ACCESSORY LIABILITY AND CONTRIBUTION, RELEASE AND APPORTIONMENT

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[This article considers how the common law, statutory and equitable rules of contribution apply to the liability of accessories for breaches of trust and fiduciary duty. It examines accessories' rights to contribution and the impact that releases and the proportionate liability legislation may have on those rights. It is argued that rules governing contribution between trustees should not be applied to accessories, and that a release of a trustee or fiduciary should not automatically operate to release an accessory from liability. Statutory reform is also called for to implement the contribution provisions of the Wrongs Act 1958 *(Vic) in all other states and territories, and to amend the proportionate liability legislation to exclude trustees, fiduciaries and accessories from its application.]*

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I INTRODUCTION

A solicitor knowingly assists a trustee to misappropriate money from a trust fund. The beneficiaries of the trust discover the breach of trust and take action to recover the money. While both the trustee and the solicitor have sufficient assets to satisfy the judgment and could both be successfully sued, the beneficiaries choose only to sue the solicitor for the breach.[1] The court finds the solicitor

[1] The beneficiaries may choose not to pursue the trustee because they have released the trustee for valuable consideration or for personal reasons, such as where the trustee is a relative.

liable for assisting in a breach of trust and holds the solicitor liable for all losses flowing from the breach.

This scenario ('Scenario') invites a number of questions. Can the solicitor then recover money from the trustee ('contribution')? If so, to what amount should he or she be entitled? If the beneficiaries decide not to sue the trustee *and* to sign a deed releasing the trustee from liability ('release'), would this affect any rights of contribution the solicitor might otherwise have against the trustee? Finally, might the proportionate liability legislation enacted in all states and territories protect the solicitor from liability for the entire amount? Should it?

While some of these questions have been recently considered by Australian courts,[2] there is a lack of case law and commentary examining the laws of contribution, release and proportionate liability, and their application to third parties, such as the solicitor in the Scenario, who assist or induce breaches of trust or fiduciary obligation.[3] The relevant material is contradictory and is often unsupported by reasoning or authority. As a result, the answers to the above questions are unclear.

The aim of this paper is to provide principled answers to these questions by examining the limited case law on point, reasoning by analogy from the law relating to trustees and other areas of law, and analysing, where appropriate, the relevant legislation. The underlying rationale for third party liability and general principles of equity will also be drawn upon to inform this analysis.

In this paper, the terms 'accessory' and 'accessories' will be used to refer to both knowing assistants and knowing inducers and the term 'fiduciary' will be used to refer to non-trustee fiduciaries.

II ACCESSORY LIABILITY

Third parties — such as the solicitor in the Scenario — who participate in a breach of trust or fiduciary obligation may be held personally liable in equity as a knowing assistant (if they assist in the breach),[4] or as a knowing inducer (if they induce or procure the breach).[5] Both forms of accessory liability reflect equity's preoccupation with protecting beneficiaries, who are 'vulnerable to abuse by the fiduciary' due to the fiduciary's 'special opportunity to exercise … power or discretion to the detriment of that other person.'[6] Not only do the accessory liability rules deter third parties from assisting or inducing breaches of trust and (at least in the case of knowing assistants) fiduciary obligation, they

2 See, eg, *McNally v Harris* [2008] NSWSC 659 (30 June 2008) ('*McNally*'); *Coulton v Coulton* [2008] NSWSC 910 (4 September 2008) ('*Coulton*').

3 The lack of case law addressing these issues may be attributed to the tendency of plaintiffs to only sue third parties when the trustee or fiduciary is insolvent.

4 *Barnes v Addy* (1874) 9 Ch App 244, 251–2 (Lord Selborne LC); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*').

5 See, eg, *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216; *Alleyne v Darcy* (1854) 4 I Ch R 199; *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840 ('*Eaves*'); *Farah* (2007) 230 CLR 89, 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

6 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J).

also provide beneficiaries with another defendant to pursue, thereby increasing the beneficiaries' chances of recovering their losses.[7]

A *The Test for Accessory Liability*

1 *Knowing Assistance*

In order to attract liability as a knowing assistant, a third party must have assisted in a breach of trust or fiduciary obligation with knowledge of a 'dishonest and fraudulent design' on the part of the trustee or fiduciary.[8] In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah*'),[9] the High Court of Australia confirmed that: (1) actual knowledge; (2) a deliberate shutting of eyes to the breach; (3) a calculated abstention from making inquiries which an honest and reasonable person would make; or (4) actual knowledge of the facts, which to a reasonable person would suggest a breach of trust or fiduciary obligation, are each sufficient to establish the level of knowledge required to give rise to liability as a knowing assistant.[10] Mere knowledge of facts which would have put a reasonable person on inquiry will not attract liability.[11]

To be liable as a knowing assistant, a third party must have participated in a 'dishonest and fraudulent design'[12] — a requirement that now appears to refer to conduct which is 'morally reprehensible.'[13] While 'dishonesty' here is not used in the same way as in 'a criminal law context or actual fraud in the common law sense',[14] it must be 'more than a mere breach of duty'.[15]

While the third party's actions must have had more than a minimal causative effect on the breach,[16] English case law suggests that it is not necessary to determine the exact causal significance of the assistance on the breach or the ensuing loss,[17] and the type of assistance which will attract liability may vary widely, from forging documents to facilitate the breach, to 'covering up' the

7 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 386–7 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May) ('*Royal Brunei*').

8 *Barnes v Addy* (1874) 9 Ch App 244, 251–2 (Lord Selborne LC).

9 (2007) 230 CLR 89.

10 Ibid 163–4 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). These categories of knowledge reflect categories one to four on the five-category '*Baden* scale', which was developed in the United Kingdom case of *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, 234 (Peter Gibson J).

11 *Farah* (2007) 230 CLR 89, 163–4 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *NCR Australia v Credit Connection Pty Ltd (in liq)* [2004] NSWSC 1 (14 January 2004) [168]–[169] (Austin J).

12 *Farah* (2007) 230 CLR 89, 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

13 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 397–8 (Gibbs J) ('*Consul*'), citing *Selangor United Rubber Estates Ltd v Craddock [No 3]* [1968] 2 All ER 1073.

14 *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 225 FLR 1, 531 (Owen J) ('*Bell*').

15 Ibid 551.

16 *Re-Engine Pty Ltd v Fergusson* (2007) 209 FLR 1, 24 (Dodds-Streeton J) ('*Re-Engine*'). See also *Brown v Bennett* [1999] 1 BCLC 649, 659, where Morritt LJ held there was no liability for an accessory where their assistance had no causative effect.

17 *Grupo Torras SA v Al-Sabah [No 5]* [1999] CLC 1469, 1667 (Mance J).

breach after it has occurred.[18] The third party need not have received trust property or otherwise profited from the transaction.[19]

2 *Knowing Inducement*

The principle of knowing inducement has not been the subject of recent examination by the courts. Accordingly, uncertainty surrounds the elements which must be satisfied to give rise to liability. The cases cited in *Farah* in support of a separate liability for knowing inducement are predominately mid-19th century cases involving trustees.[20] There have only been a handful of Australian cases which have acknowledged that a separate principle does, or may, exist.[21] These cases suggest that the main differences between the two forms of accessory liability are:

(a) the level of participation in the breach required to attract liability — to attract liability as a knowing inducer, there must have been inducement or procurement, rather than mere assistance;[22] and

(b) the state of mind of the fiduciary or trustee. Unlike knowing assistance, third parties may still be liable for knowing inducement in the absence of a 'dishonest and fraudulent design' on the part of the trustee or fiduciary. Accordingly, the trustee or fiduciary may be innocent of any fraud or dishonesty.[23]

18 See *Re-Engine* (2007) 209 FLR 1, 24–5 (Dodds-Streeton J), citing *Courtenay Polymers Pty Ltd v Deang* [2005] VSC 318 (11 August 2005); see also *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 194 (Lord Millett).

19 This paper is not concerned with 'recipient liability', which attaches to third parties who receive property in breach of trust or fiduciary obligation.

20 *Farah* (2007) 230 CLR 89, 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216; *Alleyne v Darcy* (1854) 4 I Ch R 199; *Eaves* (1861) 30 Beav 136; 54 ER 840. See also Charles Harpum, 'The Stranger as Constructive Trustee (Part I)' (1986) 102 *Law Quarterly Review* 114, 141–4, which discusses the cases cited in *Farah*.

21 See, eg, *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, 238–9 (Gummow J). In this case, Gummow J stated that '[t]he respondents would be accountable … if they had knowingly induced or immediately procured breaches of duty … in the sense revealed by such authorities as *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840, and *Midgley v Midgley* [1893] 3 Ch 282' but found in that case that this cause of action had not been made out. See also *Tableau Holdings Pty Ltd v Joyce* [1999] WASCA 49 (14 June 1999) [30]–[32] (Steytler J), quoting R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 6th ed, 1997) 332–3; *Kation Pty Ltd v Lamru Pty Ltd* (2009) 257 ALR 336, 365–6 [114]–[118] (Basten JA); *Manildra Laboratories v Campbell* [2009] NSWSC 987 (23 September 2009) [171]–[172] (McDougall J). The author is aware of only one Australian case, *Syrimi v Hinds* (1996) 6 NTLR 1, 11 (Angel J) ('*Syrimi*'), in which the principle has been applied. In this case, the Court found that it was not necessary to decide whether the principle of knowing inducement applied in *Eaves* and *Midgley v Midgley* should be 'treated separately from *Barnes v Addy* … or … as part of a yet to be finally formulated larger whole'.

22 In *Farah* (2007) 230 CLR 89, 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), the High Court stated that this liability arises where the third party has 'knowingly induced or immediately procured breaches of duty by a trustee'.

23 See, eg, *Eaves* (1861) 30 Beav 136; 54 ER 840. See also ibid 159 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

However, it appears that the level of knowledge required to attract liability as a knowing inducer is the same as for a knowing assistant.[24]

In addition, *Syrimi v Hinds* ('*Syrimi*')[25] suggests that liability also extends to third parties procuring or inducing a *fiduciary's* breach of fiduciary obligation — in other words, it is not limited to procuring or inducing breaches of trust.[26] While it will be assumed that this is correct for the purposes of this paper, *Syrimi* needs to be treated with caution. In that case, no principled reasons were given in support of the proposition that the principle of knowing inducement would extend to inducing breaches of fiduciary duty (in addition to breaches of trust). In light of its concerns in *Farah* regarding the potential injustice which may arise as a result of extending the knowing assistant principle to breaches of fiduciary duty,[27] the High Court may be reluctant to apply the principle of knowing inducement to third parties who induce or procure breaches by *fiduciaries* — particularly as it appears that the 19th century knowing inducement cases involved breaches of trust.[28]

B *Remedies Available against Accessories*

1 *Losses Flowing from Breach*

Knowing assistants are jointly and severally liable with defaulting trustees and fiduciaries to pay equitable compensation for any loss suffered by the beneficiaries as a result of the breach.[29] For the purposes of this paper, it has been assumed that knowing inducers are similarly jointly and severally liable to pay equitable compensation for any losses that arise.[30] Equitable compensation is calculated by

[24] *Syrimi* (1996) 6 NTLR 1, 11 (Angel J). However, in addition to the reasons discussed below, this case should be treated with caution. In this case, the Court was forced to rely on knowing inducement rather than knowing assistance to hold the third parties liable as a result of the plaintiffs' failure to plead fraud: at 4–5. While the Court used the language of 'procuring' and 'inducing', the fiduciaries (rather than the third parties) appeared to be the key instigators of the breach. Accordingly, *Syrimi* may be better characterised as a case of knowing assistance rather than one of knowing inducement. Harpum states that the authorities on knowing inducement suggest that the third party must have 'knowledge of the relevant terms of the trust' and that this knowledge 'must be subjective or something very close to it': Harpum, above n 20, 141.

[25] (1996) 6 NTLR 1.

[26] Ibid 13 (Angel J).

[27] See (2007) 230 CLR 89, 164 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[28] See, eg, *Eaves* (1861) 30 Beav 136; 54 ER 840 (in which trustees paid over the trust fund to the wrong persons on the basis of a forged marriage certificate); *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216 (in which a trustee invested trust money in an unauthorised investment); *Midgley v Midgley* [1893] 3 Ch 282 (in which an executor, in breach of trust, paid £135 of the testator's estate to a third party who was not entitled to it).

[29] See, eg, *New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd* [2004] NSWSC 781 (26 August 2004) [34], where Young CJ in Eq noted with apparent approval that 'Ford and Lee point out … that the accessory is jointly and severally liable with the principal malefactor to pay the amount of equitable compensation required to restore the trust fund'. See also *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (20 May 2005) [1600] (Lewison J) ('*Ultraframe*'). However, as equitable remedies are discretionary, it may be open for the courts to hold otherwise.

[30] In *Syrimi* (1996) 6 NTLR 1, 13 (Angel J), the knowing inducers were held liable to pay equitable compensation. In *Eaves* (1861) 30 Beav 136; 54 ER 840, a third party induced a breach of trust by forging a marriage certificate in order to ensure his illegitimate children received trust funds.

reference to the amount which is necessary to restore the beneficiaries to the position in which they would have been if the breach had not occurred.[31] It is more favourable to plaintiffs than common law compensation, in that issues of foreseeability, causation and remoteness are generally not relevant.[32]

2 *Account of Profits and Exemplary Damages*

Knowing assistants — and, it is assumed, knowing inducers[33] — are liable to account for any profits they receive as a result of their assistance.[34] In some circumstances, an amount may be subtracted to allow for their skill, expertise and/or financial contributions.[35] While there is some support in Australian case law for the proposition that knowing assistants are jointly and severally liable to account for any profits made by a fiduciary or trustee,[36] Gzell J of the New South Wales Supreme Court recently endorsed the approach taken by the English courts,[37] stating (without deciding the point) that, in his view, accessories should only be required to account for profits made by a fiduciary to the extent that the accessory shares in the fiduciary's profit.[38] In Australia, exemplary damages have never been ordered against fiduciaries, trustees or knowing assistants.[39]

In summary, in light of the onerous remedies imposed upon accessories, and the range of levels of assistance and moral culpability which may attract accessory liability, there is a clear need to carefully consider accessories' rights to contribution and the impact of releases and the proportionate liability legislation on those rights.

For example, the solicitor in the Scenario may have had the minimum level of knowledge required to satisfy the knowledge test and provided 'assistance' of

Romilly MR ordered that the children repay the money they had received, the knowing inducer pay any amounts not recovered from the children and then any outstanding amounts paid by the trustees, who had been innocent of the knowing inducer's design: at 30 Beav 136, 141–2; 54 ER 840, 843. This case has led Harpum, above n 20, 143–4 n 94 to conclude that a knowing inducer 'bears the primary responsibility for any loss that ensues', except if the trustees were 'parties to a fraudulently induced breach of trust', in which case the trustees may be 'equally accountable and not merely answerable for what the inducer could not pay'. Although not clear, this suggests that while knowing inducers will be jointly and severally liable with the relevant trustees or fiduciaries, the courts may attempt to apportion the loss to reflect the defendant's responsibility and culpability for the loss.

31 *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 272–3 (Spigelman CJ).

32 See, eg, *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, 215–16 (Street J).

33 Given that knowing inducers will often be more morally blameworthy than knowing assistants, there is no reason why an account of profits would not be ordered against these third parties, if it would otherwise be ordered against knowing assistants.

34 *Consul* (1975) 132 CLR 373, 397 (Gibbs J); *Colour Control Centre Pty Ltd v Ty* (1996) 39 AILR ¶5-058.

35 See *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 672 (Toulson J) ('*Fyffes*'); *Colour Control Centre Pty Ltd v Ty* (1996) 39 AILR ¶5-058.

36 *United States Surgical Corp v Hospital Products International Pty Ltd* (1982) 2 NSWLR 766, 817 (McLelland J) (not addressed by the High Court on appeal).

37 See, eg, *Ultraframe* [2005] EWHC 1638 (Ch) (20 May 2005) [1600] (Lewison J).

38 *Glandon Pty Ltd v Tilmunda Pastoral Co Pty Ltd* [2008] ASAL ¶55-186, 59 873–4 [108]–[110].

39 See *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 422 (Heydon JA). See also *McNally* [2008] NSWSC 659 (30 June 2008) [115] (White J).

negligible causal significance. The trustee may have been both causally and morally more responsible than the solicitor for the breach, and may have possibly even benefited from it. In these circumstances, would it be appropriate to find the solicitor liable for the entire loss, when the trustee was also capable of satisfying the onerous judgment? Could the solicitor rely on the principles of contribution or the proportionate liability legislation to avoid that outcome?

III CONTRIBUTION

Accessories are jointly and severally liable with defaulting trustees or fiduciaries for losses arising from breaches of trust or fiduciary obligation.[40] As a result, judgment may be enforced against one or more of them.[41] However, if judgment is enforced against only one defendant, that wrongdoer (such as the solicitor in the Scenario) may not be left without recourse. Parties who have satisfied more than their share of a judgment may generally seek contribution or indemnity from the other wrongdoers. While in Victoria, contribution claims are governed by statute,[42] equitable principles still apply to contribution claims involving breaches of trust or fiduciary obligation in all other Australian jurisdictions, and it is to these equitable principles that this paper now turns.

A *Contribution in Equity*

1 *General Right to Contribution*

In equity, a general right to contribution arises where a wrongdoer pays more than his or her share of a judgment in satisfaction of a common obligation.[43] Where liability is joint and several, once the judgment has been satisfied by one wrongdoer, the liabilities of all the wrongdoers are discharged. Therefore, the right to contribution arises from principles of natural justice — it is designed to counter the injustice that would occur if a person liable for the same damage did not bear some of the burden.[44]

To supplement these general principles of contribution, equity has developed specific rules to apply as between trustees liable for breaches of trust. It has been suggested that these principles also govern contribution claims between knowing assistants and trustees or fiduciaries.[45] The remainder of this section will explore:

(a) the effect of applying the trustee contribution rules to accessories;

(b) whether the trustee contribution rules, in particular the joint fraud rule, should be applied to accessories; and

40 *Ultraframe* [2005] EWHC 1638 (Ch) (20 May 2005) [1600] (Lewison J).
41 *Goodwin v Duggan* (1996) 41 NSWLR 158, 166 (Handley and Beazley JJA) ('*Goodwin*').
42 See *Wrongs Act 1958* (Vic) s 24AD(4).
43 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, 350–1 (Kitto J) ('*Albion*').
44 Ibid; *Friend v Brooker* (2009) 239 CLR 129, 148 (French CJ, Gummow, Hayne and Bell JJ).
45 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2117].

(c) the general equitable contribution principles which might apply if the trustee contribution rules do not.

2 *Application of Trustee Contribution Rules to Accessories*

(a) Trustee Contribution Rules

The general principle governing contribution between trustees is that 'trustees liable to make good a breach of trust should bear the burden equally' ('equal contribution rule').[46] Equity will only depart from the equal contribution rule in exceptional circumstances.[47] In these exceptional circumstances, the courts have developed rules which provide one wrongdoer with a right to be indemnified by the other wrongdoers ('trustee indemnity rules'). Under these rules:

(a) co-trustees who reasonably rely on the advice of a solicitor-trustee are entitled to an indemnity from the solicitor ('solicitor-trustee rule');[48]

(b) innocent co-trustees have a right to be indemnified by defaulting co-trustees who receive trust funds for their own use ('personal benefit rule');[49]

(c) innocent co-trustees are entitled to be indemnified by their fraudulent co-trustees ('single fraudulent wrongdoer rule');[50] and

(d) trustees who are also beneficiaries and who benefited from, or consented to, the breach must indemnify co-trustees out of their beneficial interest ('trustee-beneficiary rule').[51]

It also appears that, under the laws of contribution that apply to trustees, fraudulent trustees may not obtain contribution from other fraudulent trustees ('joint fraud rule').[52]

The equal contribution rule, the trustee indemnity rules and the joint fraud rule will be collectively referred to as the 'trustee contribution rules'.

(b) Application of Trustee Indemnity Rules to Accessories

The solicitor-trustee, personal benefit and single fraudulent wrongdoer rules ((a)–(c) above) indemnify only those trustees who have acted innocently or reasonably. As previously discussed, the minimum level of knowledge required

46 *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, 54 (Richardson J) ('*Savin*'). See also *Lingard v Bromely* (1812) 1 Ves & B 115, 117–18; 35 ER 45, 45 (Sir William Grant MR) ('*Lingard*').

47 *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1, 13 (Beaumont, Hill and Sundberg JJ) ('*Bialkower*').

48 See, eg, *Bahin v Hughes* (1886) 31 Ch D 390, 395 (Cotton LJ).

49 Ibid 395–6; *Goodwin* (1996) 41 NSWLR 158, 166 (Handley and Beazley JJA).

50 *Baynard v Woolley* (1855) 20 Beav 583; 52 ER 729; Heydon and Leeming, above n 45, 582.

51 *Chillingworth v Chambers* [1896] I Ch 685, 707 (Kay LJ) ('*Chillingworth*').

52 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) 417; Heydon and Leeming, above n 45, 582; Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* (Little, Brown and Co, 4th ed, 1988) vol IIIA, 405, cited in *McNally* [2008] NSWSC 659 (30 June 2008) [151] (White J); *Belan v Casey* (2003) 57 NSWLR 670, 701 (Campbell J). See also obiter remarks by Callinan J that 'unclean hands will … bar relief by a trustee against co-trustees' in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 337–8 ('*Burke*'), and a similar discussion by Gaudron and Hayne JJ: at 293.

to attract liability as an accessory is actual knowledge of the facts which, to a *reasonable* person, would suggest a breach of trust or fiduciary obligation. It is unlikely that accessories would be considered to have acted *reasonably* by assisting in a breach with this level of knowledge.[53] In addition, given the level of knowledge required, accessories could not be described as acting *innocently*.

Accordingly, even if the trustee indemnity rules do apply to accessories, it seems unlikely that these indemnities will benefit either knowing assistants or knowing inducers. Further, given that liability as a knowing assistant only arises where the relevant trustee or fiduciary has a dishonest or fraudulent design, the rules are unlikely to assist trustees or fiduciaries to obtain indemnities from knowing assistants for the same reason. However, in the case of knowing inducement, the relevant trustee or fiduciary may have acted innocently, and hence may benefit from the trustee indemnity rules.

As a result, it appears that extending the trustee indemnity rules to accessories and fiduciaries would allow:

(a) trustees or fiduciaries to be indemnified by knowing inducers who are solicitors, where the breach arose as a result of the trustee or fiduciary acting reasonably on the solicitor's advice;

(b) innocent trustees and fiduciaries to be indemnified by knowing inducers to the extent of any benefit the inducer receives from the breach;

(c) non-fraudulent trustees and fiduciaries to be indemnified by fraudulent knowing inducers. As will be discussed below, it seems likely that knowing inducers will always be considered 'fraudulent' (it is assumed that 'fraudulent' in this context would refer to equitable, rather than common law, fraud); and

(d) trustees, fiduciaries, and accessories to be indemnified by trustees, fiduciaries or accessories who are beneficiaries and who benefited from, or consented to, the breach, out of their beneficial interest.

Accordingly, in most cases, the trustee indemnity rules should apply to prevent accessories from obtaining contribution from defaulting trustees, fiduciaries and other accessories.

3 *Should the Trustee Contribution Rules Apply?*

There are few cases exploring whether the trustee contribution rules should apply in relation to knowing assistants, and no cases addressing the ability of knowing inducers to obtain contribution.[54] Moreover, there has been no principled academic or judicial discussion of the point. In an attempt to redress this

[53] For example, if an accessory relied on the advice of a solicitor-trustee when assisting a breach of trust with actual knowledge of the facts which would suggest a breach to a reasonable person, then it is suggested that any reliance on the advice of that solicitor-trustee is unlikely to be 'reasonable' for the purposes of applying the solicitor-trustee rule in (a) above.

[54] See, eg, *MacDonald v Hauer* (1977) 72 DLR (3d) 110; *Savin* [1985] 2 NZLR 41.

deficiency, the case law and policy rationales which could support the application of the trustee contribution rules to accessories will be discussed.[55]

(a) Lack of Authority

The two cases commonly cited for the proposition that the trustee contribution rules apply to knowing assistants are not strong authorities for this principle. In *MacDonald v Hauer*, the Saskatchewan Court of Appeal applied some of the trustee contribution rules, such as the trustee-beneficiary rule and the equal contribution rule, to a knowing assistant.[56] In *Westpac Banking Corporation v Savin*, the New Zealand Court of Appeal applied the equal contribution rule to a knowing assistant, without providing any reasoning or authority for doing so.[57] In *Bank of New South Wales v Vale Corporation (Management) Ltd (in liq)*,[58] and in various New Zealand cases arising out of the Equiticorp Industries litigation,[59] conflicting views were proffered, but the issue was left undecided as the cases were decided on other grounds.[60] However, these cases are of limited persuasive value in Australia.

In light of the lack of case law in this area, it is not surprising that a New Zealand court has described the law relating to contribution claims involving knowing assistants as 'a complex grey area of the law which has yet to be fully developed'.[61]

(b) Flawed Reasoning

Doubtful reasoning underlies cases which support the application of the trustee contribution rules to knowing assistants. In *MacDonald v Hauer*, the Court referred to the knowing assistant as being a 'co-trustee'.[62] In a High Court of New Zealand case, Wylie J believed that the argument for treating the two knowing assistants 'as co-trustees is sound',[63] on the basis that the trustee contribution rules 'must apply as much to constructive trustees as to express trustees'.[64] The plaintiff in *Bank of New South Wales v Vale Corporation (Management) Ltd (in liq)*, with whom the court agreed at first instance, argued along similar lines.[65] These remarks suggest that the courts have been confused by the 'ambiguous and misleading phrase' that knowing assistants are liable to

55 While there is also a real question as to whether the trustee contribution rules should be applied to fiduciaries, that issue is beyond the scope of this paper.

56 (1977) 72 DLR (3d) 110, 134–5 (Bayda JA).

57 [1985] 2 NZLR 41, 54 (Richardson J).

58 (Unreported, New South Wales Court of Appeal, Street CJ, Glass and Samuels JJA, 21 October 1981) [13], [23] (Street CJ).

59 See, eg, *Equiticorp Industries Group Ltd v Hawkins [No 4]* (1992) 5 PRNZ 484; *Equiticorp Industries Group Ltd v Hawkins* [1994] BCL 198.

60 The persuasiveness of *McNally* — the only Australian decision in which a trustee contribution rule (the joint fraud rule) has been applied to an accessory — is discussed separately below.

61 *Equiticorp Industries Group Ltd v Hawkins* [1994] BCL 198 [10] (Smellie J).

62 (1977) 72 DLR (3d) 110, 132–5 (Bayda JA).

63 *Equiticorp Industries Group Ltd v Hawkins [No 4]* (1992) 5 PRNZ 484, 491.

64 Ibid.

65 (Unreported, New South Wales Court of Appeal, Street CJ, Glass and Samuels JJA, 21 October 1981) [13]–[14] (Street CJ).

account as 'constructive trustees';[66] they have failed to recognise that accessories are *not* constructive trustees and, unlike trustees and fiduciaries, are not subject to fiduciary obligations.[67] The phrase 'liable to account as a constructive trustee' merely denotes the accessory's duty to account as constructive trustees *to the beneficiaries*[68] — it does not mean that accessories should be treated as 'constructive trustees' in respect of their rights against *other wrongdoers*.

(c) Rationales: Not Applicable to Accessories

As discussed above, under the trustee contribution rules there is 'no intermediate position between these two extremes' of equal contribution or full indemnity.[69] The extension of these rules to accessories may lead to artificial and unjust outcomes, as it would be rare for co-trustees, let alone trustees or fiduciaries and accessories, to be equally responsible for the breach.

The trustee contribution rules arose out of the unique relationship between *trustees* and, as a result, should not be applied unquestioningly to accessories. For example, the equal contribution rule is based on the view that active trustees should have no greater liability than passive co-trustees.[70] This strict approach is designed to ensure that trustees do not neglect the duties they have undertaken.[71] Unlike fiduciaries and third parties, express trustees have the legal title to the trust property vested in them,[72] and their principal obligation is to maintain the trust property in accordance with the terms of the trust.[73] Accordingly, trustees have a positive obligation to take steps to protect the trust property from third parties and from other trustees.[74] In contrast, third parties have no obligation to take active steps to protect trust property. Instead, third parties have only the proscriptive obligation not to assist, induce or benefit from a breach of trust or fiduciary duty. Therefore, it is arguably not appropriate to extend the rules which govern liabilities between co-trustees to accessories who do not have the same obligations.

The trustee indemnity rules were developed specifically to alleviate injustices arising between *trustees*, and are primarily concerned with protecting trustees who lack moral culpability. They are *not* designed to accommodate particular injustices which might arise upon the application of the equal contribution rule to *accessories*. For example, it would be unjust to hold knowing assistants (who

66 *Barnes v Addy* (1874) 9 Ch App 244, 251–2 (Lord Selborne LC); *Fyffes* [2000] 2 Lloyd's Rep 643, 671 (Toulson J). See also *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, 409 (Millet LJ) ('*Paragon*').

67 *Paragon* [1999] 1 All ER 400, 409 (Millet LJ); *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [141] (Lord Millet) ('*Dubai*').

68 *Selangor United Rubber v Cradock [No 3]* [1968] 2 All ER 1073, 1097–8 (Ungoed-Thomas J).

69 *Bialkower* (1998) 83 FCR 1, 13 (Beaumont, Hill and Sundberg JJ).

70 *Booth v Booth* (1838) 1 Beav 125, 129–30; 48 ER 886, 888 (Lord Langdale).

71 Ibid 888.

72 Justice Gummow, 'Compensation for Breach of Fiduciary Duty' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 57, 64.

73 Ibid 73.

74 *Head v Gould* [1898] 2 Ch 250, 268–9 (Kekewich J). See also *Goodwin* (1996) 41 NSWLR 158, 160 (Handley and Beazley JJA).

have assumed no responsibility to protect the trust funds) equally liable for breaches in which they played only a minor role. Furthermore, as will be discussed below, if the joint fraud rule is applied to third parties, it may have the untenable effect of prohibiting accessories from obtaining *any* contribution.

(d) Joint Fraud Rule

This paper will now examine one of the trustee contribution rules — the joint fraud rule — in further detail. While no Australian cases have applied the joint fraud rule to trustees, in the recent case of *McNally v Harris* ('*McNally*'), White J stated that three defendants who were liable as knowing assistants or knowing recipients (under the first limb of *Barnes v Addy*) were *not* entitled to contribution from another wrongdoer (who would have been liable as both a knowing assistant and knowing recipient) based on the general proposition that trustees who have acted dishonestly should not be entitled to contribution.[75] White J did not provide any principled reasons for applying the joint fraud rule to knowing assistants, simply saying '[t]he same principle must be applied to persons liable as accessaries [sic].'[76] This is the first time that the joint fraud rule has been applied to knowing assistants in Australia, and its application warrants careful examination.

(i) To What Type of 'Fraud' Does the Joint Fraud Rule Apply?

The type of 'fraud' required to attract the joint fraud rule is unclear. It cannot refer to the broad concept of constructive equitable fraud, which arises upon a breach of obligation recognised in equity, as this is likely to encompass all breaches of trust and fiduciary duty,[77] and would conflict with the well-accepted principle that trustees may recover contribution from other trustees for breach of trust. *Lewin on Trusts* and *Underhill and Hayton* both consider that it refers to actual fraud,[78] which may mean either:

(a) actual fraud at common law (the tort of deceit); or

(b) actual equitable fraud.

As the joint fraud rule is an equitable rule, it seems likely that the 'fraud' to which it refers is actual equitable fraud. This appears to be the interpretation adopted by White J in *McNally*.[79] Actual equitable fraud connotes 'conscious dishonesty' or 'reckless indifference', but generally does not require proof of an

75 [2008] NSWSC 659 (30 June 2008) [150]–[154].

76 Ibid [152].

77 See L A Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman Press, 1957) 171–2; *Nocton v Lord Ashburton* [1914] AC 932, 954 (Viscount Haldane LC). For a more recent discussion of equitable fraud and how it differs from common law fraud, see *Bell* (2008) 225 FLR 1, 556–8 where Owen J notes that '[t]he doctrine of equitable fraud is broad and, like many equitable principles, cannot easily be defined': at 556.

78 John Mowbray et al, *Lewin on Trusts* (Sweet & Maxwell, 17th ed, 2000) 749; David J Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (Butterworths, 15th ed, 1995) 903–4.

79 See [2008] NSWSC 659 (30 June 2008) [155]. White J held that the joint fraud rule applied because the defendants had assisted in a 'fraudulent' breach of trust. This appears to be based on his finding that the breach of trust 'was dishonest and fraudulent when considered by reference to equitable principles': at [95]. There was no suggestion that the elements of actual fraud at common law were present.

actual intention to deceive.[80] 'Reckless indifference' is likely to encompass the minimum level of knowledge required to attract accessory liability (ie, actual knowledge of the facts which, to a reasonable person, would suggest a breach of trust or fiduciary obligation). Accordingly, accessories are always likely to be considered actually fraudulent in equity. This conclusion is supported by judicial and academic acknowledgement of the association between fraud and accessory liability.[81]

Therefore, the rule, if it applied to accessories, might prevent them from obtaining contribution in *any* circumstance. This would be a surprising result and it has clearly not been contemplated by those judges and commentators who have suggested that knowing assistants are able to access contribution.[82] Accordingly, the extent to which the joint fraud rule has been applied to trustees, and whether the application of the rule to third parties can be justified, will be considered below.

(ii) Lack of Case Law Endorsing the Rule

There is a lack of case law endorsing the joint fraud rule. In *McNally*, White J referred to the texts *Jacobs Law of Trusts*[83] and *Scott on Trusts*[84] in support of his decision to refuse contribution between knowing assistants.[85] While both texts state that trustees involved in a fraudulent breach of trust are prevented from recovering contribution from co-trustees, neither refers to any Australian case in support of this position.[86] The only Australian case cited by White J is *Belan v Casey*, in which Campbell J, in obiter, referred to *Lingard v Bromley* ('*Lingard*'),[87] *Attorney-General (UK) v Wilson* ('*Wilson*'),[88] and a 19th century text,[89] in support of the application of the joint fraud rule to joint *tortfeasors*.[90]

Other cases cited as endorsing the joint fraud rule are of doubtful authority. The rule derives from general comments made in *Charitable Corporation v Sutton*[91] and *Wilson*,[92] (both cited in Goff and Jones in support of the joint fraud

80 *Armitage v Nurse* [1998] Ch 241, 250 (Millet LJ); *Green v Wilden Pty Ltd* [2005] WASC 83 (10 May 2005) [479]–[480] (Hasluck J); *Bell* (2008) 225 FLR 1, 558 (Owen J).

81 See, eg, *Paragon* [1999] 1 All ER 400, 409 (Millet LJ); *Dubai* [2003] 2 AC 366, 404 (Lord Millet); *Yeshiva Properties No 1 Pty Ltd v Marshall* (2005) 219 ALR 112, 116 (Bryson JA) ('*Yeshiva*'); Alastair Hudson, *Equity & Trusts* (Cavendish Publishing, 4th ed, 2005) 740.

82 See Charles Mitchell, 'Apportioning Liability for Trust Losses' in Peter Birks and Francis Rose (eds), *Restitution and Equity* (Mansfield Press, 2000) vol 1, 211, 220; *MacDonald v Hauer* (1977) 72 DLR (3d) 110, 134–5 (Bayda JA); *Savin* [1985] 2 NZLR 41, 54 (Richardson J).

83 Heydon and Leeming, above n 45, 582.

84 Scott and Fratcher, above n 52.

85 [2008] NSWSC 659 (30 June 2008) [150]–[151].

86 Scott and Fratcher, above n 52, 405 cite a Louisiana case (*Girod's Legatees v Pargoud*, 11 La Ann 329 (1856)) and a Canadian case (*MacDonald v Eastern Trust Co* (1957) 12 DLR (2d) 92) in support of this principle; Heydon and Leeming, above n 45, 582.

87 (1812) 1 Ves & B 114; 35 ER 45.

88 (1840) Cr & Ph 1; 41 ER 389.

89 George Spence, *The Equitable Jurisdiction of the Court of Chancery* (Stevens and Norton, 1846) vol 1.

90 *Belan v Casey* (2003) 57 NSWLR 670, 701.

91 (1742) 2 Atk 400, 406; 26 ER 642, 646 (Harwicke LC).

rule)[93] which, as *Lewin's Practical Treatise on the Law of Trusts* notes, 'may have referred simply to the position in an action for damages at [common] law' rather than to breaches of trust.[94] In *Wilson*, Cottenham LC stated that 'where the liability arises from the wrongful act of the parties … there is no contribution between them'.[95] However, the Rolls Court in *Baynard v Woolley* refused to apply this broad statement to co-trustees, noting that there had been a number of cases in which trustees had successfully called on their co-trustees to restore trust funds despite being in breach of duty themselves.[96] *Lingard*, which deals only with contribution among tortfeasors, has also been mistakenly cited in support of the joint fraud rule.[97]

(iii) Grounds for the Rule

Two grounds may justify the application of the joint fraud rule to trustees and, by analogy, to accessories and fiduciaries:

(i) the equitable principle of 'clean hands'; or

(ii) the rule preventing contribution between joint tortfeasors.

A Clean Hands Principle

The joint fraud rule may have arisen from the equitable maxim that in equity 'a plaintiff must come with clean hands'.[98] In *McNally*, White J quoted with approval Scott's *Law of Trusts*,[99] which justifies the joint fraud rule on this basis.[100]

However, there is authority which suggests that the clean hands maxim only applies if a judgment in the plaintiff's favour would allow that plaintiff to take advantage of their own wrong.[101] Enforcing rights of contribution between fraudulent parties does not enable parties to take advantage of their wrongs and does not require the court to condone or encourage an unlawful purpose or enforce an illegal transaction. In fact, to disallow contribution may allow 'windfall gains' to those wrongdoers from whom contribution is sought,[102] by unjustly enriching those wrongdoers at the other's expense. It might also encourage collusion or fraudulent behaviour by parties who are confident that the wronged party will sue another wrongdoer.

92 (1840) Cr & Ph 1; 41 ER 389. See also the discussion of this case in Charles Mitchell, *The Law of Contribution and Reimbursement* (Oxford University Press, 2003) 213.
93 Goff and Jones, above n 52, 417.
94 Roland Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 750.
95 (1840) Cr & Ph 1, 21; 41 ER 389, 398.
96 (1855) 20 Beav 583, 585–6; 52 ER 729, 729–30.
97 (1812) 1 Ves & B 114, 116–17; 35 ER 45, 45 (Sir William Grant).
98 See, eg, *Fitzroy v Gwillim* (1786) 1 Term Rep 153; 99 ER 1025.
99 [2008] NSWSC 659 (30 June 2008) [151].
100 Scott and Fratcher, above n 52, [258.3].
101 See *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552, 561 (Young J). This is also arguably supported by *Nelson v Nelson* (1995) 184 CLR 538, 617 (McHugh J) ('*Nelson*').
102 See *Nelson* (1995) 184 CLR 538, 579 (Dawson J), 611 (McHugh J).

In addition, it appears that parties who have unclean hands may 'wash' their hands of the misconduct.[103] Arguably, once one party has satisfied the judgment, they have washed their hands of the misconduct and thus should be entitled to contribution. An analogy can be drawn from the High Court's reasoning in *Nelson v Nelson*.[104] While that case dealt with the different but related doctrine of illegality, the Court recognised a resulting trust in favour of the plaintiff on condition that the plaintiff 'do equity' by repaying money owing to the Commonwealth as a result of her actions pursuant to an illegal purpose.[105] This approach has recently been applied in *Carantinos v Magafas* in the context of the clean hands maxim.[106] Accordingly, there are strong arguments that the clean hands doctrine does not support the acceptance of the joint fraud rule in Australia.

B Impliedly Abolished by Tortfeasors Legislation

The joint fraud rule may also have been impliedly abolished by legislation allowing contribution between tortfeasors. Williams states that the joint fraud rule, 'if it existed, was probably the result of equity following the common-law rule in *Merryweather v Nixan*',[107] a rule which prevented joint tortfeasors from accessing contribution. He argues that, following the abolishment of the common law rule by statute,[108] 'its equitable extension should also be regarded as abrogated, on the maxim *cessante ratione legis cessat lex ipsa*'.[109] However, while this maxim has been applied in a number of cases (most notably to bring equity in line with statutes of limitation)[110] it should be treated with caution.[111]

(e) Conclusion

The injustices which may arise if the trustee contribution rules apply to accessories suggest that these rules should not govern contribution claims involving accessories.[112] In particular, the lack of authority and policy rationales in support of the application of the joint fraud rule to prevent accessories from obtaining

103 *Karl Suleman Enterprises Pty Ltd (in liq) v Babanour* (2004) 49 ACSR 612, 622–3 (Beazley JA). See also Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 180–202 for a discussion of the clean hands doctrine.

104 (1995) 184 CLR 538.

105 Ibid 571 (Deane and Gummow JJ).

106 [2008] NSWCA 304 (14 November 2008) [59]–[64] (Hodgson JA).

107 Glanville L Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (Stevens & Sons, 1951) 127, citing *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337. But see P H Winfield, 'Equity and Quasi-Contract' (1948) 64 *Law Quarterly Review* 46, 47.

108 See, eg, *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5.

109 Williams, *Joint Torts and Contributory Negligence*, above n 107, 127. This maxim ('when the reason of the law ceases, the law itself also ceases') supports the development of common law and equity to reflect 'steady trend[s] in legislation': *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 (Lord Diplock). See also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 230 (Kirby J).

110 See, eg, *Knox v Gye* (1872) LR 5 HL 656.

111 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 615 (Gummow J) ('*Thompson*'); *Lamb v Cotogno* (1987) 164 CLR 1, 11 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

112 While beyond the scope of this paper, similar arguments may apply in respect to co-fiduciaries.

contribution suggests that *McNally* was wrongly decided and that the joint fraud rule should not be applied by Australian courts to prevent accessories from seeking contribution.

4 *General Contribution in Equity*

If, as argued above, the trustee contribution rules do not apply to accessories, the general equitable principles of contribution would likely govern their rights. The extent to which an equal contribution rule applies under the general equitable principles of contribution and what indemnities, if any, are available to trustees and fiduciaries, are examined below.

(a) Equal Contribution?

In *Burke v LFOT Pty Ltd*, Gaudron ACJ and Hayne J said that, under the general equitable principles of contribution, those 'jointly or severally liable in respect of the same loss or damage should contribute … equally where they are liable in the same amount'.[113] However, while '[t]he weight of authority, and perhaps the history of contribution to this time, appear to be against unequal apportionments',[114] under these general equitable principles there seems to be some scope to argue for a *proportionate* approach to determining contribution claims involving accessories on the grounds that the equal contribution principle:

(i) developed out of different relationships; and

(ii) is a rebuttable presumption.

(i) Different Relationships

The general rule of equal contribution developed out of cases involving co-insurers and co-sureties.[115] In these situations, issues of differing culpability or responsibility for the relevant debt do not arise because sureties and insurers are *not* wrongdoers. Instead, their liability arises under contracts which 'cover the identical risk and loss'[116] and only arise upon *another*'s default or the occurrence of another event over which they have no control. It does *not* arise following the default of one or more of those liable. This contrasts with accessories and trustees or fiduciaries who are, often to differing extents, responsible for causing the loss.

113 (2002) 209 CLR 282, 292.

114 Ibid 324–5 (Kirby J). See, eg, *Fico v O'Leary* [2004] WASC 215 (11 October 2004) [247]–[248], in which Heenan J held that four defendants (two of whom had breached their fiduciary duties) should contribute equally on the basis that:

> Contribution in equity is not based upon the comparative culpability of the defendants found liable to pay the damages or compensation awarded to the claimant. Because the parties are equally liable for the same obligations contribution can only be apportioned between them equally in equity.

See also the comments by Young J in *Sky Channel Pty Ltd v Tszyu [No 2]* [2000] NSWSC 1150 (30 November 2000) [12], firmly dismissing an argument in favour of proportionate contribution.

115 See *Albion* (1969) 121 CLR 342, 349–50 (Kitto J).

116 *Burke* (2002) 209 CLR 282, 334 (Callinan J).

This equal contribution rule has generally been applied to relationships such as 'co-sureties, co-insurers, partners, [and] co-owners',[117] all of which can and should be distinguished from the accessory–trustee and accessory–fiduciary relationship. While partners and co-owners may sometimes be wrongdoers with differing levels of responsibility for the loss, in these situations an 'implied contract' exists: these persons have agreed, or are taken to have agreed, that they will be equally liable for any losses that arise.[118] Unless a contrary intention is apparent, 'the parties are taken to have intended to share equally',[119] and the equal contribution rule will be applied. In contrast, it would be difficult to impute an agreement between trustees or fiduciaries and third parties to share any liability equally, particularly where they have not intentionally conspired to breach the trust or fiduciary duty.

Thus, as the equal contribution rule arose out of situations where the parties liable had assumed equal responsibility, rather than in circumstances where issues of fault might arise, this rule should not be extended to claims involving accessories.

(ii) Rebuttable Presumption

There is some authority which suggests that the equal contribution rule is merely a rebuttable presumption.[120] As Kirby J has noted, there *is* authority in Australia for the courts to apportion contribution in a just and equitable manner.[121] This approach is consistent with the view that the courts have 'a wide discretion to make appropriate orders for contribution between wrongdoers to ensure that each party … makes a just contribution';[122] it is also consistent with the Federal Court's comment that '[c]ontribution is "founded on equality"… not literal equality, but proportionate equality.'[123] However, this approach has not been widely accepted by Australian courts.[124]

(b) Indemnities

Under general equitable contribution principles, there appears to be a right of indemnity where one wrongdoer has been induced by another to act wrong-

117 Ibid 292 (Gaudron ACJ and Hayne J) (citations omitted).

118 Ibid 299 (McHugh J).

119 *Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467, 477 (Giles JA); *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 488 (Taylor and Owen JJ).

120 See *Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467, 477 (Giles JA).

121 See cases cited in *Burke* (2002) 209 CLR 282, 324–5: *Jones v Mortgage Acceptance Nominees Ltd* (1996) 63 FCR 418, 422 (Davies J); *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* (1997) 144 ALR 528, 539 (Merkel J); *Duke Group Ltd (in liq) v Pilmer* (1998) 144 FLR 1, 253–4 (Mullighan J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 232 (Kirby J). See also *Flinders Diamonds Ltd v Tiger International Resources Incorporated* [2006] SASC 139 (11 May 2006) [107] (Layton J).

122 See *Acohs Pty Ltd v RA Bashford Consulting Pty Ltd* (1997) 144 ALR 528, 539 (Merkel J). Merkel J's comments were noted in *Hampic Pty Ltd v Adams* [2000] ATPR ¶41-7373, 40 552–3 [57]–[59] (Mason P and Davies AJA).

123 *Bialkower* (1998) 83 FCR 1, 13 (Beaumont, Hill and Sundberg JJ).

124 See, eg, *Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612 (29 June 2010) [433]–[435] (Ward J).

fully.[125] Accordingly, if the general principles of equitable contribution do apply as between accessories and trustees or fiduciaries, this may provide trustees or fiduciaries with a right to seek an indemnity from knowing inducers who have induced them to breach their obligations.

(c) Conclusion

It has been argued above that the trustee contribution rules should not apply to accessories and, instead, the general equitable principles of contribution should apply in these situations. While the weight of Australian authority suggests that these general equitable principles require the courts to make equal contribution orders (unless an indemnity or the joint fraud rule applies), the 'notion of discretion [which] has deep historical roots in the Equitable tradition'[126] should be employed to take into account differing levels of responsibility when ordering contribution between accessories and trustees or fiduciaries. Where one party jointly or severally liable for a breach of trust or fiduciary obligation is at greater fault, the contribution order should reflect this disparity. The merits of this approach are explicitly recognised by statutes in Victoria and the United Kingdom and similar statutes should be enacted in other Australian jurisdictions to ensure that a proportionate approach to contribution is adopted by Australian courts.

B *Statutory Contribution in Victoria*

In Victoria, the equitable right to recover contribution has been supplanted by the *Wrongs Act 1958* (Vic) ('*Wrongs Act*').[127] The relevant provisions of the Act, which were based upon the *Civil Liability (Contribution) Act 1978* (UK) c 47, were introduced in 1986 to expand the statutory right of contribution, which had previously been restricted to claims between tortfeasors.[128]

1 *Application of the* Wrongs Act *to Accessories*

Under the *Wrongs Act*, a 'person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage'.[129]

Section 23A(1) provides that:

> a person is liable in respect of any damage if the person who suffered that damage … is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.

125 *Burke* (2002) 209 CLR 282, 294 (McHugh J).
126 Lionel Smith, 'Fusion and Tradition' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 19, 31.
127 *Wrongs Act* s 24AD(4)(a).
128 *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109, 120–1 (Gleeson CJ, Gummow and Hayne JJ) ('*Alexander*').
129 *Wrongs Act* s 23B.

The reference to 'breach of trust' removes doubt that the *Wrongs Act* applies to trustees and accessories who are liable for losses arising out of breaches of trust. It is also likely that the phrase 'or otherwise' will encompass breaches of fiduciary duty, as the *ejusdem generis*[130] principle of statutory interpretation is unlikely to restrict the meaning of the phrase 'or otherwise' to exclude breaches of fiduciary obligation, given the various types of liability which expressly attract the application of the *Wrongs Act*.[131] Accordingly, the *Wrongs Act* is likely to govern contribution claims between accessories and trustees or fiduciaries.

2 *Assessing the Appropriate Contribution under Statute*

Under the *Wrongs Act*, the courts have discretion to apportion contribution in a 'just and equitable' manner taking into account the wrongdoer's responsibility for the loss.[132] The Victorian Supreme Court has said that it is 'the whole of the relevant conduct of each [wrongdoer] which must be compared', including 'the relevant culpability or blameworthiness … and the causal potency of their respective acts and omissions'.[133]

While English courts have looked at similar factors under the equivalent English legislation,[134] they have emphasised that their discretion is not limited to considering the 'responsibility' of each party. For example, in *Dubai*, the financial consequences of the orders and the possible insolvency of defendants were considered relevant factors.[135] Benefits received by the knowing assistant were also taken into account to ensure that he did not remain 'in possession of his spoils'.[136] This approach was recently approved by the New South Wales Supreme Court in *Reinhold v NSW Lotteries Corporation [No 2]* ('*Reinhold*') in relation to a similar provision under the New South Wales proportionate liability legislation.[137] The Court said that if a wrongdoer has profited from their actions which caused the plaintiff's loss, that should be taken into account when considering the responsibility of each wrongdoer.[138] Accordingly, it seems that all the circumstances of the case may be examined by the courts when determining the appropriate contribution of each wrongdoer under the *Wrongs Act*.

3 *Relationship between Equitable Principles and Statutory Discretion*

While prima facie the *Wrongs Act* appears to have supplanted the equitable contribution rules, Goff and Jones have suggested that, under the equivalent

130 'General matters are constrained by reference to specific matters'.

131 English authority also supports this interpretation: see, eg, *Dubai* [2003] 2 AC 366, 374–5 (Lord Nicholls).

132 *Wrongs Act* s 24(2).

133 *Keller v Metropolitan Ambulance Service of Victoria* [2002] VSC 222 (12 June 2002) [9]–[10] (Mandie J), applying *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532–3 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ).

134 See *Dubai* [2003] 2 AC 366, 387 (Lord Hobhouse). See also Mitchell, 'Apportioning Liability for Trust Losses', above n 82, 211.

135 See *Dubai* [2003] 2 AC 366, 384 (Lord Nicholls).

136 Ibid 383 (Lord Nicholls), 406 (Lord Millet). The House of Lords in *Dubai* also considered what effect the receipt of benefits had on contribution: at 385 (Lord Nicholls), 388 (Lord Hobhouse).

137 [2008] NSWSC 187 (7 March 2008) [57]–[58] (Barrett J).

138 Ibid [61].

United Kingdom legislation, it is 'an open question whether the courts will be guided, in the exercise of their statutory discretion', by these rules.[139] As discussed above, if the trustee contribution rules apply to accessories, a range of indemnities may be accessible. It has been argued that the United Kingdom equivalent of s 24AD(4)(a) of the *Wrongs Act*,[140] which states that 'nothing in this Act shall affect … any express or implied contractual or other right to indemnity', ensures that the equitable trustee indemnity rules still apply.[141]

However, there is a strong argument that the Victorian Parliament did not intend the *Wrongs Act* to preserve the trustee indemnity rules. Those rules were developed by the courts to alleviate the application of the equal contribution rule to trustees who were considered less blameworthy. The *Wrongs Act* has removed the equal contribution rule by allowing contribution to be determined according to relative blameworthiness. Accordingly, the *Wrongs Act* has also removed the rationale underlying the trustee indemnity rules. Therefore, the maxim *cessante ratione legis cessat lex ipsa* supports the conclusion that Parliament has impliedly abolished the trustee indemnity rules. This is consistent with Kirby J's observations in *Alexander v Perpetual Trustees WA Ltd* that under the *Wrongs Act*, 'the mind of the decision-maker is released from the former categories and rules of equity'.[142] It is also consistent with the United Kingdom Law Commission's *Report on Contribution* (which led to the creation of the United Kingdom legislation upon which the *Wrongs Act* is based), which states that '*common law* rights of indemnity … should be preserved' (arguably as opposed to equitable rights).[143] Accordingly, when determining contribution claims between accessories and trustees or fiduciaries in Victoria, the courts should look to the circumstances of the case and not be influenced by obsolete equitable principles.

C *Conclusion*

It has been argued that it is not appropriate to apply the trustee contribution rules to accessories who are not trustees and who have not assumed the responsibility of protecting trust property. While there is scope to argue for contribution orders which reflect the parties' responsibility for the loss under the general principles of equitable contribution, those arguments are unlikely to be successful given the weight of contrary authority. Accordingly, it is recommended that the Victorian contribution legislation be adopted in all Australian jurisdictions to ensure that contribution laws truly are 'bottomed and fixed on general principles

139 Goff and Jones, above n 52, 408.

140 *Civil Liability (Contribution) Act 1978* (UK) c 47, s 7(3)(a).

141 Mitchell, *Contribution and Reimbursement*, above n 92, 81; Ontario Law Reform Commission, *Report on the Law of Trusts* (1984) vol II, 379. In *Alexander* (2004) 216 CLR 109, 146, Kirby J (with whom Callinan J agreed: at 159) suggested that s 24AD(4) 'does not "exclude" any entitlement to contribution.' It is respectfully submitted that this interpretation conflicts with the express words of the Act.

142 (2004) 216 CLR 109, 147. This case may also support an argument that the Act does not apply to these indemnities due to their equitable nature: at 146.

143 Law Commission, *Law of Contract: Report on Contribution*, Law Com Report No 79 (1977) 7 (emphasis added).

of justice'.[144] Uniform contribution laws would also avoid the difficulties which arise when determining the law applicable to contribution claims.[145] Ensuring a just approach to contribution is of particular importance in relation to knowing assistants (such as the solicitor in the Scenario), who may otherwise be held liable for significant losses in respect of which they played a minor role, and, conversely, for innocent trustees or fiduciaries who have been procured or induced to breach their obligations by a third party.

IV RELEASE, COVENANT NOT TO SUE AND CONSENT

The introductory paragraph raised the possibility of a beneficiary releasing a trustee or fiduciary and pursuing a third party for the entire loss.[146] This prospect has led Bryson JA to express concern that third parties may, in some circumstances, be held liable for the entire amount at the plaintiff's whim.[147] In order to explore a beneficiary's ability to elect which wrongdoer is to bear the burden of a breach, three situations will be explored in this Part:

(a) where the beneficiary releases the trustee or fiduciary from liability while not accepting the underlying breach;

(b) where the beneficiary merely agrees not to sue the trustee or fiduciary; and

(c) where the beneficiary consents to the breach itself.

A *Release*

A beneficiary who validly releases a trustee from liability cannot later pursue that trustee for his or her breach.[148] The impact that a release of a defaulting trustee or fiduciary has on the liability of an accessory is not clear. In *Yeshiva Properties No 1 Pty Ltd v Marshall* ('*Yeshiva*'), Bryson JA, with whom Mason P and Beazley JA agreed, stated:

> it is doubtful whether an equitable remedy against an alleged accessary [sic] should be granted to a plaintiff who has given the alleged defaulting trustee or fiduciary a release, or has decided not to sue the trustee or fiduciary.[149]

In the recent case of *Coulton v Coulton*,[150] McLaughlin AsJ, while not deciding the matter, provided some useful guidance.[151] In Victoria, this issue is less

144 *Dering v Winchelsea* (1787) 1 Cox 318, 321; 29 ER 1184, 1185 (Eyre CB).

145 There are often difficulties determining the law applicable to contribution claims, and whether tort choice of law or restitutionary choice of law rules apply: see, eg, *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; *Fluor Australian Pty Ltd v ASC Engineering Pty Ltd* (2007) 19 VR 458.

146 As noted by Gleeson CJ and Callinan J in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, 641 ('*Baxter*'), '[t]here are many circumstances in which a person with a claim against a number of joint tortfeasors may wish to settle with one, or some, of them, and continue with, or commence, proceedings against others.' The same can be said in respect of beneficiaries with a claim against those jointly and severally liable for breach of trust or fiduciary obligation.

147 *Yeshiva* (2005) 219 ALR 112, 134.

148 See, eg, *Farrant v Blanchford* (1863) 1 De G J & Sm 107; 46 ER 42.

149 (2005) 219 ALR 112, 134.

significant as wrongdoers may pursue other released wrongdoers for contribution under the *Wrongs Act*.[152] Accordingly, in Victoria, a release will not disadvantage accessories. This section will focus on the implications of a release in other Australian jurisdictions.

1 *Uncertain Case Law on Trusts*

It is accepted that *generally* where liability is joint and several, a release of one party 'contractually discharges the others'[153] ('release rule') unless the settlement giving rise to the release is fraudulent or illegal.[154] However, there are conflicting authorities regarding the impact of a release on those jointly and severally liable for breaches of trust or fiduciary obligation.

For example, in *Wilkie v McCalla*, the Victorian Supreme Court indicated that a release of a trustee might release the other liable trustees.[155] The suggestion appears to have been based on the appellant's argument, citing *Cheetham v Ward*, that '[t]he liability of the trustees is joint and several, and a discharge of one is a discharge of all'.[156] However, *Cheetham v Ward* deals only with the effect of release upon joint *debtors*. In *Thompson v Australian Capital Television Pty Ltd* ('*Thompson*'), Gummow J noted that there were conflicting United States and Irish authorities on the matter (discussed in further detail below), without reaching a conclusion on the correct approach to take.[157]

The limited academic writing on this topic reflects the uncertainty in the law. While Williams has argued that 'a release of one does not release the other (contrary to the rule for joint and several liability in contract)',[158] Mitchell's view is that, because the liability is joint and several, a knowing assistant would also

150 [2008] NSWSC 910 (4 September 2008). In this case, the plaintiff had released one of her business partners 'from all or any actions, suits, causes of action … whatsoever at law or in equity' relating to any event predating the date of the deed of release: at [43] (McLaughlin AsJ). That partner had transferred partnership assets to the defendant, his wife, allegedly in breach of his fiduciary obligations. The plaintiff alleged that the defendant was a knowing assistant. The defendant argued that the release of her husband, the fiduciary, also acted to release her (the knowing assistant) from any liability, on the basis that liability as a knowing assistant 'is a liability in equity which is at most accessorial to the alleged breach' by the fiduciary: at [45]. While not deciding the matter, McLaughlin AsJ was satisfied that the plaintiff had an arguable case that the knowing assistant had not been released and accordingly dismissed the defendant's application for summary dismissal: at [51]–[52].

151 It should be noted that *Coulton* is an unreported interlocutory decision on a strike out application and, as a result, may have limited precedential value.

152 *Wrongs Act* s 23B(3). See also Jonathan Goodliffe, 'Releasing Joint and Several Obligations' (1996) 11 *Journal of International Banking Law* 195, 198.

153 *Thompson* (1996) 186 CLR 574, 608 (Gummow J).

154 See *Wallace v Kelsall* (1840) 7 M & W 263, 272; 151 ER 765, 769 (Lord Abinger CB), applied in *Page v McKensey* [2008] NSWSC 147 (28 February 2008) [28] (Windeyer J).

155 [1905] VLR 278, 293 (A'Beckett J).

156 Ibid 288 (Agg and Sanderson) (during argument), citing *Cheetham v Ward* [1797] 1 Bos & P 630; 126 ER 1102.

157 (1996) 186 CLR 574, 608–9 n 159.

158 Glanville L Williams, *Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and the Common-Law Dominions* (Butterworths, 1949) 159.

be released from liability.[159] Underhill and Hayton take the middle ground, stating 'a release of one trustee *may* incidentally operate as a release of the others'.[160]

2 *Rationales*

In *Thompson*, Gummow J noted two cases in which the courts took different approaches to determining the effect of a release on those jointly and severally liable for breach of trust:[161] the United States approach in *First and Merchants National Bank of Richmond v Bank of Waverly* ('*Waverly*')[162] and the *Blackwood v Borrowes* ('*Blackwood*')[163] approach. While both decisions suggest that the release rule *does* apply to trustees, they adopt different rationales for justifying that application. Each rationale is discussed in further detail below.[164]

(a) 'Unity of Action' Rationale

At common law, the release rule was applied to joint tortfeasors because:

> where there was a joint tort there could be only one action and one judgment for the whole amount of damages to which the plaintiff was entitled. That is to say, the cause of action was one and indivisible so that when judgment was obtained … the cause of action merged in the judgment and precluded further recovery against any remaining tortfeasors.[165]

In *Waverly*, a Virginian court used the unity of action rationale to justify the application of the release rule to trustees, finding that a co-trustee's liability was discharged by a release of another co-trustee notwithstanding that the parties did not intend to discharge that other wrongdoer.[166] The Court said that:

> These fiduciary wrongdoers are just as much joint wrongdoers as any other joint tort-feasors. There is just one cause of action against them. When one of them satisfied that single cause of action the other was released.[167]

However, this approach is based upon a somewhat confused understanding of trustees' liability. Unlike tortfeasors, there is *not* one cause of action between

[159] Charles Mitchell, 'Assistance' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 139, 208.

[160] Hayton, above n 78, 848 (emphasis in original). See also Meagher and Gummow, above n 21, 683.

[161] (1996) 186 CLR 574, 608–9 n 159. Note that Gummow J came to no conclusion regarding the impact of a release in this situation.

[162] 170 Va 496 (1938).

[163] (1843) 4 Dr & War 441; 65 RR 729.

[164] See also *Teparyl Pty Ltd v Willis* [2009] V ConvR ¶54-766, 64 463 [30]–[31] (Byrne J) for an explanation of the rationale for applying the release rule to co-sureties. This rationale arises out of the nature of the relationship of co-sureties and should not be applied to those jointly and severally liable for breach of trust or fiduciary obligation.

[165] *Thompson* (1996) 186 CLR 574, 581 (Brennan CJ, Dawson and Toohey JJ). See also *Bryanston Finance Ltd v De Vries* [1975] 1 QB 703, 730 (Lord Diplock). In relation to joint debtors, see Goodliffe, above n 152, 195.

[166] 170 Va 496 (1938). In *Coulton* [2008] NSWSC 910 (4 September 2008) [46] (McLaughlin AsJ), the defendant relied on the 'analogous principles' that were applied in *Waverly* to co-trustees to support her argument that she should be released from liability.

[167] *Waverly*, 170 Va 496, 503, 504 (Gregory J) (1938).

those jointly and severally liable for breaches of trust. At common law, judgment against one joint tortfeasor would prevent a plaintiff from taking action against other joint tortfeasors, even if the judgment was not satisfied.[168] In contrast, beneficiaries may sue as many wrongdoers for breach of trust — who are jointly and severally liable — as they wish, until the judgment is satisfied.[169] Unlike joint tortfeasors, who at common law were unable to obtain contribution from other joint tortfeasors,[170] wrongdoers liable for breaches of trust or fiduciary obligation generally have rights to contribution against each other (subject to the trustee contribution rules discussed above). Accordingly, a beneficiary's action against parties jointly and severally liable for breaches of trust or fiduciary obligation 'can hardly be regarded as a single cause of action'.[171] As McLaughlin AsJ said in *Coulton*, the 'equation of co-trustees with joint tortfeasors [by the Court in *Waverly*]… has no warrant either in law or in principle and totally misconceives the nature of the office of a trustee.'[172]

This conclusion is also supported by the High Court's decision in *Thompson*. In that case, the High Court examined the impact of legislation which altered tortfeasor liability to resemble the liability of those jointly and severally liable for breaches of trust, that is, by granting joint tortfeasors a right to contribution and allowing plaintiffs to pursue more than one tortfeasor until the entire judgment was satisfied.[173] The High Court held that these changes removed the 'unity of action' and thus impliedly abolished the tortfeasor's release rule.[174] Accordingly, the unity of action rationale does not support the application of the release rule to trustees, fiduciaries and accessories.

(b) General Grounds of Fairness

General grounds of fairness may also justify the application of the release rule to parties involved in breaches of trust or fiduciary duty. In *Blackwood*, it was held that, by releasing one trustee, the plaintiff was estopped from pursuing the other trustees, not 'upon the technical ground of the release of one trustee operating as a release to the other, but … upon the substance and merits of the case.'[175] However, in this case the terms of the release had set out the plaintiff's 'very clear' *consent* to the breach, rather than an attempt to *release* one wrongdoer and maintain an action against the others.[176]

168 *Brinsmead v Harrison* (1872) LR 7 CP 547.
169 Williams, *Joint Obligations*, above n 158, 159; *Blyth v Fladgate* [1981] 1 Ch 337, 353 (Stirling J).
170 *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337.
171 Williams, *Joint Torts and Contributory Negligence*, above n 107, 44.
172 [2008] NSWSC 910 (4 September 2008) [48].
173 See *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5.
174 *Thompson* (1996) 186 CLR 574, 584 (Brennan CJ, Dawson and Toohey JJ).
175 (1843) 4 Dr & War 441, 475; 65 RR 729, 743–4 (Sir Edward Sugden LC).
176 Ibid Dr & War 476; RR 744.

Arguably, *Blackwood* supports the proposition that the courts may exercise their discretion to apply the release rule according to the merits of the case.[177] However, applying the release rule to trust and fiduciary situations would conflict with equity's desire to ensure that the beneficiary is compensated 'to the fullest extent possible'.[178] Generally, the special vulnerability of beneficiaries would mean that it is inappropriate to prevent them from recovering compensation from other wrongdoers merely because they had chosen to release one.

(c) Special Rules for Accessories?

If the release rule does apply as between trustees, it has been argued that a release of a trustee or fiduciary should have a different effect upon accessories.

In *Coulton*, McLaughlin AsJ considered that *Waverly* had been wrongly decided and stated that, even if the release rule did apply to co-trustees, he was not persuaded that it would, by analogy, also apply to knowing assistants.[179] In *Yeshiva*, Bryson JA, with whom Mason P and Beazley JA agreed, suggested that knowing assistants should not be held completely liable where the trustee or fiduciary had been released, stating:

> To my mind it is doubtful whether an equitable remedy against an alleged accessary [sic] should be granted to a plaintiff who has given the alleged defaulting trustee or fiduciary a release, or has decided not to sue the trustee or fiduciary. Doing equity as between the plaintiff and the accessary [sic], who is not the person *principally* liable, seems to me to be possible only if the plaintiff also pursues his claim against the person *principally* liable.[180]

These comments appear to be influenced by the distinction drawn by Sales, as well as Elliot and Mitchell, between trustees and fiduciaries, who are 'principally' or 'primarily' liable for the breach, and accessories, whose liability is described as 'secondary'.[181]

However, while the liability of accessories *is* 'secondary' in the sense that it only arises following a 'primary' breach of trust or fiduciary obligation by another,[182] the term secondary is misleading as it suggests that accessory liability

[177] A similar approach is taken by Gleeson CJ and Callinan J in *Baxter* (2001) 205 CLR 635, 656, who suggest that plaintiffs may not be able to pursue one tortfeasor after releasing another where it is 'unconscientious'.

[178] *Maguire v Makaronis* (1997) 188 CLR 449, 492 (Kirby J).

[179] [2008] NSWSC 910 (4 September 2008) [50].

[180] (2005) 219 ALR 112, 134 (emphasis added).

[181] Steven B Elliot and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *Modern Law Review* 16, 17; Phillip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491, 501–9. A similar argument was raised in *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* [1998] FCA 564 (28 May 1998), where the defendants argued that even if they would have been held liable as knowing assistants, given their liability being 'ancillary and dependent upon the liability of the defaulting fiduciaries … and the fiduciaries having received an unqualified release of that liability', the defendant should also be released from liability. However, as Lindgren J found that no breach by the fiduciary had occurred, it was unnecessary for him to consider the issue. The defendant in *Coulton* also appeared to adopt a similar argument: *Coulton* [2008] NSWSC 910 (4 September 2008) [45] (McLaughlin AsJ).

[182] *Royal Brunei* [1995] 2 AC 378, 382 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May).

is a subordinate or lesser liability. Generally, knowing inducers will have taken the primary role in the breach. This may also sometimes be the case for knowing assistants, for example, where the third party has taken a lead role in conspiring with a trustee in a dishonest or fraudulent design. Furthermore, as it appears that the courts may order an account of profits against the knowing assistant but not the 'primary' wrongdoer, accessory liability is not so 'duplicative' that a release of the 'primary' wrongdoer should automatically release the third party.[183] In other words, their liability is not derived solely from the primary liability. As accessories may be primarily responsible for the breach, they should not be automatically released on the basis of the 'secondary' nature of their liability.[184]

3 *The Approach to Be Taken*

(a) Most 'Equitable' Approach

In *Yeshiva*, Bryson JA appeared to misconceive the nature of accessory liability (although it is arguable that this was simply an unfortunate use of terminology), however, his remark that 'the court should not allow the plaintiff to decide which party to sue for the entire amount and which party to … release'[185] has merit. This author's preferred approach is for the courts to treat releases of trustees or fiduciaries as extinguishing their own liability and reducing the other defendants' liability by their share of the damages. This 'share' would be the greater of:

(i) the amount paid by the trustee or fiduciary in settling with the beneficiary; or

(ii) the amount that the court would otherwise have allowed the remaining wrongdoers to recover from the released trustee or fiduciary.

Take, for example, a situation where three knowing assistants and a trustee are involved in a breach of trust. In normal circumstances, the courts would permit the three knowing assistants to obtain contribution from the trustee in an amount of 25 per cent of the judgment. However, in this case, the trustee had been released by the beneficiary in return for a settlement amount equivalent to 45 per cent of the judgment. If the approach proposed above was adopted, then the total amount the three knowing assistants would be liable to pay would be the judgment reduced by 45 per cent.[186] If, instead, the released trustee had only paid an amount in settlement equivalent to 10 per cent of the judgment, then the total amount that the other three wrongdoers would be liable to pay should be the judgment reduced by 25 per cent.

183 See *Ultraframe* [2005] EWHC 1638 (Ch) (20 May 2005) [1600] (Lewison J); *contra* Mitchell, 'Assistance', above n 159, 208.

184 For further discussion of whether knowing assistance liability is primary or secondary, see Pauline Ridge, 'Justifying the Remedies for Dishonest Assistance' (2008) 124 *Law Quarterly Review* 445.

185 (2005) 219 ALR 112, 134.

186 In these circumstances, the released trustee *may* be able to seek contribution from the other three wrongdoers to reflect the fact that the released trustee has satisfied more than his or her share of the common obligation (although, as discussed below under the heading 'Contribution Allowed', there is some doubt whether the trustee contribution rules or a release may prevent contribution between some trustees, fiduciaries and accessories).

This approach is fair and equitable because it allows beneficiaries to release one wrongdoer at their own election and expense, while still receiving some compensation from the remaining wrongdoers (assuming that the beneficiary has not already recovered their entire loss as part of the settlement with the released trustee or fiduciary). It supports the public policy aim of encouraging releases, which are a form of settlement, in order to relieve the burden on the courts. It does not conflict with the general prohibition against double recovery,[187] and also ensures that the other wrongdoers do not bear more than their share of the burden. Accordingly, Bryson JA's concerns are assuaged, as the beneficiary is prevented from choosing who bears the *entire* burden of the loss.

(b) Alternative Approach

If the above approach is not adopted and a release of the trustee or fiduciary does not release the accessory, it is recommended that the courts:

(i) take into account any advantage received by the beneficiary in respect of the release; and

(ii) allow contribution.

(i) Advantage Discounted

It will often be the case that the released wrongdoer will have paid the beneficiary an amount in settlement in consideration for the release. Any advantage the beneficiary receives in return for releasing one wrongdoer should be subtracted from the judgment owing. For example, in *Yeshiva*, the plaintiffs had agreed to release the other wrongdoers in return for a 'large advantage'.[188] Bryson JA suggested, in obiter, that in such cases the plaintiffs 'should bring the value of that advantage into account' when seeking a remedy against the knowing assistant.[189] This also finds support in Gleeson CJ and Callinan J's comments that plaintiffs should be allowed to settle with one wrongdoer and claim against another, as long as credit for the amount received from the released wrongdoer is given.[190] Similarly, Powell JA has stated that 'any payment made by either of the trustees to the beneficiaries goes to reduce the loss and, to that extent, enures for the benefit of the other trustee *as against the beneficiaries*',[191] which also supports this approach.

(ii) Contribution Allowed

In some cases, discounting any advantage obtained by beneficiaries in return for the release from the judgment owing may still result in the remaining wrongdoers being held liable for a disproportionate amount.[192] Accordingly, also

[187] See *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, 522 (Lord Nicholls for Lords Keith of Kinkel, Lloyd of Berwick, Nicholls, Steyn and Hardie Boys J); *Baxter* (2001) 205 CLR 635, 656 (Gleeson CJ and Callinan J), 669 (Kirby J).

[188] (2005) 219 ALR 112, 134 (Bryson JA).

[189] Ibid.

[190] *Baxter* (2001) 205 CLR 635, 653. See also the remarks by Gummow and Hayne JJ: at 661.

[191] *Goodwin* (1996) 41 NSWLR 158, 167 (Powell JA) (emphasis altered).

[192] For example, where the plaintiff has released one wrongdoer for minimal consideration.

allowing accessories to obtain contribution from those released would ensure that these accessories were not disadvantaged. If contribution is allowed, any sum already paid by the trustee or fiduciary in return for the release should be treated as part of their own satisfaction of the judgment. However, this approach is less attractive than the preferred approach, discussed above, because it effectively voids the beneficiary's decision to release one wrongdoer, ignores the clear intention of the parties to the release, allows circularity of action[193] and discourages settlement.

In any event, it is not clear whether contribution orders against released wrongdoers may be made in those circumstances. As discussed above, there is some doubt as to whether the joint fraud rule and other trustee contribution rules may prevent contribution between some trustees, fiduciaries and accessories. While it has been argued in this paper that the joint fraud rule should not apply to prevent contribution between accessories, the recent decision in *McNally* supports the application of the joint fraud rule in Australia and is likely to be followed by other courts.

In addition, the right to contribution only arises where parties share a common obligation.[194] Arguably, once a beneficiary releases a wrongdoer, that wrongdoer no longer shares a common obligation giving rise to a right to contribution.[195] However, in these circumstances, the general equitable principles of contribution might allow such claims, because to leave 'one party, who has paid the whole, without remedy, would be the greatest injustice'.[196] Upholding an accessory's contribution claim against a released trustee may therefore perhaps be justified on the basis of doing equity between the parties. To 'do equity', the courts may be inclined to construe 'releases' as covenants not to sue rather than releases, and therefore allow contribution claims. This approach has been adopted in some cases involving debtors and tortfeasors,[197] and it is therefore likely that this approach will be adopted in the future.

B *Covenant Not to Sue*

In contrast to a release, if a plaintiff covenants not to sue the trustee or fiduciary and then pursues the third party for the entire amount,[198] it seems clear that (subject to any impediments imposed by the trustee contribution rules discussed

193 This reason has influenced the development of the release rule in relation to joint debtors: see *North v Wakefield* (1849) 13 QB 536, 541; 116 ER 1368, 1370 (Patteson J).

194 *Friend v Brooker* (2009) 239 CLR 129, 148 (French CJ, Gummow, Hayne and Bell JJ).

195 In *Resource Equities Ltd v Leon Carr Resource Equities Ltd* [2008] NSWSC 977 (14 August 2008) [39], McDougall J held that that a release prevented the appellants from recovering equitable contribution from the respondent because it resulted in him having 'no common obligation with them'. This decision was overturned on appeal on the basis that the settlement deed was a covenant not to sue rather than a release: *Carr and Purves v Thomas* [2009] NSWCA 208 (23 July 2009) [38] (Beazley, Ipp and McColl JJA). Accordingly, the New South Wales Court of Appeal did not need to reach a concluded view on this aspect of McDougall J's decision.

196 *Lingard* (1812) 1 Ves & B 114, 116; 35 ER 45, 45 (Sir William Grant MR).

197 See *Dorgal Holdings Pty Ltd v Buckley* (1996) 22 ACSR 164, 166–7 (McLelland CJ in Eq). See generally *Northland Bank v Willson* (1999) 1 BLR (3d) 62 (Wilkins J).

198 See generally the discussion in Mitchell, 'Assistance', above n 159, 209.

above) the third party will be able to obtain contribution from the trustee or fiduciary.[199] This reasoning is based on the nature of a covenant not to sue. Rather than releasing wrongdoers from their liability altogether or consenting to the breach, the plaintiff merely agrees not to sue them.[200] Accordingly, while this effectively allows circuitry of action, it would not prevent accessories from obtaining contribution. Once more, money paid by a wrongdoer to a plaintiff to obtain the covenant should be treated as part of the wrongdoer's satisfaction of the judgment.

C *Consent to Breach*

A beneficiary who, with full knowledge, consents to[201] or acquiesces in[202] a breach of trust cannot pursue a trustee for the breach.[203] The courts are likely to adopt the *Blackwood*[204] approach and hold that such a consent effectively releases all those liable for the breach. This argument is supported by Beech J's view that a beneficiary's fully informed consent to a breach of trust would apply in the favour of accessories would otherwise be liable for that breach of trust, noting that '[i]n such circumstances there would be no sufficient reason for a court of Equity to enforce any equitable obligation in favour of the party who had consented to the breach'.[205] The same reasoning applies to trustee exemption clauses 'which absolve [the trustee or fiduciary] from duty in the first place',[206] so that there has been no breach of duty for the third party to assist in. However, it may often be difficult to determine whether a beneficiary is consenting to the breach, or merely releasing a wrongdoer. Given the vulnerability of beneficiaries, it is suggested that the courts should adopt a cautious approach and find that a beneficiary has consented to the breach only when presented with clear evidence that that was the beneficiary's intent.

D *Conclusion*

The release rule should not be applied to those jointly and severally liable for breaches of trust or fiduciary obligation. The unity of action argument and general principles of fairness do not support its application. Instead, a release

199 See, eg, the following analogous reasoning of Baker J in *Deanplan Ltd v Mahmoud* [1993] Ch 151, 170 in respect of joint debtors: 'A covenant not to sue is not a release. It is merely a contract between the creditor and the joint debtor which does not affect the liabilities of the other joint contractors or their rights of contribution or indemnity against their co-contractor.' See also *Carr v Thomas* [2009] NSWCA 208 (23 July 2009) [34]–[38] (Beazley, Ipp and McColl JJA).

200 See *Deanplan Ltd v Mahmoud* [1993] Ch 151, 170 (Baker J).

201 See *Spellson v George* (1992) 26 NSWLR 666, 669 (Handley JA).

202 See *Chillingworth* [1896] 1 Ch 685, 704 (North J).

203 It is important to note that while consent is a 'prima facie defence', the courts must still consider whether it would be 'fair and equitable' to allow the beneficiary to claim against the trustee: see *Spellson v George* (1992) 26 NSWLR 666, 669 (Handley JA), 673–5 (Hope AJA), 680 (Young AJA).

204 (1843) 4 Dr & War 441; 65 RR 729.

205 *Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21 (28 February 2008) [248] (Beech J).

206 Mitchell, 'Assistance', above n 159, 159.

should act to release all those jointly and severally liable for the part of the judgment which the released person would be otherwise expected to pay. If this approach is not adopted, any amount paid by a wrongdoer to obtain a release should be taken as being paid to the plaintiff in satisfaction of the judgment and accessories should be allowed to obtain contribution from released parties, less any amount paid in settlement by the released wrongdoer.

V PROPORTIONATE LIABILITY

Assuming accessories are not generally prevented from obtaining contribution from other wrongdoers as a result of the trustee contribution rules or a release, in some situations accessories may still be required to satisfy the entire judgment without receiving contribution from the trustee or fiduciary — for example, where the trustee or fiduciary is insolvent and possibly (in the case of knowing inducers) where a trustee, who has 'acted honestly and reasonably', is excused from liability for breach of trust under the relevant trustee legislation.[207] However, in response to 'the effect of the insurance crisis on the professional indemnity insurance market',[208] proportionate liability legislation has been introduced throughout Australia to alleviate the burden on defendants — and through them, their insurers, who would otherwise be held liable for the entire amount.[209] This legislation prevents defaulting parties from compensating plaintiffs for more than the proportion of the damage for which they are 'responsible', regardless of whether the other wrongdoers are insolvent or have ceased to exist.[210] In this part, the application of the legislation to those who participate in breaches of trust or fiduciary obligation will be examined.[211] If the legislation applies to these parties, it may displace many of the equitable and common law principles of contribution and apportionment discussed earlier in this paper.

A *Application of the Proportionate Liability Legislation*

In order to attract the application of the legislation:

207 See, eg, *Trustee Act 1925* (NSW) s 85. This outcome would be consistent with Pettit's comments regarding the impact of equivalent provisions upon co-trustees: Phillip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2006) 523, citing *Fales v Canada Permanent Trust Co* [1977] 2 SCR 302.

208 Explanatory Statement, Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Bill 2004 (ACT) 2.

209 See generally *Wrongs Act*; *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Proportionate Liability Act 2005* (NT); *Civil Liability Act 2003* (Qld); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA). Note that while these Acts are similar, they are not identical. Similar provisions have also been included in Pt VIA of the *Trade Practices Act 1974* (Cth) and ss 1041L–1041S of the *Corporations Act 2001* (Cth) in relation to liability for misleading and deceptive conduct, but these provisions are not dealt with in this paper.

210 See, eg, *Civil Liability Act 2002* (NSW) s 34(4).

211 The following discussion is not applicable to the South Australian legislation, which only applies to liabilities in damages that arise under the law of torts, under statute or for breach of a contractual duty of care: see *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 4(1).

(a) the wrongdoers must be 'concurrent wrongdoers' who have not acted intentionally or fraudulently; and

(b) the claim must be an apportionable claim.

1 *Concurrent Wrongdoers*

Concurrent wrongdoers are defined as persons whose acts or omissions 'caused, independently of each other or jointly, the damage or loss that is the subject of the claim'.[212] Accessories and defaulting trustees or fiduciaries are always likely to be considered 'concurrent wrongdoers' due to the joint and several nature of their liability. However, the legislation does not apply to concurrent wrongdoers who intended to cause, or did fraudulently cause, the economic loss or damage ('exclusion').[213] It is not clear whether this exclusion refers to actual fraud at common law, or whether it refers to equitable fraud (or to both).[214] As noted above, while accessories are likely to have acted fraudulently in equity, they may not have committed actual fraud at common law.

If the exclusion applies to actual fraud at common law, it appears that:

(a) knowing inducers would often be excluded from the direct application of the legislation, because their actions in inducing a breach with knowledge will often amount to actual fraud at common law or be considered intentional;

(b) some knowing assistants are also likely to be excluded from the direct application of the legislation because they acted intentionally or fraudulently. However, this will depend on the facts of each case;

(c) trustees or fiduciaries who have committed the relevant breach as part of a 'dishonest or fraudulent design' with the assistance of a third party may often be prevented from accessing the legislation. However, there may be circumstances in which a 'dishonest and fraudulent design' falls short of actual fraud or intent to cause loss;[215] and

(d) trustees or fiduciaries who have been 'induced' or 'procured' by a knowing inducer to breach their trust or fiduciary obligation may be able to have

212 See, eg, *Civil Liability Act 2002* (NSW) s 34(2).

213 See, eg, ibid s 34A(1).

214 See V J Vann, 'Equity and Proportionate Liability' (2007) 1 *Journal of Equity* 199, 210–11. While defendants' fraudulent or intentional actions have, in some cases, prevented them from accessing the legislative limitation on liability, these cases have not clarified the meaning of the term 'fraudulent'. See, eg, *Commonwealth Bank of Australia v Saleh* [2007] NSWSC 903 (28 August 2007) [275] in which Einstein J held that 'no questions arise in terms of proportionate liability or in terms of contributory negligence' in light of the fraudulent conduct which had occurred This case appeared to be a clear case of actual fraud — the defendants had intentionally fabricated bank statements and other financial documents and acted with the intent to defraud the bank. However, these actions are likely to be considered fraudulent in accordance with equitable principles as well. For an example of a case where one wrongdoer's liability was held not to be limited by the legislation because his actions were intended, see *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694 (6 July 2007).

215 See *Bell* (2008) 225 FLR 1, 531 (Owen J), suggesting that this phrase did not include 'actual fraud in the common law sense'. While these comments appear to be made in relation to the term 'dishonest', the context in which these comments were made suggest that they also apply to the phrase 'dishonest and fraudulent design'.

> their liability limited under the legislation (particularly where the trustee or fiduciary has acted innocently).

If the exclusion refers to, or includes, actual equitable fraud, it seems likely that *all* accessories, as well as trustees and fiduciaries who participate in a 'dishonest and fraudulent design', will be prevented from accessing the legislation. If so, it seems likely that only innocent trustees or fiduciaries who have been induced or procured to breach a trust or fiduciary obligation will have their liability limited under the legislation.

Generally, under the legislation, the liability of wrongdoers who are excluded from its application will be determined in accordance with the legal rules, if any, that (apart from the proportionate liability provisions) are relevant.[216] The consequences of this position are discussed later in this part.

2 *Apportionable Claim?*

Concurrent wrongdoers are able to access proportionate liability legislation where there is an 'apportionable claim', defined as:

> a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care.[217]

(a) A Claim for Economic Loss or Damage to Property?

To be apportionable, a claim must be for economic loss or damage to property. In most cases, accessory liability will arise in relation to 'economic loss or damage' to trust property or property held by a fiduciary.

(b) Action for Damages?

As noted above, for the legislation to apply, the claim must be 'in an action for damages'.[218] As the word 'damages' is not usually used in the context of equitable remedies, Parliament may have intended the legislation to apply only to common law actions for damages.[219] While the words 'or otherwise' indicate that the provisions are not restricted to claims in tort or contract, the reference to these claims may, under the *ejusdem generis* principle of statutory interpretation, limit the meaning of the word 'action' to similar common law actions for damages and thus exclude claims for equitable compensation. Nonetheless, under the New South Wales and Victorian legislation, 'damages' include 'any form of monetary compensation',[220] which appears broad enough to include

216 See, eg, *Civil Liability Act 2002* (NSW) s 34A; *Wrongs Act* s 24AI(2). In Victoria, *Wrongs Act* s 24AM states that a defendant 'against whom a finding of fraud is made' is jointly and severally liable for the damages awarded against any other defendant in the proceeding.

217 See, eg, *Civil Liability Act 2002* (NSW) s 34(1)(a). The *Civil Liability Act 2003* (Qld), *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and *Wrongs Act* contain slightly different provisions.

218 See, eg, *Civil Liability Act 2002* (NSW) s 34(1).

219 See Vicki Vann, 'Equitable Compensation for Undue Influence, Unconscionable Conduct and Estoppel?' (Paper presented at the Obligations III Conference, Brisbane, 13 July 2006) 34. See also Explanatory Memorandum, Professional Standards Bill 2004 (Qld) 19.

220 *Civil Liability Act 2002* (NSW) s 3; *Wrongs Act* s 24AE.

equitable compensation. In other contexts, the courts have interpreted 'damages' to include equitable compensation.[221] Accordingly, in light of the criticisms of the *ejusdem generis* principle,[222] it seems likely that the words 'action for damages' would be interpreted sufficiently broadly to include actions against accessories for equitable compensation.

(c) 'A Failure to Take Reasonable Care'

In order to be an apportionable claim, the loss must have arisen from 'a failure to take reasonable care'.[223] The undesirable consequences of applying the legislation to limit the liability of wrongdoers liable in equity, as discussed below, may lead the courts to conclude that the legislature intended the phrase to encompass only common law duties of care.[224] However, for the purposes of this discussion it will be assumed that this phrase is not so limited.

There are at least two possible interpretations of the requirement that loss must have arisen from a failure to take reasonable care. Each interpretation is discussed in turn below.

(i) Breach of an Express Duty to Take Care

On one view, the reference to a 'failure to take reasonable care' may refer only to a breach of an express duty to take care, such as a trustee's express duty to exercise reasonable care when administering a trust,[225] or may also include the equitable duty of care owed by some fiduciaries, such as directors.[226] Assuming that the phrase *does* encompass breaches of trustees' or fiduciaries' duties of care, an interesting question arises — can third parties be liable as accessories for assisting in, or inducing, these breaches?

While a trustee's or fiduciary's duty of care is an *equitable* duty, it is not a fiduciary duty. Fiduciary duties are restricted to the proscriptive fiduciary obligations to avoid conflict and not obtain an unauthorised profit from the relationship.[227] Accessory liability attaches to a person who assists in, or

221 See, eg, *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213, 215–16 (Brownie J) and cases cited therein. See also comments by Barrett J that 'equitable compensation is sometimes referred to as a species of "damages"': *Degiorgio v Dunn [No 2]* (2005) 62 NSWLR 284, 290 [13].

222 See, eg, *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368, 373–7 (Glass JA).

223 See, eg, *Civil Liability Act 2002* (NSW) s 34; cf *Civil Liability Act 2003* (Qld) s 28.

224 See, eg, the comment by Buchanan JA in *Pearsons Barristers and Solicitors v Avison* [2009] VSCA 54 (27 March 2009) [30] that: 'Although the point need not be decided, I doubt that a claim for breach of trust, albeit one seeking equitable compensation, falls within the description in s 24AF(1) of the *Wrongs Act* as "arising from a failure to take reasonable care."' Cf Sandip Mukerjea, 'Proportionate Liability for Economic Loss: The Story So Far' (2008) 19 *Insurance Law Journal* 279, 280–4, which suggests that, at a minimum, the proportionate liability provisions apply to a breach of an equitable duty of care. In the recent case of *Main Road Property Group Pty Ltd v Pelligra & Sons Pty Ltd* [2010] VSC 5 (15 January 2010) [29], Croft J considered it was 'arguable' that the claimed breaches of fiduciary duties were apportionable claims for the purposes of the *Wrongs Act*, but did not feel it necessary to decide the matter.

225 See *Re Speight; Speight v Gaunt* (1883) 22 Ch D 727, 739–40 (Jessel MR).

226 See *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 235–6 (Ipp J).

227 See, eg, *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137–8 (Gummow J).

procures or induces, a breach of *trust or fiduciary obligation*.[228] Therefore, it appears that third parties who assist in, induce or procure breaches of a trustee's duty of care will be liable as accessories because this is a breach of trust.[229] While Mitchell cites confidential information cases — such as *Thomas v Pearce*[230] — for the proposition that assisting in breaches of a fiduciary's equitable duty may lead to accessory liability,[231] these cases wrongly applied the test for breach of confidence by treating 'third parties' differently from primary recipients of the information.[232] Accordingly, under the current test for accessory liability, it seems that third parties assisting in a fiduciary's breach of their duty of care do not attract such liability because they assist in a breach of an *equitable*, rather than a *fiduciary*, duty.

(ii) Factual Failure to Take Care

Recent cases suggest that the proportionate liability provisions will apply more broadly to losses which arise from a *factual* failure to take care.[233] For example, fiduciaries may unintentionally breach their fiduciary obligation to avoid conflicts of interest as a result of their carelessness. In that case, the breach itself is not a breach of a duty to take reasonable care, but the underlying reason for the beneficiary's loss is arguably the fiduciary's failure to take reasonable care.[234] Accordingly, in some circumstances a third party may be liable as an accessory for assisting in a breach of fiduciary duty that arises from a factual failure to take care.

B *Impact of Legislation on Accessories*

As discussed above, it seems likely that knowing inducers will generally not be able to have their liability directly limited by the legislation. However, the legislation may apply to innocent trustees or fiduciaries who have been procured by those third parties to breach their trust or fiduciary obligations where that

228 See, eg, *Farah* (2007) 230 CLR 89, 164 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

229 Cf J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185, 235.

230 [2000] FSR 718.

231 Mitchell, 'Assistance', above n 159, 164.

232 See, eg, Richard Arnold, 'Circumstances Importing an Obligation of Confidence' (2003) 119 *Law Quarterly Review* 193, 198–9; John Glover, 'Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-Made Law' (2001) 21 *Legal Studies* 594, 596.

233 See, eg, *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450, 458, in which Middleton J stated that the proportionate liability provisions in the *Wrongs Act* 'do not require that the claim itself be a claim in negligence or for a breach of duty — it only requires that the claim arise from a failure to take reasonable care.'

234 It is likely that the breach of trust or fiduciary obligation will usually be the action giving rise to the plaintiff's loss. Accordingly, in most cases, the courts will examine whether the trustee's or fiduciary's breach involved a failure to take care, rather than whether the accessory's assistance in the breach involved a failure to take reasonable care. In most cases where a beneficiary suffers loss as a result of a 'dishonest or fraudulent design' on the part of a trustee or fiduciary, the trustee's or fiduciary's actions which caused that loss are unlikely to have arisen out of a mere failure to take reasonable care.

breach is of an express duty to take care, or arises on the facts from a failure to take care. Further, assuming that the legislation only excludes persons who have committed actual fraud at common law, the legislation may, in some circumstances, also limit the liability of knowing assistants and the defaulting trustees or fiduciaries whom they have assisted.[235]

Accordingly, where a third party has assisted, induced or procured a breach of a trustee's (but not a fiduciary's)[236] duty of care or, possibly, a breach of trust or fiduciary obligation which arises from a 'factual' failure to take care, it appears that:

(i) if the accessory *did not* act intentionally or fraudulently, their liability would be limited to the proportion of the loss they are responsible for; and

(ii) if the accessory *did* act intentionally or fraudulently, the accessory will be jointly and severally liable for the entire loss.

However, in those circumstances, if the relevant trustee or fiduciary did not act intentionally or fraudulently, and accordingly had his or her liability limited to the proportion of the loss for which they are responsible,[237] the equitable damages payable by the third party could still be effectively limited or expanded by the legislation, for the reason that plaintiffs cannot recover more than their loss.[238]

As an example of this last point, if a court finds that a trustee or fiduciary is 80 per cent responsible under the legislation and the trustee or fiduciary compensates the beneficiary for 80 per cent of the equitable damages payable, it would appear that the liability of the third party who has acted intentionally or fraudulently will be indirectly reduced to 20 per cent. This is a surprising result, as it appears that Parliament did not intend for the legislation to benefit dishonest or fraudulent parties.[239] However, the alternative (ie, that the amounts recovered by the plaintiff from the trustee are not taken into account) would seem to give the plaintiff an unfair windfall and conflict with the principle against double recovery.

235 In most circumstances, the existence of a 'dishonest and fraudulent design' is likely to mean that the relevant trustee or fiduciary has caused the loss intentionally.

236 This is because, as discussed above, it does not appear that accessories will be liable for assisting in a breach of a fiduciary's equitable duty.

237 See, eg, *Civil Liability Act 2002* (NSW) s 35(1)(a). Determining responsibility involves a consideration of the degree of departure from the standard of care of the reasonable person, taking into account the importance of the causative conduct of each wrongdoer and the relative importance of the wrongdoer's conduct in causing the economic loss. The same principles that are applied when determining contribution under the *Wrongs Act* appear to apply when determining appropriate apportionment under the New South Wales legislation.

238 See, eg, *Civil Liability Act 2002* (NSW) s 37(2). For a discussion of issues surrounding double recovery in the context of proportionate liability, see *Gunston v Lawley* (2008) 20 VR 33, 49–50 (Byrne J).

239 See, eg, *Civil Liability Act 2002* (NSW) s 34A(1). However, the third party's liability will still be unlimited. So, for example, if the trustee or fiduciary is unable to compensate the beneficiary for their share of the judgment because they are insolvent, the third party would be liable to pay the entire judgment.

C *Conclusion: Is It Desirable for the Proportionate Liability Legislation to Apply?*

While the current legislation may often only affect accessories in an indirect and limited manner, this legislation should *not* apply to any breaches of trust or fiduciary obligation. The problems leading to the introduction of the legislation, such as rising insurance premiums and plaintiffs targeting 'deep pockets', are also a serious concern in relation to trustees, fiduciaries and accessories.[240] However, many of these problems can be addressed by simply improving contribution laws.

The legislation's benefits are outweighed by the need to protect beneficiaries from harm. This need is reflected in the strict tests and onerous remedies equity has developed 'to fulfil the purposes of equity' which are 'different from those of the common law.'[241] These include 'the ready restitution and reinstatement of the beneficiary to the fullest extent possible.'[242] In contrast, the defendant-favouring legislation, by restricting a wrongdoer's liability, would prevent beneficiaries from fully recovering where the other wrongdoers are insolvent or deceased. Other legislation, such as s 5 of the *Professional Standards Act 1994* (NSW), has explicitly recognised these concerns by not limiting liability for breaches of trust. As Getzler notes, 'there is a deep discordance between the stringent approach to fiduciary loss in the Australian courts and the policies restricting liability stated in the new legislation.'[243]

VI CONCLUSION

The striking lack of authority regarding the principles of contribution and release and their application to accessories means that there are no simple answers to the questions posed in the introduction. This paper has attempted to provide answers by examining general principles of equity and analysing the relevant statutes, referring to the underlying reasons for accessory liability and reasoning, where appropriate, by analogy from other more developed areas of law.

It has been argued that, notwithstanding the recent case of *McNally*, the trustee contribution rules (including, in particular, the joint fraud rule) and the equitable contribution rule, should *not* be applied to third parties, such as the solicitor in the Scenario. Instead, contribution claims involving accessories should be governed by what is just and equitable in the circumstances, taking into account each party's responsibility for the loss.

240 See generally Paul D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance: "Should Not My Loss Be Your Loss?"' in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, 1993) 195.

241 *Maguire v Makaronis* (1996) 188 CLR 449, 492 (Kirby J).

242 Ibid.

243 Joshua Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 239, 271 n 127.

In light of equity's desire to protect beneficiaries, a release of a trustee or fiduciary should not automatically operate to release an accessory from liability. However, holding third parties liable for the entire amount would inequitably allow beneficiaries to decide where the loss should lie. A preferable approach may be to treat the beneficiary's release of the trustee or fiduciary as reducing the judgment owing by the greater of either the amount the trustee or fiduciary would otherwise have contributed to the judgment, or the amount actually paid by the trustee or fiduciary to the beneficiary, in return for the release.

The confusion surrounding the laws of contribution, release and apportionment emphasises the need for statutory reform. The contribution provisions of the *Wrongs Act* provide a just and equitable approach to determining contribution claims between wrongdoers and should be adopted in all Australian jurisdictions.[244] However, to ensure that beneficiaries are protected, the proportionate liability legislation should also be amended to exclude parties liable for breaches of trust or fiduciary obligations from the application of the legislation.

Adopting a principled approach to the laws of contribution and release in relation to accessories is particularly important due to the strict test for liability and the harsh remedies imposed upon accessories. Adopting a more flexible test to determine accessory liability or tailoring remedies available against accessories to reflect their responsibility for the loss may be an alternative way to resolve some of the problems discussed in this paper.[245]

The harsh remedies which may be imposed on accessories, and the relatively low levels of assistance (at least in the case of knowing assistants) and knowledge required to attract liability, emphasises the need for the courts and the legislature to adopt a cautious and principled approach when developing the law relating to accessories, contribution, release and apportionment. The courts should be wary of misleading terminology such as 'secondary liability' or 'constructive trustee' which is often used in the context of accessory liability. The equitable principles underpinning accessory liability, and equity in general, must be appreciated in order to achieve a satisfactory balance between the interests of the wronged beneficiaries, the defaulting trustees or fiduciaries and accessories such as the solicitor in the Scenario outlined at the beginning of this paper.

244 Preferably with a definition of indemnity which explicitly excludes equitable indemnities.

245 See, eg, Finn, above n 240, 212–17, where Finn argues that third parties' degree of participation in the wrongdoing should be weighed against their level of knowledge.