWCA 1382, [2008] Ch 313 [64]-[71]; *Williams* (n 8) [31]; *Grimaldi* (n 1) [555]. But see further, Jamie Glister’s chapter in this book.

\(^{92}\) See Ridge, ‘Justifying the Remedies’ (n 12).

\(^{93}\) See Part II A.
causal contribution to that wrong, and yet, as just discussed, the latter relief is well-established.\textsuperscript{94} Furthermore, there is ample and highly respectable authority to support the availability of gain-based relief for equitable accessory liability.\textsuperscript{95} Those who argue against gain-based relief for equitable accessory liability on the grounds that it is not available for common law forms of accessory liability appear to overlook the quite different nature of the equitable wrongs that equitable accessory liability protects, as well as the discretionary nature of the relief and the well-established equitable jurisdiction to award gain-based relief.\textsuperscript{96} As discussed above, an important proviso is that equitable remedies are not available as of right.\textsuperscript{97} An account of profits may be awarded, but need not be.\textsuperscript{98}

This brings us to the second, more difficult, question: when is an account of profits an available remedy? That is, what is the requisite causal connection between a gain made by D and the breach of trust or fiduciary duty by PW for which D is accessorially liable such that D can be required to account for that gain to C? The causal question has been addressed with respect to a fiduciary’s gains: the court must ‘determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.’\textsuperscript{99} The question is whether the profits were ‘within the scope and ambit of [the fiduciary’s] duty.’\textsuperscript{100} But, of course, D is not a fiduciary and does not owe fiduciary duties so the same approach does not necessarily apply. Just as the causation test for fiduciary profits must ‘express the policy of the law in holding fiduciaries to their duty,’\textsuperscript{101} so must the causation test that applies to D’s gains express the policy underpinnings of participatory liability. But what appears to have happened so far is that the assessment of D’s gain-based liability is bundled indiscriminately with the assessment of PW’s gain-based liability; either by choice\textsuperscript{102} or by oversight, different bases for gain-based relief have not been contemplated.

A recent decision of the English Court of Appeal, \textit{Novoship (UK) Limited v Mikhayluk (Novoship)}, has now considered this question.\textsuperscript{103} \textit{Novoship} concerned a claim

\begin{itemize}
\item \textsuperscript{94} See Part II A.
\item \textsuperscript{95} The remedy is more established in Australia than England: see, eg, \textit{Consul Development} (n 19) 397; \textit{Michael Wilson} [106] (n 5); \textit{Grimaldi} (n 1). It has been reasserted by the English Court of Appeal: \textit{Novoship} (n 5). See also, \textit{Cook v Deeks} [1916] AC 554 (PC); \textit{Fyffes} (n 20); \textit{Ultraframe} (n 29) [1589]-[1601].
\item \textsuperscript{96} See, eg, Peter Devonshire, ‘Account of Profits for Dishonest Assistance’ (2015) \textit{Cambridge Law Journal} 1 who argues that gain based relief should only be available for dishonest procurement and not dishonest assistance. He argues further (fn 1) that the latter ‘should be recast as a common law wrong and governed by existing forms of liability in tort.’ These arguments are fundamentally at odds with the current law, which would require legislation to implement and, in my view, cannot be supported on principled grounds. Contrast to Devonshire, the Hon William Gummow, ‘Dishonest Assistance and Account of Profits’ (2015) 74 \textit{Cambridge Law Journal} 405.
\item \textsuperscript{97} Part II C.
\item \textsuperscript{98} See, eg, \textit{Grimaldi} (n 1).
\item \textsuperscript{99} \textit{Hospital Products Limited v United States Surgical Corporation} (1984) 156 CLR 41 (HCA) 110 (Mason J). See also \textit{Warnman} (n 34) 558.
\item \textsuperscript{100} \textit{Phipps v Boardman} [1967] 2 AC 46 (HL) 127 (Lord Upjohn). See also \textit{Warnman} (n 34) 558-559; Gummow, ‘Dishonest Assistance’ (n 96) 407.
\item \textsuperscript{101} \textit{Maguire v Makaronis} (n 51) 468.
\item \textsuperscript{102} See, eg, \textit{Warman} (n 34): the parties agreed that the accessories’ liability would be determined on the same basis as PW’s liability.
\item \textsuperscript{103} \textit{Novoship} (n 5).
\end{itemize}
for dishonest assistance in breach of fiduciary duty. In simplified terms, the fiduciary PW was a director and the general manager of C. The relevant breach of fiduciary duty was in ‘negotiating new and different contracts with [D] with whom he was contemporaneously sharing bribes’ in relation to the chartering of vessels owned by companies in C’s corporate group.104 D dishonestly participated in the bribery (thereby satisfying the elements of the dishonest assistance claim) and received some of the bribe monies. D went on to negotiate shipping charters, through PW, with C. The charters turned out to be lucrative due to unexpected changes in the state of the market. An issue for the Court of Appeal was whether the profits made by D from the charters were referable to D’s dishonest assistance in PW’s breaches of fiduciary duty such that D should be liable to account for those profits.

The Court held, consistently with the general principles discussed in Part II above, that a dishonest accessory’s equitable wrongdoing is distinct from, and different in nature to, PW’s breach of fiduciary duty. There are two forms of equitable wrongdoing at play. Therefore, it was held, the rules pertaining to an account of profits against a fiduciary should not apply to the dishonest assistant. This, perhaps, does not accurately reflect the flexibility of the principles discussed in Part II above. Consistently with those principles, it would be more accurate to say that the rules pertaining to an account of profits against a fiduciary may have more or less relevance depending upon the nature of the relationship between D and PW. On the facts of Novoship, however, D was not the alter ego of PW, nor closely related; the parties were independent actors pursuing independent ends and there was no reason to take the approach adopted with respect to fiduciary profits.

The next step in the Court’s reasoning in Novoship was as follows:

Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy.105

There can be no argument with the need to ensure coherence and consistency across the common law, including equity, but this proposition in its more specific formulation is problematic. Why are the principles governing loss-based remedies at common law assumed to apply to equity’s gain-based remedies? If analogies are to be drawn with the common law, then it should be with the assessment at common law of gain-based relief. A difficulty that then arises is that gain-based relief is largely an equitable phenomenon for which there is no obvious common law analogy.106 Hence, with respect, the Court’s reasoning in Novoship is flawed on this point.107 A further difficulty, at least from an Australian perspective, is that the High Court has not accepted that analogies should be drawn with the assessment of common law damages even in relation to loss-based

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104 ibid [54].
105 ibid [107].
106 Cf the judgments of Lord Nicholls and Lord Hobhouse in Attorney-General v Blake [2001] 1 AC 268.
107 See also Andrew Stafford and Stuart Richie, Fiduciary Duties: Directors and Employees, 2nd edn (Bristol, Jordan Publishing, 2015) [9.329].
remedies for breach of non-fiduciary equitable duties.\textsuperscript{108} Hence the reasoning does not accord with Australian law.

The Court in \textit{Novoship} then extrapolated, from common law principles concerning causation of loss, a distinction between ‘a breach which is the effective cause of a loss and one which is merely the occasion for the loss’.\textsuperscript{109} That distinction was to be made ‘by the application of common sense.’\textsuperscript{110} Applying this test to the facts, rather than the ‘but for’ test that applies to a fiduciary’s liability for equitable compensation, the Court found that ‘the effective cause’ of D’s profits was an ‘unexpected change in the market’; the dishonest assistance merely providing ‘the occasion for [D] to make a profit’.\textsuperscript{111} Therefore, there was an ‘insufficient direct causal connection’ between the dishonest assistance which led to D’s use of C’s vessels and the resulting profits made by D.\textsuperscript{112}

This step in the Court’s reasoning also provokes questions. The determination of legal causation as a normative matter, rather than simply establishing a factual causative link between a legal wrong and resulting loss or gain, is bedevilled by complexity and (at least from the perspective of this non-specialist) confusion. The references to ‘common sense’ and ‘effective causes’ pertain originally to the determination of causation questions by juries.\textsuperscript{113} They do not boost confidence that the importation of the common law rules on causation will bring clarity to the question whether D should account to C for D’s profits.

The Court in \textit{Novoship} went on (under the heading of ‘Discretion’) to find, in addition, that the sought-after account of D’s profits fell outside the rationale for ordering an account of profits. This, according to the Court, was to ensure that ‘profits which ought to have been made for [C]’ were restored to C.\textsuperscript{114} But this rationale for awarding an account of profits was taken from \textit{fiduciary} law; it does not necessarily apply to D’s accessory liability.\textsuperscript{115} In the normal course of events D would never be expected to make profits for C. It is also contrary to Australian law which requires a fiduciary to account for all gains made within the scope of the fiduciary duty, whether or not they ‘ought to have been made for [C]’: ‘it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken…’.\textsuperscript{116} Leaving those concerns to one side, however, it is the rationale and purposes of \textit{participatory} liability that should determine whether an account of profits is an available remedy. The rationale and

\begin{footnotesize}
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\item[109] \textit{Novoship} (n 5) [108].
\item[110] ibid [108] (citing \textit{Galoo Ltd v Bright Graham Murray} [1994] 1 WLR 1360).
\item[111] \textit{Novoship} (n 5) [114].
\item[112] ibid [115].
\item[113] \textit{See Amaca Pty Ltd v Booth} [2011] HCA 53, (2011) 246 CLR 36 [65]. See also, Gummow, ‘Dishonest Assistance’ (n 96) 408.
\item[114] \textit{Novoship} (n 5) [116]-[117].
\item[115] Nor does it appear consistent with the UK Supreme Court’s decision in \textit{FHR European Ventures LLP v Cedar Capital Partners LLC} [2014] UKSC 45 [47]; [2015] AC 250 which requires a fiduciary to account for bribes that, by their nature, should not have been taken at all. But see Lusina Ho, ‘Equitable Compensation on the Road to Damascus?’ (2015) 131 Law Quarterly Review 213, 217-218.
\item[116] \textit{Warman} (n 34) 558 citing \textit{Birtchnell v Equity Trustees, Executors & Agency Co Ltd} (1929), 42 CLR 384, 409; \textit{Furs Ltd v Tomkies} (1936) 54 CLR 583, 592; \textit{Consul Development} (n 19). Quoted with approval in \textit{Grimaldi} (n 1) [509] (see also at [514] (ii)).
\end{itemize}
\end{footnotesize}
purposes of fiduciary law are relevant to the inquiry, but only indirectly. As discussed above, the awarding of an account of profits for participatory liability addresses both the principled rationale for liability (it is unconscionable for D to knowingly interfere for personal gain with the fiduciary relationship between C and PW) as well as the pragmatic purposes of the liability.

Finally, the Court held that, unlike the ‘automatic’ ordering of an account of profits against a fiduciary, the remedy here was discretionary and should be withheld on the facts because it ‘would be disproportionate in relation to the particular form and extent of wrongdoing’. This is consistent with the general principle that the Court may withhold an equitable remedy in its discretion upon settled principles. Yet, in Novoship this discretionary exercise appears to be surplus, given the Court’s prior finding that D’s dishonest assistance was not a legally relevant cause of D’s profits.

If these criticisms of the reasoning in Novoship are valid, what is the preferable approach? I would suggest that a normative inquiry into causation based upon common law principles is an obfuscatory exercise in this context. Instead, once D’s participatory conduct is found to be a factual (‘but for’) cause of D’s gains (that is, that the gains were ‘received as a result of such participation’) the normative inquiry into whether D should account to C for those gains is better conducted by reference to the general principles outlined above in Part II. In particular, the question in Novoship could have been more simply framed as whether an account of profits on the particular facts was consistent with the rationale and purposes of dishonest accessory liability and, if so, whether the Court should exercise its discretion to award that remedy. In fact, this approach was taken in Novoship, but the clarity of the reasoning was muddied by the additional reliance upon common law principles concerning a normative, rather than a factual, causative link.

IV Conclusion

It is trite, but nonetheless important, to say that the remedies for equitable participatory liability must be consistent with the rationale and purposes of that liability. Because participatory liability is ancillary to a primary wrong, this in turn requires examination of the rationale and purposes of trust and fiduciary law. Current questions concerning the monetary remedies for equitable participatory liability are inextricably linked to those concerning the remedies for breach of trust and fiduciary duty. The latter questions must be resolved before the former can be fully addressed. A potential error for courts addressing the remedies for breach of trust and fiduciary duties, however, is to assume that the same answers will necessarily apply to the liability of a third party participant. The participant’s remedial liability must still be addressed in relation to his or her own

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117 Part II A.
118 Fyffes Group (n 20) 669.
119 Strictly speaking, the award of equitable remedies is always in the court’s discretion. See above, Part II C.
120 Novoship (n 5) [119] citing Fyffes Group (n 20); Satnam Investments Ltd v Dunlop Heywood & Co Ltd [1999] 3 All ER 652, 672b-c; and Walsh v Shanahan [2013] EWCA Civ 411.
121 See Part II C.
122 Consul Development (n 19) 397.
123 Cf Grimaldi (n 1).
wrongdoing and in a way that is consistent with the rationale and purposes of that form of liability. In doing so, it remains the case that the equitable nature of that liability fundamentally shapes the availability and determination of the appropriate remedy.
CHAPTER NINE

This is the submitted version of an essay which will appear in Tim Bonyhady (ed), *Finn’s Law and Australian Justice* (Federation Press, 2016, forthcoming). Permission granted by Federation Press to include the essay in this thesis on condition that this chapter be excluded from the electronic copy of the thesis, or only made available via restricted access, for three months after publication of the book. For further information on the book, see [http://www.federationpress.com.au/](http://www.federationpress.com.au/)
PARTICIPATORY LIABILITY AND THE HALLMARKS OF AN AUSTRALIAN EQUITY

PAULINE RIDGE

I INTRODUCTION

I was fortunate in being taught Equity by Paul Finn at the Australian National University during the period in which Sir Anthony Mason and Sir William Deane of the High Court of Australia were leading a renaissance in equitable doctrine and remedy. An enduring lesson from this experience was that in order to make sense of doctrinal complexity, it is necessary not only to immerse oneself in that complexity so as to understand it, but then to stand back in order to see the broad themes, principles and policies at play. In doing so, it may be the case that fluidity of principle, rather than fixed formulae, emerges as a more accurate characteristic of the relevant law. This essay concerns that process of explaining and applying the law. It is about judicial method in relation to equitable doctrine and remedy, and specifically, the judicial method championed by Paul Finn. The essay describes and critically evaluates this judicial method by reference to the doctrines and remedies concerning third party participants in equitable wrongdoing (‘participatory liability’) and, particularly, the influential judgment of the Full Federal Court in Grimaldi v Chameleon Mining NL (No 2) (Grimaldi) of which Justice Finn was the primary author.¹

The essay first describes the Australian framework for determining participatory liability, the leading High Court cases, and the facts and issues in Grimaldi, and shows that the Australian law is in need of further clarification and reform. The essay then describes, in the context of equitable doctrine, two key features of the judicial method espoused by Paul Finn in his extra-judicial writings. They are referred to here (although not by Finn) as ‘hallmarks’, meaning distinctive features denoting excellence. The essay considers the embodiment of the two hallmarks in the Full Federal Court’s judgment in Grimaldi with respect to participatory liability. Paul Finn has drawn extensively upon the jurisprudence of the High Court to illustrate his preferred judicial methodology, although his account is descriptive of only some strands of that jurisprudence. The equitable case law of the High Court is not a homogenous body of jurisprudence and judicial method. Hence, this essay

II EQUITABLE PARTICIPATORY LIABILITY IN AUSTRALIA

A An Outline

‘Participatory liability’ is the term used by the Federal Court in Grimaldi to refer to the equitable liability of a defendant, D, who is linked through his or her culpable conduct (‘participation’) with another’s equitable wrong (the primary wrong). Although D is liable because of his or her own wrongdoing, the liability is ‘ancillary’ or ‘secondary’ in that it is premised upon equitable wrongdoing by the primary wrongdoer, PW. D is a third party to the equitable duty or duties owed by PW to the claimant, C, but becomes personally liable to C for the consequences of PW’s breach of those duties. One consequence of this essential and ancillary characteristic of the liability is that generally (but not always) D is jointly and severally liable with PW for compensatory and account-based remedies that flow from the primary wrong, rather than the third party’s own wrong. Participatory liability is thus distinguishable from other equitable third party liabilities such as that of a trustee de son tort or knowing dealer, and from liability based

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2 A defence of the hallmarks is beyond the scope of this essay. Instead, the focus is upon the embodiment of the hallmarks in Grimaldi and whether they might be used to reform the current Australian law on equitable participatory liability.

3 As discussed below, ‘participation’ can be misleading as a description of the relevant conduct required for recipient liability. The receipt of misappropriated trust property (or its traceable proceeds) on which liability turns may occur so long after the breach of trust that it becomes artificial to say that the recipient has ‘participated’ in that breach. For this and other reasons it is debatable whether recipient liability can be conceptually grouped with other forms of (true) participatory (ie accessory) liability.


6 In relation to gain-based relief, D is only liable for D’s own gains and not for PW’s gains: Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 244 CLR 427 [106]. A further qualification on the general approach is that in recipient liability the remedial focus is squarely upon the value of the property received by D.

upon persisting property rights of a claimant, all of which do not require a primary wrong to have been committed.\(^8\)

The most commonly litigated scenarios of participatory liability involve D’s participation in another’s breach of trust or fiduciary duty. Trust and fiduciary relationships are at the heartland of equitable regulation where the most extensive remedies are available and prophylactic and deterrence concerns are high. Unlike other equitable obligations, it is difficult for a third party to become personally subject to the trust or fiduciary obligation, and so a different, ancillary, basis for D’s liability must be found if the beneficiary of the trust or fiduciary obligation is to be fully protected. Participatory liability is one means for doing so.

D may be unrelated to the trustee or fiduciary PW – a professional agent, such as a solicitor or an accountant or a bank – or intimately related – a de facto partner, spouse, or, as if often the case, a corporate alter ego. Needless to say, the attractions of litigating against professionals with indemnity insurance, as well as the ubiquity of corporations and corporate wrongdoing, mean that participatory liability is highly significant in practice. For the same reasons, the scope and potentially onerous nature of the liability raise policy concerns and require careful judicial setting of the culpability threshold for liability.

The current Australian framework for participatory liability as determined by the High Court has three, overlapping categories and these are framed in terms of the primary wrongs of breach of trust and breach of fiduciary duty.\(^9\) A third party to a trust or fiduciary relationship, D, will be personally liable in relation to a breach of trust or fiduciary duty if:

1. D knowingly received trust property misappropriated by the trustee or fiduciary (recipient liability);\(^10\)

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\(^8\) This point is not always fully appreciated See generally, Dietrich and Ridge, above n 4, ch 7.

\(^9\) See *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 (*Farah Constructions*). Participatory liability may arise in relation to equitable wrongs other than breach of trust and fiduciary duty, such as breach of confidence, but is not often needed because it is easier for third parties to satisfy the elements of the primary wrong.

\(^10\) Liability for knowing dealing with trust property contrary to the trust is often coupled with recipient liability, but is rarely established. It is not a participatory liability because it does not depend upon a primary wrong by the trustee. It is not considered here. See further, *Lee v Sankey* (1873) LR 15 Eq 204; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 391-392. See also, Dietrich and Ridge, above n 4, [7.3] applied in *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 [45] (*Fistar*).
2. D knowingly assisted in a ‘dishonest and fraudulent design’ on the part of the trustee or fiduciary (knowing assistance or accessory liability);\textsuperscript{11} or,

3. D procured or induced the breach of trust or fiduciary duty (procurement liability).\textsuperscript{12}

It should be added that the ambit of the first category of recipient liability is considerable because assets in the custody of a fiduciary, such as company assets in relation to company directors, are considered to be trust property for these purposes. Furthermore, subsequent knowing recipients of the traceable product of the trust property are also liable under this category.\textsuperscript{13}

The Australian framework for participatory liability closely reflects nineteenth century English authorities. Indeed, the two most utilised categories of the framework, knowing receipt and knowing assistance, are colloquially and tellingly often referred to as the ‘two limbs of Barnes v Addy’ (an 1874 Court of Appeal in Chancery case in which Lord Selborne LC described the rare circumstances in which agents of trustees would be liable in relation to a trustee’s breach of trust).\textsuperscript{14} At least until Grimaldi, the three categories of the Australian framework were applied as though they covered the field of equitable participatory liability and, generally, in a formulaic fashion. Symptomatic of the formulaic approach has been the importance attached to the infamous Baden scale of knowledge, a five-point, fixed scale of distinct states of knowledge or notice that is applied to the first two categories of liability in order to determine whether D has the requisite mental state for liability.\textsuperscript{15}

\textsuperscript{11} The phrase ‘dishonest and fraudulent design’ comes from Barnes v Addy (1874) LR 9 Ch App 244, 251-252. The formulation was affirmed in Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [161]-[163], [179]-[184] and has been explained by Leeming JA on principled grounds in Hasler v Singtel Optus Pty Ltd [2014] NSWCA 266; (2014) 87 NSWLR 609 [122]-[124] where it was said to refer to conduct that transgressed ‘ordinary standards of honest behaviour’: [124].

\textsuperscript{12} Although the High Court in Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [161] distinguished between ‘knowingly induced or immediately procured’, subsequent courts tend not to place any weight on the distinction. Indeed, until recently, instances of procurement and inducement were dealt with under the knowing assistance category of the framework. From now on, ‘procurement’ will be used to refer to this form of participatory liability. See further, Dietrich and Ridge, above n 4, [8.3.2.1].

\textsuperscript{13} Fistar [2016] NSWCA 81 [63]-[64].


To understand why the Australian law adopted and retained this framework and what questions arise in relation to it, it is necessary to mention briefly the two most relevant High Court authorities.

B  The High Court and Participatory Liability

The High Court has considered participatory liability in depth only twice. Neither occasion was optimal for principled development of the law. The first occasion was in 1975 in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (*Consul Development*). The case concerned the participatory liabilities of an articled clerk and his corporate alter ego who were involved in a breach of fiduciary duty by a senior employee (PW) of the clerk’s principal solicitor (the claimant). The clerk, through his company, took up property development opportunities which, it was alleged, should have been offered by PW to the principal solicitor. Three reasoned judgments were delivered in the High Court. Those of Gibbs and Stephen JJ constitute the majority opinions as Barwick CJ agreed with Stephen J. McTiernan J dissented, although this was largely due to his interpretation of the findings of fact at first instance.

The timing of *Consul Development* was unfortunate. The case reached the Court ‘too late’ for an optimal decision because of a recent trilogy of English cases with which the High Court was obliged to deal. This was a time when great deference was still accorded to the English courts; appeals from the High Court to the Privy Council were abolished only four months after *Consul* was decided. The effect of the English cases (and contemporary English equity texts upon which the English courts relied) was to frame the

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16 Assistance liability. Levels (i) and (ii) (actual knowledge), level (iii) (reckless indifference) and level (iv) ‘knowledge of circumstances which would indicate the facts to an honest and reasonable man’ (*Baden*) suffice for liability; *Farah Constructions*; *Grimaldi* [267]. Level (iv) is said to ensure that ‘the morally obtuse cannot escape by failure to recognise an impropriety that would have been apparent to an ordinary person applying the standards of such persons’: *Farah Constructions* [177].

17 There is, however, a useful comparison of the respective justifications for liability across the common law, including equity, ‘where the law grants remedies against a third party who interferes in the legal relations between two other persons’ in *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 [120]-[121].

18 (1975) 132 CLR 373. A related form of participatory liability was considered by the High Court in *Bank of NSW v Rogers* (1941) 65 CLR 42 (third party liability for undue influence).

19 Stephen J drew extensively upon Jacobs P’s judgment in the New South Wales Court of Appeal. Menzies J sat on the case, but died before delivering a judgment.

19 Selangor United Rubber Estates Ltd v Cradock [No 3] [1968] 1 WLR 1555 (Selangor); Carl Zeiss Siftung v Herbert Smith & Co [No 2] [1969] 2 Ch 276; Karak Rubber Co Ltd v Burden [1972] 1 WLR 602 (Karak Rubber).

modern law almost exclusively in accordance with Lord Selborne’s judgment in *Barnes v Addy* concerning the liability of agents of defaulting trustees. Two categories of liability, ‘knowing receipt or dealing’ and ‘knowing assistance’ in a ‘dishonest and fraudulent design’, were recognised and were applied to all ‘strangers’ to a trust or custodial fiduciary relationship. The English cases had not conclusively determined the requisite mental state for liability (actual knowledge or something less) for either category. In *Consul Development* Gibbs J did not consider it necessary to resolve that question on the facts before him, whereas Stephen J focussed on it. At the doctrinal level, subsequent Australian courts found it difficult to discern the ratio of *Consul Development*, particularly with respect to the requisite mental state for recipient and assistance liability and requisite nature of the breach of trust or fiduciary duty for assistance liability.

However, the discussion by Gibbs J of the rationales for participatory liability is compelling and of ongoing importance.

Equitable participatory liability did not come before the High Court again until 2007 in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (*Farah Constructions*). This case is the leading Australian authority and the source of the current framework. *Farah Constructions* involved claims of breach of fiduciary duty in relation to a joint venture and resulting property development, knowing assistance by the fiduciary’s corporate alter

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21 In *Selangor* [1968] 1 WLR 1555, 1579-1580 Ungoed-Thomas J distinguished two categories of ‘strangers’ to the trust who become liable as ‘constructive trustee.’ The first category concerned ‘Those who, though not appointed trustees, take upon themselves to act as such and possess and administer trust property for the beneficiaries…’. The second category concerned ‘[t]hose whom a court of equity will treat as trustees by reason of their action…’. His Honour then quoted from the passage in Lord Selborne’s judgment in *Barnes v Addy* dealing with the circumstances in which agents of trustees would be liable for a breach of trust by those trustees and concluded, somewhat counterintuitively, that Lord Selborne’s reference to those who ‘receive and become chargeable with some part of the trust property’ fell within his first category of constructive trustees and Lord Selborne’s reference to those who ‘assist with knowledge in a dishonest and fraudulent design on the part of the trustees’ fell into his second category. In *Karak Rubber* [1972] 1 WLR 602, 632-633 Brightman J also described two categories of constructive trustee, although in terms slightly inconsistent with the *Selangor* categorisation, and adopted the shorthand descriptions of those categories in R E Megarry and P V Baker, *Snell’s Principles of Equity* (Sweet & Maxwell Ltd, 26th ed, 1966) 202, 203, namely, ‘knowing receipt or dealing’ – to describe the *Barnes v Addy* description of ‘those who receive and become chargeable with some part of the trust property’ – and ‘knowing assistance’.

22 See above n 10 as to knowing dealing.

23 *Selangor* and *Karak Rubber* involved claims of knowing assistance against banks in relation to breach of fiduciary duty by company directors. Despite this, a framework of liability drawn from *Barnes v Addy* and formulated with trusts in mind was applied.


ego and knowing receipt of misappropriated trust property by the fiduciary’s wife and children and another corporate alter ego. In the 30 or so years since Consul Development, there had been a flood of participatory liability cases in England and Australia – due in part to a realisation that fiduciary law was a powerful legal weapon against corporate fraud – and the Australian law was confused. Matters were brought to a head by the NSW Court of Appeal’s decision that recipient liability should be reframed as a strict liability unjust enrichment claim rather than a fault based liability.28 The Court of Appeal accordingly held that the property development opportunity was trust property received by the fiduciary’s wife and children who were strictly liable to account for their gains from the opportunity unless they had changed their position or were bona fide purchasers for value without notice. On appeal, the High Court decided that there had been no breach of fiduciary duty (hence, participatory liability on the part of the company and the fiduciary’s family members could not arise), but went on to reject the argument that a strict liability unjust enrichment claim should be recognised either in substitute for, or alongside, the equitable recipient liability claim.29

The Court’s general discussion of participatory liability was couched in doctrinal and formalistic terms with virtually no discussion of policy or principle. For example, the Court retained the Barnes v Addy formula, but provided little by way of explanation as to why the law should be framed in those terms, other than that this accorded with its earlier decision in 1975 in Consul Development. Rather surprisingly, the Court adopted the Baden scale of knowledge, using it to interpret the earlier judgments in Consul Development.30 The latter case, despite its ambiguity on the points, was also taken as conclusive authority for the requisite mental element for assistance liability31 and for a requirement that a trustee or fiduciary’s breach constitute a ‘dishonest and fraudulent design’ for the purposes of assistance liability. In addition to the two Barnes v Addy categories, the Court acknowledged nineteenth century cases dealing with procurement

28 Say-Dee Pty Ltd v Farah Constructions Pty Ltd [2005] NSWCA 309.
29 Farah Constructions [2007] HCA 22; (2007) 230 CLR 89 [116]-[120], [192]. Subsidiary findings included that confidential information (here concerning the property development opportunity), does not constitute property for the purposes of recipient liability and that recipient liability does not fall within the in personam exception to indefeasibility of title pursuant to the relevant Torrens land registration system.
30 Ibid [174]-[175]. See also concerning the Baden scale, above n 14.
31 Ibid [177] (levels (i)-(iv) of the Baden scale). The requisite mental element for recipient liability is not explicitly stated in Farah Constructions, although subsequent courts have clarified that levels (i) to (iv) of the Baden scale suffice: Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 [268]-[269].
or inducement of breach of trust by third parties, creating the third category of the current Australian framework for participatory liability described above.

Importantly, the Court in *Farah Constructions* chose not to address the Privy Council’s 1995 decision in *Royal Brunei Airlines Sdn Bhd v Tan (Royal Brunei Airlines)* which had discarded the *Barnes v Addy*-derived liability framework, the *Baden* scale of knowledge, and the equitable language of conscience. Instead, the Privy Council had identified and conceptually distinguished two distinct categories of third party liability. Pursuant to the Privy Council’s reformed framework, which was subsequently accepted by the courts in England, Singapore, New Zealand and Hong Kong, the first category of liability is equitable accessory liability. This encompasses (but reformulates) knowing assistance and procurement liability. Accessory liability is determined according to the accessory’s ‘dishonest’ procurement or assistance of *any* breach of trust. Recipient liability was not in direct consideration in *Royal Brunei Airlines*, but was sharply distinguished from accessory liability in that case. According to the current English law, recipient liability remains fault-based and this is determined according to whether the receipt of trust property was unconscionable in all the circumstances, including with reference to D’s mental state. It is fair to say that the English law concerning recipient liability is unsettled; indeed it may be that the conceptual distinctions between accessory liability and recipient liability emphasised in *Royal Brunei Airlines* are not as great as suggested in that case.

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35 *George Raymond Zage III v Ho chi Kwong* [2010] 2 SLR 589. Some doubt has been cast upon the conceptualisation of recipient liability in Singapore by *Wee Chiau Sok Ann v Ng Li-An Genevieve* [2013] SGCA 36; [2013] 3 SLR 801.
C Questions Following Farah Constructions

The High Court in *Farah Constructions* did not consider the changes wrought by *Royal Brunei Airlines* in light of the respondents’ arguments and the finding of no breach of fiduciary duty. The changes and other important questions concerning participatory liability were left unanswered on the basis that they would be decided when a suitable case arose. One such question was whether Australia’s tripartite participatory liability framework of knowing receipt, knowing assistance, and procurement should be abandoned in favour of two, distinct, categories as had been done by the Privy Council and, if so, how recipient liability should be conceptualised. Whilst the High Court made it clear that recipient liability was fault-based, it went no further.

The question remaining after *Farah Constructions* is whether recipient liability is of the same genre as liability for assisting or procuring breach of another’s duty. Are the ‘two limbs…two discrete types of liability…or merely different species of a single genus of liabilities’? The answer has remedial and procedural implications as well as influencing future development of the law. Procurement and assistance are clearly forms of accessorial conduct. Liability for procuring or assisting in a breach of trust or fiduciary duty has the same core elements as accessory liabilities in the common law and criminal law, namely: a primary wrong committed by another, involvement through conduct by the procurer or assistant in that wrong, with the requisite mental state (generally related to the person’s knowledge of the primary wrong). The precise content of each of these three elements of accessory liability will depend upon the purposes and values of the primary wrong and the jurisdiction/s in question. It is not the case that the same requirements and remedies necessarily apply, nor even that the liability will be similarly structured. Nevertheless, accessory liabilities across private law share unique features that make it a useful way to categorise the law for at least some purposes.

A corollary of accessory liability is that the accessory’s culpable involvement occurs before or at the time of the primary wrong and so facilitates the commission of that wrong. But a knowing recipient is liable even if their knowing receipt of the trust property occurred long after the primary wrong, so long as the trust property is traceable.

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41 *Farah Constructions* [2007] HCA 22; (2007) 230 CLR 89 [162]-[164].
43 Compare, for example, the doctrinal elements of the tort of inducing breach of contract with knowing assistance liability.
44 See further, Dietrich and Ridge, above n 4, [3.3.4].
to the recipient who received with the requisite mental state.\textsuperscript{45} Thus, recipient liability is not necessarily accessorial because whilst the knowing recipient may perpetuate or compound the primary wrong, he or she does not necessary facilitate its occurrence. A further distinction is that the primary wrong for recipient liability must involve a misappropriation of equitable property, whereas for accessory liability this is not essential.\textsuperscript{46} But are these such significant distinctions as to warrant dismantling the existing Australian participatory liability framework which conceptually groups accessory liability and recipient liability on the basis of their fault-based and ancillary nature? In other words, there is an overlap of classificatory schemes - one governing accessory liability across private law and criminal law, the other governing ancillary, fault-based liability in equity. Can they co-exist or is change necessary?

An opportunity to address the unfinished business of \textit{Farah Constructions} presented itself in 2013 when the High Court granted leave to appeal from the WA Court of Appeal’s decision in \textit{Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)} on issues that included the framing of the elements, remedial outcomes and scope of participatory liability.\textsuperscript{47} The case settled before the hearing and most of the questions remain.\textsuperscript{48}

D \textit{Grimaldi v Chameleon Mining NL (No 2)}

\textit{Grimaldi} was decided by the Full Federal Court in 2012. It concerned the liability of third party mining companies (‘Company’ D) for breaches of fiduciary duty by directors and officers (PW) of the claimant company (Company C) during the formation of mining ventures in Western Australia. Simplifying the facts considerably: the participatory liability question was whether Company D knowingly received payments (trust property) from Company C in breach of fiduciary duties owed to Company C by its directors and officers. Those payments contributed to the acquisition of iron ore tenements in the very early stages of a profitable mining venture by Company D. The ‘central issue’ of the case was thus whether Company C could obtain a share of Company D’s profits on the basis of recipient liability (either through an account of profits or a remedial constructive trust over assets of Company D).\textsuperscript{49} The case was unusual in involving a claim for gain-based

\begin{itemize}
  \item \textsuperscript{45} See further, Dietrich and Ridge, above n 4, ch 7.
  \item \textsuperscript{46} See Dietrich and Ridge, above n 4, [8.3.1.3].
  \item \textsuperscript{47} [2012] WASCA 157; (2012) 44 WAR 1.
  \item \textsuperscript{48} Questions to be heard on appeal were whether trust property includes property under the control of a fiduciary for the purposes of recipient liability, the circumstances in which there is a ‘receipt’ of trust property in the context of complex security transactions and the meaning of ‘dishonest and fraudulent design’ for the purposes of knowing assistance. The latter question has now been comprehensively dealt with in Hasler v Singtel Optus Pty Ltd [2014] NSWCA 266; (2014) 87 NSWLR 609.
  \item \textsuperscript{49} \textit{Grimaldi} [2012] FCAFC 6; (2012) 200 FCR 296 [1].
\end{itemize}
relief, rather than for loss-shifting from the claimant to the fiduciary and third parties.\textsuperscript{50} The decision, in broad terms, was that Company D knowingly received trust property (Company C’s property) and that an account of profits was the more appropriate remedy on the facts, rather than a remedial constructive trust, although both remedies were available in principle.

It is common knowledge that Finn J authored the Court’s judgment in \textit{Grimaldi}, but it is clear that the judgment also reflects the court’s expertise as a whole. Justice Finn used the case to expound on all aspects of equitable participatory liability (an area that he had written on extra-judicially)\textsuperscript{51} as well as on trusts and fiduciary law more generally and the principles governing equitable relief. The case has had international attention, particularly in relation to the obiter discussion of constructive trusts and fiduciary bribes (a topic outside the scope of this essay).\textsuperscript{52} Of most interest here are the section entitled ‘[t]hird party liability: a digression’ in which an alternative principle of participatory liability is offered,\textsuperscript{53} the following sections which analyse in depth various aspects of the current Australian law,\textsuperscript{54} and finally, the extensive discussion of the principles pertaining to equitable remedy, particularly gain-based remedies for recipient liability.\textsuperscript{55}

III HALLMARKS OF AN AUSTRALIAN EQUITY

A An Outline

Two hallmarks of equitable judicial method espoused by Paul Finn have particular relevance to reform of the law on participatory liability. The first concerns the framing of equitable doctrine, the second involves the manner of its application. The two hallmarks are as follows:

1. the exposition of doctrine in terms of its basal principle, organising ideas, and policy underpinnings; and,

\textsuperscript{50} Ibid [2].

\textsuperscript{51} See, eg, Paul D Finn, ‘The Liability of Third Parties for Knowing Receipt or Assistance’ in DM Waters (ed), \textit{Equity, Fiduciaries and Trusts} (Carswell, Toronto, 1993) 195; Paul Finn, ‘Knowing Receipt and Knowing Assistance: Balkanising Equity’ Paper delivered to the 25\textsuperscript{th} Annual Banking & Financial Services Law & Practice Conference, Queenstown, New Zealand, 25-26 July 2008.


\textsuperscript{53} \textit{Grimaldi} [2012] FCAFC 6; (2012) 200 FCR 296 [242]-[248].

\textsuperscript{54} Ibid [249]-[286].

\textsuperscript{55} Ibid [503]-[568].
2. the discretionary and holistic application of equitable principle and
determination of equitable remedy.

A further hallmark of this judicial method that does not warrant extended discussion here,
but is integral to it is:

3. an openness to principled ‘fusion’ of the common law and equity.

Accordingly, the development of equitable principle should not occur in
isolation, but should be informed by principles shared with the common law.56
Similarly, both the common law and equity have a symbiotic relationship with
statute law.57

These hallmarks are drawn not only from Finn’s approach to equitable principle and
method in his own writing, but also from his assessment of the approach of other lawyers.
In particular, a recurring theme in Finn’s scholarship58 both before and after his time on
the Federal Court concerns the regeneration and flourishing of equitable doctrine from
1982, when Sir William Deane joined Sir Anthony Mason on the High Court,59 which
continued during Sir Anthony Mason’s period as Chief Justice from February 1987 to
April 1995.60 This regeneration drew upon a strong foundation of Australian equity
jurisprudence including, but not limited to, earlier decisions of the High Court.61

B The Basal Principle and Organising Ideas of Equitable Doctrine

56 Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish, R Nolan, J O’Sullivan and
57 In the context of participatory liability, legislation may be useful in indicating policy directions in the
law, particularly where a consistent pattern is apparent. The enormous significance to equity of the
misleading and deceptive conduct and unconscionability provisions introduced into Australian legislation
by the Trade Practices Act 1974 (Cth) is a recurring theme in Paul Finn’s writing. See also, Sir Anthony
are strong arguments for treating statute law as well as existing judicial decisions as a platform for future
elaboration of the common law. In this way statute law will buttress the willingness of the courts to adapt
old doctrine, in conformity with its historic purpose, so as to give it an operation in factual situations which,
according to currently accepted standards of fairness and justice, call for relief.’
Paul Finn, ‘Unity, Then Divergence: The Privy Council, the Common Law of England and the Common
Laws of Canada, Australia and New Zealand’ Andrew Robertson and Michael Tilbury (eds), Divergences
in Private Law (Hart Publishing, 2016, forthcoming) 37. See also, P D Finn (ed), Essays in Equity (Law
Book Company Limited, 1985) v; ‘Commerce, the Common Law and Morality’ (1989) 17 Melbourne
University Law Review 87.
59 ‘In a Court of considerable talent, they were to provide its intellectual leadership in private law, but by
no means only in private law, for over a decade.’ Paul Finn, ‘Divergence and Convergence: the Privy
Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand’
17.
60 See generally, Cheryl Saunders (ed), Courts of Final Jurisdiction: The Mason Court in Australia
(Federation Press, 1996).
The first hallmark involves a focus by courts upon the ‘basal principle and organising ideas’ of equitable doctrine and a corresponding rejection of rigid doctrinal formulae. As is well-known, the Mason Court gave prominence to the organising idea of ‘conscience’ in equity and, specifically, a basal principle preventing the unconscionable exercise of common law rights. The basal principle translated into specific doctrines which were reformulated in terms of fluid principles, rather than formulaic sub-categories. As Sir Anthony Mason observed in Paul Finn’s Essays in Equity, there was a ‘reworking [of] existing doctrine in the light of general concepts and traditional objectives’.

In such an exercise, an explicit acknowledgement of policy and the underlying values of the law is essential. In Finn’s words, referring to the period of the Mason Court:

the courts had a responsibility to explain and justify what they were doing: the policy considerations and the purposes pursued in legal developments ought not to be obscured by facades of doctrine and precedent.

The first hallmark is very evident in Grimaldi’s treatment of participatory liability. Finn, in his extra-judicial writing, had been extremely critical of the emphasis in Australian law upon the Barnes v Addy formula. In his view, the courts were engaging in a fundamentalist style of textual exegesis at the expense of principle and sound policy. There was a 'preoccupation with the theology of doctrine'.

Accordingly, the Court, in what it called ‘[t]hird party liability: a digression’, began its discussion of participatory liability by observing that, historically, third parties were personally liable for breach of trust or fiduciary duty in a much wider range of scenarios.

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62 Ibid 518.
64 See especially, Walton Stores (Interstate) Ltd v Maher (1987) 164 CLR 387 (estoppel).
than envisaged by *Barnes v Addy*. The Court described four scenarios and noted there could be more. Accordingly it reformulated the liability in terms of its basal principle and organising ideas:

> [P]articipatory liability as it evolved in equity in cases prior and subsequent to *Barnes v Addy* was not based on inflexible formulae. Given the variety of circumstances in which, and bases on which, a third party could be characterised as a wrongdoer in equity…varying importance has been given to three matters: (i) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant; (ii) the nature of the third party's role and participation, eg as alter ago, inducer or procurer, dealer at arm's length, etc; and (iii) the extent of the participant's knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.\(^{69}\)

Here there is a rejection of the *Barnes v Addy* doctrinal formulae – and, implicitly, the current Australian framework for liability – in favour of three, broadly described, elements of liability. There is an emphasis on flexibility and fluidity in that ‘varying importance’ is given to the three elements of liability, suggesting that the importance of each element may be determined relative to the weight of the other elements. Most striking, in terms of a switch from ‘formulae’ to ‘basal principle’, is the reformulation of the mental element of participatory liability. Instead of the formulaic Baden scale of constructs of knowledge, there is a much broader description of possible states of mind, including ‘knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary’. Unsurprisingly, the Court in *Grimaldi* disparaged the Baden scale on the basis that ‘it tends to invite the use of formulae to solve problems.’\(^{70}\)

There is, however, little explicit discussion of the policy underpinnings of participatory liability in this part of the *Grimaldi* judgment. This is perhaps surprising given that there are significant concerns about the potentially unjust and onerous nature of the liability if applied too readily (in particular with respect to the burden upon professional agents and banks)\(^{71}\) and there are unresolved questions as to how it should apply in the corporate

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\(^{69}\) Ibid [247].

\(^{70}\) Ibid [260].

\(^{71}\) See, eg, Paul D Finn, ‘The Liability of Third Parties for Knowing Receipt or Assistance’ in DM Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 195.
context. But of course, the Court was not able to consider the case in terms of the basal principle it described and would have been precluded by the authority of *Farah Constructions* in any event from so doing (as it acknowledged). Having prefaced its remarks with the description of ‘a digression’, the Court concluded by acknowledging that the case had been ‘pleaded and run solely as a *Barnes v Addy* case’ and that ‘[n]ecessarily we limit ourselves to what is to be derived from *Barnes* as it is understood in Australia.’

The Court went on to deal with recipient liability’s place in the current participatory liability scheme, but not at great length. It concluded that recipient liability fell within the broad principle of participatory liability because it was ‘fault-based’ and had ‘the same knowledge/notice demands as in [knowing] assistance cases.’ The Court, consistently with *Farah Constructions*, rejected the argument that recipient liability should be conceived of as a strict liability claim based upon unjust enrichment and subject to a change of position defence, noting that the courts had ‘shown little appetite …and appropriately so…[for that approach].’ But the Court did not consider whether recipient liability was appropriately grouped with the other instances of fault-based participatory liability. Recent scholarship has moved away from the unjust enrichment model, whilst still conceptually distinguishing recipient liability from accessory liability, but this question was not explored in *Grimaldi*.

C Judicial Discretion and Flexibility

The second hallmark of the judicial method espoused by Finn is closely related to the first. It concerns the use of judicial discretion and flexibility in the application of legal principle and in the determination of remedy. The equitable inquiry is not always susceptible to being pinned down, particularly in the early stages of formation of principle. Thus, the application of equitable principle may require that a judgment be

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74 Ibid.
76 Ibid [267].
77 Ibid [258].
78 See, eg, Charles Mitchell and Stephen Watterson, ‘Remedies for Knowing Receipt’ in Charles Mitchell (ed), Constructive and Resulting Trusts (Hart Publishing, 2010) 115 (the unconscionable, or knowing, recipient becomes a true trustee though his or her wrongdoing).
made in the round, with close attention paid to the particular facts, as to whether the principle applies. This is not always the case, of course, as it is inherent in the cyclical nature of doctrinal development that the need for discretion will wax and wane. Sometimes discretion is not necessary because clear and specific doctrinal requirements are justified on grounds of principle and policy. Indeed, certainty – in the sense of predictability of outcome – may be a policy factor of some weight. Nonetheless, it remains the case that ‘the application of equitable principle often requires a broad evaluative judgment’.

A recent illustration of the second hallmark occurs in the judgment of Lord Walker of Gestingthorpe for the UK Supreme Court in Pitt v Holt, a case concerning the equitable doctrine of mistaken gifts. It shows that the ‘hallmarks’ approach is not necessarily confined to any particular jurisdiction. The basal principle identified by Lord Walker was equity’s concern ‘to prevent unconscionable conduct’. He continued:

The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round [the elements of the doctrine] and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.

In relation to the substantive legal principles in Grimaldi, the second hallmark is evident at the aspirational level only and can be seen in the Court’s suggested basal principle of participatory liability which it could not apply.

Judicial discretion and flexibility are, however, clearly evident at the remedial stage in Grimaldi when determining whether a constructive trust or account of profits should be awarded in relation to Company D’s recipient liability. Remedial discretion is a strong theme in Finn’s writing: he advocates that the full range of remedies be available in

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80 Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish, R Nolan, J O’Sullivan and G Virgo (eds), Restitution: Past, Present and Future (Hart Publishing, 1995) 251, 260; a ‘far more instance-specific evaluation of conduct’ is required when the law is formulated in terms of standards, rather than rules. See also, Phripps v Boardman [1967] 2 AC 46, 123 (Lord Upjohn): ‘Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.’

81 See, eg, in the context of doctrines governing access to trust information by beneficiaries, GE Dal Pont, ‘Beneficiaries and Trust Information’ (2014) 39 Australian Bar Review 46.


principle (a ‘basket’ of remedies taken from equity and the common law), with the court selecting the most appropriate.\textsuperscript{85} None of this is particularly controversial, I would suggest, in Australia where equitable remedies are not available as of right, are fashioned to the facts of the particular case and may be awarded on terms.\textsuperscript{86} A coherent body of Australian law exists to regulate the exercise of judicial discretion in their award. In any event, according to \textit{Grimaldi}, ‘[i]t is the case that, in many instances and for many types of equitable wrong, the remedy that is most appropriate will self select absent unusual circumstances.’\textsuperscript{87}

The second hallmark is clearly evident in the Court’s reasons for not awarding a remedial constructive trust for recipient liability on the facts of \textit{Grimaldi}.\textsuperscript{88} There was consideration of whether a remedial CT over part of Company D’s assets was the ‘appropriate remedy’ and would provide ‘practical justice’. The relevant considerations were complex: the money of Company C had contributed to the start-up of Company D’s operations, but the latter’s current wealth was attributable to a variety of causes. The overall composition of Company D had changed since the knowing receipt; the original wrongdoers were no longer involved. There were also the practical implications of imposing a constructive trust to consider: would this unduly impede the future operations of Company D and generate further disputes? The Court considered these matters against the criteria of ‘appropriateness’ and ‘practical justice’, and referred to US case law involving mining operations, in order to decide that a constructive trust was not appropriate and then to determine how an account of profits would be calculated.\textsuperscript{89}

Thus, at least two of the hallmarks of an Australian equity as Finn identified and applauded them in the Mason High Court were implemented by him in his swansong judgment for the Full Federal Court in \textit{Grimaldi}. But unlike Sir Anthony Mason and Sir William Deane, Justice Finn was not a member of the High Court and \textit{Grimaldi} was decided within the constraints of existing High Court authority. As has been noted in the NSW Court of Appeal,\textsuperscript{90} and was also acknowledged in \textit{Grimaldi} itself, the broad

\begin{thebibliography}{99}
\bibitem{86} \textit{Warman v Dwyer} (1995) 182 CLR 544, 559. In relation to ‘discretionary remedialism’ and the High Court, see further, Simon Evans, ‘The High Court’s Equity Jurisprudence’ in Peter Cane (ed), \textit{Centenary Essays for the High Court of Australia} (LexisNexis Butterworths, 2004) 390, 399-402.
\bibitem{87} \textit{Grimaldi} [2012] FCAFC 6; (2012) 200 FCR 296 [503].
\bibitem{89} \textit{Primeau v Granfield} 184 F 480 (1911) discussed in \textit{Grimaldi} at [541]-[546].
\bibitem{90} \textit{Hasler v Singtel Optus Pty Ltd} [2014] NSWCA 266; (2014) 101 ACSR 167 [82].
\end{thebibliography}
principle of participatory liability described in Grimaldi is not binding law. Nor was it presented by the Court as a legal principle capable of immediate application. The question this essay will conclude with is whether a future High Court should take up the hallmarks approach suggested by Grimaldi in relation to participatory liability.

IV FUTURE HIGH COURT DEVELOPMENT OF THE LAW

In relation to the first hallmark of judicial method described above – the exposition of doctrine in terms of its basal principle, organising ideas, and policy – the question is whether the High Court should endorse the use of basal principle, rather than doctrinal formulae, and refashion the current participatory liability framework to accord with the principle stated in Grimaldi.

In relation to the second hallmark described above – the discretionary and holistic application of law – the question of most interest is as to the method of application of the basal principle, if adopted. Does it operate at a higher, conceptual level only or does it provide a template for how liability is determined on a case by case basis? There is far less uncertainty regarding the second hallmark in its application to the remedies for participatory liability given the well-established High Court authority on equitable remedial discretion; that issue will not be pursued further here. The following discussion begins with the Grimaldi principle as it applies to the accessory liability aspect of participatory liability (for assistance and procurement of equitable wrongs) and then considers the place of recipient liability within the Grimaldi principle.

A The Hallmarks Applied to Equitable Accessory Liability

At a conceptual level, the basal principle of participatory liability described in Grimaldi and which is comprised of three factors, namely, the nature of the fiduciary wrongdoing; (ii) the nature of the third party, D’s, role and participation; and (iii) D’s mental state,91 accurately reflects the elements of accessory liability in equity and across private law more generally. Indeed, the Grimaldi principle offers a template for an analytical framework of accessory liability in private law.92 Such an analytical framework supposes a contextual, holistic relationship in which the significance of each of three elements of accessory liability (the primary wrong, the accessorial conduct and the accessory’s mental state) is determined in relation to the other two elements. In particular, it is the interplay of conduct and mental elements that determines whether there is a sufficient culpability

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92 See Dietrich and Ridge, above n 4, Ch 3.
link to the primary wrong for D to be made liable in relation to that wrong. The question is normative: ‘is D sufficiently connected to the primary wrong with sufficient knowledge such that he or she should be held liable for the primary wrong in light of the purposes and values of that primary wrong?’ Thus, the Grimaldi principle is analytically sound in relation to accessory liability and, indeed, reflects the operation of accessory liability across private law.

Furthermore, the dynamic interplay of the three elements of accessory liability – what Grimaldi refers to as the ‘varying importance’ given to each of the three elements in different scenarios – is also reflected, albeit in a fixed fashion, in the current doctrinal requirements for knowing assistance liability and procurement liability. For example, the current law holds that if D’s accessorial conduct is by way of assisting the primary wrong, then that primary wrong must be particularly egregious. It must constitute a ‘dishonest and fraudulent design’. Whereas, if D’s accessorial conduct is by way of procurement of the primary wrong, D will be liable regardless of the egregiousness of the primary wrong – any breach of trust or fiduciary duty suffices. In other words, the more independently wrongful the participant’s conduct, the less weight is placed upon the nature of the primary wrongdoing. Thus, the Grimaldi basal principle is consistent with the existing law.

But can the Grimaldi principle also translate to the level of judicial determination of accessory liability? That is, should the second hallmark of equitable method also be adopted such that the Grimaldi principle is applied in a discretionary and holistic manner, in substitution for the current, fixed categories of knowing assistance and procurement? Is there a case for ‘judgment in the round’? The signs are encouraging in relation to the Grimaldi principle’s acceptance as a working legal principle. As well as indications of approval from influential former judges, there are at least two substantive reasons in support of such a development.

The first is that the Court in Grimaldi did not alter the substance of the existing law, but merely described it in a more inclusive, less formulaic, fashion. If the Court’s approach were to be adopted, then what we have is a re-visioning of the existing law, rather than a radical departure from it. Some changes may be entailed, of course. Some requirements

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93 Ibid Ch 3.
94 See above n 11.
that are presently fixed (for example, the requirement for a dishonest and fraudulent design just discussed) would become elements of greater or lesser significance depending upon all the facts. But the changes would be to how liability is determined rather than to the essence of why liability is imposed. Furthermore, whilst the nascent principle may be considered ‘uncertain’ in some respects, over time this will diminish as the courts flesh out its application.97

The second reason for thinking that the Grimaldi principle could operate successfully at the level of judicial decision-making concerns the experience in England and other jurisdictions that have adopted the Privy Council’s reformulation of equitable accessory liability in Royal Brunei Airlines.98 Lord Nicholls rejected the Barnes v Addy formulaic approach in that case, acknowledged the policy issues and underlying norms of the law and reformulated the law in terms of a broad principle of ‘dishonest’ accessory liability. His judicial method clearly illustrates the first and second hallmarks of the method propounded by Finn. The approach in Royal Brunei Airlines – a contextual approach that weighs up the third party’s conduct and mental element against a criterion of ‘dishonesty’ appears to work well in practice and has permitted the English courts to articulate the standards of conduct that they expect of their commercial community.99 This is not an endorsement of the Privy Council’s formulation of the law in Royal Brunei Airlines, but an argument that the judicial method is the same or very similar to that which is evident in Grimaldi. The English courts’ experience (after a few teething problems)100 demonstrates that the method works well in practice in this area of liability.

B  The Hallmarks Applied to Equitable Recipient Liability

How might recipient liability – rather than accessory liability – be dealt with by the High Court in light of Grimaldi? The question is whether the Grimaldi principle is an appropriate and accurate ‘basal principle’ for recipient liability as well as for equitable accessory liability. As discussed above, Grimaldi does not address the question whether recipient liability is conceptually distinct from the other, accessory, forms of participatory liability, other than by rejecting a strict liability, unjust enrichment reformulation of

recipient liability. On the one hand, there are clear commonalities between equitable accessory liability and recipient liability. Both are fault-based ancillary liabilities that focus upon D’s conduct and mental state. Although recipient liability requires D to have received trust property, it will not usually be the case that D retains that property and the liability is personal in nature.¹⁰¹ Priorities-based claims to trust property or its traceable proceeds actually in the recipient’s hands, although deceptively similar to recipient liability, rest upon a different conceptual foundation.¹⁰² The core rationale for recipient liability – that it is wrong to knowingly interfere with or contravene the equitable relationship between C and PW (the trust or fiduciary relationship) for personal gain – also underpins much, but not all, of equitable accessory liability.¹⁰³ In particular, Professor Gummow has concluded in the context of knowing assistance liability in equity:

The better view of all species of accessorial or participatory liability is that they are not based upon inflexible formulae, nor are they parasitic upon pre-existing property rights. Rather, the liability is ‘fault-based’, in the sense of responding to what in the eye of a court of equity is unconscientious conduct.¹⁰⁴

But on the other hand, the remedial focus of equitable accessory liability and of recipient liability appear to be quite different: accessory liability looks to the consequences flowing from the primary wrong; recipient liability focuses upon D’s wrongdoing and the value of the property received by D. Accordingly, it may be helpful to distinguish recipient liability from accessory liability in order to bring clarity to the appropriate remedies. Removing recipient liability from the Grimaldi basal principle might also allow for greater coherence between accessory liability in equity and accessory liability in other areas of private law, given that there is an attractive coherence in their operation. But too strong a conceptual division may detract attention from the common – and essential – fault rationale the equitable underpinnings of the two liabilities.

There are a range of views concerning the nature of recipient liability and its relationship to accessory liability.¹⁰⁵ But there is no self-evidently ‘correct’ view discernible in the precedents. This is where the hallmarks style of judicial method comes into its own.

¹⁰¹ The scenario in Grimaldi [2012] FCAFC 6; (2012) 200 FCR 296 was unusual in this respect.
¹⁰³ See further Dietrich and Ride, above n 4, [7.6.2] and [8.1.3].
¹⁰⁴ Gummow, ‘Knowing Assistance’, above n 96, 319.
because it requires a court to explicitly address the policies and norms underlying liability and a policy decision must be made here. It is principled to recognise the commonalities of accessory and recipient liability through grouping them under a basal principle of participatory liability (although ‘ancillary liability’ would then be a more accurate label given that a recipient D need not necessarily participate in the primary wrong itself). It would be equally principled to disengage them and instead recognise two closely related, yet distinct, forms of equitable fault-based ancillary liability. This might lead to greater clarity in the application of the law and determination of remedy.

V CONCLUSION

The Federal Court’s judgment in Grimaldi manifests and vindicates at least two of the hallmarks of an Australian Equity as espoused by Paul Finn, although it does not satisfactorily resolve the perennial questions surrounding recipient liability. These hallmarks are, of course, not universally endorsed. Australia’s remedial constructive trust, for example, has been described by the President of the UK Supreme Court as ‘Equity at its flexible, flabby worst’. Whilst this essay has not attempted a comprehensive defence of the hallmarks, it is worth noting a third hallmark of Finn’s Australian Equity, a robust legal independence. This is the view that Australia, on the whole, has its own valuable body of equity jurisprudence upon which to draw. Useful insights and lessons may, and should, be gleaned from all common law jurisdictions, including the United States, but no particular deference need be paid to any. If, as I have suggested, the approach in Grimaldi accords with the previous case law, although expressed at a higher level of generality, and if it suggests a judicial method that has been employed to good effect in the related context of dishonest accessory liability in England, then there is a strong case for the Grimaldi approach to participatory liability being affirmed and further developed by the High Court.

106 Lord Neuberger, ‘The Remedial Constructive – Fact or Fiction’ (Speech delivered at the Banking Services & Finance Law Association Conference, Queenstown, New Zealand, 10 August 2014).