The place of *Barnes v Addy* in modern Australian commercial law

MINOR THESIS

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by

Stewart Maiden
Student no. 123 762

Under the supervision of Professor Michael Bryan

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This thesis is the work of the candidate alone, except where due acknowledgment is made in the text, and does not include material for which any other university degree or diploma has been awarded:

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Stewart Maiden
Outline of Argument

This thesis describes two equitable causes of action:

1. the action for culpable* receipt of property applied in breach of fiduciary duty; and

2. the action for culpable assistance in breach of fiduciary duty.

The paper is particularly concerned with the role of those two actions in Australian commercial law. The objective of the work is positive, not normative. It aims to describe the existence and operation of each of the actions, and the remedies available when a plaintiff successfully proves them. It adds to our understanding of the Australian law by identifying and explaining the relevant and binding authorities, mapping a path through the thicket of conflicting cases which presently plague practitioners.

Part one of the paper introduces the argument. Part two briefly describes the legal wrongs to which the actions can respond. Part three sets out the causes of action at length. First, it describes the relationship between the actions and the wider realm of legal responses to wrongs involving fiduciary duties, particularly those in property and unjust enrichment. It then goes on to examine the constituent elements of each cause of action, and analyse their recent evolution. Part four of the paper sets out the remedies which a plaintiff can seek. As the actions and the remedies which respond to them are equitable, the courts have a wide-ranging discretion in deciding whether, and how, to apply the available remedies. The final section of part four examines the existence of that discretion and explains some of the factors relevant to its exercise.

The thesis concludes that the two causes of action are powerful, flexible equitable actions which remain extremely relevant to modern Australian commercial law.

* Here the word “culpable” is deliberately chosen instead of either “knowing” or “dishonest”, to recognise the extant conflict between those two words (and permutations of each) as the applicable touchstone for liability.
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1 Introduction

This thesis examines the liability of those who receive property obtained in breach of trust or fiduciary duty, and those who assist in the breach of such duties. It is particularly concerned with fiduciary duties which stem from commercial relationships and those owed by corporate officeholders. The basis of third party liability in the event of a breach of fiduciary duty is commonly traced to Barnes v Addy.\(^1\) This paper examines the modern Australian incarnations of the “two limbs” of Barnes v Addy: the action for knowing receipt of property the subject of a breach of trust or fiduciary duty (the “receipt action”), and the action for culpable\(^2\) assistance in a breach of such a trust or fiduciary duty (the “assistance action”). The aim of the paper is to describe the causes of action which have evolved from Barnes v Addy in Australia, in a manner useful to those who must rely on them or respond to them.

To properly understand the operation of those two actions, one must comprehend where they sit in the broader universe of actions. For that reason, the paper considers the interplay between each of the actions and those which are proximate to them in the overlapping spheres of equity and the common law. In particular, it briefly considers a recent argument that the action for knowing receipt has (or should be) subsumed within the action for unjust enrichment, to determine whether the cases support that argument.

The paper begins by examining the potential bases of liability, by describing the existence and sources of the duties which those involved in the management of

\(^1\) *Barnes v Addy* (1874) LR 9 Ch App 244.

\(^2\) Here the word “culpable” is deliberately chosen instead of either “knowing” or “dishonest”, to recognise the extant conflict between those two words (or permutations of each) as the applicable touchstone for culpability.
companies must uphold. It then goes on to briefly describe two other forms of non-statutory action: the “property” action, and the cause of action in unjust enrichment. Each of those actions can be available in the same or similar circumstances which give rise to a receipt or assistance claim.

At the centre of the paper is an examination of the constituent elements of each of the causes of action, and an analysis of their recent evolution. Each of the recipient and assistant actions has been the focus of judicial deliberation in high appellate courts in the United Kingdom during the last ten years. The paper pays particular attention to the way in which that English jurisprudence has been adopted by Australian courts.

The paper goes on to consider the potential extension of Barnes v Addy liability to breaches of statutory duties, particularly duties under the Corporations Act 2001 (C’th) (the “Corporations Act”), using Robins v Incentive Dynamics as an illustration. The extension of recipient or assistant liability to a statutory context in that situation could provide the framework for a similar extension to situations such as a breach of the Trade Practices Act 1975 (C’th), superannuation legislation and other legislation which establishes liability for misfeasance in the course of corporate activity (although such a broader discussion is beyond the scope of this paper).

Finally, the paper considers the range of remedies available for receipt and assistance claims, and the factors considered by the courts in determining which remedy to award. Statutory remedies are examined to place the other remedies in their proper context.

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3 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244.
The practical significance of the analysis presented lies in the avenues of recovery opened by its subject matter: receipt and assistance claims are one mechanism by which a frustrated creditor can look beyond an incorporated debtor for satisfaction of a claim which might otherwise be frustrated in an insolvency administration. Proprietary remedies provide access directly to the assets concerned, avoiding issues of proof and priority which are otherwise created in insolvency, and enabling a plaintiff to reach under the corporate veil and access assets otherwise shrouded by incorporation. As Lord Nicholls said:

"Increasingly plaintiffs have recourse to equity for an effective remedy when the person in default, typically a company, is insolvent. Plaintiffs seek to obtain relief from others who were involved in the transaction, such as directors of the company, or its bankers, or its legal or other advisers. They seek to fasten fiduciary obligations directly onto the company’s officers, or to have them held personally liable for assisting the company in breaches of trust or fiduciary obligations."

Professor Bryan addresses the motivation for such peripheral actions head-on:

"[T]he natural defendants to this secondary litigation ... are, for the most part, solvent and inescapably within the jurisdiction of the court."

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4 There are other consequences, too: see W M C Gummow, "Unjust Enrichment, Restitution and Proprietary Remedies", in PD Finn (ed) Essays on Restitution (1990) 47, 71 ff.


The relative novelty of some of the causes of action discussed within this paper, and the academic and judicial debate which still rages as to the correct taxonomy, scope and application of many of them, renders apposite the recent observation of Hansen J: 7

"if the case raises an area of law which is not only beset by authorities in which there is a variance of opinion, but for which the authorities do not establish a satisfactory explanation of the relevant underlying principles, the judge is left to his own devices."

The examination provided in this paper attempts to predict the outcome of judicial device by explaining the tools at judges’ disposal. Many hands have cramped in attempting normative analyses of the theories touched upon in this paper. I seek to achieve something altogether less ambitious: where possible, a positive statement of the Australian law; where not, a prediction of its likely development. This is a purely descriptive paper, which seeks to divine the status of the law as it is, and thus predict the future application of that law to particular facts.

Finally, I must point out that this is a paper about causes of action which respond to breaches of duty. It is not a paper about duties themselves. In examining statutory, equitable and fiduciary duties, the paper presupposes the relevant breach, rather than dwelling on the root, existence, content and breach of the duties. That said, the existence of the duties must be recognised and described before the consequences of their breach can be analysed.

2 Foundations of liability

A description of the existence and content of the many duties owed to a company by those who are associated with it falls outside the scope of this paper. What follows is merely a brief sketch of the bases of such liability, to provide a background against which the causes of action which respond to them can be examined.

Company property may be misapplied by being employed in breach of a statutory duty. The Corporations Act sets out a number of duties which must be complied with by directors and officers of a company.\(^8\) Directors and other officers may owe further non-statutory duties to the company which arise from the express or implied\(^9\) terms of the contract of employment. Directors are subject to a common law duty of care to exercise reasonable care, skill and diligence.\(^10\) That tortious duty is less commonly the subject of litigation than the equitable duties described below, because equitable compensation provides a more flexible remedy than the award of damages at common law.\(^11\) Equity imposes further duties on officers and employees. Each is a fiduciary. A fiduciary is not, unless expressly authorised by a fully-informed principal, allowed to put himself or herself in a position where interest and duty conflict. The authors of *Ford's Principles of Corporations Law* identify three "principal rules" which emerge from that general rule. A director must not, without the company's consent:\(^12\) have a personal interest or inconsistent engagement with a third party in any matter falling within the scope of his or

\(^{8}\) Notably, those in ss 180 - 183.

\(^{9}\) See for example *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.


\(^{11}\) *AWA Ltd v Daniels v/as Deloitte Haskins & Sells* (1992) 7 ACSR 759, 872.

her service (the “conflict rule”); misuse his or her position for his or her own or a third party’s advantage (the “profit rule”); or misappropriate company property for his or her benefit or the benefit of a third party (the “misappropriation rule”).

Of course, there are other equitable duties (owed by fiduciaries and others) which are not fiduciary duties. Ford states “[a] duty of care and diligence arises in equity, just as a duty of care and diligence arises from the relation of a trustee to a beneficiary, but is not to be equated with or termed a fiduciary duty.”

The next part of the paper describes the causes of action which flow from a breach of one or more of the duties just described. As I will demonstrate, concepts relevant to the proof of property actions (such as tracing) can also be important in proving recipient and assistant liability. Further, on a given set of facts, an action in unjust enrichment (or for money had and received) can sometimes be available in parallel to an action in receipt. For those reasons, I will briefly consider “property” actions and claims in unjust enrichment before moving to a detailed analysis of recipient and assistant liability.

3 Causes of action

3(a) “Property” actions

“Property actions” must be distinguished from proprietary remedies. A property action is a cause of action by which a person with an interest in property seeks to vindicate that interest against another person claiming a competing interest in the same property. Property actions rely on the mechanisms of tracing (whether at common law, in

equity, or both). Proprietary remedies (discussed at 4(c) below) are responses which the law provides to certain causes of action. The difference between property actions and actions which can give rise to proprietary remedies is illustrated by the following statement of Megarry VC:

"The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights."

Property actions are the focus of this section of the paper.

Where a plaintiff has an interest in some property which has come into the hands of a defendant, and the plaintiff can prove a prior equal or higher-ranking interest in the property, the burden of proof falls on the defendant to prove a defence such as bona fide purchaser for value without notice. Without such a defence, a "clash of equities" will occur, and the person with the "best equity" will have his or her right to the property enforced. As Gummow J has said:

"Equitable proprietary remedies may serve to sustain a proprietary interest held by the plaintiff before the occurrence of the events which have given rise to the
need for equitable intervention. The tracing by a beneficiary of trust property would be a clear example ... equity treats the owner who has been parted from property as a result of fraud, undue influence, unconscionable dealing, mistake or other circumstances justifying rescission of that transaction, as having retained an equitable estate which may be assigned or devised."

Birks terms the action a “vindication”, the plea “that thing is mine.” For Birks, the existence of the plaintiff’s right is the event to which the law provides a remedy. Smith calls the claim a “title claim”.18

Smith notes that the difference between personal and proprietary rights is “not a purely theoretic or semantic issue; on the contrary, blatant uncertainty about the meaning of ‘proprietary’ has consistently bedevilled the development of the law relating to claims derived from tracing”. Proprietary rights, he says, are exercisable against people in general. However, as proprietary rights can always be described as having some subject matter, it is more convenient to describe them as being a right in that subject matter – that is, the item of property to which the right relates. A corollary of the fact that a proprietary right is always a right in something is that if the subject matter is destroyed, then so is the right.20

To make a title claim, the plaintiff must be able to identify some property in which the right is claimed. The process of doing so is commonly referred to as “tracing”. The actions discussed later in this paper frequently rely on the use of tracing principles,

and it is important to build that discussion on a solid foundation. Lionel Smith’s analysis of property claims provides such a base.

**Following, tracing and claiming**

According to Smith, we must distinguish between three separate concepts: “Following” is a process of identifying a specified asset, usually as it is transferred from one person to another. Following focuses on the original asset and usually identifies a “new” party relevant to the analysis.

“Tracing” identifies a new asset as the subject of a claim. The new asset is something which the old asset has “become” – a legal, not a physical metamorphosis (for example, the conversion of currency into an asset purchased with that cash). The most salient difference between tracing and following is that the latter can be exclusively factual. Following can involve no more than the proof that a particular tangible thing was in a certain place at a certain time, while tracing always involves the application of legal rules. Thus “tracing” properly so called, is neither a claim nor a remedy, but a means of determining whether one asset is the proceeds of another. The utility of tracing is not confined to the case where a plaintiff seeks a proprietary claim. It is equally necessary where he or she seeks a personal remedy against a knowing recipient or knowing assistant, because an essential element of such a claim is the movement of the subject property or its traceable proceeds through the hands of the defendant or the person the defendant is alleged to have assisted.

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The third concept is “claiming”. Claiming is the exercise of legal rights in respect of an asset which has been subject to the tracing or following exercise. In that regard, the exercise of following or tracing is preliminary to the exercise of claiming. The mere ability to trace property does not of itself give rise to a claim in that property. Some accepted cause of action must be identified. Following and tracing are used to identify the asset which is the subject of the claim (or to determine whether a particular asset may be subject to a claim) and the defendant(s) against whom the claim can be brought.

Smith’s taxonomy has support in high authority. In Boscawen v Bajwa, Millett LJ said:

“Tracing properly so called, however, is neither a claim nor a remedy but a process. Moreover it is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a personal remedy against the knowing recipient or knowing assistant.”

According to Smith, when one speaks of following, one is speaking of following a “thing”. When one speaks of tracing, one speaks of tracing the “value” of an original asset through its substitution into another asset. It is that value which is traced, and not any property or asset which can be identified in different forms after each substitution.

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The value traced is not value in an asset but value in the right (whether ownership or some lesser right) to that asset.25

Smith emphasises the difference between claims generated through tracing (what I refer to as “property actions”) and claims derived from other sources. A property claim against an asset is available because the value in that asset is a substitute for the value in another asset to which the plaintiff had a claim. Smith contrasts claims such as those for disgorgement, where the plaintiff relies on a wrong to establish the connection to an asset generated as a result of that wrong. In the latter case, there is no substitution of value in the new asset for the value in the original asset. The value has been obtained as a direct result of a wrong, not as a result of an exchange for the plaintiff’s value. One is not the traceable proceeds of the other because it was not acquired in substitution for it. Smith points out that disgorgement and a claim to traceable proceeds can in some cases be deployed concurrently and in others, successively.26 Examples are *Scott v Scott*27 and *Attorney General for Hong Kong v Reid*28 respectively.

The latter case illustrates successive deployment. The defendant had purchased property with the proceeds of bribes he accepted while employed as a prosecutor in Hong Kong. That is, he obtained property (money) as the result of a wrong (accepting a bribe) and converted it into other property (real estate in New Zealand). The remedy of disgorgement was available for the money received, and that money was traced into the

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28 *Attorney General of Hong Kong v Reid* [1994] 1 AC 326.
proceeds received from the substitution (the New Zealand properties), which were then available to the plaintiff. Smith describes it thus:29

"the proprietary interest held by [the plaintiff] in the bribe money was generated without any regard to tracing; that interest was then transmitted to the freeholds, via the exercise of tracing."

What Smith speaks of is the creation of proprietary rights: proprietary rights in the value of a substituted asset are created by means of the substitution; proprietary rights in an asset created by the commission of a wrong can be disgorged.

In addition to the creation of rights by transfer and by wrongdoing, property rights may be the "fruits" of another asset30 - for example, the generation of a harvestable product from a crop, or a dividend from a share. The holder of the original asset becomes the holder of the new asset, for "no other reason than his holding of the original asset at the time the new asset was created".31 That situation is distinguished from substitution, because to obtain the fruits, the owner does not need to give up the asset which generates them. As with disgorgement and tracing, so the law of "fruits" and tracing can operate concurrently and successively. To adopt Smith's example, if a person steals money from another and uses the money to buy shares, any subsequent declaration of a dividend in those shares is a fruit of the shares. By tracing the value in the stolen money into the shares, the plaintiff can establish a claim to those shares and if that claim is upheld, the right to the dividends.

So why trace? First, as Smith says "the defining characteristic of proprietary rights is that they avail against an indefinite class of persons". Thus by successfully tracing the plaintiff's rights into a substituted right to property, the plaintiff can seek to enforce that right against any subsequent acquirer of it. Similarly, the plaintiff might be the successor in title to the person who owned the property at the time the action arose. Contrast a personal right, created by a wrong committed against the plaintiff. The product of that wrongdoing, while capable of disgorgement from the original wrongdoer, cannot be followed into a subsequent owner. Secondly, proprietary rights will generally have priority over those of unsecured creditors in a recipient's insolvency. Thirdly, the value of ownership of the substituted property might be greater than the value of the original asset (particularly where the asset has borne fruit). Further, a claim based on proprietary rights can attract procedural advantages – where the substituted property is within the jurisdiction, but the potential defendant is outside, the rules of court might allow proceedings to be brought against the defendant regardless of its absence. Courts are also more willing to award an interlocutory injunction preventing the destruction or alienation of the property claimed. Proprietary claims might remain available after the limitation period for any personal action has passed. Some laws might treat the proprietary status of the plaintiff's rights as significant. A proprietary claim may give rise to a final order that the defendant transfer possession of a particular thing to the plaintiff where that thing has some specific value to the plaintiff.

34 Stump v Gaby (1852) 2 De GM & G 623; (1852) 42 ER 1015.
A further use for the tracing doctrine arises in the case of "reviving subrogation". Smith, borrowing from Mitchell,\(^37\) states "reviving subrogation arises where an obligation of the defendant has been discharged with value which was traceable to the plaintiff. In some circumstances, the plaintiff will be allowed to take over the rights which the discharged creditor used to have against the defendant."\(^38\) Tracing is relevant in those circumstances because the plaintiff needs to show as part of the claim that the value in property was used to discharge the obligations.

Finally (and most relevantly for present purposes) tracing can assist to establish the existence of particular property in possession of a defendant for certain personal actions. For example, an action in unjust enrichment or for the receipt of trust property requires the plaintiff to show that the defendant had the traceable proceeds of the property in question at some time.

Having briefly explored the theory behind following, tracing and claiming, I now sketch the rules which apply to tracing claims in Australia. The basic rules of tracing, sufficient to underpin the analysis that follows, can be generalised and expressed as follows:\(^39\)

1. Where a person receives property impressed with some obligation, and the property remains separate and identifiable, value can be traced, at law and in equity, into that property in the recipient’s possession.\(^40\)


\(^{39}\)A digest of some of the following rules can be found in Commissioner of Taxation v Macquarie Health Corp Ltd (1998) 88 FCR 451.

\(^{40}\)Re Hallet's Estate (1879) 13 Ch D 696, 709 and Scott v Scott (1962) 109 CLR 649, 660-4.
2. Where the property has been substituted in a way which does not give rise to identifiable proceeds (for example, where funds are “dissipated” by use in the ordinary course of business), value cannot be traced into the property.\textsuperscript{41}

3. Where property is traceable, the plaintiff has an election: he or she can either take the property \textit{in specie}, or assert a lien over it to secure satisfaction of a claim for the value of what was taken.\textsuperscript{42}

Those three rules are the only rules of tracing which co-exist at common law and in equity. The following remaining rules can only be seen by the law’s “good eye” – equity.\textsuperscript{43}

4. Where the recipient has mixed the property with his or her own property, rendering separate identification of the property impossible, equity allows value to be traced into the entire corpus of the recipient’s property, except any part which the recipient can identify as solely his or her own.\textsuperscript{44}

5. Where property impressed with different obligations is mixed in the recipient’s possession, the general rule is that the beneficiaries of the

\textsuperscript{41} Re Diplock’s Estate [1948] Ch 465, 521.

\textsuperscript{42} Identified by J Glover, \textit{Equity, Restitution and Fraud} (2004) 382 as “the election in Hallet’s case” (from \textit{Re Hallet’s Estate} (1879) 13 Ch D 696, 709.

\textsuperscript{43} Puma Australia Pty Ltd v Sportsman’s Australia Ltd (No 2) [1994] 2 Qd R 159, 162. The basis for the difference at law and in equity was described by Lord Greene MR in \textit{Re Diplock’s Estate} [1848] Ch 465, 519-520.

\textsuperscript{44} Brady v Stapleton (1952) 88 CLR 322.
several obligations have an interest in the mixed fund to the extent of their respective contributions.\textsuperscript{45}

6. Subsequent diminution of a mixed fund by the recipient is presumed to exhaust the recipient’s property prior to exhausting any of the subject property.\textsuperscript{46}

7. A beneficiary’s claim to mixed funds is limited to the “lowest intermediate balance” of the fund in which the subject funds have been mixed, unless it can be inferred that the recipient intended to “top up” the mixed fund by with any subsequent contributions.\textsuperscript{47} That is, the lowest balance which the fund has reached in the period between the date of mixing and the date of the claim is the high-water mark above which the beneficiary’s value cannot be traced.

8. Where the recipient’s accounts have become disorganised it may not be possible to trace into them at all.\textsuperscript{48}

9. Value cannot be traced into property held by a recipient if that property was mixed with other property by a person standing prior to the recipient in the chain of title.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{45} O’Keefe v Law Society of New South Wales (1998) 44 NSWLR 451.
\item \textsuperscript{46} Re Hallet’s Estate (1880) 13 Ch D 696.
\item \textsuperscript{47} Re Grey (No 2) (1900) 26 VLR 529; James Roscoe (Bolton) Ltd v Winder [1915] 1 Ch 62; Re Goldcorp Exchange Ltd; Kensington v Liggett [1995] 1 AC 74.
\item \textsuperscript{48} Windsor Mortgage Nominees Pty Ltd(1979) ACLC 132, 195; ASC v Melbourne Assets Management Nominees Pty Ltd (1994) 49 FCR 334.
\item \textsuperscript{49} Agip (Africa) Ltd v Jackson [1990] Ch 265, 285 per Millett J. Contrast “clean” substitution: Puma Australia Pty Ltd v Sportsman’s Australia Ltd (No 2) [1994] 2 Qd R 159, 162.
\end{itemize}
Tracing is a process, not a remedy. It is an essential process in any case where the plaintiff brings a property action or seeks a proprietary remedy. It is also an indispensable tool in any action where proof of receipt is an essential element. For that reason, an understanding of the tracing process and its context is essential to any analysis of the actions explained below. As Millett J held in *Agip (Africa) Ltd v Jackson*, “[t]racing claims and cases of ‘knowing receipt’ are both concerned with rights of priority in relation to property taken by a legal owner for his own benefit”50 However, knowing assistance is not. In the latter case, the horse has bolted and the plaintiff is looking to the stable boy to make good its price. The relevance of tracing in assistance cases is to identify parties to whom the property has passed, to determine whether they might have been “assisted” by the defendant.

The case of *National Australia Bank Ltd v Rusu*51 is an interesting example of the interaction between following, tracing, claiming, unjust enrichment and *Barnes v Addy*. At the time of the case, the first defendant (Ms Rusu) was serving time for having stolen $476,500 from her then employer, the plaintiff bank. Bryson J found Rusu liable to the Bank not only in debt but also “to tracing and other equitable remedies (sic)”52 in respect of the stolen money. No mention was made of any stolen money which was still in Rusu’s possession, and judgment was only awarded against Rusu an amount equal to the stolen money, plus interest and costs. In that context, his Honour’s mention of equitable remedies is curious.

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50 *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 292 per Millett J.
51 *National Australia Bank Ltd v Rusu* [2001] NSWSC 32.
52 *National Australia Bank Ltd v Rusu* [2001] NSWSC 32, [5].
The second defendant, Mato, was the *de facto* husband of Ms Rusu. Mato had collected Ms Rusu from the Bank immediately following her theft of the money, but Bryson J found that it had not been established that Mato participated in the theft, or received or handled the entire sum of stolen money. However, his Honour found that Mr Mato had used funds of such significant amounts that in the circumstances it was improbable that they came from any source other than Ms Rusu. His Honour concluded that Mato must have known the funds he obtained from Rusu belonged to the Bank - or, "in a more formal way, he must have known facts which showed that the money was held by her on a constructive trust for NAB from which the money had been stolen".53 Applying *Black v Freedman & Co.*,54 Bryson J was unable to find that Mato handled, or was a participant in the theft of, all of the stolen funds. His Honour was therefore unable to hold him liable for the entire amount stolen. However, in respect of each of the payments which his Honour found on a balance of probabilities had been made by Mato from stolen monies received from Rusu, his Honour gave judgement for the sum of those amounts against Mato personally. Additionally, his honour found Mato was "subject to a tracing remedy (sic) where property to which the money was applied [could] be identified".55 His Honour held that the Bank’s money was traceable into a boat and trailer which Mato had purchased, and against which his Honour awarded the bank a charge. His Honour found that certain deposits to bank accounts were made with monies which rightfully belonged to the bank, and allowed a claim against those funds. His Honour’s award of a "tracing remedy" was in fact the use of the doctrines of tracing to determine that money stolen from the Bank had been substituted with a boat and trailer

53 *National Australia Bank Ltd v Rusu* [2001] NSWSC 32, [21].
54 *Black v Freedman & Co.* (1910) 12 CLR 185.
and with a deposit in other accounts. Having successfully identified the substituted value in those assets, the Bank was able to claim against the substituted assets and was awarded an equitable remedy granting an interest\(^56\) in them.

The third and fourth defendants were Mato’s parents. The parents owned a house which was mortgaged to a financier (Avco) to secure the parents’ liability for a debt due to Avco. Mato was a party to the loan agreement and was the recipient of the borrowed funds. Mato had used the funds to purchase equipment for his barely-profitable concreting business. The Bank alleged that Rusu and Mato used stolen funds to reduce the liabilities of Mato and his parents to the financier. Seven payments totalling $37,600 were particularised. Mr. Mato claimed that each of those payments was made by him from a cheque account and from cash he held which he had obtained from his business over the years. His Honour did not accept that explanation.

The Bank claimed that Mato’s parents were liable to the Bank as constructive trustees for each of the payments. His Honour found that as Mato was the sole principal debtor, the $37,600 was not in any sense paid by Mato to or on account of his parents. His parents had joined in the loan agreement only as guarantors for Mato and were entitled to an indemnity from him if any of the liability actually fell on them or their property. The benefit they obtained from the payments was “oblique” in that their joint and several liability to Avco was reduced, but in his Honour’s opinion “it is not possible to equate this oblique benefit with the receipt by them of money to which [the Bank] was entitled in equity”.\(^57\) The only recipient of the $37,600 was Avco, which had not

\(^{56}\) But not a proprietary right: see the discussion of equitable liens and charges set out under 4(c)(ii) below.

\(^{57}\) National Australia Bank Ltd v Rusu [2001] NSWSC 32, [38].
received the payments as an agent of Mato or his parents. The parents could not therefore be the subject of a recipient claim under *Barnes v Addy*, or the subject of a claim for unjust enrichment. There was no evidence that the parents had any knowledge of their son’s involvement in any wrongdoing upon which an assistant claim might be founded. Further, his Honour found that the benefit obtained by the parents was a result of payments made by Mato and should be seen as a benefit which they received for value, because they were entitled as against their son to have those payments made by him.

Tracing the $37,600 from the bank through Rusu and then Mato could only lead to Avco. Avco was not named as a defendant, and there could have been no supportable claim against it. Avco gave consideration for the payments it received (a complete defence to an unjust enrichment claim), and had no knowledge, whether actual or constructive, of the fraud (thus avoiding any possibility of being subject to a *Barnes v Addy* claim for recipient liability).

One of the actions considered by Bryson J in *Rusu* was a cause of action in unjust enrichment. I now turn to examine that cause of action.

**3(b) Restitution and unjust enrichment**

The word “restitution” embraces two concepts:58

1. the remedial response to an event of unjust enrichment (an “autonomous” or “independent” claim in restitution); and

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2. a remedy for another cause of action, designed to strip benefits gained as a result of the events which gave rise to that cause of action (a "dependent" claim in restitution).

Restitutionary remedies can be of equitable or common law origin.\(^59\)

Autonomous restitution is the law’s response to an event which falls within the “unifying legal concept of unjust enrichment” identified by Deane J in \textit{Pavey & Matthews Pty Ltd v Paul}.\(^60\) According to Mason, the “acknowledged grundnorm” for legal and equitable causes of action or remedies concerning those events judicially accepted as ‘unjust’” is the “fourfold enquiry” adopted from Birks’ seminal 1985 book \textit{An Introduction to the Law of Restitution}.\(^61\) According to that fourfold enquiry, to establish an event of unjust enrichment, the plaintiff must prove:

1. the defendant has been enriched;
2. the enrichment was at the plaintiff’s expense;
3. there is some (judicially accepted) “unjust” element in the enrichment; and
4. there is no restitutionary defence available to the defendant.

While it still remains controversial to say so (for reasons I will briefly set out below), the cause of action in autonomous unjust enrichment is now firmly grounded in


\(^{60}\) \textit{Pavey & Matthews Pty Ltd v Paul} (1987) 162 CLR 221, 257.

Australian precedent. In Pavey & Matthews Pty Ltd v Paul the High Court explicitly recognized that a claim in quantum meruit is founded in a claim to restitution based on unjust enrichment, and not some form of quasi-contract. A builder brought a quantum meruit claim against its customer for materials and labour supplied under a building contract. The building contract did not satisfy a statutory requirement that it be in writing, and the defendant denied any liability, claiming that the contract was unenforceable. The Court recognised that the true foundation of the right to recovery of the sum sought by the plaintiffs had its foundation in unjust enrichment, and not in any implied contract. Thus, failure of the building contract to comply with the statute did not prevent recovery on the quantum meruit claim. Success depended on proof that the work was done by the plaintiff, accepted by the defendant and not paid for. The obligation to pay thus created differed from the obligation to pay created by the contract. Explicit recognition of the place of unjust enrichment can be found in the judgment of Deane J (with whom Mason and Wilson JJ agreed on this point). His Honour said:

"unjust enrichment ... constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case."

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62 The following set of cases was selected by Dr Jonathan Moore for inclusion in an as-yet unpublished paper on the subject of the existence of the cause of action in unjust enrichment.
63 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221.
64 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, 256-7 (Deane J).
In Australia & New Zealand Banking Group Limited v Westpac Banking Corporation, the High Court held that the basis of an action for money had and received for recovery of an amount paid under a mistake of fact lay in unjust enrichment. Importantly, their Honours held “the common law right of action may arise in circumstances which also give rise to a resulting trust of specific property or funds or which would need a modern court to grant relief by way of constructive trust”. Their Honours went on to say:

"the action itself is not for the enforcement of a trust or for tracing or the recovery of specific money or property. It is a common law action for recovery of the value of the unjust enrichment and the fact that specific money or property received can no longer be identified in the hands of the recipient or traced into other specific property which he holds does not of itself constitute an answer."

In David Securities Pty Ltd v Commonwealth Bank of Australia, the High Court extended the ratio in ANZ v Westpac to moneys paid under a mistake of law.

In Roxborough v Rothmans of Pall Mall Australia Limited, the High Court held that failure of consideration for a payment imposes a burden upon the payee, thus unjustly enriched, to make restitution to the payer.

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72 Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516.
73 Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 518, 527 per Gleeson CJ, Gaudron & Hayne JJ; 588-9 per Callinan J.
In *David Securities*, Mason CJ and Deane, Toohey, Gaudron and McHugh JJ said:

"it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation on what is fair or unconscionable. Instead, recovery depends upon the existence of a qualified or vitiating factor such as mistake, duress or illegality".

Glover, among others, takes issue with the existence of autonomous unjust enrichment as a cause of action. A critique of those objections falls far outside the scope of this paper. It suffices to say that Glover (and those who share his objection) do not deny the many causes of action which are otherwise grouped under the "unifying legal concept" of unjust enrichment. For the purposes of the argument set out in this paper, the dispute can be put to one side.

Autonomous unjust enrichment has two "impacts" on the analysis presented in this paper. First, it impacts on the question, discussed below, of whether recipient liability is strict or remains grounded in its fault-based tradition. Secondly, and arising from the first impact, it enables an answer to the question of whether the common law action in autonomous unjust enrichment (or action for money had and received) is an effective substitute for equity's action in recipient liability, or whether the actions are co-existent. Those issues are addressed in the following section.

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75 J Glover, *Equity, Restitution and Fraud*, 2004, [1.11], 16-17, relying on Justice Gummow's judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [74] and others.
3(c) The liability of recipients and accessories in equity

The path which began at *Barnes v Addy* is well travelled. That case did not create a new cause of action, but it is the base camp from which jurists and commentators most commonly launch their assault on the mountainous jurisprudence which supports the two actions it contemplated. The import of the case is found in Lord Selborne’s ratio:76

"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."

While it is important to remember that his Lordship’s statement should not be treated “as though it were a statute”,77 those words have been applied with reverence by subsequent courts. The name of the case now provides a shorthand description, “the two

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76 *Barnes v Addy* (1874) LR 9 Ch App 244, 251-2 per Lord Selborne LC.
77 As was submitted by counsel for the plaintiff in *Baden & Ors v Societe Generale Pour Favoiser Le Developpement Du Commerce Et De L’Industrie En France SA* [1993] 1 WLR 509, 573, and later by the Privy Council in *Royal Brunei Airlines SDN BHD v Tan* [1995] 2 AC 378, 385-6, where their Lordships described Lord Selborne’s judgment as having operated as a “straight jacket” for the accessory principle. See too Charles Harpum, “The Basis of Equitable Liability”, in P Birks (Ed) *Frontiers of Liability* (1994) 13: “Lord Selborne’s formulation was in an unreserved judgment given without the benefit of full citation of previous authority.”
limbs of *Barnes v Addy*, for the two heads of liability which Lord Selborne described. In this paper, I refer to those causes of action as “recipient liability” and “assistant liability” respectively. As will be seen, the constituent elements of each has long since departed from the relatively simple formulation which his Lordship posited.

Equitable recipient liability is created when a person, with relevant knowledge of a breach of an equitable duty, treats property in his or her possession inconsistently with the equitable duty that has been breached. Assistant liability attaches to those who culpably assist in the breach of the equitable duty. The liability of a recipient or an assistant to the plaintiff is joint and several with that of the primary wrongdoer. The practical effect of that is that there is no requirement that a plaintiff sue all wrongdoers, although it remains open to him or her to do so.

Two important issues of nomenclature must be explained at the outset. First, in many cases and articles, regardless of the remedy sought or ordered, the defendant (whether recipient or assistant) is referred to as a “constructive trustee” if found liable. That choice of terminology was used by the High Court in *Giumelli v Giumelli*. Strictly speaking, while a constructive trust may be imposed if a recipient retains the property or some traceable substitute of it, “constructive trustee” is an inappropriate description of the liability of a mere assistant (who will not have trust property to which liability as a trustee can attach) or a recipient who has disposed of the property in an untraceable fashion. Birks has commented “there is no need whatever for personal liabilities to be

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dignified by the addition of the colophon ‘as constructive trustee’". As Mitchell points out, the expression can only mean that the defendant’s personal liability resembles the personal liability of a trustee to account to his or her beneficiary. That concept is further explained by Mitchell and Elliot, who say that the expression was never meant to convey the idea that

"dishonest assistance involves a custodial relationship between the assistant and the claimant ... on the contrary, the expression has always been understood to mean that a dishonest assistant is accountable as if he were a trustee, although he is not."

Dal Pont and Chalmers suggest it is more appropriate to refer to such defendants as being “accountable in equity”. However, both that term and “constructive trustee” suffer from too close an association with a particular equitable remedy. I suggest the use of the broader expression “personally liable in equity” to describe the position of a person found to bear recipient or accessorial liability. A defendant who is also found to hold some property on a constructive trust can then be badged as a trustee in addition.

Secondly, the concept of “knowledge” as it applies in the Barnes v Addy context must be discussed. Knowledge remains relevant to claims in both receipt and assistance, although it is no longer decisive of the latter. Bryan points out that the issue of

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knowledge is “an area of equity which has been over-theorised with very little practical benefit.”  

In Baden & Ors v Societe Generale Pour Favoriser Le Developpement Du Commerce Et De L’Industrie En France SA ("Baden"), the plaintiffs’ counsel synthesised five possible types of knowledge or circumstances which would lead a court to impute knowledge: 

- **Type (i) knowledge:** actual knowledge;
- **Type (ii) knowledge:** wilfully shutting one’s eyes to the obvious (or “Nelsonian knowledge”);
- **Type (iii) knowledge:** wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;
- **Type (iv) knowledge:** knowledge of circumstances which would indicate the facts to an honest and reasonable person; and
- **Type (v) knowledge:** knowledge of circumstances which would put an honest and reasonable person on inquiry.

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While the Baden scale has its detractors\textsuperscript{88} and the ratio of the case itself is no longer good law,\textsuperscript{89} the scale there propounded provides a convenient reference\textsuperscript{90} which I adopt for the purposes of analysis.

It is also important to note the difference between the terms “knowledge” and “notice” in equity, particularly when used in conjunction with the word “constructive.”\textsuperscript{91}

Constructive notice is notice “of a fact with which a person is fixed although he has no subjective knowledge of it.”\textsuperscript{92} It consists of “that knowledge that would have come to a person’s attention had he or she made the inquiries a reasonably prudent person would have made in the circumstances.”\textsuperscript{93} It is an equitable concept relevant to the resolution of a clash of priorities, and is “central to the equitable concept of the bona fide purchaser for value without notice.”\textsuperscript{94}

\textsuperscript{89} Indeed in Royal Brunei Airlines SDN BHD v Tan [1995] 2 AC 378, 392 the Privy Council opined it was “best forgotten”.
\textsuperscript{91} A distinction unfortunately glossed over by Ashley AJA in his Honour’s dissenting judgment in Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133,164.
\textsuperscript{92} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 151 per Tadgell JA.
In *Re Montagu's Settlement Trusts*[^95] Sir Robert Megarry VC counselled against the use of equity's classifications of "notice" to classify "knowledge" in a *Barnes v Addy* context. According to the Vice-Chancellor[^96]

"in determining whether a constructive trust has been created, the fundamental question is whether the conscience of the recipient is bound in such a way as to justify equity in imposing a trust on him. The rules concerning a purchaser without notice seem to me to provide little guidance on this and to be liable to be misleading."

His Lordship gave five reasons for that statement. First, the rules concerning a bona fide purchaser for value without notice (to which the equitable classification of notice is relevant) apply only to purchasers and not volunteers. Knowledge is relevant in recipient liability cases regardless of the recipient's status as a volunteer or a person who has given value. Secondly, it is unusual for volunteers to employ solicitors, through whom imputed notice might arise. Thirdly, there is

"a fundamental difference between the questions that arise in respect of the doctrine of purchaser without notice and constructive trusts... I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is sufficiently

[^95]: *Re Montagu's Settlement Trusts* [1987] Ch 264.
affected for it to be right to bond him by the obligations of a constructive trustee." 97

Fourthly, the modern tendency of equity to put "less emphasis on detailed rules that have emerged from the case and more weight on the underlying principles that engendered those rules..." is better served by regarding the Baden categories as "useful guides [and] aides in determining whether or not [the defendant's] conscience was affected in such a way as to require him to hold any or all of the [property] received on a constructive trust." 98

Fifth, his Lordship adopted the statement of Gibson J in Baden99 that "the court should not be astute to impute knowledge where no actual knowledge exists," finding that statement drew succour from Barnes v Addy itself.100

Earlier, the Court of Appeal in Re Diplock101 also held that the categories of notice are inapplicable to the knowledge requirement. The Re Diplock and Re Montagu's Settlement Trust distinctions were adopted by Foster AJ in Gertsch v Atsas.102 In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd, Tadgell JA drew a distinction between knowledge and notice, although in describing different forms of notice, his Lordship slipped into the nomenclature of knowledge and cases which deal with that term.103

97 Re Montagu's Settlement Trusts [1987] Ch 264, 278.
100 Re Montagu's Settlement Trusts [1987] Ch 264, 279, referring to Barnes v Addy (1874) 9 Ch App 244, 256.
103 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 151 per Tadgell JA.
Now equipped with the appropriate tools of analysis, I can describe the action for recipient liability.

3(c)(i) Receipt

Lord Nicholls aptly summarises the operation of recipient liability: 104

"The cardinal feature of this head of liability is the wrongful receipt or retention of property in which another person ... has a subsisting beneficial interest ... [I]n respect of identifiable property or its proceeds the deprived beneficiary may have a proprietary remedy ... [T]he recipient's personal liability in this situation ... is of particular importance when the property has been dissipated or is no longer identifiable, so that a proprietary remedy is not available."

There is some controversy about the rationale underpinning the action for knowing receipt. As Finkelstein J has stated, "the learning on the first limb [of Barnes v Addy] is in danger of becoming a quagmire of conflicting propositions and rationales." 105

The controversy is summarised by the following statement of Millett J: 106

"I do not see how it would be possible to develop any logical and coherent system of restitution if there were different requirements in respect of knowledge for the common law claim for money had and received, the personal claim for account in equity against a knowing recipient and the equitable proprietary claim."

106 El Ajou v Dollar Land Holdings [1993] 3 All ER 717, 739, overruled on other grounds: [1994] 2 All ER 685.
The action in unjust enrichment (or, if you like, the strict liability common law action for money had and received) must either have subsumed, or alternatively must co-exist with, the action for equitable recipient liability. Adopting Mason P’s taxonomy (discussed under 3(b) above) the claim for recipient liability is a dependent claim in restitution. The controversy identified by Lord Millet is this: is that claim now appropriately considered an autonomous claim in restitution, independent of its equitable origins?107

The controversy can be resolved by the explanation proffered by Lord Nicholls108 and reinforced by Peter Birks.109 That is, the “old name and ... its singularity”110 has in fact become two separate causes of action, one in unjust enrichment, and one purely equitable:111

“First, recipient liability should cover all third party recipients. This would be a principle of strict liability in that it would apply to every recipient with an impeachable title irrespective of fault, but it would be restitutionary in nature. It would be confined to restoring an unjust gain. Change of position would be available as a defence accordingly. Secondly, dishonest recipients should be personally liable to make good losses as well as accounting for all benefits.”

Lionel Smith asks a pertinent question: what is the point of the argument?\textsuperscript{112} If a strict liability action is available, why persist in the use and development of a fault-based action? With the flowering of the strict liability action in unjust enrichment, won’t plaintiffs be attracted to that claim, and the claim in knowing receipt wither? Smith doesn’t purport to have the answer, but he hints at the difficulty inherent in showing “defective transfer” between plaintiff and defendant in cases involving interposed third parties, such as breaches of trust. In such circumstances, there would be obvious utility in a claim which recognises the breach of trust outside the stringent requirements of the fourfold enquiry.

Further, if the existence of an “equity” is a precondition to the award of a proprietary remedy (for which see 4(c) below), the equitable action is more useful in cases where a proprietary remedy is desirable. Finally, the equitable action is not subject to a defence of change of position.\textsuperscript{113}

The thesis of this section of the paper is that, in Australian law, the circumstances which give rise to the equitable action for “knowing receipt” may also give rise to an action in unjust enrichment, and \textit{vice versa}. The two actions have different constituent parts, and while they might commonly co-exist, they will not necessarily do so in every circumstance. As Anderson and Steytler JJ held in \textit{LHK Nominees v Kenworthy} “there is some support for the proposition that liability of a recipient of misapplied property is coexistent with the liability in restitution of a person unjustly enriched at another’s

\textsuperscript{112} L Smith, “\textit{W(h)ither Knowing Receipt}” (1998) 114 \textit{Law Quarterly Review} 394.
\textsuperscript{113} \textit{K & S Corporation Ltd & Anor v Sportingbet Australia} (2003) 86 SASR 312.
expense.\textsuperscript{114} The following analysis provides an exegesis of that support and concludes that it is the dominant gene in the Australian family of cases on receipt.

An examination of Australian authorities on recipient liability can begin with the decision of \textit{Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd},\textsuperscript{115} a decision of a single judge of the Supreme Court of Victoria which has been mentioned in almost every subsequent appellate-level recipient liability case to the date of this paper. In that case, Hansen J set out three “approaches” to the categorisation of recipient liability, appropriated from Bryan:\textsuperscript{116} the “property approach”, the “conscience approach”, and the “restitutionary approach”. According to his Honour, the restitutionary approach had much to recommend it. According to that view, the first limb of \textit{Barnes v Addy} is consistent with, explicable by reference to, and appropriately governed by, the law of unjust enrichment. In order to behave consistently with accepted forms of unjust enrichment, liability is strict (i.e. independent of any knowledge on the defendant’s part) and subject to restitutionary defences. Prior to \textit{Koorootang}, that view had drawn the support of Millet LJ in \textit{El Ajou v Dollar Land Holdings}\textsuperscript{117} and Lord Nicholls (in \textit{obiter dicta} on behalf of the Judicial Committee of the Privy Council) in \textit{Royal Brunei}.\textsuperscript{118}

While Hansen J recognised that there were authorities in support of the separate existence of recipient claims in equity and unjust enrichment,\textsuperscript{119} his Honour went on to say that the distinction between the two claims is “irrational, and if it truly exists, ought to be

\textsuperscript{114} \textit{LHK Nominees v Kenworthy} (2002) 26 WAR 517, 554 per Anderson and Steytler JJ.

\textsuperscript{115} \textit{Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd} [1998] 3 VR 16, 105.


\textsuperscript{117} \textit{El Ajou v Dollar Land Holdings} [1993] 3 All ER 717.

\textsuperscript{118} \textit{Royal Brunei Airlines SDN BHD v Tan} [1995] 2 AC 378, 387.

\textsuperscript{119} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited} [1998] 3 VR 16, 101.
abolished.” Recipient liability is restitution-based, and “strict but subject to the
defences of bona fide purchase and change of position.” However, his Honour’s
comment was obiter dicta: the plaintiff had pleaded its case on a traditionally-formulated
recipient liability basis, and Hansen J went on to find that the knowledge required for
recipient liability was category (iv) or higher on the Baden scale.

The Victorian Court of Appeal considered recipient liability in the light of
Koorootang in Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd. The appellant
bank took a mortgage over the respondent company’s real property to secure the
obligations of the company as guarantor for the debts of a third party rogue. The rogue
and his wife had attested to the affixation of the company’s seal to the guarantee and
mortgage although neither was a director of the company. The bank knew the mortgagor
comp any was a trustee company, and knew the rogue was neither shareholder or director
of the company. The bank registered the mortgage under Torrens title legislation. The
mortgagor brought proceedings to set aside the mortgage. The mortgagor’s claims
included fraud within the provisions of the statute, and that the bank’s conduct had
invested the mortgagor with an equitable claim in personam which gave rise to a
constructive trust of the mortgage in favour of the mortgagor. On the latter point, the
mortgagor essentially claimed that the bank’s conduct constituted it a knowing recipient
of the interest in the property.

121 Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd [1998] 3 VR 16, 100.
122 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133. Interestingly, the authorised reports of
the two cases appear contiguously.
Tadgell JA considered academic discussion of the knowledge requirements sufficient to ground assistant and recipient liability, and touched upon academic and judicial opinion as to the normative value of the strict liability action for recipient liability.123 His Honour distinguished those general discussions from the situation then before the Court, saying “none of [the former] is had, however, in the framework of a Torrens system of title.”124 Having said that, his Honour went on to say125

"The search for a satisfying criterion of liability of a non-trustee to account for receipt of an item of trust estate ought no doubt to heed the circumstances of the receipt, if receipt there has been; and here it is not possible to escape the circumstance that, if there was a ‘knowing receipt’ by the appellant, it was a receipt by virtue of registration under the Transfer of Land Act.126"

The respondents’ argument assumed that the acquisition of a proprietary interest by registration of a mortgage over property held subject to a trust amounted to a receipt of trust property. His Honour found that, as authority established that title to Torrens system land is obtained by registration, it is not possible to treat a party who has obtained title by registration as having received trust property if that registration was obtained without fraud. Where registration is obtained by fraud, the Torrens legislation provides that the interest thereby obtained is defeasible. However, his Honour held:127

124 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 156 per Tadgell JA.
125 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 156 per Tadgell JA.
126 Transfer of Land Act 1958 (Vic).
127 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 157 per Tadgell JA.
"to recognise a claim in personam against the holder of a mortgage registered under the Transfer of Land Act, dubbing the holder a constructive trustee by operation of a doctrine akin to 'knowing receipt' when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes."

The effect of his Honour's judgment was ably summarised by Ashley AJA in his dissenting judgment. It is worth repeating that summary in full.128

"The approach accepts that, speaking generally, improper receipt of trust property can give rise to a constructive trust. But it says that, in the case of a dealing with trust property which is Torrens system land, recourse to imposition of such a trust is in part unnecessary, for dishonest receipt will constitute statutory fraud. Otherwise the possible scope of the remedy is denied operation."

Because Tadgell JA found that the Transfer of Land Act precluded the conclusion that the Bank had received trust property, his comments regarding the existence of fault-based recipient liability were obiter dicta.

Winneke P substantially concurred with the reasoning of Tadgell JA. Having done so, his Honour went on to implicitly accept the existence of a knowledge element in the receipt action by saying (emphasis added) "nor ... do the authorities speak with one voice as to the level of knowledge which is required to constitute a recipient of trust

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128 Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 166 per Ashley AJA.
property a constructive trustee of that property."\textsuperscript{129} The learned President’s concurrence with the judgment of Tadgell JA rendered that statement \textit{obiter dicta} for the same reasons. \textit{Koorootang} was distinguished on the basis that it involved a dishonest mortgagee.\textsuperscript{130} Neither judge made welcoming noises toward Hansen J’s opinion that recipient liability should be strict.

In his dissenting judgment, Ashley AJA accepted the existence of the knowledge-based action, finding that

\begin{quote}
\textit{the weight of authority is, I consider, in favour of constructive knowledge and constructive notice of breach of trust ... being pertinent when the possible liability of a recipient of trust property is under consideration.}\textsuperscript{131}
\end{quote}

Ashley AJA found the bank liable for having knowingly received trust property.

In \textit{Rogers v Kabriel},\textsuperscript{132} the defendants (one of whom was the plaintiff’s accountant) attempted to argue that the equitable action excluded the operation of the unjust enrichment claim. Acting outside the scope of his authority, the accountant had “invested” $650,000 of the plaintiff’s money in a film production company which was his primary employer. The accountant was entitled to receive commission from investments he obtained in the company. The “investment” came to nothing and could not be recovered. Young J gave judgment for the sum against the accountant. The plaintiff also pursued the company in an action for money had and received. His Honour found that the

\textsuperscript{129} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 136 per Winneke P (emphasis added). A similar \textit{obiter} statement was later made by Mason P in \textit{Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor} (2003) 45 ACSR 244, 256.

\textsuperscript{130} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 157 per Tadgell JA.

\textsuperscript{131} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 164 per Ashley AJA.

\textsuperscript{132} Rogers v Kabriel [1999] NSWSC 368.
action was open, on the basis that the transaction had never been consummated (because the terms of the “investment” were so vague) and therefore consideration had totally failed. The defendant company submitted that the restitutionary count “does not outflank and supersede the principles enunciated in Barnes v Addy.”\(^{133}\) If it did, the argument continued, there would never have been a need for recipient liability under Barnes v Addy, because the restitutionary action exists without the more onerous knowledge requirement. To allow the plaintiff to succeed in the unjust enrichment action where the Barnes v Addy claim was available would be to defeat the latter claim “by a side-wind”.\(^{134}\) Young J demonstrated explicit acceptance of the co-existence of the two actions by calling the argument a red herring, and saying\(^{135}\)

“there is no need even to involve Barnes v Addy. There was a direct payment to [the production company] in circumstances where [the accountant], the agent for both parties, knew the full circumstances. The purpose for which the money might have been paid was never consummated. The money must be returned.”

His Honour went on to find that the defence of change of position must fail, and found the case against the defendant company was made out. It was thus unnecessary for his Honour to consider the plaintiff’s alternative claim for recipient liability.

In *Tara Shire Council v Garner*\(^{136}\) the Queensland Court of Appeal applied the dissenting judgment of Ashley AJA in *Sixty-Fourth Throne*. Atkinson J delivered the leading judgment with which McMurdo P substantially agreed. Her Honour did not

\(^{133}\) Rogers v Kabriel [1999] NSWSC 368, [60].  
\(^{134}\) Rogers v Kabriel [1999] NSWSC 368, [60].  
\(^{135}\) Rogers v Kabriel [1999] NSWSC 368, [60].  
\(^{136}\) *Tara Shire Council v Garner* [2003] 1 Qd R 556.
consider the strict liability / knowledge controversy, but held that recipient liability depended on a degree of knowledge “precisely the same as that which the High Court required for the second limb in Consul Developments ... where the knowledge falls within the first to fourth categories in Baden, but [not] the fifth category.”137 Davies JA, in dissent, did not find it necessary to address the issue.

The judgment of Finkelstein J In Spangaro v CIAFM138 provides more explicit support for the co-existence argument, and is an interesting example of the application of principles of unjust enrichment and recipient liability to a single set of facts.

The plaintiff, Spangaro, subscribed for interests in a managed investment scheme. The terms of the scheme included a provision that if a minimum subscription of 200 interests was not reached by a certain date, all subscribers’ funds would be returned. The subscription moneys were paid into an account held by the custodian of the project. After the closing date, the custodian paid the subscription moneys to the first defendant (CIAFM), which was the responsible entity for the scheme. The plaintiff sued CIAFM claiming that the subscription moneys paid by the custodian were moneys had and received. Finkelstein J found that the minimum number of subscriptions had not been received by the closing date, and the custodian’s payment of the subscription moneys to CIAFM was therefore in breach of trust. Having found that CIAFM had been unjustly enriched at Spangaro’s expense, and CIAFM having pleaded no defences to the unjust enrichment claim, his Honour found CIAFM liable to make restitution of the money it received from the custodian in breach of trust. Having done so, and apparently uninvited,

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his Honour then went on to say (emphasis added) “on the facts as found it is difficult to resist the conclusion that CIAFM may also [be] liable to Mr Spangaro as a constructive trustee [of the same money].” His Honour then went on to examine the existence of the equitable action for knowing receipt. The co-existence of the two actions, and the ongoing existence of fault-based liability in equity, was clearly contemplated by his Honour’s judgment. Because a cause of action in recipient liability was not pleaded, his Honour’s comments on the point were obiter dicta. Nevertheless, his Honour analysed the state of the law and the facts of that case and held, “were it necessary to do so”, he would have found the requisite degree of knowledge in the managing director of the defendant, so rendering the defendant liable as a constructive trustee. Whether the “necessity” referred to by Finkelstein J would have arisen out of a cause of action pleaded in recipient liability, or a prayer for proprietary relief, or some other factor, cannot be determined on the face of the reported judgment.

Most recently, Ashley J has held that “recent cases give no support to the proposition that knowledge, actual or constructive, is not a necessary element in the first limb of Barnes v Addy.” His Honour there considered three actions arising from the same set of facts: one in receipt, one for money had and received, and one in conversion.

It follows from the above analysis that recipient liability and unjust enrichment should be treated as separate causes of action, which can in some circumstances be concurrently available. That being so, it is unnecessary for this paper to provide a deep

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140 NIML Limited v MAN Financial Australia Limited [2004] VSC 449, [59] per Ashley J. While the judgment cites Koorootang and Macquarie Bank, his Honour does not appear to have been taken to any of the subsequent cases.
analysis of the competing theories or explain at any length the controversy between “fault based” and strict liability formulations of knowing receipt.\textsuperscript{141} It only remains to explain the elements which a plaintiff must establish to successfully prosecute proceedings founded on the fault-based action.

**Establishing a claim in receipt**

The elements of a receipt liability claim are:

1. the existence of a fiduciary obligation;

2. breach of that obligation;

3. the receipt by a third party of property held subject to the fiduciary obligation; and

4. a requisite degree of culpability in the recipient.

In *Rogers v Kabriel* Young J held that recipient liability imposes liability only in cases where the property received is trust property, and does not extend to the receipt of gains made or benefits received in breach of fiduciary duty.\textsuperscript{142} In *Colour Control Centre Pty Ltd v Ty*,\textsuperscript{143} Santow J reached the opposite conclusion. His Honour found a former employee whose company had benefited from the employee’s breach of fiduciary duty liable under both the recipient and assistant limbs of *Barnes v Addy*, in circumstances where no trust property was involved. In *Robins v Incentive Dynamics*, the New South

\textsuperscript{141} As to which see Glover, *Equity Restitution and Fraud* (2003) 472-4, and the authorities there cited.

\textsuperscript{142} *Rogers v Kabriel* [1999] NSWSC 368, [173] citing *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396 and *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 253.

\textsuperscript{143} *Colour Control Centre Pty Ltd v Ty* (1996) 39 AILR 5-058.
Wales Court of Appeal held that recipient liability extends beyond the receipt of trust money and to property protected by fiduciary obligations. The same conclusion was reached by a differently-constituted Court of Appeal in Evans v European Bank. It follows that a recipient liability claim is available in either situation. To cater for that, in the remainder of this paper, I use the expression “fiduciary property” to describe property held subject to a trust or some other fiduciary obligation.

Knowing receipt contemplates receipt of not only the fiduciary property but also receipt of any interest in fiduciary property which makes the recipient a direct beneficiary of the breach of duty. The recipient need not retain the assets or their traceable proceeds to found liability. It is sufficient that the assets have passed through the recipient’s hands. Of course, once the assets have left the recipient’s hands, a proprietary remedy will no longer be available against the recipient, but equitable compensation for the breach of duty will.

The recipient must receive the trust property in a “beneficial”, as opposed to “ministerial” capacity. That is, the recipient must not receive the property as the agent of another.

Culpability

What degree of culpability must exist to make a recipient of trust funds culpable? It is at this point that unjust enrichment and Barnes v Addy recipient liability part ways.

144 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 256-7.
147 Robb Evans of Robb Evans & Associates v European Bank Limited [2004] NSWCA 82, [165]-[175].
Broadly speaking, knowledge establishes the culpability required by the equitable action. Liability will attach if the recipient receives the property knowing the facts which establish the breach of fiduciary duty, or receives the property "innocently", and continues to deal with the property inconsistently with the equitable obligation after becoming aware of those facts.148

So what is the requisite degree of knowledge? As Nourse LJ held in BCCI v Akindele:149

"the question is whether the recipient must have actual knowledge (or the equivalent) that the assets received are traceable to a breach of trust or whether constructive knowledge is enough."

Thanks to the magisterial survey of the then-prevailing authorities provided by Hansen J in Koorootang,150 an examination of the Australian law can begin with that judgment. His Honour's thorough examination of the authorities began with the conclusion that the law on recipient liability was in a state of uncertainty.151 His Honour pointed out what he saw as two "crucial questions, upon which there appears to be conflicting authority":152 First, what level of knowledge on the part of the alleged constructive trustee must be established? Secondly, what is it that the alleged constructive trustee must have knowledge of?

148 See e.g. Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602, 632.
150 Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16.
The consequence of the acceptance of unjust enrichment as the foundation of recipient liability (as Hansen J would have determined had the pleadings left it open to him) would be that proof of the plaintiff's case would rest on the fourfold enquiry.\textsuperscript{153} If that were the case, the relevance of knowledge would lie not in the proof of liability, but in disproving the defendant's entitlement to rely on a restitutionary defence.\textsuperscript{154} However, in addressing the case as it had been pleaded, his Honour had to deal with the plaintiff's acceptance that it was required to prove receipt of property and the relevant knowledge.\textsuperscript{155}

While Hansen J found that there may be “blurring at the edges” of the Baden categories,\textsuperscript{156} he decided that the authorities established that categories (i) to (iv) were sufficient to render a defendant culpable in a recipient liability action. Only category (v) knowledge fell outside the bounds of culpability, as “cases in that category are properly to be characterised as ones where the defendant is guilty of mere carelessness.”\textsuperscript{157} Five years earlier, Kirby P had come to the same conclusion in his dissenting judgment in \textit{Equiticorp Finance Ltd v Bank of New Zealand},\textsuperscript{158} albeit without the benefit of the exhaustive analysis of authority offered by Hansen J.

Hansen J’s reasons have been enthusiastically adopted all over the country. They were adopted by Anderson J in the Supreme Court of Western Australia, in \textit{Hancock Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 102} (although his Honour omitted the absence of a restitutionary defence from that formulation).

\textsuperscript{153} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 102}
\textsuperscript{154} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 102-3.}
\textsuperscript{155} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 105.}
\textsuperscript{156} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 105.}
\textsuperscript{157} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Limited [1998] 3 VR 16, 105.}
\textsuperscript{158} \textit{Equiticorp Finance Ltd v Bank of New Zealand (1993) 32 NSWLR 50, 103-4.}
Family Memorial Foundation Ltd & Anor v Porteous & Anor. In the Queensland Court of Appeal, in Tara Shire Council v Garner, Atkinson J (with whom McMurdo P agreed) also agreed with Hansen J's reasons. The same result was reached by Besanko J (of the Supreme Court of South Australia) in K & S Corporation Ltd v Sportingbet Australia. Similarly, in the Federal Court of Australia, in Spangaro v Corporate Investment Australia Funds Management Ltd, Finkelstein J opined that "the weight of judicial opinion" supported the view that the knowledge required for recipient liability was category (iv) or higher on the Baden scale. In Gertsch v Atsas, Foster AJ in the New South Wales Supreme Court reached the same conclusion, but for different reasons. While that case was decided after Koorootang, it does not appear that his Honour was referred to that case.

The prevailing judicial wisdom in the United Kingdom deserves mention, merely to highlight the different position which pertains in that jurisdiction. The leading case is Bank of Credit and Commerce International (Overseas) Ltd & Anor v Akindele. Two companies, BCCI and ICIC, were subsidiaries of the same holding company. In 1985, employees of BCCI procured employees of ICIC to enter into a transaction with a wealthy Nigerian Businessman, Chief Akindele. Akindele was to pay ICIC US$10 million, which ICIC would use to purchase 250,000 shares in the companies' mutual


160 Tara Shire Council v Garner [2003] 1 Qd R 556, 579. Davies AJA did not find it necessary to consider the point when delivering his dissenting judgment.


parent. At any time within a three year period commencing two years from the date of the agreement, Akindele had an option to sell the shares and ICIC agreed to arrange that sale at a price which would provide Akindele with a 15% annual return on his investment. That rate was significantly higher than the prevailing interest rates at the time. Akindele exercised the option in late 1988 and was paid $16.679 million by BCCI, in accordance with arrangements made between BCCI and ICIC. BCCI and ICIC later went into liquidation. The liquidator of BCCI claimed that Akindele held the $6.679 million profit as a constructive trustee, claiming that he had received the funds knowing that the arrangement was a fraudulent breach of BCCI's directors' fiduciary duties. At trial, Akindele conceded that the arrangement between ICIC and BCCI was a fraudulent mechanism by which those companies' parent purchased parcels of its own shares using dummy loans. External funds were obtained to perform an accounting trick by which the dummy loans could be shown to be performing, without the creation of a liability which would have occurred had funds been obtained by deposit.

Nourse LJ gave the leading judgment of the Court of Appeal, with which Ward and Sedley LJJ agreed. Nourse LJ held "while a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should."165

His Lordship went on to examine Sir Robert Megarry V-C's "seminal judgment" in re Montagu's Settlement Trusts,166 summarising the broad effect of that judgment:167


166 In re Montagu's Settlement Trusts [1987] Ch 264.

"in order to establish liability in knowing receipt, the recipient must have actual knowledge (or the equivalent) that the assets received are traceable to a breach of trust ... constructive knowledge is not enough."

His Lordship then asked himself what purpose was served by the categorisation of knowledge. The purpose can only be to enable the court to determine whether a recipient can conscientiously retain the funds received; whether the recipient’s "conscience is sufficiently affected" by the combination of knowledge and receipt for equity to compel him or her to make good the breach of duty. 168 His Lordship went on to say: 169

"... if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt. For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance,170 so ought there to be a single test of knowledge for knowing receipt. The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."

His Honour was not blind to the sort of criticisms levelled at the word "unconscionable" by Lord Nicholls in Royal Brunei Airlines v Tan. 171 He said that the test of unconscionability. 172

170 For which see the discussion of Royal Brunei Airlines SDN BHD v Tan [1995] 2 AC 378 below.
"though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley LJ on one hand and of Richardson J on the other."

The "wisdom" referred to is the following two statements:

"... if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country."\(^{173}\)

and

"Clearly courts would not readily import a duty to inquire in the case of commercial transactions where they must be conscious of the seriously inhibiting effects of a wide application of the doctrine. Nevertheless 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."\(^{174}\)

A similar position was adopted by Hansen J, who in Koorootang said:

"... the application of equitable principles and remedies must take into account the context in which they are sought to be invoked, and if that context is a

\(^{173}\) Manchester Trust v Furness [1895] 2 QB 539, 545.

\(^{174}\) Westpac Banking Corporation v Savin [1985] 2 NZLR 41.
commercial one then the ordinary expectations of honest and reasonable business people become at once relevant." ¹⁷⁵

Notwithstanding that several of the cases which have adopted Hansen J's formulation of the relevant test for culpability were decided after Akindele, in most of them, the case does not rate a mention. Akindele has been cited sparingly in Australia, and it appears that the widespread adoption of Hansen J's Koorootang formulation means that Baden knowledge types (i) to (iv) will live on in the Australian law on knowing receipt, in effect if not in name.

The above analysis demonstrates that an equitable action for recipient liability is alive and well in Australia. That action can exist concurrently with an action in unjust enrichment, and the application of the respective doctrines will often depend on the manner in which the plaintiff chooses to plead its case. That, in turn, will depend in part on the remedy the plaintiff seeks, and the defences which it predicts the defendant might rely upon. The Australian action shares knowledge as the keystone of culpability with its United Kingdom counterpart, but the barometer by which the Australian and United Kingdom courts measure the required level of knowledge is different.

The Australian action for assistant liability borrows far more heavily from its British cousin.

Knowing assistance is a species of secondary civil liability. If a defendant is proved to have assisted in the commission of a breach of duty, he or she will be jointly liable to the plaintiff for the breach of that duty. Either the trustee or beneficiaries can sue an alleged assistant.

In *Royal Brunei*, the Privy Council summarised the operation of the assistant principle:

"if, for his own purposes, a third party deliberately interferes in [a trust] relationship by assisting the trustee in depriving the beneficiary of the property held for him by the trustee, the beneficiary should be able to look for recompense to the third party as well as the trustee. Affording the beneficiary a remedy against the third party serves the dual purpose of making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion."

Their Lordships drew an analogy with liability for knowingly interfering with the performance of a contract, stating "the underlying rationale is the same."

The elements of the second limb of *Barnes v Addy* were summarised by the authors of Jacobs: (a) the existence of a fiduciary duty (as trustee or otherwise); (b) the

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177 *Young v Murphy* [1996] 1 VR 279, 281 (Brooking J); *McMahon v Livingstone* [2001] NSWSC 55, [49] (Windeyer J); Cf *Fried v National Australia Bank* [2001] FCA 907, [180]-[194] (Gray J, failure of trustee to take action a prerequisite to beneficiary's right to sue).
carrying out of a dishonest or fraudulent design by the fiduciary; (c) the assistance of a third party in the carrying out of that design; and (d) the presence of knowledge in the third party at the time of the assistance.

Following *Royal Brunei* the second of those elements is no longer required in the United Kingdom: a third party can be found liable as a knowing assistant in the absence of dishonesty or fraud on the party of the trustee or fiduciary. Mitchell\textsuperscript{181} finds the Australian position “unclear”.\textsuperscript{182} However, as he goes on to point out, in *Consul Developments Pty Ltd v DPC Estates Pty Ltd*\textsuperscript{183} (discussed at length below) McTiernan and Gibbs JJ held that the primary breach need not have been fraudulent, and Stephen J held that “fraud or breach of trust was required” (emphasis added). Thus, while knowing assistance is a secondary form of liability (that is, there must be a primary breach which the defendant has assisted) it is clear that whether *Consul, Royal Brunei, Twinsectra Ltd v Yardley & Ors*\textsuperscript{184} or some hybrid of the three cases provides the relevant law (as to which, see the discussion below), the primary breach need not be fraudulent, dishonest or even “knowing”.

Having removed *mens rea* in the primary breach from the formulation of liability, a further “practical” element must be added. Like any other action, there is an element of causation - the plaintiff must show that the primary breach caused him or her a loss or

\textsuperscript{180} Meagher and Gummow, Jacobs’ Law of Trusts in Australia, 6th ed., (1997) [1339].
\textsuperscript{183} *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.
\textsuperscript{184} *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164.
that the assistant or some third party has been enriched by it. The plaintiff need not show that the assistant’s conduct in itself caused the loss, but, as Elliott and Mitchell state, “a (fairly attenuated) causal link between the defendant’s actions and the primary wrong, and proof of a (stronger) causal link between the primary wrong and the claimant’s loss.”

Thus, the elements of an assistance claim can be distilled to the following:

1. the existence of a fiduciary obligation;
2. breach of that obligation;
3. causation of loss in the obligee, or gain in any other party;
4. assistance by a third party in the breach; and
5. a requisite degree of culpability in the assistant.

As was explained in the introduction, this paper supposes the pre-existence of the first two elements. The third has been explained above. What remains to be explored are the final two elements.

Liability for knowing assistance extends beyond assistance in a breach of trust: it extends to breaches of fiduciary duties. Mitchell states that the question of whether the

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187 Selangor United Rubber Estates Ltd v Craddock (No 3) [1968] 1 WLR 1555; Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602; Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373; Evans of
breach of duty must involve a misapplication of trust funds “did not appear to have troubled” the High Court in *Consul.*\(^{188}\) A person can be held liable as an assistant to a breach of confidential information: *Burger King Corp v Hungry Jack's Pty Ltd.*\(^{189}\)

**What is “assistance”**?

The defendant must have helped the primary wrongdoer. McDonald states that “any positive conduct in the nature of assistance will be relevant.”\(^{190}\) Of course, culpability extends beyond assistance to procurement or inducement.\(^{191}\) Mitchell suggests the test is to ask whether the defendant’s actions had “some causative significance” - actions of “minimal importance” are insufficient.\(^{192}\) Assistance, and thus importance, is of course a question of fact. Company directors whose companies have assisted a breach are frequently found liable on the basis that it was their act that caused the company’s assistance.\(^{193}\) It is not necessary to show that the defendant’s actions were a requisite element of the wrongdoing, nor is a defendant able to escape liability by showing that the breach would have occurred absent his or her actions.\(^{194}\) Facilitation of

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\(^{189}\) *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187.


\(^{191}\) *Royal Brunei Airlines SDN BHD v Tan* [1995] 2 AC 378; see too *Aequitas Ltd v Sparad No 100 Ltd* (2001) 19 ACLC 1006.


a later breach of trust is sufficient, but actions taken after the fact cannot incur liability: the knowledge must have been held at the time of assistance.

Mitchell has explored the difficulties in establishing assistance by omission. In *Beach Petroleum NL v Abbot Tout Russell Kennedy*, the New South Wales Court of Appeal addressed the practical difficulties of an allegation of assistance by failing to draw conclusions from available information or take further steps which might have revealed evidence of the wrongdoing. In so doing, the Court pointed out that there was a difference between the conduct of an honest person and that of a prudent person, and found that in a given set of circumstances it does not necessarily follow that there is only one course of action which an honest person would take.

**What is “knowing”?**

What degree of knowledge is sufficient to establish culpability?

The landmark Australian assistance case is *Consul Developments v DPC Estates*. The business of DPC Estates Pty Ltd was to purchase dilapidated properties in Sydney, redevelop them and sell them for a profit. Its managing director, Walton, was a solicitor. DPC employed Grey to identify suitable properties for purchase, obtain reports from real estate agents about those properties, and make recommendations to Walton. Walton’s articled clerk, Clowes, became the managing director of Consul Developments Pty Ltd upon the death of Clowes’ father. Clowes and Grey agreed that if Grey identified

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196 *Lurgi ( Aust) Pty Ltd v Gratz* [2000] VSC 278, [69].
199 *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1, 89.413-4, 89.419-20.
200 *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.
a property suitable for Consul to develop, Grey and Consul would share equally in the profit or loss on the development of that property. In respect of the first lot of properties identified, Grey told Clowes that Walton had been informed of the properties and decided not to purchase them. Clowes knew that Walton’s companies were having difficulty raising finance. Consul purchased a number of the properties, and DPC sued, claiming Consul held the properties as constructive trustee. The breach complained of was of Grey’s fiduciary duties to his employer. The case against Consul was one of assisting in that breach. No trust property was involved.

The suit against Consul was dismissed by the trial judge on the grounds that Grey’s fiduciary duties were not owed to DPC. On appeal, the Appeal Division of the Supreme Court of New South Wales found that Consul held the properties on constructive trust for DPC subject to an equitable lien for expenditure, minus any profits it had made. A majority of the High Court found that Grey owed a fiduciary duty to DPC, which he had breached. However, the Court found that Clowes (and therefore Consul) did not have the necessary knowledge of Grey’s breach of duty to establish accessory liability. Relying on Barnes v Addy, Stephen J (with whom Barwick CJ agreed) accepted that “proof of knowledge is essential”.\(^\text{201}\) His Honour found that neither type (i) or (ii) knowledge existed,\(^\text{202}\) and went on to consider whether recourse could be had to the doctrine of constructive notice.

After reviewing the English cases as to notice, Stephen J stated\(^\text{203}\)

\(^{201}\) Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 408 per Stephen J.
\(^{202}\) Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 408 per Stephen J.
\(^{203}\) Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 412 per Stephen J.
"in my view the state of the authorities as they existed before Selangor\textsuperscript{204} did not go so far ... as to apply them to that species of constructive notice which serves to expose a party to liability because of negligence in failing to make inquiry. If a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust the case may well be different, as it clearly will be if the defendant has consciously refrained from enquiry for fear lest he learn of fraud. But to go further is, I think, to disregard equity's concern for the state of conscience of the defendant."

In applying the law to the facts of the situation, Stephen J held\textsuperscript{205}

"in that situation a reasonable, honest man would not, in my view, have had knowledge of circumstances telling of breach of fiduciary duty by Grey. This being the furthest extent to which any possible doctrine of constructive notice may go in such a case it follows that the doctrine, even if applicable, cannot impute to Consul the knowledge necessary to render it liable to the plaintiff."

Thus Stephen J and Barwick CJ accepted that knowledge of the relevant improper conduct was the touchstone of liability, and the requisite degree of knowledge was that which can be described as type (iv) or higher on the Baden scale.\textsuperscript{206}

Gibbs J found that Clowes actually believed that Walton's companies were not interested in purchasing any of the properties in question. On the facts which Clowes

\textsuperscript{204} Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555.
\textsuperscript{205} Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 413 per Stephen J.
\textsuperscript{206} See Equitcorp Finance Ltd v Bank of New Zealand (1993) 32 NSWLR 50, 104 per Kirby P (in dissent); Tara Shire Council v Garner [2003] 1 Qd R 556, 578 per Atkinson J; Of Maronis Holdings Ltd v Nippon Credit Australia Ltd(2001) 38 ACSR 404, 526-27 per Bryson J.
believed, Grey was not acting in breach of any fiduciary duty in participating in the purchase of the properties. Clowes did not knowingly participate in Grey’s breach, and in those circumstances an honest and reasonable man would not have thought it necessary to inquire further.207 Thus Clowes and Consul had neither actual nor constructive knowledge of Grey’s breach, and it was unnecessary for his Honour to determine what the relevant standard was. Nevertheless, in obiter dicta, his Honour appears to have accepted that type (iv) knowledge was the appropriate standard:208

“...It may be that it is going too far to say that a stranger will be liable if the circumstances would have put an honest and reasonable man on inquiry, when the stranger’s failure to inquire has been innocent and he has not wilfully shut his eyes to the obvious. On the other hand, it does not seem to me to be necessary to prove that a stranger who participated in a breach of trust or fiduciary duty with knowledge of all the circumstances did so actually knowing that what he was doing was improper. It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognizing an impropriety that would have been apparent to an ordinary man."

The next watershed in the development of the action was the Privy Council’s 1995 decision in Royal Brunei Airlines v Tan.209 The plaintiff (Royal Brunei Airlines) had appointed a travel agent (BLT) to act as its agent for the sale of passenger and cargo transport services. By the terms of the agreement between those parties, BLT was to hold

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207 Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 400 per Gibbs J.
208 Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 398 per Gibbs J.
amounts received from its customers on trust for Royal Brunei, but was entitled to deduct commission to which it was entitled from those trust funds. BLT did not pay such amounts into a separate trust account, but into its ordinary current account. Money in the current account was used for the ordinary business purposes of BLT. A standing arrangement between BLT and its bank resulted in any balance in that account in excess of a particular amount being transferred to another account in the name of BLT or its managing director and principal shareholder, the defendant Tan. BLT was in arrears of the payments it owed Royal Brunei at the time the agreement between the two companies was terminated. Royal Brunei pursued Tan for the amounts owed. Judgment was entered in favour of Royal Brunei at first instance. The Court of Appeal of Brunei Darussalam allowed Tan’s appeal. While Tan admitted having assisted in BLT’s breach of trust, the court found that his conduct fell short of dishonesty, and was thus insufficient to found liability. Royal Brunei appealed to the Privy Council. The issue on appeal was “whether the breach of trust which is a prerequisite to assistant liability must itself be a dishonest and fraudulent breach of trust by the trustee.”

Delivering the judgment of the Board, Lord Nicholls stated that dishonesty on the part of the assistant is a necessary and sufficient basis for liability, regardless of the state of mind of the party in breach of trust. In the context of accessorial liability, their Lordships held that dishonesty was synonymous with a lack of probity, and meant “simply not acting as an honest person would in the circumstances.” The test is objective, but has a subjective element: the honesty of the person’s conduct must be

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assessed in light of what the person actually knew at the time.213 Their Lordships identified further subjective characteristics relevant to the determination of honesty: personal attributes of the assistant such as experience and intelligence, and the reason for acting as he or she did.214

Their Lordships held that in some circumstances there exists a "gradually darkening spectrum" of conduct, at one end of which is honest conduct, and at the other, dishonest. In the context of risk taking by company officers or trustees, some risks are authorised, some not. Where the differences are of degree rather than of type, an honest person would know there is doubt, and is expected to "attain the standard which would be observed by an honest person placed in those circumstances."215 Their Lordships held that it was impossible to provide more specific guidance:

"An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person ... Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of acceptable conduct."216

Thus the Privy Council held that honesty, not knowledge, is the litmus test of accessorial liability. To ask whether a person dishonestly assisted in what turns out to be a breach of trust is217

"to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of 'knowingly' assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the 'sort' of knowledge required, when the truth is that 'knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not of kind."

Lord Nicholls' judgment made clear that dishonesty, not "unconscionability" was the preferable label. According to the Board, dishonesty has an ordinary meaning to non-lawyers. To the extent that "unconscionable" means something more than "dishonest", its meaning is unclear. Birks agreed, saying "'unconscionable', indicating unanalysed disapprobation ... embraces every possibility in the controversy",218 thus proving of no assistance in solving the controversy itself.

While the Privy Council held that knowledge is not the touchstone, it can provide reliable indicia of dishonesty through its contribution to what amounts to dishonesty in the circumstances of each individual case.219

Their Lordships summarised their conclusion thus:\textsuperscript{220}

"A liability in [equity] attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly..."

Following \textit{Royal Brunei}, the second limb has lost its former moniker as "knowing assistance".\textsuperscript{221}

In Australia, three major strands of judicial opinion have emerged since \textit{Royal Brunei}: those that treat the case as having altered the state of the law in Australia; those that treat it as a purely English position which has not altered \textit{Consul Developments} as the binding authority; and those that would reconcile the two cases. A fourth and anomalous position has been stated by Bryson J but has not been subsequently developed.

\textbf{Cases which adopted \textit{Royal Brunei}}

Even before its headnote was written, \textit{Royal Brunei} was adopted with gusto by many trial and appellate courts in Australia.

In \textit{Turner v TR Nominees Pty Ltd}\textsuperscript{222} Santow J considered \textit{Royal Brunei} and stated that Lord Nicholls had formulated a new assistant principle, which simplified Lord Selborne's formulation. Santow J went on to apply the \textit{Royal Brunei} dishonesty test, but not before finding that the defendant's conduct also amounted to knowing assistance.

\textsuperscript{220} \textit{Royal Brunei Airlines SDN BHD v Tan} [1995] 2 AC 378, 392.
\textsuperscript{221} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164.
\textsuperscript{222} \textit{Turner v TR Nominees Pty Ltd} (1995) 31 ATR 578; BC9501732.
under the “traditional formulation”. Although his Honour found both the “old” and “new” tests satisfied, by resting on the latter test, the judgment is an endorsement of the Royal Brunei formulation.

Burchett J’s application of the Royal Brunei principle in News Ltd v Australian Rugby Football League Ltd was not questioned by the Full Federal Court when it overturned his Honour’s judgment on appeal.

The most unequivocal application of Royal Brunei can be found in Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd & Ors. In that case, Hansen J held that after Royal Brunei, the standard of fault was “beyond doubt”. Anderson J adopted Hansen J’s reasoning in Hancock Family Memorial Foundation Ltd & Anor v Porteous & Anor.

In Currabubula Holdings v DRE Downtown Real-Estate, Hodgson CJ in Eq considered an assistant liability claim against the directors of a company which was the fiduciary of another company. The fiduciary was alleged to have breached its duty to the principal company. His Honour explained the principles of recipient and assistant liability in brief, citing Barnes v Addy and Royal Brunei, and went on to say:

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223 His Honour did not specifically mention Consul Developments.
“where a fiduciary obtains property in breach of a fiduciary duty, then the fiduciary may become a constructive trustee of that property; and in that event subsequent disposal of that property in breach of the constructive trust will involve the principles discussed above. A person who dishonestly (or knowingly?) assists the breach of fiduciary duty and thereby obtains property may become subject to recipient liability, and thus to a constructive trust in favour of the fiduciary’s principal: Consul Developments, Royal Brunei Airlines. A person who dishonestly assists in the breach of fiduciary duty, but does not thereby obtain property, may become subject to an accessory liability to the principals for loss caused by the fiduciary’s breach of duty: Royal Brunei Airlines.”

His Honour found that the defendant company had breached its fiduciary duties, but not in any way which involved dishonesty on the part of its directors. His Honour declared a trust in favour of the plaintiff, the subject of which was the commission earned by the defendant in breach of its duties, and said:231

“it is conceivable that, if it turns out that [the fiduciary company] cannot repay the commission to the plaintiff, this may be because of subsequent events that involved accessory liability or recipient liability in [the directors]. If that be the case, the plaintiff may have remedies against them ...”

In Compaq Computer Australia Pty Ltd v Merry & Ors,232 Finkelstein J set out Lord Nicholls' “dishonesty” test and expressly applied it.233 In so doing, his Honour

231 Curabubula Holdings Pty. Ltd. and DRE Downtown Real-Estate Pty Ltd [1998] NSWSC 518. The medium-neutral citation contains no paragraph or page numbering.

recognised "it is not universally accepted that this is a proper approach." However, given the factual similarities between Compaq and Royal Brunei (which his Honour explicitly acknowledged) it is not surprising that Finkelstein J applied Royal Brunei.

The Full Court of the Supreme Court of South Australia applied the principle in Pascoe Ltd (in liq) v Lucas, but found no evidence of dishonesty.

In Beach Petroleum NL v Kennedy, the New South Wales Court of Appeal noted the parties' concurrence that Royal Brunei set out the relevant test. That recognition was adopted by Bryson J in National Australia Bank Ltd v Rusu, where his Honour stated that objective dishonesty of the Royal Brunei type was the "necessary ... and sufficient ingredient" of culpability required to found liability for assistance.

In Tenwood Holdings Pty. Ltd. & Oliver, Steytler J applied the Royal Brunei test in allowing the amendment of a statement of claim alleging dishonest assistance in a fraudulent design by a fiduciary (in that case a firm of solicitors). His Honour found that the pleading was sufficient to "make out an arguable case of dishonest assistance (in the sense described in the Royal Brunei Airlines case)."

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233 Compaq Computer Australia Pty Ltd v Merry, Payes, Bunnett, Sharp, Bassat, Kras, Horman & Thomson (1998) 157 ALR 1, 5.
240 Tenwood Holdings Pty Ltd v Oliver [2000] WASC 69.
241 Tenwood Holdings Pty Ltd v Oliver [2000] WASC 69, [52].
The New South Wales Court of Appeal upheld Rolfe J’s application of the Royal Brunei principle in Hungry Jack’s Pty Ltd v Burger King Corp. In so doing, the Court of Appeal referred to High Court’s judgment in Forestview Nominees Pty Ltd v Perpetual Trustee WA Ltd, which cited Royal Brunei but did not consider the dishonesty test. The High Court cited Royal Brunei again in Giumelli v Giumelli, but Besanko J has correctly observed that the passing reference did not amount to an endorsement of the Royal Brunei knowledge test. The next reference to Royal Brunei by the High Court was in Pilmer v Duke Group Ltd (in liq) – another equivocal mention.

In Aequitas Ltd v Sparad No 100 Ltd, Austin J held that the High Court did not go so far in Consul Developments as to

“consign to legal history the numerous cases that had identified increasingly refined subcategories of actual and constructive knowledge ... [as the Privy Council did in Royal Brunei, but] by adopting a narrow view of ‘knowledge’, the practical effect of which is similar to a test of dishonesty, they paved the way for that step to be taken.”

His Honour went on to conclude that Royal Brunei was “a statement of the modern Australian law.”

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242 Hungry Jack’s Pty Ltd v Burger King Corp [1999] NSWSC 1029; upheld on appeal Burger King Corp v Hungry Jack’s Pty Ltd [2001] NSWCA 187.
248 Aequitas Ltd v Sparad No 100 Ltd (2001) 19 ACLC 1006 (SCNSW).
249 Aequitas Ltd v Sparad No 100 Ltd (2001) 19 ACLC 1006, 1080 per Austin J.
250 Aequitas Ltd v Sparad No 100 Ltd (2001) 19 ACLC 1006, 1080 per Austin J.
In Capital Investments Corporation Pty Ltd v Classic Trading Pty Ltd,\(^{251}\) after referring to Royal Brunei and Burchett J's application of it in Australian Rugby Football League, Weinberg J described the principle as "the accessorial liability principle adumbrated in Barnes v Addy and further explained in Royal Brunei Airlines.\(^{252}\)"

In Patrick v Capital Finance Pty Ltd (No 2) Tamberlin J referred to Royal Brunei approvingly but without elaboration.\(^{253}\)

In Emanuel Management Pty Ltd and Ors v Foster's Brewing Group Ltd and Ors, Chesterman J decided that the Royal Brunei test was authoritative.\(^{254}\) His Honour stated that Consul did not contain a "definitive exposition of the necessary ingredients to establish the liability of one who assists in a breach of fiduciary duty."\(^{255}\) Consul was founded in part on Selangor United Rubber Estates Ltd v Cradock (No 3)\(^ {256}\) and Karak Rubber Co Ltd v Burden (No 2)\(^ {257}\), which have both been doubted in subsequent decisions. Further, notwithstanding their Honours' reliance on Selangor, both Gibbs J and Stephen J (with whom Barwick CJ agreed) expressed doubts about the authority of that case in their respective judgments in Consul.\(^ {258}\)

\(^{251}\) Capital Investments Corporation Pty Ltd v Classic Trading Pty Ltd [2001] FCA 1385.

\(^{252}\) Capital Investments Corporation Pty Ltd v Classic Trading Pty Ltd [2001] FCA 1385, [290]-[302], [328]-[329].

\(^{253}\) Patrick v Capital Finance Pty Ltd (No 2) [2002] FCA 1570, [61] per Tamberlin J. In the later case of Patrick v Capital Finance Corporation (Australasia) Pty Ltd [2004] FCA 120, his Honour found it unnecessary to decide between sub missions of the plaintiff (that a reasonable and honest banker in the defendant's position should have been aware of the breach) and the relevant defendant (equivalent to the Royal Brunei test) on the grounds that the evidence was insufficient to satisfy either test.

\(^{254}\) Emanuel Management Pty Ltd and Ors v Foster's Brewing Group Ltd and Ors [2003] QSC 205, [1581]-[1582] per Chesterman J.

\(^{255}\) Emanuel Management Pty Ltd and Ors v Foster's Brewing Group Ltd and Ors [2003] QSC 205, [1581]-[1582] per Chesterman J.

\(^{256}\) Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555.

\(^{257}\) Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602.

\(^{258}\) Emanuel Management Pty Ltd and Ors v Foster's Brewing Group Ltd and Ors [2003] QSC 205, [1581]-[1582] per Chesterman J.
While the reasoning of the Judicial Committee in *Royal Brunei* was sound, it does not bind Australian courts. Indeed, as Mitchell has pointed out "as a decision of the Privy Council, *Royal Brunei* is technically weaker authority in England than decisions such as those of the Court of Appeal in *Barnes v Addy* and *Belmont Finance Corp v Williams Furniture Ltd.*"259 Although Mitchell goes on to say "still the English Courts have aligned themselves with the views of the Privy Council in subsequent cases,"260 that has not universally been the case in Australia.

Cases which have not followed *Royal Brunei*

In *Gertsch v Atsas & Ors*,261 Foster AJ held (in *obiter dicta*):262

"... formulations on this topic in Australian decisions do not refer directly to concepts such as 'impropriety' or 'want of probity'. Nor do they select out as the governing concept, the notion of 'dishonesty' which was the subject of exposition in the Brunei case. I have come to the conclusion that the acceptance of the first four Baden categories, even though they now have no prominence in England, amounts really to no more than accepting a standard of honesty appropriate in the circumstances. The reference in category (iv) to 'the facts' sufficiently indicates, in my view, that a person receiving, for his own use, trust property, whilst in the state of knowledge posited, would not, relevantly, be acting honestly."

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262 His Honour's statement was *obiter dicta* because *Gertsch* was a knowing receipt case: it involved the receipt of a testamentary legacy paid in breach of a testamentary trust by an executor who had forged the will.
While it was not made clear in his Honour's examination of the cases, it appears he accepted *Consul* as the relevant standard in assistance cases.\(^{263}\)

It is dangerous to rely on the *Gertsch v Atsas* formulation. His Honour was considering a knowing receipt case. That analysis commenced with twentieth-century English authority on knowing receipt and strayed (for reasons his Honour did not make clear) into the realm of knowing assistance cases before arriving at a conclusion as to the standard of culpability for knowing receipt. Notwithstanding his Honour's novel path of reasoning, the conclusion he reached is consistent with the modern Australian position of culpability for knowing receipt explained above.

In *Esanda Finance Corp Ltd v Reyes & Ors*,\(^{264}\) Simos J, referring to *Royal Brunei*, stated "the present position in England is now different from the position in Australia,"\(^{265}\) and went on to say "I am of the opinion that in the present case, I should apply the relevant principles as enunciated by Stephen J [in *Consul*]."\(^{266}\)

His Honour's position is reflected by the judgment of Barrett J in *NCR Australia Pty Ltd v Credit Connection Pty Ltd*.\(^{267}\) Ashley AJA made similar statements in his Honour's dissenting judgment in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.\(^{268}\)

A third category of decisions attempt to reconcile *Royal Brunei* and *Consul*.


\(^{264}\) *Esanda Finance Corp Ltd v Reyes & Ors* [2001] NSWSC 234.

\(^{265}\) *Esanda Finance Corp Ltd v Reyes & Ors* [2001] NSWSC 234, [108].

\(^{266}\) *Esanda Finance Corp Ltd v Reyes & Ors* [2001] NSWSC 234, [113].

\(^{267}\) *NCR Australia Pty Ltd v Credit Connection Pty Ltd* [2004] NSWSC 1, [164]-[169].

\(^{268}\) *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 163-4, per Ashely AJA.
Judgments which attempt to reconcile Royal Brunei with Consul

In Colour Control Centre v Ty\textsuperscript{269} Santow J held that assistant liability attached to third parties who were accessories in “dishonestly procuring or assisting in the breach of trust or fiduciary duty.”\textsuperscript{270} In so finding, his Honour relied on Royal Brunei, Consul Developments\textsuperscript{271} and US Surgical Corporation v Hospital Products International Inc.\textsuperscript{272}

In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd,\textsuperscript{273} Tadgell JA found that his rejection of allegations of fraudulent conduct (including wilful blindness) against the appellant “necessitate[d] also a rejection of the submission that the appellant was constituted a constructive trustee [by way of assistant liability] on account of dishonesty on its part.”\textsuperscript{274} Having applied the Royal Brunei test to dispose of the assistance claim in that case, his Honour went on to say

“it may be that much the same test [as that in Royal Brunei] should be applied in Australia, treating dishonesty as including wilful blindness and what Gibbs J, in Consul Development at 412, called ‘moral obtuseness’.”\textsuperscript{275}

Writing extrajudicially, Young CJ in Eq said: \textsuperscript{276}

“Foster AJ [in Gertsch] said that the decision [Brunei] was contrary to what the High Court had said in [Consul] which was binding on Australian judges ... the

\textsuperscript{269} Colour Control Centre v Ty (1996) 39 AILR 5-058, BC9505089.
\textsuperscript{270} Colour Control Centre v Ty (1996) 39 AILR 5-058, BC9505089, 18-19.
\textsuperscript{271} Consul Developments v DPC Estates (1975) 132 CLR 372.
\textsuperscript{272} US Surgical Corporation v Hospital Products International Pty Ltd[1983] 2 NSWLR 157, 253-6.
\textsuperscript{273} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133.
\textsuperscript{274} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 155 per Tadgell JA.
\textsuperscript{275} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, 156 per Tadgell JA.
safe course for Australian lawyers would be to follow Foster AJ’s advice and follow Consul rather than Royal Brunei or Twinsectra insofar as the latter cases move down some new path.”

As stated above, Gertsch cannot be regarded as an authority on assistant liability. Further, Young CJ in Eq himself had earlier applied both Consul and Royal Brunei (albeit in obiter dicta) in Rogers v Kabriel.277 In that case, the plaintiff’s accountant advised her to invest $1 million in a film production company which, unknown to her, was the accountant’s primary employer. The basis of the advice was that the investment would enable the plaintiff to obtain a tax deduction. However, the money was not used for a purpose which rendered the plaintiff’s investment tax deductible. The plaintiff sued the accountant and the production company claiming, among other things, recipient liability. While assistant liability was unpleaded, his Honour considered its potential application, stating278 (citations preserved):

“Negligence in failing to make inquiry is insufficient.279 The Court looks to all the circumstances known to the alleged participant, its experience and intelligence and its reason for acting as it did.280”

His Honour went on to find that the defendant company did not assist the accountant’s breach of fiduciary duty, as it had no knowledge of the circumstances which led to the investment being made and there was no reason why it should have.

278 Rogers v Kabriel [1999] NSWSC 368, [174].
279 Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 402.
Knowledge of the source of the funds, falling short of proving knowledge of any dishonest design, was inadequate to found liability.\textsuperscript{281}

In \textit{Lurgi (Aust) Pty Ltd v Ritzer Gallagher Morgan Pty Ltd}\textsuperscript{282} Byrne J referred to the \textit{Royal Brunei} principle, and set out the effect of the majority judgments in \textit{Consul Developments} before going on to say “I shall approach this case on the same basis.”\textsuperscript{283} While his Honour did not explicitly say so, it must be assumed that he viewed the two cases as capable of being reconciled, but it is not clear on what basis that reconciliation was performed: the part of the case relating to assistant liability was decided on the basis that the assistant had actual knowledge of the fraud being committed, and that the fraud would have been apparent to an honest and reasonable man in the assistant’s position.\textsuperscript{284}

In the related case of \textit{Lurgi (Australia) Pty Ltd v Gratz}\textsuperscript{285} Byrne J held that the plaintiffs “must establish that, at the time [the purported assistant] performed the acts of assistance, [she] actually knew that funds had been dishonestly obtained so as to give rise to the existence of a constructive trust in favour of [the plaintiffs], or that she knew facts which would indicate this to an honest and reasonable person.”\textsuperscript{286} His Honour found that categories (i) through (iv) on the \textit{Baden} scale provided the applicable knowledge requirement for assistance cases.\textsuperscript{287}

\textsuperscript{281}Rogers v Kabriel [1999] NSWSC 368, [174].
\textsuperscript{282}Lurgi (Aust) Pty Ltd v Ritzer Gallagher Morgan Pty Ltd [2000] VSC 277.
\textsuperscript{283}Lurgi (Aust) Pty Ltd v Ritzer Gallagher Morgan Pty Ltd [2000] VSC 277, [45]-[46].
\textsuperscript{284}Lurgi (Aust) Pty Ltd v Ritzer Gallagher Morgan Pty Ltd [2000] VSC 277, [69].
\textsuperscript{285}Lurgi (Australia) Pty Ltd v Gratz [2000] VSC 278.
\textsuperscript{286}Citing Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 398, per Gibbs J, and 412, per Stephen J.
\textsuperscript{287}Citing Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, 412, per Stephen J.
In *Voss & Anor v Davidson & Ors*,288 Helman J applied what his Honour found to be the majority view in *Consul Developments* (elements (i) through (iv) on the *Baden* scale) while referring to *Royal Brunei*. His Honour held289

"in Australia, the scale is not as easily dismissed as their Lordships suggested in *Royal Brunei Airlines v Tan*. Dishonesty remains, however, the touchstone of liability. As explained in *Royal Brunei Airlines v Tan*, the standard of honesty is not subjective although it is applied in the context of what the person in question actually knew at the relevant time."

His Honour went on to quote from Lord Nicholls' explanation of what amounts to honesty in an assistance context, and then explained the majority view in *Consul Developments* before concluding that "the dishonesty required to establish assistant liability" was found in categories (i) to (iv) of the Baden scale.290 That statement agrees with the summary of the Australian position by the authors of *Jacobs*.291

In *The Duke Group Ltd (in liq) v Alamain Investments Ltd and Ors*,292 Doyle CJ accepted a submission that the case in question concerned a claim for "dishonest assistance in a breach of fiduciary duty."293 His Honour cited *Royal Brunei* as authority for the proposition that the required standard was of objective dishonesty, and cited

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288 *Voss & Anor v Davidson & Ors* [2002] QSC 316.
289 *Voss & Anor v Davidson & Ors* [2002] QSC 316, [27]-[28].
290 *Voss & Anor v Davidson & Ors* [2002] QSC 316, [30].
293 *The Duke Group Ltd (in liq) v Alamain Investments Ltd and Ors* [2003] SASC 415, [125].
Consul in concluding that it “probably suffices” for a plaintiff to prove knowledge equivalent to that expressed by Baden type (iv).²⁹⁴ His Honour said:²⁹⁵

“I accept the further submission by Mr Karkar that it is relevant that the Court is presently concerned with a claim against the defendants for dishonest assistance in a breach of fiduciary duty. The knowledge on the part of the defendants that must be proved has been described as “objective dishonesty”: Royal Brunei Airlines v Tan [1995] 2 AC 378 at 309. It probably suffices for the plaintiff to prove that the defendants knew “ ... of facts which themselves would, to a reasonable man, tell of fraud or breach of trust ... ”: Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373 at 412 Stephen J.”

Bryson J’s position

A surprising divergence from the predominant trichotomy is found in the judgment of Bryson J in Maronis Holdings Ltd v Nippon Credit Australia Ltd.²⁹⁶ It is necessary to quote his Honour at length:²⁹⁷

In my respectful view the judgments in Consul Development Pty Ltd v DPC Estates Pty Ltd do not establish authoritatively the Australian law on constructive notice in relation to accessory liability. There was no clear majority view. In my understanding Stephen J treated the test for liability as actual knowledge or calculated abstension from inquiry. Barwick CJ concurred with Stephen J and

²⁹⁴ The Duke Group Ltd (in liq) v Alaman Investments Ltd and Ors [2003] SASC 415, [125] per Doyle CJ.
²⁹⁵ The Duke Group Ltd (in liq) v Alaman Investments Ltd and Ors [2003] SASC 415, [125] per Doyle CJ.
²⁹⁶ Maronis Holdings Ltd v Nippon Credit Australia Ltd (2001) 38 ACSR 404 (NSWSC).
Gibbs J assumed without deciding that the formulation in Selangor United Rubber Estates v Craddock was correct and decided the appeal on the basis that if it was correct the facts of Consul Development did not meet it. McTiernan J dissented and was ready to accept extensions of the doctrine in Selangor United Rubber Estates and in Karak Rubber Co v Burden. Consul Development cannot be said to be a binding High Court authority for lack of a majority opinion. The formulation in United States Surgical ‘... facts which, to a reasonable man would demand inquiry’ states a test which could not be fulfilled lightly and is not far removed from a test of want of probity or of dishonesty."

His Honour’s judgment would extend the knowledge requirement to Baden type (v). In that regard, it is inconsistent not only with Consul but with all recent considerations of the assistant liability principle by superior courts in Australia, even those that continue to apply the Baden-type degrees of knowledge distilled from the disjoint majority in Consul. It is also important to note the difference between his Honour’s judgment in Maronis and his Honour’s earlier judgment in National Australia Bank Ltd v Rusu.298 With due respect to his Honour, Maronis can only be discarded as an anomaly.

Twinsectra

An analysis of the three different attitudes to Royal Brunei demonstrated by the Australian judiciary cannot be completed without considering the subjective cat thrown

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298 *National Australia Bank Ltd v Rusu* [2001] NSWSC 32 (discussed at length above).
among the pigeons of honesty by the Law Lords in *Twinsectra v Yardley*. In that case, a solicitor (Leach) acted for the defendant (Yardley), who sought a loan of £1 million from the plaintiff (Twinsectra). Twinsectra refused to loan the money without a solicitor’s undertaking that the loan funds would only be released for the acquisition of property. Leach refused to grant that undertaking. Yardley procured the undertaking from another firm of solicitors (Sims). Twinsectra paid the funds to Sims. Upon receiving Yardley’s assurance that the money was to be applied in the acquisition of property, Sims paid the money to Leach. Leach did not take steps to ensure that the money was so applied; he merely paid it out upon Yardley’s instructions. Yardley used almost £360,000 for purposes other than the acquisition of property. Twinsectra was not repaid and it sued, *inter alia*, Leach. The basis of the action against Leach was that he had dishonestly assisted in the payment by Sims to Leach, which payment was a breach of trust. The case dealt with two issues: whether a trust was created by virtue of the undertakings, and whether Leach should be liable as an assistant to a breach of that trust.

This paper is concerned with the latter issue. At trial, Carnwath J found that no trust was created, and that Leach had not been dishonest. The Court of Appeal found a trust existed, and held that Leach had been dishonest. Leach appealed to the House of Lords.

Lord Hutton recommended that the *Royal Brunei* principle be applied, but that the House of Lords should.

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299 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164.
300 *Twinsectra Ltd v Yardley & Ors* [1999] Lloyd's Rep Bank 438.
301 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 172 per Hutton LJ.
"state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

Lord Hutton gave two reasons for that finding. First, his Lordship considered Lord Nicholls' statement that:302

"Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of acceptable conduct."

Of that statement, Lord Hutton said:303

"the use of the word "knowing" ... would be superfluous if the defendant did not have to be aware that what he was doing would offend the normally accepted standards of honest conduct, and the need to look at the experience and intelligence of the defendant would also appear superfluous if all that was required was a purely objective standard of dishonesty. Therefore I do not think that Lord Nicholls was stating that in this sphere of equity a man can be dishonest even if he does not know that what he is doing would be regarded as dishonest by honest people."

303 Twinsectra Ltd v Yardley & Ors [2002] 2 AC 164, 173 per Hutton LJ.
Secondly, given the “grave” status of a finding of dishonesty (particularly against a professional) Lord Hutton stated that it would be “less than just” for a person to be found to be dishonest in assisting a breach of trust in circumstances where the person “had not been aware that what he was doing would be regarded by honest men as dishonest.”

Lords Slynn, Steyn and Hoffman agreed with the conclusion drawn by Lord Hutton on that point, and with the reasons upon which it was founded. Importantly, Lord Steyn was a member of the Board which delivered the judgment in *Royal Brunei*.

Lord Millett delivered a powerful dissenting judgment. In his Lordship’s opinion, Lord Nicholls was

“adopting an objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person placed in similar circumstances. Account must be taken of subjective considerations such as the defendant’s experience and intelligence and his actual state of knowledge at the relevant time. But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was.”

Lord Millett went on to say “[n]either an honest motive nor an innocent state of mind will save a defendant whose conduct is objectively dishonest... equity looks to a man’s conduct, not his state of mind.”

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304 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 173 per Hutton LJ.
305 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 167 per Slynn LJ, 167 per Steyn LJ, 170-1 per Hoffman LJ.
306 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 198 per Lord Millett.
307 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 197 per Lord Millett.
that Lord Nicholls used the word “dishonest” in an objective fashion. The question for the House of Lords to answer was:\textsuperscript{308}

"whether a plaintiff should be required to establish that an accessory to a breach of trust had a dishonest state of mind (so that he was subjectively dishonest in the R v Ghosh\textsuperscript{309} sense); or whether it should be sufficient to establish that he acted with the requisite knowledge (so that his conduct was objectively dishonest). This question is at large for us, and we are free to resolve it either way. I would resolve it by adopting the objective approach."

His Lordship gave three reasons for the final sentence of that statement:\textsuperscript{310}

1. Consciousness of wrongdoing is an aspect of \textit{mens rea}; while an appropriate element in criminal liability it is not an appropriate condition for civil liability.

2. The objective test is consistent with Lord Selborne’s statement in \textit{Barnes v Addy}, and “traditional doctrine [which] taught that a person who knowingly participates in the misdirection of money is liable to compensate the injured party.”\textsuperscript{311}

3. Accessorial liability is the “equitable counterpart of the economic torts”, which are intentional torts for which negligence is insufficient and

\textsuperscript{308} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 200 per Lord Millett.
\textsuperscript{309} \textit{R v Ghosh} [1982] QB 1053.
\textsuperscript{310} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 200-201 per Lord Millett.
\textsuperscript{311} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 200 per Lord Millett.
dishonesty unnecessary.\textsuperscript{312} Liability depends on knowledge; the introduction of subjective dishonesty “introduces an unnecessary and unjustified distinction between the elements of the equitable claim and those of the tort.”\textsuperscript{313} Such a distinction would encourage a plaintiff to try and:\textsuperscript{314}

“spell a contractual obligation out of a fiduciary relationship in order to avoid the need to establish that the defendant had a dishonest state of mind. It would, moreover, be strange if equity made liability depend on subjective dishonesty when in a comparable situation the common law did not. This would be a reversal of the general rule that equity demands higher standards of behaviour than the common law.”

After explaining the Board’s judgment in \textit{Royal Brunei}, Lord Millett shrank from the \textit{Royal Brunei} test, expressing a preference for a return to the knowledge touchstone. As to what should constitute the requisite degree of knowledge, Lord Millett stated that it was sufficient that the assistant knew that the property was not at the free disposal of the principal. In some cases, it might be sufficient that the assistant knows that the scheme being assisted is dishonest.\textsuperscript{315} Knowledge of the elements that constitute a trust is sufficient. It is not necessary that the assistant grasp that a trust has in fact been

\textsuperscript{312} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 200-1 per Lord Millett.

\textsuperscript{313} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 201 per Lord Millett.

\textsuperscript{314} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 202 per Lord Millett.

\textsuperscript{315} \textit{Twinsectra Ltd v Yardley & Ors} [2002] 2 AC 164, 200-1 per Lord Millett.
created. Thus, Leach should have been held liable as an assistant because he knew that he was assisting Sims to default in his undertaking to Twinsectra.

**Australian Courts’ attitudes to Twinsectra**

*Twinsectra* has had a mixed reception in Australian courts. In *Cadawallader v Bajco Pty Ltd*, Heydon JA (Santow JA and Gzell J agreeing) referred to *Royal Brunei* and *Twinsectra* and said:

> "This Court is not bound by decisions of either the Privy Council or the House of Lords, at least since 1986. A more appropriate starting point for an assessment of the tests for secondary liability would be the decisions of this Court in and since DPC Estates Pty Ltd v Grey and Consul Developments Pty Ltd and the High Court in that case ... They may not be easy to analyse, but they propound less rigorous tests [than do Royal Brunei and Twinsectra]."

Barrett JA applied Heydon JA’s statement in *Haljhide v Beaven*, although finding himself not required to determine the appropriate test in that case.

McDermott suggests that Lord Millett’s judgment in *Twinsectra* was more in accord with the Australian authorities than the majority view in that case. However close his Lordship’s judgment parallels the Australian authorities, and however detailed his Lordship’s analysis, if the majority opinion in *Twinsectra* is not binding on Australian

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316 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 202 per Lord Millett.
317 *Cadawallader v Bajco Pty Ltd* [2002] NSWCA 328.
318 *Cadawallader v Bajco Pty Ltd* [2002] NSWCA 328, [199] (citations removed).
319 *Haljhide v Beaven* [2003] NSWSC 1207.
courts (and it is not) Lord Millett's dissenting view is even less so. Further, Lord Millett did not posit a point in the traditional spectrum of knowledge at which his Lordship opined that culpability should attach. That being so, it is impossible to equate his Lordship's dissent with the vague position which has been accepted as the *ratio* from *Consul*.

In *LHK Nominees v Kenworthy*,321 Anderson and Steytler JJ identified the warring principles without deciding between them, saying (citations preserved):322

"As to the second limb in *Barnes v Addy* ... this has come to be understood as requiring a finding of dishonesty, either in the sense of knowledge by the defendant that what he was doing would be regarded as dishonest by honest people323 or, perhaps, knowledge on his part of circumstances which would indicate to an honest and reasonable person that a fraud is being committed.324"

Their Honours went on to find that no evidence of dishonesty was established on the facts. In the same case, Pullin J accepted that the decision in *Royal Brunei* "correctly states the law", thus finding that

"a 'knowing assistance' claim requires proof that the knowledge of the breach of trust involves dishonesty which, in my view, is the same as 'fraud' within the meaning of ss. 68 and 134 of the Transfer of Land Act"325.326

321 *LHK Nominees v Kenworthy* (2002) 26 WAR 517
322 *LHK Nominees v Kenworthy* (2002) 26 WAR 517, 556 per Anderson, Steytler JJ.
323 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Twinsettra Ltd v Yardley* [2002] 2 AC 164, [6], [8], [20] and [36].
324 *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 376 per Barwick CJ (agreeing with Stephen J) 412 per Stephen J and 398 per Gibbs J.
325 *Transfer of Land Act 1893* (WA).
In Victoria University of Technology v Wilson and Ors, Nettle J applied Twinsectra:

"As Lord Hoffman observed in Twinsectra v Yardley, if a plaintiff is to succeed in a claim of knowing involvement it is necessary for the plaintiff to show that the defendant had a dishonest state of mind. It is not enough to show that a defendant's state of mind was wrong or even that it was misguided. He or she must be shown to have been conscious that what was done transgressed ordinary standards of honest behaviour. Accordingly, if a defendant honestly believes in facts which to the mind of right thinking people would mean that the transaction was not dishonest, then the defendant is not liable."

His Honour's statement was accepted as the relevant standard of proof by the plaintiffs in Maher and Ors v Millennium Markets Pty Ltd and Ors.

Conclusion: what establishes culpability in an assistant?

Can the Twinsectra "standards of honest behaviour" test be reconciled with the Consul knowledge requirements? As is demonstrated by the cases cited above, prior to Twinsectra, many courts had reconciled Consul with Royal Brunei, without encountering difficult questions of conflict. The two tests are a comfortable fit: the objective honesty formulation from Royal Brunei can be reconciled with the Baden (i) – (iv) standard distilled from Consul by importing the Consul standard into the subjective knowledge element of the dishonesty formulation in Royal Brunei. Tadgell JA's statement in

326 LHK Nominees v Kenworthy (2002) 26 WAR 517, 567 per Pullin J.
327 Victoria University of Technology v Wilson and Ors [2004] VSC 33 per Nettle J, [188]-[189].
328 Maher and Ors v Millennium Markets Pty Ltd and Ors [2004] VSC 174, [94]-[97].
Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd\textsuperscript{329} can be considered an early application of that combination.

Twinsectra adds an extra piece to the puzzle: even the subjective element of the knowledge of wrongdoing is somewhat marginalised by the introduction of Lord Hoffman's "knowledge of the reasonable man's standard of honesty" test. While it is tempting to write off Twinsectra on the basis that the House of Lords explicitly acknowledged that it had paid regard to the potential stain on a professional man's character, it is impossible to flippantly ignore the ratio of the case on that basis, particularly after it has been adopted by at least one superior court in this country.

To date, no appellate court in Australia has applied the Twinsectra test. By contrast, each of the three post-Royal Brunei approaches to culpability identified above has found at least some degree of support in Australia's intermediate appellate courts. Until the matter is finally addressed by the High Court, trial judges must draw their guidance from those cases. Consul Developments is a decision of the High Court and remains good law. Royal Brunei has been adopted and applied by various intermediate level appellate courts in ways which do not clash with Consul playing an ongoing role. The above summary of cases shows that more appellate-level support exists for Royal Brunei (whether in its "pure" form or as applied in conjunction with Consul Developments) than for the test derived solely from Consul Developments. That being so, I suggest that the appropriate standard of culpability is the hybrid test, which recognises the binding authority of Consul Developments and the accepted wisdom of Royal Brunei.

\textsuperscript{329} Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133.
3(d) **Equitable intervention for breach of statutory duties?**

Having now described the state of the Australian actions in recipient and assistant liability, I turn to consider whether those actions might extend beyond a breach of fiduciary duty and provide for secondary liability as a result of a breach of statutory duty. The starting point for that discussion is *Robins v Incentive Dynamics*.330

Douglas and John Robins were father and son. They were also the directors of Incentive Dynamics Pty Ltd. John Robins was its sole shareholder. Incentive Dynamics was a member of a group of companies (the “Robins Group”). Jonathon Meissner was the company secretary of Incentive Dynamics, and the treasurer of the Robins Group. Another company in the group was Coldwick Pty Ltd. John Robins was a director of Coldwick, and owned 75% of its issued shares. Coldwick’s other shareholder directors were Meissner and A. T. Lorkin.

On 22 November 1991, Coldwick purchased a property at South Melbourne for $295,000. Incentive Dynamics paid a deposit of $29,500 and an additional $77,307 toward the purchase price and stamp duty. Coldwick borrowed the remainder of the funds from a third party. The loan was secured by a mortgage over the property. On 12 May 1995, Coldwick purchased a property at Crows Nest in New South Wales. Incentive Dynamics paid the deposit and a further $119,281 toward the purchase of the property. Again, the remainder of the purchase price was borrowed from a third party and secured by a mortgage over the property. In effect, Incentive Dynamics paid all funds toward the

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330 *Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor* (2003) 45 ACSR 244.
purchase of both properties other than funds loaned by third parties and secured by mortgages.

Incentive Dynamics was wound up, and its liquidator brought actions against Coldwick, John and Douglas Robins, Meissner and other companies and individuals. Among other things, the liquidator made claims in respect of the funds provided by Incentive Dynamics to Coldwick: a personal claim alleging that the funds were extended by way of loan (and were thus repayable as a debt), and an alternative proprietary claim which alleged that the properties Coldwick purchased using funds provided by Incentive Dynamics should be declared the subject of a constructive trust in Incentive Dynamics' favour. To that end, the liquidator relied on *Barnes v Addy* and *Farrow Finance v Farrow Properties* in arguing that Meissner and the directors of Incentive Dynamics were in breach of their fiduciary duties to that company; their knowledge should be imputed to Coldwick; and therefore, Coldwick was liable as a knowing recipient of Incentive Dynamics' funds. According to the liquidator, that was sufficient to lead to the impression of a trust over the properties which those funds had been used to purchase.

At trial, Mansfield J in the Federal Court found that the payments made by Incentive Dynamics to Coldwick were ongoing current liabilities. He ordered Coldwick to repay the total of the amounts extended by Incentive Dynamics. His Honour did not find that the directors or Meissner had any "dishonest or improper intent" at the time of the transaction, and thus rejected the argument that Coldwick held the properties on constructive trust for Incentive Dynamics. His Honour went on to say:

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332 *Incentive Dynamics Pty Ltd (in liq) v Robins* [1999] FCA 808, [127]-[132].
"I am not satisfied on the evidence that the judgments to be entered against Coldwick ... will be unmet in part. I am unable to find that, even if either Meissner or Robins were in breach of duty, Incentive Dynamics will have suffered a loss by any such breach."

Following his Honour's judgment, Coldwick sold the two properties and paid the judgment debt amount of $375,064.63 to Incentive Dynamics.334 The balance of the sale proceeds were invested pending the outcome of the appeal.

In the chaos that followed Re Wakim335 and pursuant to the Federal Courts (State Jurisdiction) Act 1999 (NSW), judgments and orders to the effect of his Honour's judgments and orders were made in the Supreme Court of New South Wales on 2 March 2000. Incentive Dynamics and its liquidator then appealed Mansfield J's refusal of the constructive trust claim. The appellants sought to set aside the money judgment in their favour and replace it with what Mason P described as "more valuable declaratory and substantive relief effectively vesting the entire sale proceeds [of the two properties] in Incentive Dynamics."336

The allegation said to found proprietary relief was that Incentive Dynamics had advanced the funds to Coldwick without receiving any material benefit. In causing or permitting the funds to be advanced without insisting on proper documentation, the provision of security or the payment of interest and in failing to take any steps to ensure the repayment of the loan funds, John Robins, Douglas Robins and Meissner (the latter

333 Incentive Dynamics Pty Ltd (in liq) v Robins [1999] FCA 808, [249].
334 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 254 per Mason P.
335 Wakim, Re; Ex parte McNally (1999) 198 CLR 511.
336 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 253 per Mason P.
on the basis that he was a deemed director) were said to have breached statutory duties which included that arising under s. 232(6) of the Corporations Law. The provision of the funds in those circumstances was said by the appellants to give rise to a constructive trust in favour of Incentive Dynamics.

Mason P (with whom Stein and Giles JJA agreed on this point) held that the recipient limb of Barnes v Addy may generate “a personal obligation to make restitution with interest on moneys received, and in a proper case, be made the springboard for a proprietary claim such as a (remedial constructive) charge or trust.” His Honour accepted three submissions as sufficient to uphold the cross-appeal: First, no interest of Incentive Dynamics was advanced or intended to be advanced by the payments to Coldwick, while Coldwick, a company in which the officers in control of Incentive Dynamics were shareholders, received a benefit from the transaction. Secondly, the statutory duty precluding officers from making improper use of their position to provide an advantage to a third party was clearly breached. Mason P also found that the “general law analogue” of that duty was breached. His Honour did not find it necessary to consider the exact scope of that non-statutory duty. Thirdly, Coldwick, via its officers John Robins and Meissner, had actual knowledge of the facts giving rise to the breach of duty. It was unconscionable for Coldwick to retain any benefit from the improper

337 The relevant provision read

“An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.”

The current equivalent is s. 182(1) of the Corporations Act, which reads

“A director, secretary, other officer or employee of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.”

338 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 254 per Mason P.
339 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 255 per Mason P.
receipts. Accordingly, a constructive trust, not a personal remedy, was the appropriate relief.

Mason P went on to provide his own further reasons for upholding the appeal. Dishonesty or conscious improper intent was not a prerequisite for breach of s. 232(6). Mansfield J had “put an unnecessary and false gloss” on the section by requiring proof of dishonest and improper intent by officers consciously in breach of, or intending to breach, their duties. According to Mason P, “impropriety” for the purposes of the section consisted of a breach of the standards of conduct that reasonable persons with knowledge of the duties, powers and authority of the relevant position and the circumstances of the case would expect of a person in the same position. No benefit accrued to Incentive Dynamics from the advances to Coldwick, while its officers (through their shareholding in Coldwick) reaped a benefit. The transaction thus represented an improper use of Incentive Dynamics’ officers’ position to gain an advantage for themselves (as the majority shareholders in Coldwick) and for another (Coldwick itself). In other words, “the transactions were from start to finish an improper diversion of Incentive Dynamics’ moneys in favour of a body which, through its directors, was complicit in and privy to the impropriety.”

Applying *Belmont Finance Corp v Williams Furniture*, his Honour held that the recipient liability action extends beyond the receipt of trust money and applies to property protected by fiduciary or statutory fiduciary obligations.

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341 Robins & Ors v Incentive Dynamics Pty Ltd (in lkg) & Anor (2003) 45 ACSR 244, 256 per Mason P.  
342 *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393.  
343 Robins & Ors v Incentive Dynamics Pty Ltd (in lkg) & Anor (2003) 45 ACSR 244, 256 per Mason P.
The President found that while “the principles relating to the ‘knowing receipt’ of trust property limb of the rule in *Barnes v Addy* are in considerable flux” the case was not the appropriate vehicle to address them. The knowledge requirement, “at whatever level it is required in the uncertain jurisprudence” had been clearly made out by the actual knowledge of Coldwick’s officers.

As Coldwick had actual knowledge of the directors’ breach of their statutory duties to Incentive Dynamics, it was liable for the funds it had received as a result of those breaches. His Honour went on to award a constructive trust over the proceeds of sale of the properties which had been purchased with those funds. In doing so, he addressed the relevant mandatory and discretionary factors for the imposition of that remedy. That approach, and the gloss which Giles JA placed upon it, is discussed below.

_incentive Dynamics_ is good authority (in New South Wales, at least) for the proposition that assistant liability should attach to those assisting in breaches of statutory fiduciary duties. To that extent, it provides a springboard for similar arguments in other Australian states. However, as the discussion of assistant liability above has shown, the various trial and appellate courts have been far from consistent in their recent application of assistant liability principles.

A related question, which falls outside the scope of this paper, is whether a statutory wrong might be sufficient to provide the “unjust” element for an unjust enrichment claim.
Do Robins and Belmont allow for an argument that assistant liability should extend to other statutory duties? Bryan raised that issue prior to the decision in Robins, saying:344

"The Superannuation Industry (Supervision) Act 1993 ... makes provision for a number of non-excludable covenants which purport to codify in some respects, and extend in others, some of the equitable obligations affecting superannuation entities ... Contravention of a covenant is not an offence, though someone who suffers loss or damage as a result of conduct of another person engaged in a contravention may recover 'against that other person or against any person involved in the contravention.' ... Will superannuation trustees be required to remedy a loss on the basis of the generous principles applicable to equitable compensation, which may not be subject to considerations of remoteness of damage or mitigation of loss? ... will persons who 'knowingly' assist in a statutory contravention be liable on the basis of the degree of knowledge required of those whom it is sought to hold liable for knowingly assisting in breach of trust or other fiduciary duty? In other words, are these statutory obligations designed to operate within the framework of existing fiduciary law, or should the statute be viewed as an opportunity to recognise and enforce new norms of conduct?"

The close relationship which s. 232(6) of the Corporations Law bore to the equitable fiduciary duty of directors, and Mason P's specific reference to that general law duty provides courts with a convenient means by which they can avoid extending the

application of assistant liability to non-fiduciary statutory duties. Similarly, while the statutory provision breached in Belmont was not fiduciary in nature (it was a prohibition on the company funding the purchase of shares in itself) the Barnes v Addy liability in that case relied on the characterisation of the directors as fiduciaries and the company’s funds as trust funds. Buckley LJ relied upon the following judgment of Jessel MR:

"In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee."

That approach is consistent with the Australian position. In O'Halloran v R T Thomas & Family Pty Ltd, the New South Wales Court of Appeal held that a director’s power to deal with the assets of the company is a fiduciary power that must not be exercised for improper purposes.

In Belmont, the payment of the first company’s funds to another company, which had the effect of financing the purchase of shares in the first company, was an unlawful transaction. The payment was a breach of trust for a second reason: the consideration received by the plaintiff company was "not worth anything like the sum paid", and the payment involved a conflict of interest in the chairman of the plaintiff company: another company of which he was also the chairman received a benefit from the transaction.

345 Russell v Wakefield Waterworks Co (1875) LR 20 Eq 474, 479.
No subsequent case of which I am aware applies *Belmont* in support of an action arising out of a breach of a non-fiduciary statutory duty. *Incentive Dynamics* has not been subsequently considered on the point.

That being the case, *Belmont* and *Incentive Dynamics* provide only weak support for the extension of accessorial liability to those who assist in the breach of non-fiduciary statutory duties. As assistant liability attaches to the assistance in the breach of any fiduciary duty, Mason P's reliance on the breach of s. 232(6) of the *Corporations Law* adds little to the reach of the action. The Court's reliance on the statutory provision is best explained by the fact that the statutory provision was an easily-interpreted and obviously applicable code, which rendered unnecessary any foray into the applicability of a general law fiduciary duty. So much is implicit in by his Honour's judgment.347

4 Remedies

Having now examined the existence and operation of each of the causes of action the subject of the paper, it remains to briefly explain the remedies available to a plaintiff who successfully relies on those actions.

It is important to realise the difference between compensatory and restitutionary remedies. The former is designed to restore the injured party to his or her former position, the latter is directed at recovering the wrongdoer's enrichment and re-vesting its

347 *Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor* (2003) 45 ACSR 244, 265 per Mason P: "It is unnecessary to consider the exact scope of the non-statutory fiduciary duty that probably corresponds with s 232(6)."
value in the plaintiff. Any relationship between that value and the damage suffered by the plaintiff is irrelevant to the award of a restitutionary remedy.348

4(a) Statutory remedies

4(a)(i) Statutory remedies for breach of statutory duties

The analysis of statutory remedies available for a breach of statutory duties has only one place in this paper: it enables the reader to contrast the limited statutory relief available in a case where a non-fiduciary statutory duty has been breached, and the extensive array of relief at the disposal of the courts where a fiduciary or statutory fiduciary duty has been breached. For that reason, more than a brief sketch of statutory remedies falls outside the realm of this paper.

Certain provisions of the Corporations Act (among them the statutory duties found in ss. 180 to 183) are classified as "civil penalty provisions" by s. 1317DA of the Act. Where breached, those provisions enable civil proceedings to brought against the wrongdoer separate from any criminal prosecutions which can be commenced in respect of dishonest breach. The Australian Securities and Investments Commission ("ASIC"), or the company damaged by a breach of a civil penalty provision, may apply for a declaration that the relevant provision has been contravened: s. 1317J. Where a declaration of contravention is made, the court may order a person who has contravened the provision compensate the company for the damage suffered by the company as a result of the contravention: s 1317H. Such a declaration is not truly compensatory, as the

court can include in the award of “compensation” any profits made by any person resulting from the contravention.

Further, if the court has made a declaration of contravention and the contravention materially prejudices the interests of the company or its creditors, or materially prejudices the company’s ability to pay its creditors, or “is serious”, the court can order the contravener to pay a penalty of up to $200,000 to the Commonwealth government. It may also disqualify the person from managing companies.\textsuperscript{349}

\textbf{4(a)(ii) Section 598 of the Corporations Act}

Section 598 is a procedural section of the \textit{Corporations Act} which allows certain persons to bring a summary action for a remedy in response to an existing action available to a corporation. For present purposes, a thorough examination of its operation is unnecessary. What follows is the minimal explanation necessary to demonstrate where the section sits in the collection of remedial responses to the causes of action described in this paper.

Section 598 allows the Court to make “such orders as it thinks appropriate” if it is satisfied that

\begin{itemize}
  \item[(a)] a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and
  \item[(b)] the corporation has suffered (or is likely to suffer) loss or damage as a result.
\end{itemize}

\textsuperscript{349} \textit{Corporations Act 2001} (C’th) s. 206C.
Only an "eligible applicant" may bring a proceeding under the section. Section 9 defines an "eligible applicant" as the Australian Securities and Investments Commission ("ASIC") or a person authorised by ASIC, a liquidator or provisional liquidator of the company, an administrator of the company or an administrator of a deed of company arrangement to which the company is subject.

On its face, s 598 grants the Court extraordinarily broad powers. It allows the award of an infinite variety of remedies for an assortment of common law, equitable and statutory wrongs. It operates in addition to any common law or equitable responses which otherwise exist to those wrongs. The width of the section is tempered in practice by the courts' attitude to the section as a summary proceeding. Robson\textsuperscript{350} states that any substantive issues must be brought in a separate action, and "any extension of the simple format set out in s 598 inevitably results in the summons being converted to an ordinary action."\textsuperscript{351}

The section must also be read in context: it is of procedural operation only. It does not create a cause of action, but permits an eligible applicant to bring proceedings seeking remedies in response to an independently-existent cause of action.\textsuperscript{352} Thus, it does not create any new substantive rights in the applicant -- although it does create a right in the ASIC to enforce a cause of action which would otherwise only be enforceable at the suit of the company (or via the company's liquidator or administrator). Therefore,

\textsuperscript{350} K Robson, Robson's Annotated Corporations Act 2002, 598. Similar comments from an earlier edition of that work were recited by Weinberg J in Downey v Crawford[2004] FCA 1264.

\textsuperscript{351} Ibid, relying on Re Centrifugal Butter Co Ltd [1913] 1 Ch 188; Re Brighton Brewery Co (1868) 37 LJ Ch 278; Re Estate Mortgage Financial Services Ltd (1993) 10 ACSR 204.

the relevant limitation period is that applicable to the cause of action in respect of which a remedy is sought.\textsuperscript{353}

The orders which can be granted under s. 598 include declaratory orders - for example, a decision that the defendant is guilty of the fraud or negligence.\textsuperscript{354}

Section 1318(1) provides a defence to an action brought under s. 598. It allows the court to relieve the defendant from liability, either wholly or partly and on such terms as the court sees fit, if it appears to the court that the person, while liable, acted honestly and ought fairly be excused. It does not apply to actions in fraud.

\textbf{4(b) Personal remedies}

Breaches of the equitable duties can give rise to a number of personal remedies. The following brief section describes the personal remedies available for a breach of the duties described above.

\textbf{Equitable compensation}

Equitable compensation is equity’s rough equivalent of common law damages. It is only a “rough” equivalent, because in cases of a breach of trust and (perhaps) fiduciary duty, the concepts of causation and remoteness which can restrict the award of common law damages do not apply.\textsuperscript{355} It is available in equity’s exclusive jurisdiction – that is, it


is available as a remedy for purely equitable wrongs.\textsuperscript{356} In that regard, equitable compensation must be distinguished from equitable damages (also called damages under \textit{Lord Cairns' Act}), which are statutory damages awarded in lieu of the equitable remedies of specific performance or injunction.

Rickett points out that equitable compensation is “an established remedy with two faces.”\textsuperscript{357} Those two faces are “reparative”, where equitable compensation repairs a loss suffered by a plaintiff, and “substitutive” where equity orders a defendant provide a monetary substitute for property lost as a result of an equitable wrong. The mechanics of substitutive equitable compensation were set out by Street J in \textit{Re Dawson}:\textsuperscript{358}

\begin{quote}
"The form of relief is couched in terms appropriate to requiring the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee’s account: the effect of such increases would, at common law, be excluded from the computation of damages; but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the
\end{quote}

\textsuperscript{356} J Glover, \textit{Equity, Restitution and Fraud}, (2004) 433-4 sets out a long list of wrongs to which compensation has been awarded in response.


\textsuperscript{358} \textit{Re Dawson}; \textit{Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd} [1966] 2 NSWR 211, 214-6.
obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected."

The mechanics of reparative equitable compensation are more closely aligned with the philosophy behind the award of damages at common law.

According to Rickett, equity should approach the question of which form of compensation to award by "examining carefully the type and content of any equitable duty allegedly breached, and the nature of that breach. From that examination should flow the answer to how equity will compensate in any case."359 That formulation draws support from the New South Wales Court of Appeal's judgment in Beach Petroleum v Abbot Tout Russell Kennedy, where Spigelman CJ, Sheller & Stein JJA held "at this stage of the development of [equitable compensation] each case requires a precise focus both on the nature of the obligations and the nature of the breach."360 Rickett states that substitutive compensation should flow from a breach of "custodial" fiduciary duties (duties owed by those who receive property in circumstances binding them in equity to hold the property for another's benefit)361 and reparative compensation from non-custodial duties.

Elliot and Mitchell explain that, as assistant liability is a form of secondary liability, an assistant may be found to be accountable for the value of the property as "a

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360 Beach Petroleum NL v Abbot Tout Russell Kennedy (1999) 48 NSWLR 1, 90.
form of secondary substitutive performance.” That accountability, they explain, is the reason for the application of the term “constructive trustee” to dishonest assistants: the assistant is


“not a trustee, even by construction of law, but is subject to the same personal liabilities as a trustee because he or she is jointly and severally liable with one. In other words, the dishonest assistant is accountable not for property in his own custody but for property in the custody of another.”

While the relief may be framed in the language of property, the remedy is not proprietary: it is an award of equitable compensation which reflects the value of the property for which the defendant is secondarily liable. That is, the defendant will be liable to compensate the plaintiff in precisely the same terms as the primary wrongdoer is.

Expressed in terms of Rickett’s analysis, the assistant is likely to be ordered to pay substitutive equitable compensation if the primary wrongdoer was a custodial fiduciary – for example, a trustee. However, if the primary wrongdoer is only ordered to pay reparative compensation, being him or herself a non-custodial fiduciary (for example, one who is in breach of a duty of confidentiality) the assistant will be correspondingly liable for reparation.

Equitable compensation may be awarded against an assistant to compensate a plaintiff for loss of a chance.365

Following the New South Wales Court of Appeal’s decision in *Harris v Digital Pulse Pty Ltd*366 it seems that no award of “exemplary” compensation is available for an equitable wrong in Australia. Contrast the common law, where the award of exemplary damages is commonplace. On the basis of the *obiter dicta* of Spigelman J and the dissenting judgment of Mason P in *Digital Pulse*, Elliott and Mitchell contend that it remains arguable that exemplary compensation may be available in response to an equitable wrong “that finds its true comparator in tort rather than contract.”367 Adventurous counsel might seek to utilise that argument in conjunction with Lord Millett’s statement in *Twinsectra* that knowing assistance is the “equitable counterpart of the economic torts”,368 and the analogy drawn between assistant liability and the tort of knowing interference in contractual relations by the Privy Council in *Royal Brunei*.369

**Account of profits**

An account of profits is a money award by which the defendant is compelled to disgorge profits acquired via the wrong. The remedy is available in response to certain common law and equitable wrongs, in particular a breach of fiduciary duty.370

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365 See e.g. *Colour Control Centre v Ty* (1996) 39 AILR 5-058, BC9505089.
368 *Twinsectra Ltd v Yardley & Ors* [2002] 2 AC 164, 200-1. I acknowledge that his Lordship’s statement is an *obiter dicta* remark in a dissenting judgment in a decision which does not bind any Australian court.
Equitable compensation and an account of profits are alternative and inconsistent remedies.\(^{371}\)

An assistant will be ordered to compensate the principal for any benefit he or she received as a result of participating in the wrongdoing.\(^{372}\) Further, Elliott and Mitchell argue (on the principles of secondary liability and with the support of Canadian authority\(^{373}\)) that the assistant will be liable jointly with the fiduciary for any benefit made by the fiduciary.\(^{374}\) Like all accounts of profits, the account ordered will be subject to reduction by the amount by which the benefit can be said to be the result of the assistant’s or the fiduciary’s respective efforts.\(^{375}\)

**Rescission**

Rescission is the setting aside of a contract *ab initio*.\(^{376}\) Coupled with rescission may be orders with the effect (if not the form) of re-transferring any property the subject of the contract, compelling the delivery up of instruments for cancellation or destruction, or a corollary order for the taking of accounts or making of adjustments.\(^{377}\) Where a court determines that a transaction was entered into in breach of a fiduciary duty, it might award rescission of that contract. Where the contract in question transferred an interest in property the subject of a claim to a constructive trust, rescission of the contract will be a

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\(^{372}\) See e.g.* Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396 and *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 817 per McLelland J; *Colour Control Centre v Ty* (1996) 39 AILR 5-058, BC9505089.

\(^{373}\) Canada Safeway Ltd *v* Thompson [1951] 3 DLR 295.


\(^{376}\) Contrast termination: see *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-7 per Dixon J.

precondition to the award of the trust unless the contract is shown to have been void ab initio.\textsuperscript{378} While the cases indicate that parties themselves can rescind a contract,\textsuperscript{379} practically speaking the order of a Court is necessary where the non-rescinding party resists any acts following from and dependent upon rescission.

**Declaratory relief**

A court can make a declaration of right in respect of common law, equitable and statutory subject matter. Like all equitable remedies, the award of a declaration is discretionary.\textsuperscript{380} However, the subject of the declaration must be a legal controversy: a court will not make a declaration as to a hypothetical question.\textsuperscript{381}

**Injunction**

An injunction is an infinitely flexible remedy by which a court can order a person to perform an act (a "mandatory injunction") or to refrain from performing an act (a "prohibitory injunction"). A further distinction can be drawn between interim (or interlocutory) injunctions, which have effect only until a defined time, and perpetual injunctions. A plaintiff claiming knowing receipt might seek a mandatory injunction to compel delivery of property which it claims the defendant has received in breach of a fiduciary obligation; alternatively, if it has identified property in the hands of a defendant

\textsuperscript{378} See the discussion of Robins \& Ors v Incentive Dynamics Pty Ltd (in liq) \& Anor (2003) 45 ACSR 244 below.
\textsuperscript{380} Foster v Jojodek (1982) 127 CLR 421, 437.
\textsuperscript{381} Ainsworth v Criminal Justice Commission (1992) 175 CLR 565, 582.
to which it lays claim, it might seek a prohibitory injunction restraining the defendant from dealing with the asset in a manner inconsistent with the interest the plaintiff asserts.

4(c) Proprietary remedies

The desirability for proprietary remedies was addressed at length under the discussion of property actions, above. I now turn to briefly examine the circumstances in which an action for recipient or assistant liability might lead to the award of a proprietary remedy.

The traditional formulation of proprietary remedies is that they are “exceptional remedies … available subject to equity’s discretion.” Birks has said “in equity one can bring a pure proprietary claim, while at law one cannot.” “For the provenance of proprietary remedies,” Justice Gummow states, “one looks to equity.” Writing extra-curially, his Honour states that proprietary remedies give “specific relief in respect of particular subject matter in the hands or under the control of the defendant.” Lord Nicholls says that equity’s response to “the endurance of property rights has been to afford a proprietary remedy when the property can still be identified or its proceeds traced.”

Proprietary remedies can be awarded in respect of specific assets. For example, a declaration of constructive trust can be made over an identified asset. Additionally (as

Glover describes) proprietary remedies exist which allow the "proprietary recovery of value". That is, the recovery of a non-specific interest in property which need not be specifically identified – for example, money.\(^{386}\) Both types of proprietary remedy attach to property, not parties, and each thus shares the advantages of the remedies available in respect of claims made following a tracing or following exercise.

In the United Kingdom, it seems a fiduciary relationship remains a prerequisite for the award of a proprietary remedy.\(^{387}\) In *Agip (Africa) Ltd v Jackson*, Millett J said that requirement "has been widely condemned and depends on authority rather than principle."\(^{388}\) Relying on *Chase Manhattan Bank v Israel-British Bank (London)*\(^{389}\) Stone and McKeough demonstrate that the continued life of that prerequisite has encouraged resort to fiction.\(^{390}\)

As was pointed out by the New South Wales Court of Appeal in *Evans v European Bank Ltd*,\(^{391}\) the Australian law has diverged from the English position. As President Mason writes, the New South Wales Court of Appeal has pointed out that "a pre-existent fiduciary relationship is no longer the fictional password that opens the door to a remedial constructive trust" in Australia.\(^{392}\)


\(^{388}\) *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265, 290.


\(^{391}\) *Evans of Robb Evans & Associates v European Bank Ltd* [2004] NSWCA 82, [160].

Glover asserts that the "traditional view" of the right to a proprietary remedy requires a property right in the property in question, which must be proved by tracing or following up until the moment the claim is made.\(^{393}\) That interest is most commonly generated by a trust or fiduciary relationship. However, equitable proprietary interests are also generated "when the jurisdiction of equity is attracted by fraud, mistake, failure of consideration or unconscionability."\(^{394}\) The latter explains the "wife's equity" cases such as \textit{Muschinski v Dodds},\(^{395}\) where no transaction could be said to have given rise to a "traditional" equity, but the Court held that it would have been unconscionable for the spouse with legal title to retain his interest in the property. The reliance on equity to trigger a proprietary remedy means that the award of a proprietary interest is necessarily subject to the equitable defences.\(^{396}\)

Setting out the different frameworks in which a claim of unjust enrichment might give rise to a constructive trust, Justice Gummow has written:

"it will be apparent that a proprietary remedy will not be available generally in cases of unjust enrichment unless: (i) this would be so under existing principles of equity; (ii) those principles might be developed to cover the particular case; or (iii) the equitable principles are abandoned in favour of some free floating principle which applies across the whole field of unjust enrichment."\(^{397}\)

\(^{393}\) Glover, "Equity, Restitution and the Proprietary Recovery of Value", 1991 14(2) \textit{University of New South Wales Law Journal} 247, 266.


\(^{395}\) \textit{Muschinski v Dodds} (1985) 160 CLR 583.


\(^{397}\) W M C Gummow, "Unjust Enrichment, Restitution and Proprietary Remedies", in PD Finn (ed) \textit{Essays on Restitution} (1990), 47, 75.
His Honour also asks: if the latter is the case, “why should restitutionary claimants be favoured over those claiming in tort or contract?”398 So what is the trigger for the imposition of proprietary remedies in a restitutio

tory context? His Honour considers Goff and Jones and Birks (the latter at length) before concluding

“It is not immediately apparent why breach of contract and tortious misconduct in general should be visited with proprietary remedies only where the plaintiff can make out an equity but unjust enrichment regularly should carry come sanction of this special kind. The answer, one may expect, will be that proprietary remedies should remain equitable in nature, developing as equity continues to develop.”399

There are those who would tear down the existing equitable framework and replace it with a modern structure they call “discretionary remedialism.” Simon Evans describes discretionary remedialism as “the view that courts should have a discretion to award the appropriate remedy in the circumstances of each individual case rather than being limited to specific (perhaps historically determined) remedies for each category of causative events.”400 Glover points out that the “dissociation of right and remedy and the growth of remedialism have … developed as statutory phenomena”, citing s 87 of the Trade Practices Act 1974 (C’th) as an example.401

Proprietary remedies include the imposition of a remedial constructive trust, the recognition of an institutional constructive trust, and a range of “lesser” remedies. Each is discussed below.

4(c)(i) Constructive trust

The nature of the constructive trust was briefly explored by the High Court in *Giumelli v Giumelli*.\(^{402}\) In the context of remedies for wrongs, the constructive trust is “a remedial response to [a] claim for equitable intervention.”\(^{403}\) Unlike a resulting trust, the remedial constructive trust is imposed regardless of any actual or presumed intention.\(^{404}\) The Court ‘construes’ a trust from the circumstances by determining whether, in that particular situation, equity imposes obligations of trusteeship upon those with title to the property. If so, it requires the holder of legal title to surrender the title in question, holding the property subject to the trust and with the corresponding liability to account if the trust is breached. It does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations of an express trust. Dal Pont calls that trust the “purely remedial constructive trust”,\(^ {405}\) and says

"because it is not premised upon a breach of pre-existing fiduciary or contractual duty, the curial response (or curial intervention) must stem from a factor known to the courts of equity. It was no surprise, therefore, that the High Court in Baumgartner v Baumgartner\(^ \text{406} \) found solace in this respect in equity’s well-known proclivity against unconscionable conduct. In other words, a finding of

\(^{406}\) *Baumgartner v Baumgartner* (1987) 164 CLR 137.
unconscionable conduct attracts equity's intervention, whereas, absent such a finding, no such intervention is justified."

That remedial trust must be contrasted with the "institutional constructive trust."

The institutional trust "arises automatically without the intervention of the Court where there is a breach of trust" or fiduciary duty. In such circumstances, the Court does not award, but recognises, the existence of the trust which was created by the circumstances. The classic example, which is cited by Dal Pont, is Chan v Zachariah, where the Court declared that a lease obtained in breach of fiduciary duty was held on trust by the fiduciary for his principal.

The dichotomy between institutional and remedial trusts was analysed critically by Deane J in Muschinski v Dodds, who said "in the broad sense the constructive trust is both an institution and a remedy in the law of equity ... indeed for the student of equity, there can be no true dichotomy between the two notions." Thus, concludes Burns, the institutional trust remains remedial. Practically speaking, that must be so - until the Court declares the existence of the trust no practical use can be made of it.

A further category of constructive trust, with which this paper is not concerned, is the trust imposed upon failure of a joint endeavour. In the "joint endeavour trust", the contributions of one party to a joint endeavour are restored following the breakdown of

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410 Muschinski v Dodds (1985) 160 CLR 583, 614.

the joint venture in circumstances where the plaintiff with title to the contributions was not intended to continue to enjoy them.412

Finally, all species of constructive trust should be distinguished from the "resulting trust" which arises "where the intent of a settlor or testator in transferring or devising property otherwise would fail for want of compliance with the formalities for creation of express trusts inter vivos or by will."413 However, In El Ajou v Dollar Land Holdings,414 Millett J stated that the trust which arose upon the successful rescission of a fraudulent transaction which had transferred property was a resulting trust, and not a remedial constructive trust. It is unlikely that the El Ajou view would be accepted as the law in Australia, where the remedial constructive trust is well-established.

4(c)(ii) Non-trust remedies

Justice Gummow states that "[t]he modern fascination with the constructive trust as a remedial device tends to obscure the range of proprietary remedies",415 pointing to the equitable lien or charge as further proprietary remedies which stop short of conferring beneficial ownership.416

413 In Bathurst City Council v PWC Properties Pty Ltd (1998) 195 CLR 566, 583, where the High Court applied the constructive trust label but described such trusts as a "different species" of constructive trust.
Non-trust proprietary remedies include:

1. **An order creating an equitable charge or equitable lien to the extent of the recognised claim.** An equitable charge is not a legal or equitable proprietary right, but a “security interest to satisfy an obligation sounding in money.” It is a right in a creditor to have recourse to a specified asset belonging to the debtor in order to satisfy the debt in the event of default. As Deane J stated in *Hewett v Court*:

   "The word ‘lien’ is used somewhat imprecisely in the phrase ‘equitable lien’ to describe not a negative right of retention of some legal or equitable interest but what is essentially a positive right to obtain, in certain circumstances, an order for the sale of the subject property or for actual payment from the subject fund."

Sykes and Walker state that the difference between an equitable lien and an equitable charge lies in the mode of creation: a charge is created by the act of the parties; a lien by implication of law. Similarly, Glover states "[l]iens function as judicially imposed charges.... [c]laimants do not create liens by mutual dealings or voluntary acts." Any practical effect of the distinction between the two constructs is unclear.

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419 Hewett v Court (1982) 149 CLR 639, 664 per Deane J.


2. **A finding of equitable estoppel resulting in an order for the transfer or recognition of the interest claimed.** Equitable proprietary estoppel bears a close relationship to the constructive trust, and the order giving effect to the finding of estoppel is frequently an order imposing a constructive trust.

3. **An order for subrogation.** An obligation discharged using the plaintiff’s property can lead to the right to the security for that obligation vesting in the plaintiff. Glover lists subrogation as “an equitable remedy ... like rescission in being not of itself proprietary, but leading in many cases to a plaintiff becoming entitled to proprietary interests at law, or equitable proprietary relief.” In *Parq (Battersea)* Lord Hoffman described subrogation as “a remedy to reverse or prevent unjust enrichment which is not based in any agreement or common intention of the party enriched and the party deprived.

4. **Rescission of a contract transferring property:** Where a contract which transferred property is rescinded, the order for rescission is usually coupled with an order with the effect of a re-transferring the subject property – usually a constructive trust.

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424 Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221, 253.
4(c)(iii) Discretionary factors

Traditionally equity does not intervene unless common law remedies are inadequate.425 Further, a court will not impose a constructive trust in every situation where it is proved to be available. As Dal Pont says, "only in some cases will constructive trusteeship with proprietary consequences represent a proportionate response to the cause of action".426 In *Hospital Products v United States Surgical Corporation* Mason J held that constructive trust relief may be awarded if justice requires it in the circumstances of the case.427 However, the "justice" of the case is not determined by the old measure of the length of the Chancellor's foot: in *Muschinski v Dodds* Deane J stated:428

"The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles. Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity."

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425 *Barclays Bank Plc v Quinceacre Ltd* [1992] 4 All ER 363, 375 per Steyn J.
427 *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41, 100.
428 *Muschinski v Dodds* (1985) 160 CLR 583, 619 (citations removed).
Dal Pont and Chalmers explain why courts are keen to resort to non-trust remedies before considering the invocation of a constructive trust:429

"... because proprietary relief is the most extensive form of relief, and may prejudice innocent third parties as well as potentially enrich the claimant, the court may, in its discretion, decline to order proprietary relief if 'there is an appropriate equitable remedy which falls short of the imposition of a trust.'

On the other hand, Lord Nicholls has said430

"[I]n some circumstances, restitution and a proprietary remedy march hand-in-hand. The recipient may still have the property. When this is so, the existence of a proprietary remedy is not in itself a compelling reason for declining to impose concurrent personal liability covering the same ground. There are good practical reasons why a judgment or payment of the value of property may be preferable to an order for the return of the property. Sometimes a money judgment is enforceable more easily and more speedily than, for instance, an order requiring the eviction of members of a family from their own home."

In Bathurst City Council v PWC Properties Gaudron, McHugh, Gummow, Hayne and Callinan JJ stated:431

"Before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant. This appears to have been the cause of the division between Gibbs CJ on the one hand and Mason J and Deane J on the other hand in Muschinski v Dodds. The chief justice saw as an adequate equitable remedy an entitlement of the appellant to a contribution from the respondent to the extent to which she had paid more than one half of the purchase moneys, coupled with an equitable charge for that amount upon the half interest of the respondent in the land."

In addition to that threshold discretion, the Court has the power to mould the remedy chosen to suit the circumstances of the case. In Hospital Products, Mason CJ cited with approval the statement of Cardozo J in Beatty v Guggenheim Exploration Company: "A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."

I now turn to set out some of the factors the courts examine in exercising the discretion. That description will be supported by illustrations drawn from two recent appellate decisions: the High Court's decision in Giumelli v Giumelli and the decision

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of the New South Wales Court of Appeal in *Robins v Incentive Dynamics*[^434]. David Wright has comprehensively analysed the relevant discretionary factors.[^435] The following analysis borrows from that work. Wright groups the relevant factors under six headings:

1. **Obligation-based factors:** While the nature of the obligation breached traditionally determines the remedies available, it is not determinative. Remember Mason CJ's adoption of Cardozo J's statement: "A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."[^436] According to Wright, the court’s policy toward the obligation is important, as is the principle underlying it:[^437]

   "This relationship between the form of the relief and the obligation that has been breached indicates that it is vital to decide why an obligation is being imposed."

2. **Conduct-based factors:** While the court is not bound by the plaintiff's choice of remedy, that choice will obviously impact on the court’s decision. In addition to the plaintiff’s election as to remedy, laches, delay and waiver are all examples conduct of the plaintiff which can affect the availability and choice of a remedy. The equitable maxims “he who seeks equity must do equity” and “he who comes to equity must come with clean

[^434]: *Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor* (2003) 45 ACSR 244.
hands" are apposite. The defendant's conduct is also relevant: in fiduciary cases, for example, the court is more willing to impose a constructive trust upon a fraudulent fiduciary than on an honest one, and a court is less willing to make an allowance for a fraudulent defendant's efforts in awarding an account of profits.

3. **Result-based factors:** These include the effect of various remedies on third parties (for example, the defendant’s other creditors) and any effect the remedy might have on the public interest. As Glover points out, "[c]ourts must be persuaded that the merits of one creditor's claim are such that it should take priority over an insolvent's other creditors." Relevant to that inquiry is what, if any, "insolvency risk" was taken by the plaintiff in dealing with the defendant. Wright groups under this heading the relief which would be afforded by remedies relative to one another – often expressed by the formula "the minimum equity to do justice to the plaintiff."

4. **Claim-based factors:** the "ground" of the claim is of vital importance. Where the claim involves a pre-existing property right, creating a link between the plaintiff's case and the property in dispute, a proprietary remedy is more likely to be granted. Wright argues that such a link, while

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important, should not be solely determinative of the question.\footnote{442} Wright also argues that the commercial context of the claim might impact on the court’s discretion. He states “as a general rule, and in accordance with Sopinka J in \textit{LAC Minerals Ltd v International Corona Resources Ltd},\footnote{443} courts should be wary of utilising the constructive trust in a commercial setting where the parties can protect their rights by contract.”\footnote{444} However, as Wright himself states,\footnote{445} a commercial context may easily contain sub-contexts. Thus, it is difficult to see how the mere categorisation of a transaction as “commercial” or otherwise should itself impact on the exercise of discretion. A more appropriate formulation would be the general nature of the relationship between the parties to the dispute – but that is so vague a “factor” as not even to deserve the nomenclature.

5. **Administration of justice factors:** Notwithstanding the near-total reliance on the particular facts of each case in which a constructive trust is sought, Wright argues that the doctrine of precedent applies to the grant of constructive trusts as it does to every other remedy. That argument is consistent with the oft-cited statement of Deane J in \textit{Muschinski v Dodds}, quoted above.\footnote{446} Other administration of justice factors concern the relative practicability of the available forms of relief will also impact on the exercise of the discretion: for example, any difficulty in valuing the

\footnote{445} D Wright, \textit{The Remedial Constructive Trust} (1998) 177.  
\footnote{446} See text to footnote 428 above.
appropriate amount of damages, compensation or account of profits might favour the order of a constructive trust.447

6. General policy factors: Wright points out the ongoing debate as to whether an effective "hierarchy of remedies" exists, which would have the effect that a claim for equitable remedies would only succeed when common law remedies were inadequate.448 Anything beyond acknowledgement of the existence of that debate is outside the scope of this paper. Wright also points out that "hidden behind such ideas as proportionality is the economic analysis of remedies",449 which provides a policy basis for a considering the economic effect of available remedies relative to one another. Finally, Wright relies on Westdeutsche Landesbank Girozentrale v Islington LBC450 to support an argument that parliament's consideration of an issue might be sufficient to exclude the award of an equitable proprietary interest, even if there is no legislation directly on point.451

Finally, I turn to two recent judgments to illustrate the application of the discretions. In Giumelli v Giumelli452 the High Court held that a constructive trust should not be imposed until the Court had decided whether there is an appropriate equitable remedy which falls short of the imposition of a trust.453 The primary issue the

Court considered in that case was whether the relief (a constructive trust) granted by the Full Court of the Supreme Court of Western Australia was appropriate in the circumstances, and whether that court had given sufficient weight to the relevant factors. The issues the High Court examined were: what was necessary to avoid injustice to others; and what was necessary to avoid relief going beyond what was required for conscientious conduct by the defendants?454 Those factors pointed "inexorably to relief expressed not in terms of acquisition of title to land but in a money sum."455 The Court remitted the matter to a trial judge to ascertain the quantum of the sum, and ordered that the sum so awarded be secured by a charge over the property in question.

Robins v Incentive Dynamics456 further illustrates of the exercise of the discretion. In that case, Mason P held that where the transaction in question was entered in breach of a fiduciary duty, the form of the transaction (for example gift, loan or purchase) does not "stay the hand of equity."457 However, his Honour’s treatment of the remedy in that case demonstrates that the form of the transaction impacts on the exercise of the equitable discretion as to the form and mechanics of the remedy awarded. His Honour held that affirmation, delay, the intervention of innocent third party rights and any inability to give counter-restitution may confine the plaintiff to personal remedies or the narrower remedial constructive charge. The judgment suggests that there were no third parties (such as creditors) who had a legitimate claim to Coldwick’s assets. That being so, the

456 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244.
remedy was available and appropriate. Further, it would be iniquitous to grant only damages.458

"equity would be abrogating its role of vindicating and protecting fiduciary relationships and deterring improper profit-making conduct if it looked just at the capital sums advanced under the 'loans'. If only the loans were repaid, the defaulting officers would be unjustly enriched in consequence of their own wrongdoing. They would reap the fruits of their wrongdoing by taking the equity in the properties acquired by the corporate shell Coldwick."

His Honour said that where the impugned transaction is void, third party rights are not considered in the exercise of the discretion. However, where the contract in question is at best voidable, rescission is an essential precondition for the imposition of a remedial constructive trust.459 While the "loan" pleaded in the company's claim for in personam relief had not been rescinded, his Honour went on to grant a constructive trust anyway, on the basis that460

"In the present case, Incentive Dynamics acted at all times on the basis that it was seeking to repudiate the formal transactions (whatever they truly were) that both effectuated and disguised the fiduciary and statutory breaches."

458 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 259 per Mason P.
460 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 259 per Mason P.
No formal order for rescission was made, but it must be implied from the combination of his Honour's orders and the reasons, particularly the passage extracted immediately above.

In his concurring judgment, Giles JA insisted upon the need for rescission of a valid transaction which transferred the property over which the constructive trust was sought as a precondition to the imposition of that trust. His Honour said "requiring rescission is a way of ensuring that account is taken of the rights of third parties before equity grants a proprietary remedy, and of guarding against recovery under the contract of loan as well as having the proprietary remedy." His Honour did not refer to Mason P's statement about repudiation of the "formal transactions (whatever they truly were)" but analysed the pleadings, finding that the claim in personam and the claim for proprietary relief were clearly alternatives. The former relied upon the characterisation of the transactions as loans, while the latter relied on them as moneys simply having been provided to Coldwick. Thus, "on [Incentive Dynamics'] case for the proprietary claim, there was no question of rescission. It was as if the money had been stolen by Coldwick." Thus, the rescission requirement did not stand in the way of any proprietary relief.

The judgment of Giles JA appears to concur with that of the President. However, if Giles JA's treatment of the pleadings is followed to its logical conclusion, it would lead to a further basis for the resolution of the plaintiff's claim. The plaintiff's alternative claim alleged that the money was given to Coldwick without consideration. While (for

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461 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 260 per Giles JA.
462 Robins & Ors v Incentive Dynamics Pty Ltd (in liq) & Anor (2003) 45 ACSR 244, 260 per Giles JA.
the reasons set out by Mason P) that would be sufficient to give rise to liability under the first limb of *Barnes v Addy*, Giles JA went on to say “on its case for the proprietary claim, there was no question of rescission. It was as if the money had been stolen by Coldwick.” If the Court accepted that allegation, as Giles JA did, an action lay in unjust enrichment. Had his Honour followed his reasons through further, he would have had to address the question of when proprietary relief is justified in claims for autonomous unjust enrichment. It is unlikely that his answer to that question would have been controversial on the facts of *Incentive Dynamics*, as the directors’ actions (and thus Coldwick’s) could easily be said to demonstrate the requisite degree of unconscionability to found equitable intervention.

## 5 Conclusion

The actions for recipient and assistant liability remain an important and dynamic part of the arsenal of commercial equity. Lord Selborne’s statement in *Barnes v Addy* is “a passage as celebrated as any in the law of trusts.”\(^{463}\) The equitable actions which borrow from his formulation remain operative and relevant in the modern world. As equity’s involvement in commerce has increased, so too has the utility of the equitable actions for recipient and assistant liability.

Despite academic agitation for the recipient action to be subsumed under the widening umbrella of unjust enrichment, intermediate appellate authorities in Australia show that it retains an independent existence. With the continued existence of a knowledge requirement, it will be more difficult for a plaintiff to establish a cause of

\(^{463}\) *NIML Limited v MAN Financial Australia Limited* [2004] VSC 449, 45 per Ashley J.
action in equity, but the defences against the equitable action are also more difficult to establish. Further, there might be procedural advantages to commencing an action in equity, and equity remains the touchstone for the imposition of proprietary relief, whether through the mechanisms of equitable tracing or the process whereby a trust is “construed” from the facts (including the behaviour of the defendant). At any rate, if the facts support alternative allegations, the co-existence of the equitable and “restitutionary” actions mean a plaintiff can rely on both actions in the same proceeding.

The precise formulation of the elements of a claim for assistance are yet to be determined. Australia’s appellate courts have been inconsistent in their receipt of the recent groundbreaking English decisions of Royal Brunei and Twinsectra. From the confused array of decisions in the last nine years, only one formulation of the culpability element can satisfy the still-binding authority of Consul Developments and make room for the commercially sensible and locally popular Privy Council decision in Royal Brunei. That formulation provides that the liability turns on dishonesty. According to Royal Brunei, dishonesty is an objective standard. While the standard against which the defendant must be measured is determined according to the yardstick of the “reasonable man”, the information available to that hypothetical paradigm is informed by the degrees of knowledge canvassed by the High Court in Consul (as the vague majority decision in that case has been applied and crystallised by subsequent intermediate appellate decisions). By reading those two cases together, the law finds a comfortable fit which will provide equitable responses to assistant liability cases. The equitable nature of the two actions also informs the application of the actions to statutory duties and explains
why the authorities only stretch so far as to extend liability to those who have received
the proceeds of, or assisted in, a breach of a statutory fiduciary duty.

The remedies available for the two actions also draw heavily on the actions’
equitable roots. Proprietary relief is frequently available where recipient liability is
established, but will depend upon the ability to follow or trace the property into the hands
of the party who holds it at the time of issue. The court will consider all of the standard
discretionary factors when determining which equitable remedy to impose. That is
particularly so when the plaintiff seeks proprietary relief, which has an ability to directly
impact upon the rights of third parties as well as those of the parties to the action. As a
form of civil secondary liability, assistant liability will give rise to a remedy determined
by reference to the liability of the primary wrongdoer. The assistant’s liability may be
increased above that primary liability via an account of the profits made by the assistant
as a result of his or her wrongdoing.

Remedies are another area into which the intrusion of unjust enrichment has not
gone unnoticed. It remains unclear to what extent the courts are likely to accept
arguments that events of unjust enrichment should give rise to proprietary liability absent
any of the equitable indicia which traditionally justify their award.

The volume of modern cases dealing with recipient and assistant liability
demonstrates the relevance of those actions to contemporary commerce, but has not cured
the ambiguity which infects each of the actions. The academic debate as to their proper
formulation shows no signs of abating, and (as Koorootang and Twinsectra show) recipient and assistant liability are two areas where that debate frequently informs the
jurisprudence.
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