Equitable accessorial liability: Moving beyond *Barnes v Addy*

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*This article considers the scope and methodology of equitable accessorial liability in Australia following recent case law and litigation. The first observation is that the **Barnes v Addy** formulation of accessorial liability falls within a broader principle of liability which applies not only to breach of trust and fiduciary duty and which operates at various levels across equity. Breach of confidence and undue influence are discussed in this context. The second observation concerns the application of equitable accessorial liability to breach of non-fiduciary, equitable duties in a corporate context. Finally, the methodology employed in recent cases is compared and contrasted with the traditional methodology of the **Barnes v Addy** framework of liability.*

I Introduction

Equitable accessorial liability is often referred to colloquially as '*Barnes v Addy* liability'. This reflects the fact that Lord Selborne's judgment, in the nineteenth century Court of Appeal in Chancery decision of that name,[1] has provided the dominant framework in which the liability of a person who participates in another's equitable wrongdoing has been considered since the mid-twentieth century.[2] A line of contemporaneous nineteenth century authorities dealing with knowing inducement or procurement of a breach of trust[3] has received belated recognition in Australia and elsewhere; nonetheless, *Barnes v Addy* remains the dominant framework.[4] *Barnes v Addy* itself concerned unsuccessful claims by the beneficiaries of a family trust against two solicitors who acted in relation to the appointment of a sole trustee to the trust who then misappropriated the trust fund. Because of the context,

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1 (1874) LR 9 Ch App 244.

2 See, eg, *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555; [1968] 2 All ER 1073; *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276; [1969] 2 WLR 427; [1969] 2 All ER 367; *Karak Rubber Co Ltd v Burden* [1972] 1 WLR 602; [1972] 1 All ER 1210; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; 5 ALR 231; (1975) 49 ALJR 74; BC7500014.

3 *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216; *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840; *Alleyne v Darcy* (1854) 4 Ir Ch R 199.

4 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [161]. See also, *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193; *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 523 per Finn J; 133 ALR 1; 18 ACSR 459; BC9501547; *Syrimi v Hinds* (1996) 6 NTLR 1; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 385–6; [1995] 3 All ER 97; [1995] 3 WLR 64. See also, C Harpum, 'The Stranger as Constructive Trustee Parts 1 and 2' (1986) 102 *LQR* 114 at 267.

Lord Selborne's judgment was couched in the language of express trusts and was heavily influenced by the policy implications of imposing liability upon professional agents in such circumstances. But his judgment has been applied by later courts outside this context to breaches of fiduciary duty generally, rather than breaches of trust, and to circumstances not raising the same policy concerns. The *Barnes v Addy* framework is now taken in Australia to comprise two limbs, namely, 'knowing receipt' of property in relation to a breach of trust or fiduciary duty (the first limb) and 'knowing assistance' in a 'dishonest and fraudulent design' by the trustee or fiduciary (the second limb).[5]

This article offers three observations concerning the scope and application of equitable accessorial liability in Australia. These observations are prompted by recent Australian case law and litigation, specifically, *Grimaldi v Chameleon Mining NL (No 2)*[6] and *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)*.[7] The more significant of the two cases in this context is the Full Federal Court's decision in *Grimaldi*. The first observation is that the *Barnes v Addy* framework falls within a broader principle of accessorial liability which applies not only to breaches of trust and fiduciary duty, but which operates at various levels across equity. An indication of the scope and application of this broader principle is given in Part III. The second observation is that the heartland of equitable accessorial liability has moved from the express trust to the corporate context. Part IV of the article speculates upon whether, and how, equitable accessorial liability may arise outside the *Barnes v Addy* framework in relation to the breach of non-fiduciary, equitable duties of company directors. The third observation, discussed in Part V, is that recent cases have indicated a preference for a flexible application of the elements of the broader principle of accessorial liability rather than a formulaic application of the *Barnes v Addy* elements. My objective in making these three observations is to question the ubiquity of the *Barnes v Addy* framework and its methodology in the Australian context and to speculate as to some possible ways forward. First, however, the facts and pertinent issues in *Grimaldi* and *Westpac v Bell* are briefly outlined.

II The relevant cases

The *Grimaldi* litigation concerned the liability of third parties for breaches of fiduciary duty by directors and company officers during the formation of an iron ore mining project in Western Australia in and around 2004. The mining project went on to become immensely profitable and so, unusually for equitable accessorial liability, the central issue was whether, and in what circumstances, remedies could be gains based.[8] The court's judgment includes a valuable exposition on fiduciary law, equitable third party liability generally (including proprietary claims, tracing and accessorial liability), equitable

5 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851. See at [112]–[113] for an explanation of how the phrase 'knowing receipt' came to be adopted in preference to Lord Selborne's formulation in *Barnes v Addy* of agents who 'receive and become chargeable with some part of the trust property'.
6 (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 (*Grimaldi*).
7 (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 (*Westpac v Bell*).
8 (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [1]–[2].

remedies and remedial methodology, and the principles governing joint and several liability. Of most interest in this context is the court's discussion of accessorial liability.

The litigation which culminated in the decision of the WA Court of Appeal in *Westpac v Bell*, decided in August 2012, will also be drawn upon to support the arguments in this article.[9] The facts (in simplified form and as accepted by the Court of Appeal)[10] concerned refinancing transactions entered into in early 1990 between the 20 appellant banks and the directors of the Bell group of companies at a time when the Bell group was insolvent.[11] 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 facts provided a clear-cut case of statutory accessorial liability, but the case was fought on equitable grounds due to the attractiveness of equitable compensation and the potential for compound interest to be awarded.

The Court of Appeal's decision in *Westpac v Bell* was the subject of an appeal to the High Court, but the matter settled in September 2013 before being heard. The *Barnes v Addy*-related questions raised in the High Court appeal documents concerned the accessorial liability of the appellant banks for breaches of allegedly fiduciary duties by the respondent company's directors. These questions were directed to specific elements of the *Barnes v Addy* framework.[12] A fundamental question that was not raised in the *Westpac v Bell* litigation at any stage, but clearly underpins it, was whether there can be accessorial liability for non-trust and non-fiduciary equitable wrongdoing. In other words, can equitable accessorial liability arise outside the *Barnes v Addy* framework on these facts? The *Westpac v Bell* litigation appears to have been conducted upon the assumption that it cannot. Alternatively, it may have been assumed that the most potent equitable remedies would only be available if one or other of the two limbs of *Barnes v Addy* was made out. Hence, the emphasis in the appeal documents was upon whether prescriptive obligations of company directors, such as the duty to act in good faith in the best interests of the company and the duty to exercise powers for proper purposes, could be characterised as fiduciary so as to attract accessorial liability within the *Barnes v Addy* framework.[13] The focus of this article, on the other hand, is upon the anterior question that was not addressed in *Westpac v Bell* concerning the

9 (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001.

10 This summary is taken from the judgment of Carr AJA in the Court of Appeal, ibid.

11 Justice Owen, at first instance, found that the Group was insolvent at the time: *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; 70 ACSR 1; [2008] WASC 239; BC200809492 at [1930]–[1954]. This finding was not challenged on appeal: *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [2708] per Carr AJA.

12 The questions, as taken from the written submissions of the appellants and respondents filed before settlement of the High Court appeal, concerned: whether 'trust' property for the purposes of knowing receipt is limited to trust property in the strict sense or includes property under the control of a fiduciary; whether the refinancing transactions constituted, or resulted in, the 'receipt' of trust property; and the meaning of 'dishonest and fraudulent design' for the purposes of knowing assistance liability.

13 See, eg, Westpac Banking Corporation, 'Appellants' Submissions', Submission in *Westpac Banking Corporation v Bell Group Ltd (in Liq)*, No P18 of 2013, 7 June 2013, p 1.

scope of equitable accessorial liability.[14]

III The scope of equitable accessorial liability

My first observation is that, on current Australian law, it is possible to view the two limbs of *Barnes v Addy* as simply specific manifestations of a much broader principle of accessorial liability. This broader principle is most evident in the context of breach of trust and fiduciary duty, but can also be seen in relation to other third party liability scenarios across equity.

Breach of trust and fiduciary duty

The explicit shift of focus away from *Barnes v Addy* to a broader principle of accessorial liability in Australia was, of course, foreshadowed by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd (Farah Constructions)* decided in 2007.[15] The High Court there drew attention to nineteenth century authorities concerning inducement or procurement of breach of trust and differentiated that form of liability from the *Barnes v Addy* framework.[16] Questions remain as to the precise requirements and scope of this form of accessorial liability.[17]

The High Court in *Farah Constructions* also held with respect to the two limbs of *Barnes v Addy* itself that knowing receipt liability in Australia, like knowing assistance, is a fault-based, personal liability.[18] This was reiterated by the Full Federal Court in *Grimaldi*.[19] The court in *Grimaldi* considered at some length whether the two limbs of *Barnes v Addy* are 'merely different species of a single genus of liabilities'.[20] The court appears to conclude that they are, although not in so many words, finding that both liabilities are fault-based and both require the same level of knowledge or notice on the part of the third party.[21] The coupling of knowing receipt and knowing assistance in *Farah Constructions* and *Grimaldi* is significant in and of itself given that overseas jurisdictions tend to conceptually differentiate the two liabilities on

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14 Thus, I will not consider whether prescriptive equitable duties of directors are properly characterised as fiduciary. For the purposes of this article, I will assume that they are not so characterised. Nor will the specific *Barnes v Addy*-related questions raised on the appeal be addressed directly.

15 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851. See also, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 385–6; [1995] 3 All ER 97; [1995] 3 WLR 64.

16 Ibid, at [161]. The court cited *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216; *Alleyne v Darcy* (1854) 4 Ir Ch R 199; and *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840. See also, *Midgley v Midgley* [1893] 3 Ch 282; *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193; *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 523 per Finn J; 133 ALR 1; 18 ACSR 459; BC9501547; *Syrimi v Hinds* (1996) 6 NTLR 1. The court also cited C Harpum, 'The Stranger as Constructive Trustee: Part 1' (1986) 102 *LQR* 114 at 141–4.

17 See, eg, *Marriner v Australian Super Developments Pty Ltd* [2012] VSCA 171; BC201205739 at [156] (noting the absence of authority concerning the procurer or inducer's requisite level of knowledge); *Othman v Stanley* [2012] VSC 211; BC201203229 at [6].

18 *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

19 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [267].

20 Ibid, at [257].

21 See, ibid, at [257]–[269] and especially at [267].

the basis that recipient liability is 'restitution-based' whereas assistance liability is accessorial.[22]

The court in *Grimaldi* also explained that knowing receipt liability is separate and distinct from, although it often overlaps with, a claim to property extant in the recipient's hands on the basis that the claimant has a stronger and persisting property interest in that property based on the priority and tracing rules.[23] There often will be concurrent strict and fault-based common law, statutory and equitable liabilities, with knowing receipt liability.[24] These do not render knowing receipt liability redundant, however, because it is the trigger for a range of equitable remedies including the remedial constructive trust[25] and, as in *Westpac v Bell*, compound interest.

More importantly for the thesis of this article, however, the Federal Court in *Grimaldi* removed the spotlight from the two limbs of *Barnes v Addy* altogether, because the court made it clear that participatory liability for another's breach of trust or fiduciary duty encompasses far more than knowing receipt and knowing assistance.[26] In reaching this conclusion, the court noted that the facts of *Grimaldi* itself, depending upon their interpretation, presented two scenarios in which the *Barnes v Addy* framework was generally employed, albeit with some artificiality, and two further scenarios in which equitable accessorial liability for breach of trust or fiduciary duty outside the *Barnes v Addy* framework could be attracted. The four scenarios described by the court were as follows:[27]

(i) 'where the third party is the corporate creature, vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses, by their breach of fiduciary duty . . .'. Here, liability is explained in a number of ways in the case law; sometimes, but not necessarily, by applying either limb of *Barnes v Addy*.[28]

22 See, eg, *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 at 386; [1995] 3 All ER 97; [1995] 3 WLR 64. See further, *Grimaldi*, ibid, at [258].

23 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [251].

24 See further, M Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?' in S Degeling and J Edelman (Eds), *Equity in Commercial Law*, Lawbook, Sydney, 2005, p 327.

25 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621. See further, P Ridge, 'Constructive Trusts, Accessorial Liability and Judicial Discretion' in E Bant and M Bryan (Eds), *Principles of Proprietary Remedies*, Lawbook, Sydney, 2013, p 73.

26 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [242]–[246]. See also, Hon W Gummow AC, 'Knowing Assistance' (2013) 87 *ALJ* 311 at 311: the two limbs of *Barnes v Addy* 'do not occupy the conceptual universe of accessorial or participatory liabilities for breaches of duty by trustees and other fiduciaries, particularly company directors.'

27 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [243]–[246] (citations omitted).

28 Ibid. The cases cited by the court in relation to this scenario were *Cook v Deeks* [1916] 1 AC 554 at 565; *Queensland Mines Ltd v Hudson* [1974-1976] ACLC 40–266 at 28-709, revsd on other grounds *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1; 52 ALJR 399; (1978) 3 ACLR 176; (1977-78) CLC 40-389; *Timber Engineering Company Pty Ltd v Anderson* [1980] 2 NSWLR 488 at [11]; *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; [2000] All ER (D) 1067 at [26]; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704; [2001] All ER (D) 294 (May); [2002] BCC 600 at [97]–[105].

(ii) 'where an agent of a company (often a director) has knowledge of fiduciary or trust wrongdoing (be it his or her own or a third party's) which can be imputed to the company, the wrongdoing itself affecting a transaction or dealing involving the company . . .'. Here, according to the Federal Court, the company's accessorial liability is generally explained in *Barnes v Addy* terms.[29]

(iii) 'where the third party knowingly induces or procures a breach of trust or breach of fiduciary duty whether for his or her own, or for another person's benefit.' Here, the third party's liability is not pursuant to *Barnes v Addy*.[30]

(iv) 'where the third party deals with a known agent (or fiduciary) in a projected transaction with the agent's principal (or beneficiary) and in the course of so dealing offers and has accepted, or agrees to the agent's solicitation of, a commission, introduction fee or other collateral benefit without the informed consent of the principal.'[31] Again, this scenario, involving the third party's liability for bribes or secret commissions, falls outside *Barnes v Addy*.

The Federal Court's depiction of equitable accessorial liability as encompassing, but going beyond, the *Barnes v Addy* framework, is clearly correct.[32] Lord Selborne in *Barnes v Addy* was only concerned with the scenario of professional agents, particularly solicitors, providing services to trustees. While, his statement of principle has been applied more widely, its wording and rationale fit most comfortably within a fairly limited range of circumstances. But the situations in which accessorial liability for breach of trust and fiduciary duty may arise cover the full gamut of accessorial behaviour.[33] Furthermore, and as acknowledged in *Grimaldi*, the liability often arises in relation to corporate entities and non-trust breaches of fiduciary duty. As indicated by the court, accessorial scenarios range from situations where the third party is primarily responsible for a breach of trust or fiduciary duty (for example, having induced or procured the breach) to where the third party is a joint participant, an assistant or, at the other extreme, merely a passive instrument of the trustee or fiduciary (for example, where the third party is the corporate alter ego of the trustee or fiduciary). Thus, *Farah Constructions* and *Grimaldi* have made it clear that accessorial liability for breach of trust and fiduciary duty should not be viewed solely through the prism of *Barnes v Addy*; indeed, to do so is inconsistent with long-standing authority.

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29 The case cited by the court in relation to this scenario is *John v Dodwell & Company Ltd* [1918] AC 563 at 568–9 where the Privy Council did not refer to *Barnes v Addy*. The third party partners in that case were held to have a 'transmitted fiduciary obligation' because of the imputed knowledge of their clerks.

30 See, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [161], and above n 19.

31 The cases specifically cited in relation to this scenario were *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233 and *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119; [2005] 4 All ER 73; [2004] 3 WLR 1106; [2004] EWHC 622 (Ch).

32 See also, the discussion of case law pre-dating *Barnes v Addy* in Gummow, above n 26, at 315–17.

33 See further, Ridge, above n 25, p 75.

Can this be taken further? Although the discussion in *Grimaldi* was directed to accessorial liability for breach of trust and fiduciary duty, there was reference in passing to third party liability for breach of confidence and undue influence as manifestations of the same genus of accessorial liabilities.[34] It may be that the court was taking a more expansive view of what constitutes a 'fiduciary' relationship. This would be consistent with the extra-judicial writings of Professor Paul Finn, who was a member of the court in *Grimaldi*.[35] But not everyone would classify a relationship of confidentiality or influence as being fiduciary in the strict sense.[36] The doctrine of undue influence raises an additional complication in that its primary function is to vitiate an otherwise binding gift or contract, rather than to provide loss or gain-based remedies.[37] In other words, unlike breach of fiduciary duty and breach of confidence, the doctrine of undue influence does not involve the breach of a pre-existing duty so as to constitute a 'wrong' in the sense in which that term generally is used in common law discourse.[38] In this case, can accessorial liability arise at all? Thus, the references in *Grimaldi* to breach of confidence and undue influence raise two questions: first, whether, as a matter of principle, accessorial liability can attach to equitable wrongs other than breach of trust and fiduciary duty. And, secondly, can accessorial liability extend beyond equitable wrongs to vitiating doctrines? These questions are discussed next.

Equitable wrongs beyond breach of trust and fiduciary duty

Breach of confidence

Equitable accessorial liability for breach of confidence has a respectable case law pedigree.[39] It was recently considered by the UK Supreme Court in *Vestergaard Frandsen A/S v Bestnet Europe Ltd (Vestergaard)*.[40] Although the claim failed on the facts, Lord Neuberger of Abbotsbury PSC recognised the availability, in principle, of equitable accessorial liability for breach of confidence in circumstances where a third party assists another party, who is subject to a duty of confidentiality, in the misuse of that information and with notice of the misuse.[41]

34 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [247].
35 See, eg, P D Finn, *Fiduciary Obligations*, Law Book Company, Sydney, 1977. See also, R Bigwood, *Exploitative Contracts*, Oxford University Press, Oxford, 2003.
36 See, eg, M Conaglen, *Fiduciary Loyalty*, Hart Publishing, Oxford, 2010, pp 236–44.
37 But see, *Mahoney v Purnell* [1996] 3 All ER 61.
38 This is not to deny that undue influence has a fault-based rationale. See, R Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 *OJLS* 65 at 67 n 10. The fact that undue influence may support a compensatory remedy also supplies evidence of the 'wrong-like' nature of the cause of action: *Mahoney v Purnell* [1996] 3 All ER 61. See also, J D Heydon, 'Equitable Compensation for Undue Influence' (1997) 113 *LQR* 8.
39 See, eg, *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171. For a recent Australian review of the cases, see *Retractable Technologies Inc v Occupational & Medical Innovations Ltd* (2007) 72 IPR 58; [2007] FCA 545; BC200702690 at [67]–[81].
40 [2013] 1 WLR 1556; [2013] 4 All ER 781; [2013] UKSC 31.
41 Ibid, at [26].

This form of accessorial liability tends not to arise very often because of the ease with which a third party involved in another's breach of confidence becomes privy to the confidential information in circumstances imparting its own obligation of confidence. That is, accessorial liability readily becomes principal liability. The facts of *Vestergaard* were unusual in that the third party had not been privy to the highly technical information in question, although she was involved in the alleged breach of confidence. Nonetheless, even where principal liability could arise, because the third party has become privy to the information, the liability may still be more appropriately characterised as accessorial. Thus, for example, if the third party did not commit the original breach of confidence, but nonetheless is implicated in it, it may make more sense, both conceptually and practically, to view the third party's liability as accessorial, rather than as constituting a separate and additional breach of confidence. Significantly, the English cases have consistently grouped such liability with accessorial liability for breach of trust.[42]

Some confusion has arisen as to whether confidential information constitutes 'property' for the purposes of recipient liability under the first limb of *Barnes v Addy*. It does not by mere fact of its confidentiality[43] and therefore its receipt cannot come within the first limb, but this does not preclude a third party's participation through receipt of confidential information attracting other forms of accessorial liability.[44] Knowing assistance in a breach of confidence, for example, does not require any misappropriation of property. There are also unresolved questions concerning the requisite level of notice for a third party to be liable as an accessory to a breach of confidence and the appropriate defences.[45] Nonetheless, there is no doubt that accessorial liability for breach of confidence is available in principle.

It would appear then, that as a matter of precedent, accessorial liability may attach to breaches of equitable duties that are less obviously 'fiduciary', such as the equitable duty of confidentiality. A practical point of difference to scenarios involving breach of trust or fiduciary duty, however, is that, in relation to the latter, it is more difficult, often impossible, for a third party to assume, and therefore become subject to, the principal trust or fiduciary

42 See, eg, *Prince Albert v Strange* (1849) 1 Mac & G 25 at 44–5; 41 ER at 1178–9 per Lord Cottenham LC; *Thomas v Pearce* [2000] FSR 718 at 720 (quoting from R G Toulson and C M Phipps, *Confidentiality*, 2nd ed, Sweet & Maxwell, London, 2006, at [3-051]. In Australia see, R Meagher, J D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, at [41-110] (relied upon in *City of Sydney v Streetscape Projects (Australia) Pty Ltd* (2011) 94 IPR 35; [2011] NSWSC 1214; BC201107922 at [486]–[491] per Einstein J; remitted for retrial on findings of fact: *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 295 ALR 760; 92 ACSR 417; [2013] NSWCA 2; BC201300253 at [179] per Barrett JA; special leave to appeal refused by the High Court: *City of Sydney v Streetscape Projects (Australia) Pty Ltd* [2014] HCATrans 30.

43 But see, M Leeming, 'Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room' (2013) 36 *UNSWLJ* 1002 at 1012.

44 *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [117]–[120]. See further, M Evans, *Equity and Trusts*, 3rd ed, LexisNexis Butterworths, Sydney, 2012, at [14.28]–[14.29].

45 See, eg, *Wheatley v Bell* [1982] 2 NSWLR 544; (1982) 1A IPR 613; [1984] FSR 16; *Retractable Technologies Inc v Occupational & Medical Innovations Ltd* (2007) 72 IPR 58; [2007] FCA 545; BC200702690.

obligation (unless becoming a trustee de son tort).[46] Hence, accessorial liability is of greater practical relevance to third parties participating in breaches of trust and fiduciary duty than it is in relation to third parties participating in another's breach of confidence or, potentially, other equitable wrongs, where the possibility of principal liability being attracted is greater. Nonetheless, as a matter of principle, there seems no reason why accessorial liability cannot attach to the breach of any equitable duty. This point is explored further in Part IV in relation to the equitable, non-fiduciary, duties of company directors.

Equity's vitiating doctrines

It is less often acknowledged that the same accessorial liability themes present in the equitable wrongs cases can be seen in the equitable doctrines that vitiate contracts and gifts otherwise binding at common law. The example given in *Grimaldi* is the doctrine of undue influence as it applies to a contract that is tainted by the undue influence of another.[47] A contracting party who was subjected to either actual or presumed undue influence by a non-contracting person when entering the contract may seek its rescission if the other party to the contract has notice of either the actual undue influence or the relationship that raises the presumption of undue influence.[48]

The similarities between *Barnes v Addy*- type liability and third party liability for undue influence were explicitly noted by Justice Barrett in the NSW Supreme Court decision of *Khan v Khan*.[49] In that case, it was presumed that the spiritual undue influence of her Imam led a Muslim woman, S, to enter a contract for the sale of land to the plaintiffs, K. The issue was whether the undue influence constituted a defence to K's claim for specific performance of the contract. His Honour found that it did and that the position of K could be analogised to that of an accessory to a breach of trust or fiduciary duty. In doing so, he referred to the Privy Council's reformulation of accessorial liability for breach of trust and fiduciary duty in *Royal Brunei Airlines Sdn Bhd v Tan (Royal Brunei Airlines):*[50]

> [T]he position of [K] involves the kind of secondary liability based on knowing participation discussed in [*Royal Brunei Airlines*]. . . . The third party recipient of benefit [K], who knowingly takes with notice of the undue influence exerted upon the disponor [S] by the person having ascendancy [the Imam], takes unfair or unconscientious advantage of a situation in which a force against which equity will grant relief is known by him or her to be at work.[51]

Thus, although the remedial consequences are tailored to the nature and function of the doctrine, similar rationales and elements of liability appear to be present here as in the cases of accessorial liability for equitable wrongs

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46 *Mara v Browne* [1896] 1 Ch 199.
47 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [247], citing *Bank of New South Wales v Rogers* (1941) 65 CLR 42; (1941) 15 ALJR 67; BC4190104.
48 *Bank of New South Wales v Rogers* (1941) 65 CLR 42; (1941) 15 ALJR 67; BC4190104.
49 (2004) 62 NSWLR 229; [2004] NSWSC 1189; BC200408603.
50 [1995] 2 AC 378; [1995] 3 All ER 97; [1995] 3 WLR 64.
51 *Khan v Khan* (2004) 62 NSWLR 229; [2004] NSWSC 1189; BC200408603 at [21].

such as breach of trust and fiduciary duty. There are differences, of course. For example, the liability of an innocent third party to a gift, rather than a contract, tainted by undue influence is strict, whereas this would not be the case in relation to a gift tainted by a breach of trust or fiduciary duty.[52] But these differences can be explained and, in any event, relate only to the extent of similarity and overlap.[53] They suggest that the elements of the 'single genus of [accessorial] liabilities' posited in *Grimaldi* will vary in weight according to the circumstances and nature of the equitable doctrine in question.

IV The heartland of equitable accessorial liability is no longer the express trust

My second observation regarding equitable accessorial liability is that, in terms of occurrence and significance, the latter's heartland in Australia is now corporate misconduct and not breach of trust.[54] While the two areas of wrongdoing obviously overlap, it may be anachronistic and misleading to conceptualise equitable accessorial liability as an intrusion of trusts law into corporate law.

We should be fairly comfortable in Australia with accessorial liability arising in corporate contexts given that the two leading High Court cases on equitable accessorial liability, *Consul Development Pty Ltd v DPC Estates Pty Ltd*[55] and *Farah Constructions*,[56] both involved breach of fiduciary duty, rather than breach of an express trust, and the defendants in those cases were corporations and their alter egos.[57] Nonetheless, with respect, Lord Selborne's formulation in *Barnes v Addy* was applied in a rather literal and formulaic fashion in those cases. Nor was there any need to consider liability for non-fiduciary breaches of duty by the respective fiduciaries as their alleged breaches fell squarely within the conflict and profit proscriptions.

As illustrated most recently by the litigation in *Westpac v Bell*, there is some uncertainty as to the proper parameters of equitable accessorial liability in a corporate context. This suggests that attention should be given to the scope and role of the liability in the corporate context, and in particular, whether it is confined to the *Barnes v Addy* framework. Although there are many cases involving equitable accessorial liability for corporate misconduct, such questions have not yet been considered by the Australian courts.[58] Two such questions are discussed in this Part. The first concerns whether accessorial liability in the corporate context should be confined to trust-like scenarios. The second, and overlapping, question concerns when accessorial liability may

52 *Bridgeman v Green* (1757) Wilm 56; 97 ER 22; *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703.

53 See further, P Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 *LQR* 112.

54 This observation is not based on an empirical study.

55 (1975) 132 CLR 373; 5 ALR 231; (1975) 49 ALJR 74; BC7500014.

56 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

57 See also, *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (overturned on appeal on other grounds); *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621.

58 But see now the extra-judicial comments of Professor Gummow in relation to the second question: Hon W Gummow AC, 'The Equitable Duties of Company Directors' (2013) 87 *ALJ* 753.

attach to the breach of non-fiduciary, equitable duties of company directors.[59] The discussion in Part III above, concerning accessorial liability for equitable wrongs, has some bearing upon both questions because it concluded that, as a matter of principle, accessorial liability should be available in relation to the breach of any equitable duty whether or not the duty is trust-like or fiduciary.

Determining the overlap of trust law and corporate law: should accessorial liability be limited to trust-like scenarios?

One way of dealing with the uncertainty illustrated by *Westpac v Bell* is to expand accessorial liability beyond breach of (proscriptive) fiduciary duties to breach of other equitable duties where these are similar in nature to non-fiduciary breaches of trust. Professor Conaglen, for example, links accessorial liability to breach of trust by arguing that accessorial liability (in *Barnes v Addy* terms) can attach to the breach of any non-fiduciary equitable duty if 'it is sufficiently similar to a breach of trust'.[60] That is, for example, accessorial liability can attach not only to breach of the proscriptive fiduciary duties of company directors, but also to 'a breach of any duty which would constitute a breach of trust in an ordinary trust situation.'[61] Given that *Barnes v Addy* accessorial liability, at least on its face,[62] applies to all breaches of trust, whether or not fiduciary in nature, it makes some sense to use this fact as a means to expand the liability by drawing an analogy between breach of trustee duties and the breach of other equitable duties by non-trustees. What is not clear from Conaglen's argument and his supporting citations, however, is whether such a breach must relate to a misappropriation of property (here, company assets) in order to mimic a breach of trust.[63]

Conversely, there have been some indications in Australian law of a reining in of *Barnes v Addy* liability in its application to non-trust scenarios. Thus, for example, in *Farah Constructions*, the High Court queried whether the first limb of *Barnes v Addy*, knowing receipt liability, should apply to the receipt of property that was not subject to a trust although under the control of a fiduciary (for example, company assets under the control of company

59 I will confine my discussion to directors' equitable duties, although the same points apply to other company officers owing equitable duties to the company, fiduciary or otherwise.

60 M Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *LQR* 452 at 479.

61 Ibid, at 479. This, it is said, justifies the expansion of 'trust property' under the first limb of *Barnes v Addy* to encompass property under a fiduciary's control such as company assets controlled by the company's directors: *In re Land Allotment Co* [1894] 1 Ch 616 at 631, 638; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at 1574–5; [1968] 2 All ER 1073; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405.

62 It is not obvious that accessorial liability should attach to a trustee's breach of a duty of care, but contra J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (Eds), *Equity in Commercial Law*, Lawbook, Sydney, 2005, p 235. Similar issues are discussed below in relation to whether accessorial liability should apply to breach of a director's duty of care and skill.

63 The examples he gives suggest that this may be the case: *Brown v Bennett* [1999] 1 BCLC 649 at 655; *In re Land Allotment Co* [1894] 1 Ch 616 at 631, 638; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at 1574–5; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405.

directors).[64] The court's brief, obiter comment appears to be at odds with prior case law.[65] It has not been endorsed by later Australian judges who have considered the point, although the question was raised in the *Westpac v Bell* High Court appeal documents.[66] Perhaps the High Court in *Farah Constructions* was alluding to legitimate policy concerns about imposing too onerous a liability on third parties who deal with company directors. If so, the availability of the liability, in principle at least, still stands. Despite the reservations expressed by the High Court in *Farah Constructions*, however, the dominant view is that 'trust property' more accurately means 'entrusted property', that is, property under the control of a fiduciary, whether or not it is held upon trust.[67]

Is there something quintessential to the trust that justifies (or precludes) the imposition of accessorial liability in other, trust-like, scenarios? Justifying or precluding the expansion of accessorial liability in a corporate setting by reference to trust-like breaches is unsatisfactory, in my view, given that there appears to be a much wider role envisaged for the liability by the Australian courts.[68] Furthermore, while the rationales for equitable accessorial liability clearly include (1) the protection of equitable property interests, such as those pursuant to a trust, they also include (2) vindication of the fiduciary obligation, and (3) redress of a third party's own wrongdoing.[69] The High Court in *Zhu v Treasurer of New South Wales* enumerated these three rationales of third party liability for breach of trust and fiduciary duty in the context of a wider survey of accessorial liability across the common law. In doing so, the court

64 *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703 at [113]. Confusion as to the scope of equitable accessorial liability outside involvement in breach of trust is not confined to Australian case law. The judgment of Lord Nicholls for the Privy Council in *Royal Brunei Airlines* [1995] 2 AC 378; [1995] 3 All ER 97; [1995] 3 WLR 64 in which he formulated a new principle of accessorial liability from earlier case law is couched, for the most part, in the language of express trusts. Because of this, confusion arose in the English courts as to whether the Privy Council's reformulated principle could apply to 'pure' breaches of fiduciary duty not involving trust property: *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 at 671 per Nourse LJ; *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189 at [88] per Morritt LJ. This is not an issue in Australia: *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 396–7 per Gibbs J; 5 ALR 231; (1975) 49 ALJR 74; BC7500014. See also the facts of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

65 See, eg, *Foley v Hill* (1848) 2 HL Cas 28 at 35–6 per Lord Cottenham LC; [1843-60] All ER Rep 16; *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474; *In re Land Allotment Co* [1894] 1 Ch 616; [1891-94] All ER Rep 1032; *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) FLR 286; 45 ACSR 244; [2003] NSWCA 71; BC200301821. See also, Gummow, above n 26, at 317.

66 See eg, *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557; (2007) 25 ACLC 1094; [2007] NSWCA 191; BC200706350; *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [254], [275]; *Westpac v Bell* (2012) 44 WAR 1; (2012) 89 ACSR 1; [2012] WASCA 157; BC201206001 at [2132]–[2136] per Drummond AJA.

67 Ibid.

68 See above Part III.

69 See *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397 per Gibbs J; 5 ALR 231; (1975) 49 ALJR 74; BC7500014; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530; 211 ALR 159; [2004] HCA 56; BC200407561 at [121] (Full Court) (*Zhu*).

clearly envisaged the inclusion of accessorial liability for non-trust, fiduciary breaches at the very least. Most recently, Drummond AJA in *Westpac v Bell* has reiterated that the latter two functions enumerated by the High Court apply in the corporate context:

> *Zhu* and *Consul Developments* indicate that the rationale for intervention against persons who obtain corporate benefits from the breach by directors of their fiduciary duties to the company is twofold: firstly, to aid in the maintenance of the high standard of conduct required of fiduciaries by deterring third parties from encouraging or aiding fiduciaries to breach their duties and secondly, by refusing to permit such third parties to retain the benefits of their inequitable or unconscionable conduct.[70]

The last rationale noted by Drummond AJA is particularly significant here because, in principle, it is not limited to involvement in fiduciary wrongdoing. This rationale embodies the idea that it is wrongful (unconscionable) in and of itself, to interfere with or take advantage of a relationship governed by equity. We can see this principle expressed across equity, most clearly in relation to relationships governed by equitable duties, but also in relation to other situations where equity intervenes on the ground of conscience (for example, to overturn contracts and gifts). Thus, as noted above in Part III, Barrett J, in the context of undue influence, spoke of the third party taking 'unfair or unconscientious advantage of a situation in which a force against which equity will grant relief is known by him or her to be at work.'[71] There appears no warrant to restrict accessorial liability to third parties who participate in breach of equitable custodial duties or in breach of proscriptive fiduciary duties if a rationale for accessorial liability is the third party's own wrongful conduct. Adding weight to this argument is the fact that in no other common law context is accessorial liability limited to the context of custodial relationships.

To summarise the argument so far, accessorial liability, as a matter of principle, is not necessarily tied to breach of trust and trust-like scenarios in a corporate context. Nor, as discussed in Part III and as supported by the third rationale for liability, is it limited to involvement in a breach of fiduciary duty. This suggests that accessorial liability might arise in relation to any equitable duty owed by a company director, whether or not such a duty is described as being 'fiduciary' and whether or not it is analogous to a breach of trust. But, if this is so, when should such liability be recognised and what is its scope?

Determining the scope of equitable accessorial liability in the corporate context in relation to non-trust, non-fiduciary breaches of equitable duty by company directors

In determining the scope of equitable accessorial liability in relation to the equitable duties of company directors the principle of 'coherence' of the law and the related, so-called 'doctrine of analogy' may assist.

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70 *Westpac v Bell* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [2148].

71 *Khan v Khan* (2004) 62 NSWLR 229; [2004] NSWSC 1189; BC200408603 at [21].

Coherence of the law and the doctrine of analogy

Any recognition of equitable accessorial liability beyond the *Barnes v Addy* framework in a corporate context clearly cannot occur in a vacuum, but must be consistent with accessorial liability in the common law, statute and criminal law.[72] In this way, the accumulated wisdom of the courts and the policy choices of the relevant legislatures are respected. In recent times, the High Court has developed an impressive jurisprudence concerning 'coherence' of the law.[73] The principle of coherence has been applied, for example, in relation to the effect of statutory contraventions arising on the same set of facts as, respectively, claims in tort,[74] trust[75] and restitution.[76] In each instance the court has emphasised the need for the common law or equitable doctrine to be applied consistently with the statutory scheme even if that scheme does not directly apply to the doctrine itself. The notion of coherence may be helpful in considering the scope of equitable accessorial liability in relation to company directors because it suggests that common law and equitable liabilities must be construed so as to be consistent with concurrent statutory regimes.

Closely related to the principle of coherence is the doctrine of analogy whereby, under certain conditions, statute law may be used by analogy to develop the common law.[77] So, for example, Professor Gummow, in his recent article on the *Westpac v Bell* litigation, argues that equity, as it has done many times in other contexts, should consider statute when determining the bounds of equitable accessorial liability in a corporate context.[78] Similarly, Professor Dietrich has analysed how the same accessorial liability themes and questions arise across equity, common law, statute and criminal law in the areas of trade practices and corporate misconduct.[79] He suggests that equity and the common law should draw upon the statutory and criminal law schemes in order to develop a coherent accessorial liability framework.

In applying the principle of coherence and the doctrine of analogy, the most relevant accessorial liability regime in relation to breach of directors' duties is that set out in the Corporations Act 2001 (Cth). The Act provides for the accessorial liability of third parties in relation to the breach of some duties of

72 See further, Gummow, above n 26.

73 See, eg, *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133; [1995] HCA 25; BC9501517; *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC20010614; *Miller v Miller* (2011) 242 CLR 446; 275 ALR 611; [2011] HCA 9; BC201101793; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; 286 ALR 12; [2012] HCA 7; BC201201024. See most recently, the discussion in Leeming, above n 43, at 1017–20.

74 *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC20010614; *Miller v Miller* (2011) 242 CLR 446; 275 ALR 611; [2011] HCA 9; BC201101793.

75 *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133; [1995] HCA 25; BC9501517.

76 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; 286 ALR 12; [2012] HCA 7; BC201201024.

77 See *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414; 56 ALR 193; [1984] HCA 73; BC8400490; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; 168 ALR 123; [1999] HCA 67; BC9908417 at [18]–[28].

78 Gummow, above n 58, at 757.

79 J Dietrich, 'The Liability of Accessories under Statute, in Equity and in Criminal Law: Some common Problems and (Perhaps) Common Solutions' (2010) 34 *MULR* 106.

directors and company officers,[80] but not with respect to the statutory duty of care and diligence set out in s 180 of the Act. Hence, Professor Gummow asks:

> in the situation where the statutory regime dealing with [a director's duty of] care and diligence does not provide for accessorial liability, should equity do so? In respect of those duties where the statute does provide for accessorial liability, such as the duties to act in good faith in the best interests of the company, and to act for proper purposes, should equity intervene on a different basis to that spelled out in s 79?[81]

Applying the doctrine of analogy would suggest that some equitable, non-fiduciary duties of directors should attract equitable accessorial liability, but others, such as the duty of care, should not. This accords (is 'coherent') with a general absence across the common law of accessorial liability for negligent conduct by a principal wrongdoer. This approach also provides a principled foundation for the view expressed in dissent by Carr AJA in *Westpac v Bell* in the WA Court of Appeal:

> Where, as in this case, the directors were not dishonest but, with the benefit of hindsight, are judged to have made a commercial mistake, in my opinion the insolvency laws should be deployed to do their work untroubled by 19th century equitable principles derived from the law of trustees.[82]

An important consideration in determining the coherence of equitable accessorial liability in a corporate context will be equity's remedial methodology. Equity's continuing prominence in commercial litigation, despite the incorporation of many of its principles into statutory schemes, is largely due to the attractions of its remedies. But equity's remedial methodology is discretionary; that is, although, in principle, accessorial liability may extend beyond breach of trust and fiduciary duty to the breach of any equitable duty, there may be ramifications in terms of the available remedies. Compound interest and the like are not necessarily available as of right in a *Westpac v Bell* scenario if no breach of proscriptive fiduciary duty is found. Instead, the remedy must be moulded to the nature of the particular wrongdoing of both the third party accessory and the company director.[83] This fact may remove the 'heat' from any debate about attaching equitable accessorial liability to the breach of non-fiduciary duties by directors and other company officers.

Determining 'coherence' is not a simple process and I am not attempting a definitive resolution here. Bathurst CJ, speaking extra-judicially, has suggested that limiting equitable accessorial liability to the breach of (proscriptive) fiduciary duties by company directors:

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80 Corporations Act 2001 (Cth) ss 79, 181–183.

81 Gummow, above n 58, at 757. But see, the apparently contrary view expressed in Heydon, above n 62, p 235.

82 (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [3063].

83 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; 128 ALR 201; [1995] HCA 18; BC9506414; *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [503]. See also, P Ridge, 'Pre-Judgment Compound Interest' (2010) 126 *LQR* 279 at 296–300.

> adequately 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.[84]

That is, 'coherence' and the doctrine of analogy also require consideration of the practical consequences of imposing liability and do not provide obvious or easy answers. Nonetheless, they indicate the nature of the inquiry that must be engaged in.

V Elements of 'varying weight'

My third observation regarding equitable accessorial liability and the *Barnes v Addy* framework is taken from the judgment of the Full Federal Court in *Grimaldi* and concerns the preferred methodology for determining liability. The court held that three elements are relevant when determining liability under the 'single genus of liabilities' in relation to breach of trust and breach of fiduciary duty. The same elements apply, it is suggested, to all instances of equitable accessorial liability. The elements identified are:

> (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 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.[85]

Although not explicitly stated by the court, the second element should be interpreted so as to encompass the nature of the relationship between the third party and the trustee or fiduciary. Whether the third party is a 'stranger' (for example, a professional agent as in *Barnes v Addy*) or a corporate or non-corporate 'companion' to the trustee or fiduciary has been a significant factor in determining liability. This, in part, is because third parties who act as professional agents and who receive no benefit other than professional remuneration from their services to a defaulting trustee or fiduciary raise discrete policy issues that may not be relevant to other third party scenarios.[86] On the other hand, if the third party is the corporate alter ego companion of the trustee or fiduciary (or vice versa) then different policy concerns arise and the third (cognitive) element of liability is not likely to be contentious.

How, then, are the elements identified in *Grimaldi* to be taken into account? The Federal Court clearly rejected the *Barnes v Addy* jurisprudence in this respect. Most attention to date in *Barnes v Addy*-framed cases has been paid to the third element which is framed in terms of knowledge or notice by the third party of the fiduciary's wrongdoing. An enormous jurisprudence exists on the applicability of equitable notions of 'notice' and their matching to concepts of 'knowledge', the so-called '*Baden* scale' of knowledge, and the

84 The Hon T F Bathurst CJ, 'It Tolls for Thee: Accessorial Liability after *Bell v Westpac*', paper delivered at the Banking and Financial Services Law Association Annual Conference, 29–31 August 2013, at [22].

85 (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [247].

86 For example, professional agents of trustees and fiduciaries are uniquely placed to act as whistle-blowers on equitable misconduct.

like.[87] The High Court in *Farah Constructions*, rather unexpectedly, chose to endorse the *Baden* scale.[88] But in *Grimaldi*, the Full Federal Court preferred a wider formulation that included 'assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary'.[89] Furthermore, the court noted that, when deciding accessorial liability *outside* the confines of *Barnes v Addy*, previous courts have eschewed reliance on 'inflexible formulae'.[90] Instead, 'varying weight' had been given to the three elements identified. That is, their significance is assessed relative to the other elements and within the complete factual matrix. The tenor of the *Grimaldi* judgment is that *Barnes v Addy* cases should also employ this methodology and this accords with the suggestions of those who argue for *Barnes v Addy* cases to be decided in the manner of a 'jury question'.[91] This is consistent with the nature of equitable decision-making generally, which involves 'a mixture of learning, intuition, experience, and a sense of the case'.[92] More specifically, it means that the relevance and weight of requirements such as 'knowledge' and 'dishonest and fraudulent design' in Lord Selborne's formulation will shift according to the precise factual matrix.

The question on appeal in *Westpac v Bell* concerning whether there must be a 'dishonest and fraudulent design' for *Barnes v Addy* knowing assistance liability, and if so, what this entails, could be answered quite simply if one adopts the *Grimaldi* methodology. Lord Selborne's objective in *Barnes v Addy* was to contain the liability of professional agents, such as solicitors advising trustees, within reasonable limits. A 'dishonest and fraudulent design' by the trustee was required to demonstrate that the agent, even though receiving no benefit other than professional remuneration for services, was knowingly implicated in such egregious conduct by his principal that his or her own conscience should be affected.[93] That is, a more egregious breach of trust (a 'dishonest and fraudulent design') was required in that setting to reflect the

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87 For a recent discussion of constructive notice in the context of vitiating doctrines generally, see *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35; (2013) 87 ALJR 708; [2013] HCA 25; BC201302838 at [150]–[162]. A less discussed question in the specific accessorial context concerns the content of the third party's knowledge; for example, must the third party recognise that there has been a breach of trust or fiduciary duty? See most recently, *Macedonian Orthodox Community Church St Petka Inc v Metropolitan Petar* [2013] NSWCA 223; BC201311083 at [208]–[209], [224]–[225] (special leave to appeal refused: [2014] HCATrans 28) Also unclear is the level of knowledge required for liability for procuring or inducing an innocent breach of trust. See, *Marriner v Australian Super Developments Pty Ltd* [2012] VSCA 171; BC201205739 at [156]–[162].

88 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [175].

89 (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [247].

90 Ibid.

91 See, eg, R Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 *SLR* 187.

92 Gummow, 'Equity: Too Successful?' (2003) 77 *ALJ* 30 at 41, quoted in *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [503]. For the same methodological approach being endorsed in the contexts of proprietary estoppel and mistaken gifts, see *Pitt v Holt* [2013] 2 AC 108; [2013] 3 All ER 429; [2013] 2 WLR 1200 at [128] per Lord Walker of Gestingthorpe.

93 P Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty' in P Ridge and J Glister (Eds), *Fault Lines in Equity*, Hart Publishing, Oxford, 2012, pp 119, 137. See also, *Westpac v Bell* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [2103] per Drummond AJA.

fact that less weight could be placed upon the second and third elements of liability. This is consistent with the suggestion in *Grimaldi* that a court must consider as part of the factual matrix 'the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant'.[94] But, equally, this suggests that it is never an absolute requirement, but gains greater significance if the third party is a stranger (agent or otherwise) to the fiduciary. Perhaps this factor should have been of less relevance in *Westpac v Bell* given that, on one possible reading of the facts, it appears that the banks may have actively induced, rather than merely assisted, the breaches of duty by the directors of the Bell group of companies. Having said this, however, it must be acknowledged that the meaning of 'dishonest and fraudulent design' in Australian law is uncertain and a contrary approach that places fixed weight and a high threshold of proof on the 'dishonest and fraudulent design' requirement for *Barnes v Addy* knowing assistance liability is open on current High Court authority.[95]

VI Conclusion

In making these three observations upon recent Australian case law, my objective has been to raise some questions concerning the scope and application of equitable accessorial liability in Australia and to speculate as to possible answers. The Federal Court in *Grimaldi* has exposed the breadth and richness of detail in case law that escaped the confines of the *Barnes v Addy* framework. This should give us pause for thought on how that framework should be viewed in future given that it can be subsumed within a broader principle of equitable accessorial liability. *Barnes v Addy* liability, while of immense practical importance, does not provide a template for equitable accessorial liability as a whole. The recognition that accessorial liability in relation to breach of trust and fiduciary duty most often arises nowadays in a corporate and highly regulated context also raises questions about how the scope of such liability should be determined. Consideration of analogous statutory, common law and criminal accessorial liability schemes may help to resolve specific questions concerning equitable accessorial liability in the corporate context as well as bringing coherence to the law on accessorial liability as a whole. This will not be a straightforward task. Furthermore, while accessorial liability for non-fiduciary, non-trust breaches of equitable duties, except for the equitable duty of care, may be coherent with other areas of law, equally such liability may be less attractive once it is appreciated that the remedies are not necessarily those available for fiduciary-related liability. Finally, the Court in *Grimaldi* has presented a more attractive methodology for resolving questions of equitable accessorial liability than was possible under the *Barnes v Addy* framework. Moving beyond the *Barnes v Addy* framework as a template for equitable accessorial liability is therefore clearly an attractive option upon current Australian law, but it also poses new challenges.

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94 (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [247].

95 *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [179]–[184]. But see, *Westpac Banking v Bell* (2012) 44 WAR 1; 89 ACSR 1; [2012] WASCA 157; BC201206001 at [2112]–[2125] per Drummond AJA.