

‘THE RECEIPT OF WHAT?’: QUESTIONS CONCERNING THIRD PARTY RECIPIENT LIABILITY IN EQUITY AND UNJUST ENRICHMENT

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[This article argues that equitable recipient liability should not be displaced by a strict liability claim in unjust enrichment. Furthermore, recent judicial and academic suggestions to the contrary fail to engage in a proper analysis of the requisite elements of either claim. In particular, the questions of whether there has been a ‘receipt’ of trust property and whether proprietary relief is available have been glossed over. To demonstrate the complexity and confusion surrounding both the equitable and unjust enrichment claims the article considers (against the backdrop of proprietary claims reliant on the priority/tracing rules) the application of equitable recipient liability and unjust enrichment theory to a simple fact scenario and then more complex variations. It is argued on doctrinal and policy grounds that equitable fault-based liability best reconciles the competing claims of the beneficiary of a trust or fiduciary relationship, and the third party recipient of trust property. The High Court of Australia, in its recent decision of Farah Constructions Pty Ltd v Say-Dee Pty Ltd, reached similar conclusions on a number of key points.]

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I INTRODUCTION

The law concerning the personal liability of parties involved, broadly speaking, as 'accessories' in a breach of trust or fiduciary relationship is in a state of considerable uncertainty and confusion, leaving it 'in danger of becoming a quagmire of conflicting propositions and rationales'.¹ Traditionally, such liability is divided into two broad and potentially overlapping classes of case: (1) liability as a result of assisting in the breach of trust or fiduciary duty ('knowing assistance');² and (2) liability as a result of the receipt of trust property or other property which is the subject of a fiduciary relationship ('recipient liability' or 'knowing receipt'). Further, the possibility of a *proprietary* claim for the recovery of specific property received by a defendant, or its traceable proceeds, forms a significant backdrop to any *personal* liability. Indeed, one can question whether the two classes of personal liability ought to be dealt with as distinct and separate heads of liability at all.³

Putting that to one side for now, however, at least in relation to knowing receipt cases, the sources of confusion are manifold. These include the use of misleading descriptions and labels such as 'constructive trustee'⁴ and inconsistencies in the law as to the precise content of the recipient liability rule, in particular, the level of knowledge necessary to activate personal liability.⁵ Adding to the complexities (or perhaps providing a solution to them), more recent academic commentary argues that an alternative analysis is apposite in factual circumstances similar to those in which equity's recipient liability rule applies. Such an analysis is used by some to argue that 'strict liability' should arise on the receipt of an unjust enrichment where trust property is received by

¹ *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285, 303 (Finkelstein J). See also Anthony Mason, 'Fusion' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 11, 14.

² This is often labelled, particularly in England, as 'accessorial liability': see, eg, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 ('*Royal Brunei*'). Such labelling is unhelpful if a distinction continues to be maintained within equitable wrong-based liability between *assistance* in a breach and liability for the *receipt* of trust property, given that the more general meaning of the word 'accessory' encompasses both types of claim.

³ See generally Paul D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 195. In particular, Finn questions the need for two distinct wrong-based claims: at 209 fnn 76–8.

⁴ See generally Sir Peter Millett, 'Restitution and Constructive Trusts' in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 199.

⁵ See also *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286, 298 (Mason P) ('*Robins*').

third parties. In England, at least, there has been strong judicial and extra-judicial endorsement (from senior Law Lords) of such ‘strict’ unjust enrichment-based liability⁶ and the need for a new landmark case to resolve the difficulties.⁷

Following on from earlier obiter dicta of Australian judges,⁸ in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* (*‘Say-Dee’*),⁹ the New South Wales Court of Appeal accepted as ‘clear’¹⁰ and ‘compelling’¹¹ the view that the ‘liability of a recipient of trust property is restitution based so that liability is strict subject only to defences of bona fide purchaser (for value) and/or change of position’.¹² Consequently, courts ought to ‘abandon the fault-based idea of knowing receipt’.¹³ The Court opined that it was time to bite ‘the proverbial bullet’ in favour of such an approach.¹⁴

Yet this view, albeit dicta, was expressed in a case in which, as the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (*‘Farah’*)¹⁵ has now held, neither equity’s recipient liability rule nor unjust enrichment was applicable to the facts. Further, it is at least arguable that the proprietary remedy awarded in the case did not necessarily follow on the basis of either of those doctrines.¹⁶

Framing these difficulties in a more general way, it is suggested that factual scenarios that raise considerable challenges for equity’s recipient liability rule cannot be decided without close analysis — such challenges cannot be avoided

⁶ See, eg, *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 194 (Lord Millett); *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, 1849 (Lord Nicholls).

⁷ See, eg, Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 231. See also Millett, ‘Restitution and Constructive Trusts’, above n 4, 207; Lord Robert Walker, ‘Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt’ (2005) 27 *Sydney Law Review* 187, 202. In Australia, see Keith Mason, ‘Where Has Australian Restitution Law Got to and Where Is It Going?’ (2003) 77 *Australian Law Journal* 358, 368. Cf J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (7th ed, 2006) 289.

⁸ See, eg, *Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd* [1998] 3 VR 16, 100–5 (Hansen J) (*‘Koorootang’*); *NIML Ltd v Man Financial Australia Ltd* [2004] VSC 449 (Unreported, Harper J, 8 November 2004) [53]–[63].

⁹ [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005). See also *Multan Pty Ltd v Ippoliti* [2006] WASC 130 (Unreported, Simmonds J, 29 June 2006), approving the unjust enrichment analysis in *Say-Dee*.

¹⁰ *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [223] (Tobias JA).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid* [231] (Tobias JA).

¹⁴ *Ibid* [232] (Tobias JA). Cf *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 456 (Nourse LJ), where it is suggested that it would be ‘a fruitless exercise’ to consider the arguments in favour of a strict liability restitutionary approach at the Court of Appeal level.

¹⁵ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

¹⁶ *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) does not discuss arguments against strict liability in unjust enrichment: see below nn 17, 98 and accompanying text. For criticism of the decision: see James Watson, ‘Breach of Fiduciary Duty: Whether Volunteer Who Innocently Receives Property Must Restore It’ (2006) 80 *Australian Law Journal* 172; Brad Strahorn, ‘The End of Knowing Receipt? A Riposte to Unjust Enrichment’ (2006) 80 *Australian Law Journal* 765.

by resort to unjust enrichment or mere statements of conclusions. One needs to be clear about: (1) whether the facts are amenable to analysis on the basis of liability *for receipt*, either in equity or unjust enrichment, that is, whether there is a receipt of trust or other property at all;¹⁷ (2) whether an alternative analysis in unjust enrichment is indeed the preferable approach in some or all of these cases; and (3) what form (proprietary or personal) any remedy should take.

Unfortunately, although much attention is often paid in the cases to the second question, very little attention is paid to the first — the second question can only be meaningfully addressed after an answer to the first is obtained. It is argued that the decision of the NSW Court of Appeal in *Say-Dee* avoids important policy and doctrinal questions that need to be resolved before Australian courts embrace unjust enrichment.¹⁸ The solutions offered by unjust enrichment theory (which is itself complex) are not necessarily more desirable or easier to apply than liability in equity, yet some judges appear to view unjust enrichment as a panacea without, perhaps, fully appreciating those complexities. The High Court in *Farah* has now overturned the decision of the Court of Appeal. Although the High Court overturned the Court of Appeal's findings of fact in at least two significant ways, by holding that no breach of fiduciary duty had occurred and that the fiduciary was not an agent of the third party purchasers of the property, it went on to consider and strongly reject the conclusions reached by the Court of Appeal, on the assumption that there had been a breach of fiduciary duty. In doing so, the unanimous joint judgment in *Farah* reached many conclusions broadly consistent with this article.

This article proposes to 'plunge into [the] murky waters'¹⁹ of equity's knowing receipt rule and unjust enrichment theory, starting with a simple fact scenario that allows for the straightforward application of each doctrine. The article will also discuss other equitable claims that might arise from this scenario, for its central argument is that knowing receipt can only be properly understood within this context. From this, the article illustrates how more complex variations on the initial fact scenario raise significant conceptual difficulties and policy questions that need to be resolved irrespective of which doctrinal vehicle is applied. It is argued that only after those preliminary questions are resolved will it be possible to tackle the question of which of the two analyses, or a different approach altogether, is more appropriate.

The article adopts a seven-part structure. Part II provides an overview of the types of claim that may arise in equity from the simple fact scenario with which the discussion commences. Part III considers the general principles applicable to establishing a claim either (a) in equity, under the knowing receipt rules; or (b) on the basis of unjust enrichment theory. Part IV discusses the availability of proprietary remedies on the basis of (a) equitable principles; or (b) unjust

¹⁷ The difficulties are highlighted by a recent article: see Michael Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 327, 341–3.

¹⁸ *Contra* James Edelman, 'A Principled Approach to Unauthorised Receipt of Trust Property' (2006) 122 *Law Quarterly Review* 174, who considers that the case is an 'excellent decision' that 'achieves symmetry' but 'also shows that ... difficult issues still remain': at 177.

¹⁹ *Robins* (2003) 175 FLR 286, 298 (Mason P).

enrichment theory. Part V considers more complex factual scenarios and how the basic principles discussed in Parts III and IV apply to these more complex scenarios. This Part will include a discussion of the decision and reasoning of the NSW Court of Appeal in *Say-Dee* and, briefly, the High Court in *Farah*. Part VI will consider some of the advantages and disadvantages of the respective approaches to recipient liability in equity and unjust enrichment.

In Part VII, the article concludes that a genuinely *receipt*-based liability (whether in unjust enrichment or equity) ought to be seen as the personal liability companion to the proprietary claim dependant upon the priority and tracing rules, and hence should not be available in circumstances in which trust property or its traceable value was not received by the third party. This means that such a claim cannot extend merely to the ‘receipt’ of information or opportunities that can be asserted to ‘belong’ to the principal, but which the fiduciary ‘transfers’ to the third party.

In any case, it will be concluded that, outside the proprietary claim, any recipient-based personal liability ought to be wrongs-based and, if so, then there is no real need to distinguish between the two limbs of *Barnes v Addy*:²⁰ both are essentially similar liability rules focused on participation in wrongs. Hence, it is considered that a separate analysis of whether there is any ‘receipt’ of property or ‘enrichment’ does not *need* to be engaged in for the purposes of personal liability.

II AN OVERVIEW OF POSSIBLE CLAIMS IN EQUITY

To take a simple fact scenario: a trustee holds ‘property’²¹ on trust for their principal, who in this case, is the beneficiary of the trust. Rather than invest the property, the trustee seeks to appropriate it for their own purposes. The trustee transfers the property, directly or through intermediaries, into the hands of a third party — the defendant. The principal-plaintiff claims against the third party defendant.

In equity, the principal may have three, possibly overlapping, means of redress against the defendant:²²

- 1 a claim asserting the principal’s equitable *proprietary* interest on the basis of either:
 - a priority rules: the principal may claim an equitable proprietary interest in the original trust property by arguing that their first-in-time interest takes priority over the defendant’s later-acquired interest;²³ or

²⁰ (1874) LR 9 Ch App 244.

²¹ What may be encompassed by ‘property’ will be discussed further: see below Part V(B)(1).

²² There may also be a personal claim for compensation of the kind allowed in *Re Diplock* [1948] Ch 465 if the trust is testamentary: see Lionel Smith, ‘Unjust Enrichment, Property, and the Structure of Trusts’ (2000) 116 *Law Quarterly Review* 412, 437–8; Bryan, ‘The Liability of the Recipient’, above n 17, 327. With respect to the interaction of the equitable claims: see also R P Austin, ‘Constructive Trusts’ in P D Finn (ed), *Essays in Equity* (1985) 196, 214; Lawbook Company, *Principles of the Law of Trusts*, vol 2 (at 42) ch 22; Patrick Parkinson and David Wright, ‘Equity and Property’ in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2002) 55.

- b tracing rules: the principal may claim an equitable proprietary interest in other property held by the defendant by arguing that the value inherent in the principal's equitable proprietary interest in the original trust property can be traced into mixed or substituted property held by the defendant;²⁴
- 2 knowing receipt: a *personal* claim that the defendant knowingly received either the trust property itself or property into which the value inherent in the principal's equitable proprietary interest can be traced (whether or not the defendant still holds the traceable property);²⁵ or
- 3 knowing assistance: a claim that the defendant knowingly assisted in the trustee's breach of trust.²⁶

Claims (1) and (2) depend upon the defendant having received property in which the principal can assert an equitable proprietary interest or, in the case of claim (2), *could* have asserted such an interest at some time. Claim (1) generates proprietary remedies while, as will be explained below, claim (2) generates a personal remedy — the *claim* is property-based but the *remedy* is personal.²⁷ Claim (3) does not depend upon the receipt of property by the defendant, although any receipt of property by the defendant will be relevant if it constitutes assistance in the trustee's breach of trust.²⁸

Claim (1) depends upon the defendant continuing to hold some property. The priority rules determine which of two or more validly created, but inconsistent, interests in the same property should prevail: in this instance, the principal's earlier equitable interest in the trust property or the defendant's subsequent legal or equitable interest in the trust property. The priority rules only apply if the nature of the trust property has not changed. For example, if the trust property is shares and, in breach of trust, the trustee uses them as security for a loan by the defendant, the question is whether the principal or the defendant has better title to the shares.²⁹ By way of contrast, the focus of the tracing rules is to determine whether the principal's equitable proprietary rights *survive* in property held by the defendant that has been substituted for, or mixed with, the trust property. If the value inherent in the principal's interest in the trust property can be traced into property held by the defendant, then the principal may claim a trust or lien in relation to that property.³⁰ Hence, claims (1)(a) and (1)(b) can be conceptual-

²³ See, eg, *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 3 All ER 747. On priorities: see generally R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) ch 8.

²⁴ See, eg, *Foskett v McKeown* [2001] 1 AC 102.

²⁵ *Barnes v Addy* (1874) LR 9 Ch App 244.

²⁶ *Ibid.*

²⁷ *Re Montagu's Settlement Trusts* [1987] Ch 264, 285 (Megarry V-C). See below Part III(A).

²⁸ The knowing assistance claim will be considered from Part V onwards.

²⁹ See, eg, *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 3 All ER 747; *Koorootang* [1998] 3 VR 16. The rules of following may be needed to identify the defendant: see Sarah Worthington, *Equity* (2nd ed, 2006) ch 4.

³⁰ *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 552 (Gummow J); *Foskett v McKeown* [2001] 1 AC 102, 130 (Lord Millett). The House of Lords regarded the trust as being the original express trust. See also Charles Rickett, 'Old and New in the Law of Trac-

ised as the same claim which is dependent upon either priority or tracing rules although, historically, the two bodies of rules developed separately.

The orthodox view of tracing, as articulated in recent authorities and academic commentary, is that tracing is ‘neither a claim nor a remedy’, but simply, the *process* of ‘tracking’ the value inherent in the principal’s original equitable proprietary interest into other forms of property.³¹ The principal’s *claim* is the assertion of the principal’s original equitable proprietary interest, which is identified with the defendant’s property through the tracing process.³² The discussion so far has complied with this analysis. However, it could be argued, contrary to the current orthodoxy, that the tracing rules are by no means ‘arbitrary evidential problem solvers’,³³ but instead, embody deliberate normative choices by the courts as to when equitable proprietary rights survive mixing and substitution. Hence, tracing is *not* a neutral process that can be disassociated from the proprietary claim itself.³⁴ Nevertheless, it is not necessary to pursue that debate here.

Claim (1) is defeated if the defendant is a bona fide purchaser (of the legal title) for value without notice.³⁵ Conversely, if the defendant has notice of the principal’s prior equitable interest then the principal’s interest will prevail. Notice in this context includes:

- 1 actual notice: this includes notice inferred from ‘wilful blindness’ and ‘contrived ignorance’;³⁶
- 2 constructive notice: the notice that the defendant would have gained had they made reasonable and proper enquiries;³⁷ and
- 3 imputed notice: the actual or constructive notice acquired in the course of an agency by an agent acting for the defendant in the purchase where the

ing’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 119, 142. The contrary view is that the trust is a constructive trust: see Lawbook Company, above n 22, vol 2 (at 42) [22 750].

³¹ *Foskett v McKeown* [2001] 1 AC 102, 128–9 (Lord Millett), referring with approval to Lionel Smith, *The Law of Tracing* (1997). See also *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 103–4 (Spigelman CJ).

³² *Foskett v McKeown* [2001] 1 AC 102, 127–9 (Lord Millett); Lord Peter Millett, ‘Proprietary Restitution’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005), 309. See also *Koorootang* [1998] 3 VR 16, 88 (Hansen J); *Re Montagu’s Settlement Trusts* [1987] Ch 264, 276 (Megarry V-C).

³³ Rickett, ‘Old and New in the Law of Tracing’, above n 30, 138.

³⁴ See generally Simon Evans, ‘Property, Proprietary Remedies and Insolvency: Conceptualism or Candour?’ (2000) 5 *Deakin Law Review* 31.

³⁵ The defendant’s bona fides is a separate matter from whether the defendant had notice (although, if the defendant has notice, there is no need to consider the defendant’s bona fides): see, eg, *Nelson v Larholt* [1948] 1 KB 339; *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 528 (Lord Wilberforce). The bona fide purchaser defence extends to the purchaser of an equitable interest, but only where the prior interest is a ‘mere equity’: *Phillips v Phillips* (1862) 4 De G F & J 208, 218; 45 ER 1164, 1167 (Lord Westbury); *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277–9 (Kitto J).

³⁶ *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 3 All ER 747, 769 (Millett J).

³⁷ *Ibid.* See also *The English & Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, 707–8 (Lord Esher MR).

information acquired is material to the transaction and the agent has a duty to pass it on.³⁸

The outcomes of the priority and tracing exercises are not as clear when the defendant has no notice of the plaintiff's prior equitable interest in the trust but is not a purchaser of the legal estate for value; that is, the defendant has either purchased an *equitable* interest, or is a volunteer. In such situations, it is normally the principal's interest which has priority because the general priorities rule is that if the defendant is the bona fide purchaser for value of an *equitable* interest (for example, through providing a loan by way of an unregistered mortgage) in the trust property without notice, then the first created interest prevails.³⁹ As the authors of *Meagher, Gummow and Lehane* note, '[t]here is no general doctrine of "bona fide purchaser of an equitable estate for value without notice."⁴⁰ The situation is the same, according to the priorities rules, where the defendant is a volunteer without notice.

According to the tracing rules, if the defendant is a *volunteer* and the trust property was merely substituted by property now held by the defendant, then the principal can trace into the substituted property.⁴¹ Otherwise, the outcome will depend upon how the defendant has mixed the trust property with their own property.⁴² Whether or not tracing is possible when the defendant has purchased an *equitable* interest in the trust property without notice is unclear.⁴³ However, if the tracing rules are presumed to be consistent with the priorities rules, then the principal should be able to trace even against a defendant who is a bona fide purchaser of an equitable estate.

The application of these priority and tracing rules to a defendant who is a bona fide purchaser of an equitable interest in the principal's property, or a volunteer recipient of the principal's property, is severe where the defendant has changed their position in reliance on the receipt of the property but still holds the property or its traceable substitute. Similarly, harsh outcomes may arise where the defendant is a purchaser for value of the legal estate with constructive notice rather than actual notice. Such outcomes give a questionable supremacy to the proprietary interests of a principal at the expense of a recipient with no actual notice of wrongdoing. Although such outcomes are reflected in the common

³⁸ *Espin v Pemberton* (1859) 3 De G & J 547, 554; 44 ER 1380, 1383 (Lord Chelmsford LC); *Koorootang* [1998] 3 VR 16, 115 (Hansen J), discussing *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 658 (Mason J). See also *Re Montagu's Settlement Trusts* [1987] Ch 264, 277 (Megarry V-C). For the circumstances in which an agent's knowledge is imputed to the defendant: see Lawbook Company, above n 22, vol 2 (at 42) [22 820]–[22 850].

³⁹ For factors relevant in applying the general principle: see *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265; *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326. See also Parkinson and Wright, above n 22, 87–92.

⁴⁰ Meagher, Heydon and Leeming, above n 23, 339.

⁴¹ *Re Diplock* [1948] 1 Ch 465. See, eg, *Addstead Pty Ltd (in liq) v Liddan Pty Ltd* (1997) 70 SASR 21.

⁴² *Re Diplock* [1948] 1 Ch 465.

⁴³ But see *Re Diplock* [1948] 1 Ch 465, 522 (Lord Greene MR, Wrottesley and Evershed LJJ). However, if the English Court of Appeal was referring to the bona fide purchaser doctrine, generally that doctrine only applies to the purchase of *legal* interests: see above n 35; Meagher, Heydon and Leeming, above n 23, 339. The case involved tracing to volunteers so this question was not in issue.

law's protection of property, they are inconsistent with a clear ameliorating trend in the law regarding equitable claims. Instances of such a trend include: the statutory abrogation of the sufficiency of constructive notice for purchasers;⁴⁴ the protection given to a volunteer recipient who mixes the principal's property with their own;⁴⁵ and recent judicial attempts at a change of position defence in relation to tracing to volunteers.⁴⁶ These developments suggest that a change of position defence, specifically in relation to tracing proprietary claims, deserves further consideration.⁴⁷

III GENERAL PRINCIPLES APPLICABLE TO ESTABLISHING RECIPIENT LIABILITY IN EQUITY AND UNJUST ENRICHMENT

A *Current Liability Rules in Equity*

It is where the defendant no longer holds the trust property that recipient liability becomes most attractive to the principal, as proprietary claims to the trust property are no longer available. According to the established cases, the trigger for recipient liability is the defendant's equitable wrongdoing — in traditional terminology, the question was whether the defendant's conduct warranted their treatment as a constructive trustee.⁴⁸ However, before the defendant's wrongdoing comes into question, it must first be established that the defendant received misappropriated trust property.

1 *Receipt*

The defendant clearly receives trust property where there is a direct transfer of the legal title to, or an equitable interest in, the trust property from the trustee to the defendant. Such transfer may be absolute or by way of security.⁴⁹ It may be necessary to apply the tracing rules if the trust property passed through other hands before reaching the defendant.

The receipt of trust property must be for the defendant's personal benefit.⁵⁰ Accordingly, it is difficult to prove the liability of an agent who receives misappropriated trust property in the course of their agency.⁵¹

⁴⁴ There are now numerous statutory protections from the rigours of the constructive notice doctrine, and it has no application to registered owners of Torrens title property: see generally Meagher, Heydon and Leeming, above n 23, 198–9.

⁴⁵ *Re Diplock* [1948] 1 Ch 465.

⁴⁶ See, eg, *Gertsch v Atsas* (1999) 10 BPR 18 431. See generally Heydon and Leeming, above n 7, 682–3.

⁴⁷ *Contra* Graham Virgo, *The Principles of the Law of Restitution* (2nd ed, 2006) 708–10. Additionally, where the defendant has purchased an equitable interest, serious consideration should be given to requiring actual, rather than constructive, notice of the plaintiff's interest.

⁴⁸ See, eg, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 412 (Stephen J) ('*Consul*'); Nicholls, above n 7, 233, 235.

⁴⁹ See, eg, *Koorootang* [1998] 3 VR 16; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; *Doneley v Doneley* [1998] 1 Qd R 602.

⁵⁰ *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291–2 (Millet J) ('*Agip*'); *Evans v European Bank Ltd* (2004) 61 NSWLR 75.

⁵¹ Agents who deal with the trust property inconsistently with the trust may come within the discrete liability of 'knowing dealing': see, eg, *Lee v Sankey* (1873) LR 15 Eq 204, 211 (Ba-

2 Trust Property

The requirement that the defendant's receipt be of *trust* property is satisfied in the simple fact scenario above because the trust in question is an express trust. The scope for a knowing receipt claim is considerably widened, however, by the fact that company assets are treated as trust property in the hands of the company's directors.⁵² This principle extends to others in control of the company's assets if they owe fiduciary duties to the company.⁵³ Nor is the principle confined to company assets; it applies whenever property of the principal is under the fiduciary's control.⁵⁴

The question of whether trust property includes property impressed with a constructive trust, and further complexities, will be dealt with below.

3 Misappropriated Trust Property

Recipient liability is presumed to arise only in the context of a breach of trust or fiduciary duty; certainly, the classic formulations of recipient liability are so framed.⁵⁵ Furthermore, if the receipt of trust property occurs by way of a contract between the principal and the defendant, which is entered into by the trustee on the principal's behalf (such as where the trustee is the principal's agent), then the question of whether the trust property has been misappropriated turns on the validity of the contract. The contract must be shown to be void or voidable (and rescinded) before a knowing receipt claim can arise.⁵⁶ Alternatively, it may be possible to argue that the purported contract was a fiction and that, in effect, the trust property was stolen rather than contractually transferred.⁵⁷

con V-C); *Adams v Bank of New South Wales* [1984] 1 NSWLR 285; *Koorootang* [1998] 3 VR 16, 78–9 (Hansen J); *Agip* [1990] Ch 265, 291 (Millett J).

⁵² *Belmont Finance Corporation v Williams Furniture Ltd [No 2]* [1980] 1 All ER 393, 405 (Buckley LJ), citing *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474, 479 (Jessel MR); *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246, 297–8 (Slade LJ); *Robins* (2003) 175 FLR 286, 299–300 (Mason P). See also Smith, 'Unjust Enrichment, Property, and the Structure of Trusts', above n 22, 429 fn 71. The High Court in *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [113] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), implied that the extension of recipient liability in this way was open to question.

⁵³ *Agip* [1990] Ch 265, 290 (Millett J).

⁵⁴ *Foley v Hill* (1848) 2 HL Cas 28, 35–6 (Lord Cottenham LC); *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, 49 (Richardson J).

⁵⁵ *Barnes v Addy* (1874) LR 9 Ch App 244; *Consul* (1975) 132 CLR 373; *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 106–7 (Spigelman CJ). The requirement for a breach of duty by the trustee or fiduciary is debatable but will not be discussed further here: see, eg, Finn, above n 3, 209, 212 fn 88; cf Simon Gardner, 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 *Law Quarterly Review* 56, 69 fn 84.

⁵⁶ *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, 1855 (Lord Scott), casting doubt upon the reasoning of the Court of Appeal in *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Unreported, Lewison J, 27 July 2005) ('*Ultraframe*'); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153 (McLelland AJA). In the context of the misappropriation of company assets by directors, the question is thus whether, according to agency principles, the company directors had authority to enter into the contract with the defendant.

⁵⁷ See, eg, *Robins* (2003) 175 FLR 286.

4 *The Trigger for Knowing Receipt Liability: A Defendant's Wrongdoing*

Assuming then, that the defendant received trust property in breach of the trust and for their own personal benefit, according to the current law the question is whether the defendant's conduct constitutes an equitable wrong. It is generally agreed that the answer turns upon what the defendant knew or ought to have known of the breach of trust.⁵⁸ Early authorities on recipient liability referred neutrally to the defendant's 'cognizance' of the breach.⁵⁹ However, during the latter part of the 20th century, the equitable rules on notice were adopted in relation to knowing receipt and knowing assistance claims.⁶⁰ Equitable notice, as discussed in Part II, encompasses actual notice, constructive notice and imputed notice. In relation to claims of knowing receipt and knowing assistance, the categories of actual notice and constructive notice were famously (and controversially) restated as five levels of 'knowledge' according to the '*Baden* scale'.⁶¹

The most contentious question within equitable recipient liability concerns the defendant's requisite state of knowledge: in the terminology of equitable notice, the question is should the defendant be liable when they have constructive, rather than actual, notice of the breach of trust or fiduciary duty? The term 'constructive notice' is often used loosely in this context to include, according to the *Baden* scale, either knowledge of facts that would indicate the breach of trust to an honest and reasonable person (level (iv))⁶² or the knowledge that the defen-

⁵⁸ The question of exactly what the defendant must know *of* has not received as much attention as the nature of the defendant's knowledge (actual, constructive or imputed). This is particularly so in relation to knowing receipt (as opposed to knowing assistance) claims. In relation to knowing assistance, the Privy Council has held that the defendant does not need to know of, and recognise, the trust or fiduciary relationship (sometimes a difficult exercise) as it is sufficient that the defendant knows or suspects that they are 'assisting in a misappropriation of money': *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333, 341 (Lord Hoffmann), affirming *Twinside Ltd v Yardley* [2002] 2 AC 164, 202 (Lord Millett). The position in Australia is not as clear. The NSW Court of Appeal in *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 253 (Moffitt P, Hope and Samuels JJA) ('*USSC*'), held that the defendant must recognise both the trust or fiduciary relationship, and the breach of duty. See also Austin, above n 22, 235–8; Charles Mitchell, 'Assistance' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 139, 195–200.

⁵⁹ See, eg, *Lee v Sankey* (1873) LR 15 Eq 204, 211 (Bacon V-C).

⁶⁰ See, eg, *Selangor United Rubber Estates Ltd v Cradock [No 3]* [1968] 2 All ER 1073; *Consul* (1975) 132 CLR 373. This was despite the fact that the rules had developed in the context of proprietary claims concerning land; and further, the defence of bona fide purchaser for value without notice is not, of itself, relevant to a knowing receipt claim: see Heydon and Leeming, above n 7, 285–6; *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2006) 58 ACSR 63, 78 (Hamilton J).

⁶¹ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, 235 (Peter Gibson J) ('*Baden*'):

- (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

In *Royal Brunei* [1995] 2 AC 378, 392 (Lord Nicholls) suggested that in the context of equitable 'accessory' liability the *Baden* scale 'is best forgotten'; however, the High Court in *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [174]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), endorsed the *Baden* scale in relation to the claim for knowing assistance.

⁶² *Baden* [1992] 4 All ER 161, 235 (Peter Gibson J). This formulation was based upon Gibbs J's statement in *Consul* (1975) 132 CLR 373, 398. See also Heydon and Leeming, above n 7, 285–6.

dant would have gained had the defendant made reasonable and proper enquiries (level (v)).⁶³ However, true constructive notice depends entirely upon what a reasonable person would have discovered of the breach of duty, regardless of the facts actually known to the defendant; thus level (iv) and level (v) knowledge as described above are more accurately labelled ‘constructive knowledge’, rather than constructive notice.⁶⁴ For clarity, in the following discussion the terminology of equitable notice is used, rather than the *Baden* scale of knowledge. Specifically, ‘constructive notice’ is used to mean the notice that the defendant would have gained had they made reasonable and proper enquiries.

Equally uncertain, although not as often addressed, is whether imputed notice should suffice for knowing receipt liability. Imputed notice is relevant in two situations: first, where the defendant is a company and thus, can only ‘know’ of facts through human intermediaries; and secondly, where the defendant is either a company or an individual who receives trust property by way of an agent acting for them in relation to the receipt.⁶⁵

One reason why there is uncertainty as to whether constructive notice and imputed notice suffice for knowing receipt liability is because there are two divergent rationales for recipient liability that run through the case law:⁶⁶

- 1 the protection of the principal’s property interests as the beneficiary of a trust; and
- 2 the provision of redress for the defendant’s participation in equitable wrongdoing.

If recipient liability is primarily concerned with the first rationale, then applying constructive and imputed notice by analogy is justifiable.⁶⁷ Thus, according to Millett J, ‘[t]racing claims and cases of “knowing receipt” are both concerned with rights of priority in relation to property taken by a legal owner for his own benefit’.⁶⁸

Accordingly, on this view, the emphasis is upon property protection (specifically, the property interests of the principal) and the consequent need for the defendant to ensure that they are entitled to receive the property by making any reasonable and proper enquiries. Thus, if the defendant fails to make such

⁶³ *Baden* [1992] 4 All ER 161, 235 (Peter Gibson J).

⁶⁴ Thus, the *Baden* scale offers a wide definition of ‘knowledge’: see Gardner, above n 55, 57–8. The High Court in *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) noted that level (v) comes closest to the concept of constructive notice.

⁶⁵ See, eg, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; *K & S Corporation Ltd v Sportingbet Australia Pty Ltd* (2003) 86 SASR 312. In the first situation, the defendant is taken to have the actual and constructive notice of the persons who constitute its ‘directing mind and will’: *Lenard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC); *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 705 (Hoffmann LJ).

⁶⁶ Finn, above n 3, 209. See also *Koorootang* [1998] 3 VR 16, 100 (Hansen J), relying upon Michael Bryan, ‘Cleaning Up after Breaches of Fiduciary Duty — The Liability of Banks and Other Financial Institutions as Constructive Trustees’ (1995) 7 *Bond Law Review* 67.

⁶⁷ See, eg, *Agip* [1990] Ch 265, 292–3 (Millett J); *Powell v Thompson* [1991] 1 NZLR 597 (Thomas J).

⁶⁸ *Agip* [1990] Ch 265, 292–3. See also *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 738–9.

enquiries, their constructive notice of a breach of trust or fiduciary duty should suffice for recipient liability. Similarly, if the defendant uses an agent to do what is necessary on their behalf, then the defendant should be bound by the agent's actual or constructive notice of the facts.⁶⁹ Thus, both constructive and imputed notice suffice for liability according to the property protection rationale for recipient liability.

Conversely, if the emphasis is on the second rationale, then the sufficiency of constructive notice and imputed notice is debatable. The relevant question becomes whether the defendant behaved wrongfully and this suggests that a stronger degree of cognition of the breach of trust is necessary.

Sir Robert Megarry V-C in *Re Montagu's Settlement Trusts*⁷⁰ is the clearest proponent of the second rationale for recipient liability and, consequently, his Honour rejects the sufficiency of both constructive and imputed notice. In Megarry V-C's view, knowing receipt liability must be distinguished from the priority/tracing proprietary claim — the former is more onerous because the defendant will have to make good the principal's losses without resort to the trust property.⁷¹ Therefore, recipient liability, unlike the proprietary claim, requires a 'want of probity'.⁷²

Whilst the article agrees that constructive notice, embodying as it does, notions of mere carelessness, does not satisfy this requirement, Megarry V-C's rejection of the sufficiency of imputed notice can be challenged. On the facts before his Honour, the defendant's agent only had constructive notice of the breach of trust. The article argues that imputed notice can only suffice for recipient liability if the defendant's agent has *actual* notice of the breach of trust or fiduciary duty.⁷³ If the defendant has entrusted the responsibility for the receipt of property to an agent and the agent has actual notice of the breach of trust or fiduciary duty, then consistently with the general principles of agency law, the defendant must be imputed with their agent's actual notice. By contrast, if the defendant's agent has only constructive notice, there are no grounds for suggesting that the defendant's conscience is affected. Whether the defendant acts personally or through an agent is not the relevant question; rather, it is whether the defendant or the defendant's agent had actual notice of the breach of trust or fiduciary duty.

The two rationales for recipient liability are not entirely distinct in the case law and they often become entangled with a concurrent proprietary claim. This can be illustrated by considering recipient liability's doctrinal position in relation to a

⁶⁹ See, eg, *Powell v Thompson* [1991] 1 NZLR 597.

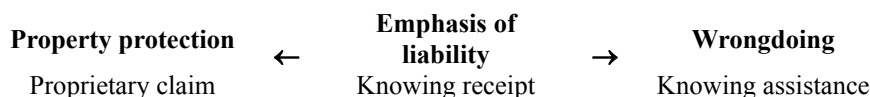
⁷⁰ [1987] Ch 264.

⁷¹ *Ibid* 272–3, 278. Of course, this justification for the acceptance of constructive notice in relation to proprietary claims is not as convincing where the defendant retains the trust property but has changed their position on the faith of the receipt. However, this goes to the potential harshness of the tracing proprietary claim, rather than to the requisite notice for recipient liability.

⁷² *Ibid* 285 (Megarry V-C).

⁷³ See *Koorootang* [1998] 3 VR 16, 88, 116 (Hansen J). See also Lawbook Company, above n 22, vol 2 (at 42) [22 820]–[22 830]. The article assumes in this discussion that all other requirements for imputed notice can be satisfied: see above n 38; *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [123]–[129] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

spectrum of potential liability in equity, based on the protection of property interests at one extreme, and redress for wrongdoing at the other:⁷⁴



Recipient liability can thus be viewed both as an in personam version of the proprietary claim dependant upon priority or tracing *and* as a subset of knowing assistance liability, in which case, the sufficiency of constructive notice, at least, continues to be problematic. Alternatively (and preferably), one rationale may be endorsed by the courts and the uncertainty regarding notice resolved. The question is largely normative and the answer in equitable terms depends on how much weight is given to the proprietary interest of the beneficiary of a trust at the expense of a defendant who has only constructive notice. This question raises much the same issues as the starker question of whether notice should be discarded altogether in favour of a strict unjust enrichment claim, and the concerns expressed in Part VI below with respect to that question apply equally here.

As discussed below, the rigorous property protection regime of tracing should not be replicated by personal liability where no traceable property remains in the defendant's hands. Instead, recipient liability should only be imposed where the defendant's conduct is wrongful. It makes sense, then, to view recipient liability as subsumed within an equitable regime of participatory liability (by receipt of trust property or otherwise) in a breach of trust or fiduciary duty. More specifically, it should be viewed as a subset of knowing assistance liability, in which case, constructive notice is not ordinarily sufficient to establish the defendant's liability.

The adverb *ordinarily* is used to emphasise the fact that notice, constructive or otherwise, has been too prominent in the enquiry as to the requisite wrongdoing for recipient liability. Thus, having accepted for the purposes of the discussion so far, the case law terminology of notice (including the *Baden* scale of knowledge), there is still a methodological question as to *how* the participatory liability should be framed. Is it preferable to formulate liability in terms of a general principle, such as 'dishonesty'⁷⁵ or 'commercially unacceptable conduct',⁷⁶ leaving the application of the principle to the court; or should the liability question be framed with more specificity, for example, according to the defendant's notice or knowledge? The latter approach is in disfavour given the difficulties that courts face in deciding whether subtle nuances in degrees of

⁷⁴ Unjust enrichment would sit closer to the property protection end of the scale but is not considered in this Part.

⁷⁵ *Royal Brunei* [1995] 2 AC 378, 391 (Lord Nicholls, on behalf of Lords Goff, Ackner, Steyn and Sir John May).

⁷⁶ *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, 761 (Knox J).

notice are present in complex factual scenarios;⁷⁷ although, rather surprisingly, the High Court in *Farah* indicated its approval of the *Baden* scale of knowledge in relation to knowing assistance liability.⁷⁸ A broad-principled approach is also unsatisfactory unless one is clear about the rationale for recipient liability. Once the preferred rationale for recipient liability is identified as redress for wrongdoing, however, a broad-principled approach becomes defensible. It is suggested that what is needed is a general principle for participatory liability (encompassing knowing assistance and knowing receipt) that can be applied to a matrix of facts so as to give appropriate weight to factors such as the defendant's cognisance of the breach, the nature of the defendant's participation (for example, whether passive or active, procurement, facilitation or professional assistance), the degree of the defendant's involvement and the defendant's personal characteristics.

On this approach, it is not the defendant's state of knowledge or notice that should determine liability, but the defendant's *conduct* within the full factual matrix, which includes, but does not solely depend upon, the defendant's state of knowledge.⁷⁹ In fact, 'knowledge' of a breach of duty should not always be essential to show the defendant's wrongdoing.⁸⁰ Conversely, the High Court in *Farah* has taken the opposite approach to participatory liability in equity by preferring to differentiate the ways in which liability might arise — through receipt of trust property, procurement or inducement of a breach of trust, or assistance in a breach of trust or fiduciary duty, respectively — and by maintaining distinct requirements for each form of liability.

What then is the current law in Australia as to the trigger for knowing receipt liability? There is a brief dictum by Stephen J in *Consul*, accepting the first rationale for liability and therefore that the defendant's constructive notice of the breach of trust or fiduciary duty is sufficient.⁸¹ In *Koorootang*, Hansen J (whilst in favour of strict liability) held that on the current law, and using the *Baden* scale of knowledge, type (iv) constructive knowledge (knowledge of facts that would indicate the breach of trust to an honest and reasonable person) sufficed for liability but type (v) constructive notice (the knowledge that the defendant would have gained had the defendant made reasonable and proper enquiries) did not.⁸² It appears that this is now the accepted view in Australia.⁸³ The High

⁷⁷ See, eg, *Royal Brunei* [1995] 2 AC 378, 391 (Lord Nicholls, on behalf of Lords Goff, Ackner, Steyn and Sir John May). See also Heydon and Leeming, above n 7, 284–6, who describe the *Baden* scale as 'the zenith of complexity'.

⁷⁸ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [174]–[175] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁷⁹ For a contextual approach using economic analysis: see Susan Barkehall Thomas, "'Goodbye' Knowing Receipt. 'Hello' Unconscientious Receipt' (2001) 21 *Oxford Journal of Legal Studies* 239.

⁸⁰ For example, where the defendant places pressure on the trustee to satisfy a debt in such a way as to make probable a breach of the trustee's fiduciary duty (such as through misappropriation of trust funds): Finn, above n 3, 215. See also *Powell v Thompson* [1991] 1 NZLR 597.

⁸¹ (1975) 132 CLR 373, 410–11.

⁸² [1998] 3 VR 16, 105.

⁸³ See Heydon and Leeming, above n 7, 286 fn 213.

Court's decision in *Farah*⁸⁴ is not inconsistent with this conclusion, but the requisite level of knowledge for establishing liability in knowing receipt was not expressly considered.

B *Unjust Enrichment Theory*

Equity's requirement that the recipient of another's equitable property, even if a volunteer, is only liable on a *personal* claim if they are a *knowing* recipient, has come under sustained attack from unjust enrichment scholars. The late Peter Birks repeatedly argued that this knowledge requirement is inconsistent with the common law's imposition of strict liability upon a recipient of enrichment at another's expense, subject to the defences of change of position or bona fide purchaser,⁸⁵ for which the onus of proof lies with the recipient. Initially, Birks' view was that the proper underlying basis of *both* types of liability was unjust enrichment,⁸⁶ liability for which is 'strict but fragile'⁸⁷ and does not depend on fault on the part of the defendant. In short, it is not a wrong.⁸⁸ Accordingly, Birks argued that equity's requirement of some knowledge on the part of the recipient was superfluous.⁸⁹ However, Birks subsequently modified his approach by accepting the extra-judicial view of Lord Nicholls⁹⁰ that rather than stripping the knowledge requirement from the knowing receipt claim in equity, the unjust enrichment claim should be made available alongside the knowing receipt claim.⁹¹ The equitable wrong thus has an ongoing role to play if remedies other than the restitution of benefits retained are sought. On this view, the unintended recipient of *trust* (that is, equitable) property should be treated in a like way to

⁸⁴ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

⁸⁵ Bona fide purchasers (of property) without notice of the breach of fiduciary duty (or the competing interests of other parties) will have a defence based on the consideration provided: *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [175], [211], [219], [234] (Tobias JA), accepting the bona fide purchaser defence to the personal unjust enrichment claim. Logically, constructive notice (a failure to take care) cannot preclude the bona fide purchaser defence to an unjust enrichment claim (though it can preclude the application of such a defence to a tracing/priority claim). Otherwise, merely careless purchasers would be worse off than careless volunteers: see Peter Birks, *Unjust Enrichment* (2nd ed, 2005) 244.

⁸⁶ See, eg, Peter Birks, *Restitution — The Future* (1992) ch 2; Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296; Peter Birks, 'Misdirected Funds' (1989) 105 *Law Quarterly Review* 352.

⁸⁷ This means that it is subject to defences: see, eg, Peter B H Birks, 'Knowing Receipt: *Re Montagu's Settlement Trusts* Revisited' (2001) 1(2) *Global Jurist Advances* 17 <<http://www.bepress.com/gj/advances/vol1/iss2/art2/>>.

⁸⁸ See Birks, *Unjust Enrichment*, above n 85, 16–19.

⁸⁹ See, eg, Peter Birks, 'Persistent Problems in Misdirected Money: A Quintet' [1993] *Lloyd's Maritime and Commercial Law Quarterly* 218, 228–9.

⁹⁰ Nicholls, above n 7, 231.

⁹¹ See Birks, *Unjust Enrichment*, above n 85, 156–8; Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 213, 223. It should be noted, however, that the High Court in *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [152] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) appears to question whether Lord Nicholls does in fact advocate the view Birks ascribes to him.

the unintended recipient of *legal* property.⁹² But as Lionel Smith has pointed out, the consequences of this view

are only slightly less startling [than Birks' earlier view]: the cases may be right, but all the lawyers and judges involved failed to notice that there was another claim available to the plaintiff, and moreover one which would render otiose any inquiry into cognition.⁹³

Similarly, the High Court in *Farah* observed that acceptance of this view 'tends to render the [knowing receipt rule] otiose'.⁹⁴

Of course, many factual situations will involve purchasers who, like volunteers who have changed their position, will only be liable in unjust enrichment if they have not acted in good faith. In those cases, an enquiry into fault is relevant and the liability would largely mirror equity's fault-based liability. Therefore, as a practical matter, *strict* unjust enrichment liability will generally only arise against volunteers who have not changed their position.

This is, however, a simplified account. Unjust enrichment theory needs further elucidation as to precisely how and when such strict liability might arise. Further, it is necessary to state at the outset that there is considerable conflict amongst unjust enrichment theorists themselves on many of the issues canvassed below. For the sake of simplicity, Birks' theory will be used as the model, as this is the most comprehensive attempt to provide a firm conceptual basis for the subject. It is, however, on Birks' last work, also one of the more expansionist views of unjust enrichment. Thus, contrary views will be noted when appropriate, particularly where Birks' theory is out of step with the prevailing judicial and academic orthodoxy.⁹⁵ Ironically, much of the development of the prevailing orthodoxy was itself driven by Birks' earlier theories.

According to Birks' widely accepted view, the determination of whether liability to make restitution for unjust enrichment arises, requires answers to five questions:⁹⁶

- 1 Was the defendant enriched?
- 2 Was the enrichment at the expense of this claimant?
- 3 Was the enrichment unjust?

⁹² *Contra* Smith, 'Unjust Enrichment, Property, and the Structure of Trusts', above n 22, 444, but Smith has since changed his views: see Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115; Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (2000) 285–8; C E F Rickett, 'Book Review' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 573, 576; Ross Grantham, 'Civil Liability for Money Laundering' (1999) 18 *New Zealand Universities Law Review* 378; Worthington, above n 29, 179–89; Bryan, 'The Liability of the Recipient', above n 17.

⁹³ Smith, 'Unjust Enrichment, Property, and the Structure of Trusts', above n 22, 413.

⁹⁴ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also at [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁹⁵ Hence, it is unlikely that many of the more expansionist views of Birks will be accepted: see, eg, Steve Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28 *Melbourne University Law Review* 759. But see *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 All ER 449, 500 (Lord Walker).

⁹⁶ Birks, *Unjust Enrichment*, above n 85, 39.

- 4 What kind of right did the claimant acquire?
- 5 Does the defendant have a defence?

It is the answer to the second question which is of critical importance in determining the plausible extent of any unjust enrichment analysis in three party situations such as the simple factual scenario discussed above.⁹⁷

The main problem concerns the question of whether the receipt of the trust property is at the expense of the plaintiff-principal since they have not themselves transferred such property to the defendant. In answering this question, one needs to determine, according to Birks, 'what constitutes a sufficient connection between the would-be claimant and the enrichment he wants to claim.'⁹⁸

The simplest situation is where a plaintiff transfers property to the recipient and some basis for restitution exists. Birks has repeatedly argued that cases in which a third party, such as a trustee, transfers (trust) property belonging to the beneficiary without their consent, are conceptually no different. An involuntary transfer is at the owner's expense irrespective of whether it occurs by accident (for example, losing money from one's pocket)⁹⁹ or through the actions of another.¹⁰⁰ Birks applies the same analysis regardless of whether legal or equitable property is at stake,¹⁰¹ and hence, he considers that legal recourse for a trustee's misuse of trust property (or a fiduciary's misuse of the principal's property) is not limited to a wrong-based claim, as such conduct lends itself to an alternative analysis of unjust enrichment. One difference, however, between legal and equitable property is that a plaintiff's potential claim against an ultimate enricher of equitable property will be destroyed should such a recipient be a bona fide purchaser.¹⁰²

According to Birks, an enrichment is 'at the plaintiff's expense' even where the defendant has received property not directly from the plaintiff (or a delinquent trustee, fiduciary or thief dealing with a plaintiff's property), but where the defendant has received property which was 'on the way' to the plaintiff when intercepted by the defendant.¹⁰³ Such a connection can be established by the legal or, less easily, factual inevitability of the receipt of property. Thus, for example, a defendant receiving property from an office or position wrongly usurped does so at the expense of the rightful holder, but the element of 'at the expense of' is not satisfied where money is paid to next of kin instead of the intended beneficiary under a will never validly completed by a solicitor.¹⁰⁴ This

⁹⁷ The fourth question, as to the form of relief, will also be considered further: see below Part IV.

⁹⁸ Birks, *Unjust Enrichment*, above n 85, 74.

⁹⁹ Cf *Holiday v Sigil* (1826) 2 Car & P 177; 172 ER 81.

¹⁰⁰ Birks, *Unjust Enrichment*, above n 85, 154. See generally Birks, 'Misdirected Funds: Restitution from the Recipient', above n 86.

¹⁰¹ Birks, *Unjust Enrichment*, above n 85, 156–8.

¹⁰² *Ibid* 86–7.

¹⁰³ Birks, *Unjust Enrichment*, above n 85, 75.

¹⁰⁴ *Ibid* 75–6.

notion of ‘interceptive subtraction’ has, however, been subject to criticism by some unjust enrichment theorists.¹⁰⁵

In summary, focusing on the receipt of equitable property, it can be seen that a prima facie unjust enrichment claim would be available, according to Birks, in the following situations relevant to this discussion:

- 1 where a trustee or a fiduciary (or even a stranger) misappropriates a principal’s beneficially owned property and transfers it to the defendant;¹⁰⁶ and
- 2 where a trustee or a fiduciary receives property ‘legally’ on its way to a principal as beneficiary.

A benefit would not be received at a principal’s expense and an unjust enrichment claim would thus not be available where, as in *Attorney-General (Hong Kong) v Reid*, a trustee or fiduciary receives property (such as a bribe or property obtained by seizing an opportunity in breach of a duty of loyalty) that was never intended to go to the principal.¹⁰⁷

Importantly, although Birks would argue that the passing of the principal’s equitable property in an unauthorised way means that there was *no basis* for such a transfer and it is that absence of basis, rather than any proof of a wrong, that establishes that the enrichment is unjust,¹⁰⁸ it must be remembered that in the cases under discussion, the involuntary transfer is established by a *breach* of trust or fiduciary duty. Trustees are empowered to dispense with the legal title to property, and thereby extinguish any equitable interest, so long as they comply with the trust instrument and obligations.¹⁰⁹ Hence, in order to establish unjust enrichment in cases where the involuntary transfer is established by a breach of trust or fiduciary duty, a judgement first needs to be made as to whether a wrong has indeed been committed. At least where a trustee or fiduciary has exercised a power, an analysis of their motives and the circumstances of the transfer may need to be engaged in to determine whether any breach of trust or fiduciary duty

¹⁰⁵ See, eg, Lionel D Smith, ‘Three-Party Restitution: A Critique of Birks’s Theory of Interceptive Subtraction’ (1991) 11 *Oxford Journal of Legal Studies* 481.

¹⁰⁶ A fortiori, an unjust enrichment claim would also be available where a fiduciary, such as an agent, misappropriated property legally owned by the plaintiff; for example, where a company director having authority to dispose of the company’s assets, misappropriates those assets.

¹⁰⁷ [1994] 1 AC 324.

¹⁰⁸ Other theorists would argue that the principal has not consented to it (and that there is thus an unjust factor of ignorance or powerlessness): see, eg, Andrew Burrows, ‘Proprietary Restitution: Unmasking Unjust Enrichment’ (2001) 117 *Law Quarterly Review* 412, 423. However, it is beyond the scope of this article to consider the competing merits of whether enrichment is ‘unjust’ because of a nominate ‘unjust factor’ (Birks’ initial approach and the current law in England at least), or an absence of basis (Birks’ subsequent approach): see also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 All ER 449, 458–9 (Lord Hoffmann).

The High Court in *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) questions whether any ‘unjust factor’ would exist in such cases and supports the view that ‘ignorance’ is not a basis for restitution.

¹⁰⁹ Where the claim against a recipient of property is based on fraud or misappropriation other than by the trustees themselves (for example, a fraudster forging documents), a personal claim based on unjust enrichment is more akin to the situation where a thief steals money from one person and transfers it to another: see Bryan, ‘The Liability of the Recipient’, above n 17.

occurred. This may suggest why, historically at least, there has been a greater emphasis on the security of receipt for recipients of equitable (as opposed to legal) property.¹¹⁰

IV FORM OF RELIEF: PROPRIETARY OR PERSONAL

A *In Equity*

Traditionally, a third party knowing recipient or knowing assistant was said to be a constructive trustee and therefore subject to all the remedies available against a trustee. More recently, the language of constructive trusteeship has been eschewed and the defendant is said to be 'accountable in equity' instead.¹¹¹ Clearly, on this basis, the principal can claim equitable compensation plus interest for any loss suffered as a result of the defendant's receipt of the misappropriated trust property.¹¹² Generally, such compensation will reflect the value of the trust property. However, it can extend to other losses suffered by the principal as a result of the defendant's receipt; for example, equitable compensation is available in addition to a proprietary remedy where there is a shortfall between the value of the trust property and the extent of the principal's losses from the breach of trust.¹¹³ As a matter of principle, an account of profits should also be available where the defendant has made a profit from the trust property.¹¹⁴

A more difficult question is whether the principal is entitled to a proprietary remedy in relation to a knowing receipt claim. There is no doubt that the principal can assert a *continuing* proprietary interest in the trust property or its traceable proceeds. The more contentious question is whether a proprietary remedy is available in response to the knowing receipt claim itself.¹¹⁵ Given that proprietary relief already exists in relation to the priority/tracing proprietary claim, it is difficult to envisage a situation in which those claims are defeated and yet a proprietary remedy is still warranted on the basis of the defendant's

¹¹⁰ This is so given that the personal liability of a recipient of equitable property is limited to where they are a 'knowing' recipient.

¹¹¹ *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 (Lord Millett). See also *Giumelli v Giumelli* (1999) 196 CLR 101, 112 (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584, 636–7 (Hansen J); Nicholls, above n 7, 233.

¹¹² *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584, 636–7 (Hansen J).

¹¹³ *Ibid.*

¹¹⁴ *Ultraframe* [2005] EWHC 1638 (Unreported, Lewison J, 27 July 2005) [577]; Nicholls, above n 7, 233. However, it is often assumed that the remedy is confined to restoration of the value of the trust property: see, eg, Bryan, 'The Liability of the Recipient', above n 17, 330.

¹¹⁵ In *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) the High Court does not expressly discuss the question of proprietary remedies for 'knowing receipt'. Although one comment in a different context could be seen as being supportive of the availability of such a remedy, it should not be accorded too much weight: at [195] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

knowing receipt.¹¹⁶ Any such remedy must involve property that was not subject to the original trust and was not received in the relevant sense from the trustee. An example is where the defendant has received trust property which is no longer identifiable in their hands (hence, any claim based on priority/tracing rules fails), yet the elements of the knowing receipt claim are met, and there is alternative property held by the defendant that could be the subject of a constructive trust or lien.¹¹⁷ Once the proprietary link to property is lost it is difficult to justify the imposition of a proprietary remedy and yet it is only in such cases that there would conceivably be a need for a proprietary remedy *for knowing receipt*.

Confusion has been generated in relation to this question by the NSW Court of Appeal's decision in *Robins*.¹¹⁸ In that case, Mason P (Stein and Giles JJA agreeing) held that a remedial constructive trust or lien was an appropriate response to recipient liability where 'profit can be traced into identifiable property [held by the defendant]'.¹¹⁹ However, '[a] full proprietary remedy is not always necessary or appropriate and it is not automatic.'¹²⁰ The problem with this reasoning is that it confounds the institutional constructive trust or lien that arises upon the assertion of the principal's pre-existing proprietary interest, with the remedial constructive trust based upon the prevention of an unconscionable assertion of proprietary rights by the defendant where the principal does not have a pre-existing proprietary interest.¹²¹ Although the Australian courts have recognised the remedial constructive trust,¹²² it is not clear that it is of much utility in this context because, on Mason P's approach, the discretionary remedial proprietary response would mirror the institutional constructive trust arising from the established circumstances. The language of remedial constructive trust in *Robins* is even more puzzling given that the facts appear amenable to a straightforward tracing exercise and consequent institutional style constructive trust. Thus, *Robins* is not convincing authority for the proposition that a remedial constructive trust or lien may be awarded for a knowing receipt claim.¹²³

¹¹⁶ See Austin, above n 22, 217. Austin makes the same point but then concludes that if a personal remedy is warranted at all it should be 'no more than a personal remedy for restitution from the recipient against whom tracing has become impossible, subject to a defence of change of position': at 217. This article disagrees with that conclusion, whilst agreeing that only a personal remedy is warranted in relation to recipient liability.

¹¹⁷ Alternatively, there could conceivably be circumstances where a proprietary claim based on priority is defeated but a knowing receipt claim is made out (and where tracing is not necessary). It is difficult, however, to envisage circumstances where the equities are not equal according to the priority rules, and yet a proprietary remedy would be warranted on the basis of knowing receipt.

¹¹⁸ (2003) 175 FLR 286.

¹¹⁹ Ibid 301.

¹²⁰ Ibid.

¹²¹ See, eg, *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 552 (Gummow J).

¹²² See, eg, *Muschinski v Dodds* (1985) 160 CLR 583. The English courts do not recognise the remedial constructive trust: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714–15 (Lord Browne-Wilkinson). See also Millett, 'Proprietary Restitution', above n 32, 317.

¹²³ For criticism of *Robins* (2003) 175 FLR 286: see Strahorn, above n 16, 773–4; Bryan, 'The Liability of the Recipient', above n 17, 331–2.

B Unjust Enrichment Theory

The fourth question in Birks' analysis requires an examination of the theoretical basis for obtaining a proprietary, as opposed to a personal, remedy for unjust enrichment and hence raises considerable complexity. This is in part a result of the complexity of the topic itself, and theorists' consequential attempts to make sense of it, and in part the result of competing viewpoints. It is best to start with Birks' own view as to when a proprietary response should arise from an unjust enrichment before noting the unlikelihood that such a view will in fact be accepted, since many commentators disagree with the analysis and the English courts, at least, appear to have rejected it.

Birks takes the view, relying on Robert Chambers' work, *Resulting Trusts*,¹²⁴ that the case law should be divided into two broad categories:

those in which there is no moment in which the enrichment is held free of any claim, and those in which for however short a time the enrichee holds the enrichment freely at his own disposition. This distinction almost exactly corresponds with the line between initial and subsequent failure of basis.¹²⁵

In the former case, a proprietary response will always arise alongside the personal claim. Birks gives as examples, the trust that might arise as a result of a mistaken payment (if *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*¹²⁶ survives as good law),¹²⁷ and where express trusts fail as invalid and a resulting trust arises back to the settlor.¹²⁸ In the latter case, there will be no proprietary response.¹²⁹

According to Birks, if a proprietary interest arises in response to unjust enrichment, it will then continue into the traceable proceeds of any such property initially received.¹³⁰

A number of difficulties arise in relation to this analysis. Birks conceded that his views are seemingly contrary to the reasoning of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,¹³¹ though not the result in that case.¹³² Further, some commentators have rejected the argument that a proprietary response can ever arise from unjust enrichment.¹³³ Finally, the underlying precept for Birks' analysis is that proprietary

¹²⁴ Robert Chambers, *Resulting Trusts* (1997).

¹²⁵ Birks, *Unjust Enrichment*, above n 85, 181–2.

¹²⁶ [1981] Ch 105.

¹²⁷ Despite being considered as wrongly decided by influential figures such as Lord Millett (writing extra-judicially), and subject to some judicial disapproval, the article considers the result of the decision (though not the reasoning therein) to be correct: see Millett, 'Proprietary Restitution', above n 32, 318.

¹²⁸ Birks, *Unjust Enrichment*, above n 85, 187–8.

¹²⁹ The exception is where property was 'ring-fenced': see Birks, *Unjust Enrichment*, above n 85, 196–7; *Re Gillingham Bus Disaster Fund* [1959] Ch 62.

¹³⁰ Birks, *Unjust Enrichment*, above n 85, 198–201.

¹³¹ [1996] AC 669.

¹³² Birks, *Unjust Enrichment*, above n 85, 190–1.

¹³³ See, eg, W J Swadling, 'Property and Unjust Enrichment' in J W Harris, *Property Problems: From Genes to Pension Funds* (1997) 130; Millett, 'Restitution and Constructive Trusts', above n 4; Millett, 'Proprietary Restitution', above n 32.

responses themselves derive from the causative events of unjust enrichment, wrongs and consent, whereas both academic commentators and the House of Lords in *Foskett v McKeown*¹³⁴ have rejected this view in seeing ‘property law’ as itself a source of legal rights (or as a causative event).¹³⁵ In short, it is unlikely that Birks’ analysis will be accepted. As Lord Millett puts it, writing extra-judicially, in relation to Birks’ argument that a claim to the traceable proceeds of property is based on unjust enrichment:¹³⁶

This convoluted analysis is not based on anything in any reported case, is not universally accepted by commentators, and is inconsistent with the analysis adopted by the House of Lords in *Foskett v McKeown*. I reject it. I prefer to say with Lord Ellenborough in *Taylor v Plumer* that:

[T]he product of or substitute for the original thing still follows the nature of the thing itself ...

Other commentators, such as Burrows, who agree with Birks’ underlying precepts, nonetheless offer up a slightly different analysis as to when a proprietary response to unjust enrichment is justifiable.¹³⁷

There are also differences of opinion amongst unjust enrichment theorists as to whether proprietary remedies are possible in response to the commission of a wrong. Birks answers this question in the affirmative, however such responses are ‘rare’,¹³⁸ as proprietary remedies arise more commonly from unjust enrichment.¹³⁹ An example of a proprietary response to a wrong is where such a remedy is awarded for breach of a fiduciary duty, as in *Attorney-General (Hong Kong) v Reid*.¹⁴⁰ Burrows, however, argues against a proprietary remedy ever being available for restitution for wrongs where a plaintiff is seeking disgorgement of benefits derived from some other source (rather than directly by

¹³⁴ [2001] 1 AC 102.

¹³⁵ See, eg, Virgo, above n 47; Richard Calnan, ‘Proprietary Remedies for Unjust Enrichment’ in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies: Current Issues and Problems* (2003) 171; Millett, ‘Restitution and Constructive Trusts’, above n 4; Millett, ‘Proprietary Restitution’, above n 32; Birks, *Unjust Enrichment*, above n 85, 32–8, 204.

¹³⁶ Millett, ‘Proprietary Restitution’, above n 32, 313–14 (citations omitted). Millett suggests that there is little difference between Birks’ views and his own as to when a proprietary remedy would arise.

¹³⁷ Burrows focuses on whether the plaintiff took the risk of insolvency: Burrows, above n 108, 425.

¹³⁸ Birks, *Unjust Enrichment*, above n 85, 34.

¹³⁹ *Ibid* 167. This is questionable. Birks repeatedly cites *A-G (Hong Kong) v Reid* [1994] 1 AC 324 as an example, but does not acknowledge other cases in which proprietary remedies have been awarded or at least considered. In England: see, eg, *Boardman v Phipps* [1967] 2 AC 46 (‘*Boardman*’). In other common law jurisdictions: see, eg, *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214; *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (for breach of fiduciary duty according to two judges, and for breach of a duty of confidence according to one of the judges). For an extensive list of authorities, following or approving *A-G (Hong Kong) v Reid*: see Meagher, Heydon and Leeming, above n 23, 198–9.

¹⁴⁰ [1994] 1 AC 324. See Birks, *Unjust Enrichment*, above n 85, 34, 188. Millett suggests that Birks considers that case to be wrongly decided: Millett, ‘Proprietary Restitution’, above n 32, 322. This may well have been so in Birks’ earlier writing, but Birks later appears to accept the decision without critical comment: Birks, *Unjust Enrichment*, above n 85, 34, 166–7, 170 fn 15, 188, 303. Millett himself supports the decision: at 323–4.

subtraction from the plaintiffs themselves), as in *Attorney-General (Hong Kong) v Reid and Boardman*.¹⁴¹

This leaves a number of possible positions in relation to proprietary responses in the context of a receipt of trust property. To simplify:

- 1 According to Birks, a proprietary response to an unjust enrichment is possible, provided there was an initial failure of basis. Similarly, according to Burrows, such a response is possible provided the plaintiff did not take the risk of insolvency.
- 2 According to other views, a proprietary remedy is never available for unjust enrichment, but it may be available either as a response to, and on the basis of, 'property law' or else as a response to a wrong.¹⁴²

Importantly, therefore, a conclusion that unjust enrichment is the appropriate cause of action does not mean that a proprietary response automatically follows. The fact that a proprietary response to a *wrong*-based claim may be justified does not answer the question of the relevant remedial response to any supposedly preferable unjust enrichment analysis (and claim) that may be available alongside such a wrong-based claim. It would be inappropriate simply to *assume* such an award of a proprietary remedy. To anticipate the discussion below,¹⁴³ this is a difficulty to which the NSW Court of Appeal in *Say-Dee* did not allude — the Court appears to have assumed that a proprietary remedy would equally follow from a strict liability approach, without considering the rather difficult and contested theoretical debate accompanying the law of proprietary responses to unjust enrichment.

Leaving these difficulties aside for now, if Birks' theory were to be applied to the simple misappropriation scenario, where a trustee breaches a trust to transfer property to the defendant, there would be an initial failure of basis, and a proprietary remedy would be available so long as traceable proceeds of the property were still available to be subjected to the *in rem* claim.

V MORE COMPLEX FACTUAL SCENARIOS

Once one moves away from the simple fact scenario above, it can be seen that both the existing equitable rules, and the application of unjust enrichment theory, prove much more difficult to apply. Two further, more complex, factual scenarios will be considered to illustrate this point.

¹⁴¹ [1967] 2 AC 46. See Burrows, above n 108, 427.

¹⁴² See Millett, 'Restitution and Constructive Trusts', above n 4; Millett, 'Proprietary Restitution', above n 32.

¹⁴³ See below Part V(B)(2).

A Scenario A

In this scenario, the property received by the defendant was never the subject of an express trust but may have been the subject of a constructive trust in the hands of a breaching fiduciary.

In equity, there is no doubt that property acquired by a fiduciary in breach of their duties to the principal *may* be impressed with a constructive trust at the court's discretion.¹⁴⁴ This is so whether or not the gain represented by such property is one that could have been made by the principal.¹⁴⁵ As a matter of principle, it follows that if the defendant receives from the fiduciary property subject to a constructive trust in favour of the principal and with the requisite notice of a breach of the constructive trust, the defendant will be liable as a knowing recipient of trust property.¹⁴⁶ Whether the rationale for recipient liability is considered to be protection of equitable proprietary interests, or redress for equitable wrongdoing, it should make no difference how the trust came into being. The pertinent questions are whether the defendant has *received* trust property and whether the defendant has the requisite level of notice. Of course, it may be more difficult evidentially, to establish recipient liability in this situation (as opposed to where an express trust is involved), for the defendant must be shown to have notice of the circumstances giving rise to the constructive trust.¹⁴⁷

On an unjust enrichment analysis, unlike in equity, whether or not the gain represented by the property could have been acquired by the principal is critical, because the defendant could not be said to have been enriched at the expense of the principal unless the property was legally or factually 'on the way' to the principal. This would not be the case if, for example, a bribe was received by a fiduciary and then passed on to the defendant (as in *Attorney-General (Hong Kong) v Reid*)¹⁴⁸ or if the fiduciary obtains property by seizing an opportunity in breach of a duty of loyalty. In such cases, the only basis for a claim against the trustee or fiduciary is on the basis of a remedy for the commission of a wrong. But what if the trustee or fiduciary transfers such property to a third party?

In relation to such a situation, Birks does not appear to address the question of whether, if a proprietary response for a wrong might arise, such an equitable

¹⁴⁴ See, eg, *Boardman* [1967] 2 AC 46; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

¹⁴⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 108 (Mason J).

¹⁴⁶ See, eg, *K & S Corporation Ltd v Sportingbet Australia Pty Ltd* (2003) 86 SASR 312 (in which stolen money was treated as trust money for the purposes of a knowing receipt claim). Although there are brief remarks to the contrary in *Consul* (1975) 132 CLR 373, 396–7 (Gibbs J), and by the NSW Court of Appeal in *USSC* [1983] 2 NSWLR 157, 247, 253 (Moffitt P, Hope and Samuels JJA), in neither case was it necessary to decide the point, because the facts could be analysed alternatively as a knowing assistance claim: see Austin, above n 22, 217–19.

¹⁴⁷ For a discussion of the requisite content of the defendant's knowledge: see above n 58 and accompanying text.

¹⁴⁸ [1994] 1 AC 324. The proprietary approach in that case has been criticised: see, eg, William Swadling, 'The Vendor-Purchaser Constructive Trust' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 463, 477–8. However, Swadling's criticism (that breach of fiduciary duty ought not to be treated differently to other types of wrong) is merely asserted and is not convincing. Cf *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 668 (Toulson J); Millett, 'Proprietary Restitution', above n 32, 323–4.

interest of the principal is one that can ground a subsequent unjust enrichment claim where the constructive trustee pays money to a third party defendant.

One could argue that property held subject to a constructive trust (in response to a wrong) should be treated as an enrichment 'belonging to the principal' such that the subsequent transfer is at the principal's expense. If this is so, then the unjust enrichment claim 'piggybacks' on the constructive trust. But such reasoning is entirely derivative upon a finding of wrongdoing and the *supposition* that a constructive trust *would* have been awarded in the circumstances. Presumably then, such a conclusion would only be possible at all if such a trust was an institutional, as opposed to remedial, constructive trust, since in the case of the latter, no proprietary interest arises until a court order to that effect. Why a recipient of something that might have been subject to a constructive trust (if proceedings had been instituted earlier) should be liable even absent any knowledge of the circumstances that might justify such a trust is unclear to us. Wrong-based liability, however, can justifiably be imposed, even if no constructive trust would have been awarded, on the basis of knowing assistance.

It must be conceded that the arguments in favour of an unjust enrichment analysis become stronger in the perhaps unusual circumstance where property received by the fiduciary (before being passed to the defendant) was 'on the way' to the principal. An example might be where an opportunity to obtain property that would have been offered to the principal is seized by the fiduciary. In such a case, Birks, at least, supports the conclusion that the receipt by the fiduciary is 'at the expense of' the principal, so as to justify a personal claim against the fiduciary. It is an open question, seemingly not dealt with by Birks (or, one suspects, other theorists), whether a subsequent transfer of such property to a third party can likewise be characterised as 'at the expense of' the principal.¹⁴⁹

It is also necessary to consider the question of the availability of proprietary remedies against the defendant in this scenario. In equity, a recipient, even of constructive trust property, can equally be subject to proprietary remedies in a priority/tracing proprietary claim as discussed above.¹⁵⁰ In unjust enrichment, the availability of a proprietary remedy depends on whether liability arises at all (as to which this article has expressed doubts), as well as the uncertainty over whether proprietary remedies can ever arise in response to unjust enrichment and the theoretical basis for such remedies. The article will return to this point below.

¹⁴⁹ This would involve combining Birks' analysis as it applies to the misappropriation of property from a principal or beneficiary where the property is then passed onto a third party, with his analysis of the receipt of property (on the way to the principal) by a fiduciary. Might it be relevant to this question whether a proprietary remedy arises against the fiduciary and whether the principal needs to deny or rely on such title? See also Birks, *Unjust Enrichment*, above n 85, 64-8.

¹⁵⁰ See above Part IV(A).

B *Scenario B*

In this scenario, the relevant property was never held by *either* the fiduciary *or* the principal.

1 *Liability in Equity*

Much more difficult, from the point of view of equity's knowing receipt rule, is a scenario where the breaching fiduciary never held the property which is the subject of the principal's claim at all (and hence cannot be said to have held it subject to a remedial constructive trust or otherwise), as the breach involved the property going directly to the defendant. This brings us, at last, to the facts as found by the Court of Appeal in *Say-Dee*.¹⁵¹ In that case, a fiduciary joint venturer used information obtained from his position to ensure that valuable property (which was required to pursue the joint venture's development proposal on neighbouring property already owned by the joint venture) was purchased by his wife and children, and a company controlled by the fiduciary. On appeal, the High Court in *Farah* rejected the conclusion that there had been a breach of fiduciary duty, but went on to consider the situation of the third parties if there had been such a breach.¹⁵² The discussion that follows proceeds on the same basis.

As the High Court confirmed, *Farah* raises several questions when analysed as a knowing receipt case, the most fundamental of which is whether there was a receipt of trust property at all. The fiduciary in that case acquired *information* which (it was argued by the principal) he should have disclosed to his principal. For equitable recipient liability to apply, the information must be regarded as trust property in his hands (in order to argue that it was later *received* by the third parties). Furthermore, on these facts, it must be constructive trust property, because the principal had no knowledge of the information having been acquired and thus cannot have intended that it be held upon an express trust. Leaving aside the question of whether the court would exercise its discretion to award a constructive trust in these circumstances, can information constitute property and, in this instance, trust property?

Clearly, information can be the subject of intellectual property rights and those rights can be the subject of a trust. Equally uncontroversial is that information can be acquired in circumstances importing an obligation of confidentiality that will be protected in equity.¹⁵³ The concept of property is not immutable, however, as its meaning must depend upon the context and purposes of the designation. Given that property can be given a broad meaning synonymous with wealth and assets (thereby including knowledge and information), is this broader meaning accepted within the context of breach of fiduciary duty and consequent recipient liability?¹⁵⁴ The NSW Court of Appeal in *Say-Dee* apparently took this approach, finding that the opportunity to acquire the neighbouring property

¹⁵¹ [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005).

¹⁵² [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [109] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁵³ See generally Meagher, Heydon and Leeming, above n 23, ch 41.

¹⁵⁴ James Edelman is of the view that it does: see Edelman, above n 18, 177.

formed ‘part of the intellectual stock-in-trade’ of the joint venture.¹⁵⁵ There are authorities that support such an approach, for example in *Spangaro v Corporate Investment Australia Funds Management Ltd*, Finkelstein J held:

The term ‘trust property’ usually refers to actual tangible property or funds. However, where an errant fiduciary or trustee has obtained a non-financial advantage (such as confidential information or opportunity) by virtue of his breach of fiduciary obligations, that advantage may also constitute ‘trust property’ ...¹⁵⁶

Finkelstein J relied upon Hutley JA’s comments in *DPC Estates Pty Ltd v Grey & Consul Development Pty Ltd*,¹⁵⁷ in which Hutley JA, in turn, cited the House of Lords’ decision in *Boardman* and said:

That case shows that the liability to account for advantages obtained by a fiduciary in the form of information and opportunity is precisely analogous to that in the case of property gained by a fiduciary. It would seem, therefore, that the position of a third party obtaining from a fiduciary advantages in the form of information and assistance should be analogous to that of a third party obtaining property from a fiduciary.¹⁵⁸

The liability in *Boardman* concerned that of the breaching fiduciaries themselves, who had used the information to obtain shares for which they had to account. The flaw in Hutley JA’s analysis of *Boardman* is that the fiduciaries in that case were not found to be constructive trustees of the information, but of the shares acquired through the wrongful use of that information. There was no need to consider the situation of information being used to allow *third parties* to obtain the shares and whether there is any receipt by third parties of property in such a case.¹⁵⁹ As Lewison J explained recently in *Ultraframe (UK) Ltd v Fielding*:¹⁶⁰

The ‘no profit rule’ may render a fiduciary liable to account for a profit made by the use of information he acquires as a result of his fiduciary position; but that is not the same as saying that the information itself is trust property or is a traceable asset.

With respect, the view that information, of itself, can be treated as trust property for the purposes of recipient liability is contrary to both authority and

¹⁵⁵ [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [173] (Tobias JA).

¹⁵⁶ (2003) 47 ACSR 285, 303.

¹⁵⁷ [1974] 1 NSWLR 443, 469–70.

¹⁵⁸ *Ibid* 470.

¹⁵⁹ Indeed, in *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 (*‘Satnam’*), the Court of Appeal rejected the extension of *Boardman* [1967] 2 AC 46 in this way: at 671 (Nourse LJ). Thus, the receipt of information and opportunity cannot be the basis of a remedy against a *non-fiduciary* (unless dishonest assistance can be shown). In any case, the treatment of the information in *Boardman* [1967] 2 AC 46 as property of the principal is controversial: see, eg, Meagher, Heydon and Leeming, above n 23, 172–3, seemingly endorsing the dissenting judgments of Viscount Dilhorne and Lord Upjohn in *Boardman* [1967] 2 AC 46.

¹⁶⁰ [2005] EWHC 1638 (Unreported, Lewison J, 27 July 2005) [1525].

principle.¹⁶¹ Further, such information cannot be traced to a third party. As the English Court of Appeal in *Satnam* held, even if *confidential* information and the opportunities that it creates are assumed to be property for the purposes of the knowing receipt rule (the Court did not decide this point), it is not possible to trace such information into real property purchased by a third party using such information.¹⁶² Thus, although the third party in *Satnam* had knowledge of the breach of fiduciary duty, they were not a recipient of trust property and, consequently, were not liable.¹⁶³ To allow tracing of non-confidential information into property purchased using such information would expand considerably the scope of the tracing rules, and therefore extend considerably the liability for receipt (in equity or unjust enrichment).¹⁶⁴ The High Court in *Farah* has reached the same conclusion for broadly similar reasons.¹⁶⁵

An alternative argument to support the application of the equitable knowing receipt rule to the facts of *Say-Dee* is that the *property* acquired by the third parties as a result of the fiduciary's information, rather than the information itself, is trust property *received* from the principal. On this view, tracing is not an essential step in the cause of action and a looser causal link suffices; that for example, *but for* the fiduciary's breach, the property would not have been acquired. Thus, the NSW Court of Appeal referred to the third parties acquiring 'the fruits of the valuable intelligence' obtained by the fiduciary.¹⁶⁶ This argument contradicts knowing receipt's characterisation as a property-based claim and disregards its connection to the priority/tracing proprietary claim. Furthermore, absent the proprietary link (through tracing) between the principals and the third parties, it becomes speculative as to whether the property would actually have been acquired by the third parties. That is, it is more difficult to show that the principal's information can be equated with the third parties' property acquired by use of that information. This is particularly so when the information is not confidential. Equitable recipient liability only applies to a receipt of trust property already subject to an express trust (including within this term, property belonging to the principal but which is in the control of the fiduciary) or a constructive trust. Therefore, it is necessary that property be traceable from the trustee or fiduciary to the third party's hands even if that property is no longer

¹⁶¹ See generally Austin, above n 22, 223–5; Lawbook Company, above n 22, vol 2 (at 42) [22 780].

¹⁶² [1999] 3 All ER 652, 671 (Nourse LJ). Some confusion has arisen with respect to Nourse LJ's statement that for either knowing receipt *or knowing assistance* there must be 'trust property or traceable proceeds of trust property': at 671. However, it seems to be accepted that this does not accurately represent his Lordship's views, which are made clear by the remainder of the relevant paragraph of his judgment: see, eg, *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189, [88] (Morritt LJ on behalf of Robert Walker LJ and Sir Ronald Waterhouse); *Rockbrook Ltd v Khan* [2006] EWHC 101 (Unreported, Roger Wyand QC, 7 February 2006) [38]–[40]. This confusion does not affect the point for which the article relies upon the decision.

¹⁶³ See also Strahorn, above n 16, 769. Of course, if there had been a finding of dishonest participation in the breach of duty, then knowing assistance may have been available as a cause of action, but no such finding was made.

¹⁶⁴ Although plausible, such a choice should not be dressed up as being determined by value-neutral 'arbitrary evidential problem solvers': see above n 33 and accompanying text.

¹⁶⁵ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [116]–[120] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁶⁶ *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [175] (Tobias JA).

identifiable in the third party's hands. If the property held by a third party is a *product* of the breach of fiduciary duty, but cannot be traced from the principal or fiduciary to the third party (as in *Say-Dee*), a knowing receipt claim is problematic.

The correctness of these arguments was affirmed by the High Court in *Farah*, which concluded that tracing was not possible on the facts of the case.¹⁶⁷

A further difficulty if *Say-Dee* is treated as a knowing receipt claim concerns the remedy awarded. The Court ordered that the third parties hold the properties, acquired through use of the fiduciary's information, on constructive trust for the 'joint venture' (presumably meaning the two joint venturer companies).¹⁶⁸ Receivers were to be appointed and the properties were to be sold, along with the joint venture's property, in one line and, if possible, after development consent had been obtained. The net profit from the sale was to be divided equally between the principal and the defendants (the fiduciary and third parties), subject to a possible allowance being paid to the fiduciary.¹⁶⁹

Clearly, the remedy is gain-based, as a compensatory remedy would have reflected the principal's loss of profits resulting from the breach of duty, discounted by the chance that the principal would not have exploited the information acquired by the fiduciary.¹⁷⁰ As discussed in Part IV, an account of profits is not usually awarded for knowing receipt, but can be justified as a matter of principle if the profits resulted from property received by the third party in breach of trust or fiduciary duty. But even if there had been a receipt of trust property here, the remedy awarded in *Say-Dee* goes much further, because the profits had not yet been realised. The constructive trust was awarded to ensure that the potential profits were, in fact, made.¹⁷¹ And, because the properties acquired by the third parties could not be traced from the principal or the fiduciary, the constructive trust here must be remedial; yet a remedial constructive trust for recipient liability raises the concerns discussed in Part IV. The remedy awarded in *Say-Dee* adds weight to this article's argument that the case is not about receipt of trust property at all, but concerns the misappropriation of a business opportunity. Consequently, if liability was to have been imposed at all, it could only have been if the case was analysed as a knowing assistance claim and the elements of such a claim were established.¹⁷² The High Court in *Farah* proceeded to consider that question in some detail.

¹⁶⁷ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [119] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). Although at [187]–[188] the Court seems to have based its decision principally on the fact that the third parties were not volunteers.

¹⁶⁸ *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [239], [244]–[245], [253] (Tobias JA).

¹⁶⁹ *Ibid* [239], [241], [244] (Tobias JA).

¹⁷⁰ *Ibid* [235], [242] (Tobias JA), where the remedy is described as 'an account of profits'.

¹⁷¹ For criticisms: see *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [201] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁷² See below Part V(B)(3).

2 *Liability in Unjust Enrichment*

The approach of the NSW Court of Appeal in *Say-Dee* is equally difficult to justify under an unjust enrichment analysis. Can one say that the receipt of something as nebulous as an ‘opportunity’ is really an ‘enrichment’ or ‘benefit’, and can this properly be said to ‘belong’ to the principals so that it was thus transferred at their ‘expense’? Further, how can one make restitution of such ‘benefit’ or its equivalent value? Can real (or other tangible) property purchased using the information and opportunity be treated as having the same value as the original benefit? Given the conclusion above that there was no *traceable* receipt of property, then it appears that the answer to these questions is ‘no’. Absent tracing, how can there be an enrichment ‘at the expense’ of the principal, and hence an independent unjust enrichment claim at all? Only if the property received by the third parties was factually ‘on the way’ to the principal (an unlikely conclusion), can the element of ‘at the expense of’ be satisfied. Unfortunately, because the NSW Court of Appeal assumed receipt without clarifying the position, it did not feel the need to analyse the facts on the basis of unjust enrichment theory.

Further, the award of a proprietary remedy on the basis of unjust enrichment is equally problematic since it is difficult to justify any *personal* liability on that basis. In any case, even if one were to accept that liability in unjust enrichment can arise, it is not entirely clear whether a proprietary remedy would follow on the basis of that theory. As has been noted in Part IV, there is disagreement as to whether, and in what circumstances, proprietary remedies are justified. On Birks’ approach, it is necessary to determine whether the enriched party ever held the enrichment ‘freely at his own disposition’,¹⁷³ and the answer to this question would be ‘no’.

However, some commentators who support unjust enrichment as the basis for strict liability (such as Lord Millett) argue that unjust enrichment does not generate proprietary responses.¹⁷⁴ But if this is so, plaintiffs would need to claim via the tracing and priorities rules in order to obtain a proprietary remedy, if desired. Alternatively, plaintiffs would need to establish a wrong and seek a constructive trust in response.¹⁷⁵ This would make a prior unjust enrichment analysis of liability redundant. Hence, although the Court in *Say-Dee* may well have been justified in imposing a constructive trust in response to an equitable wrong (such as knowing assistance), it does not follow that it would have been justified in doing so on the basis of unjust enrichment. This required further analysis. Importantly, the answer may be that a proprietary response is only justified on other grounds. If this is so, then the Court would have had to go back to those other grounds to justify the remedy sought to be applied, and any advantages of coherence would then be rather limited.

¹⁷³ See above n 125 and accompanying text.

¹⁷⁴ See above n 133 and accompanying text.

¹⁷⁵ It was argued above that a proprietary remedy for ‘knowing receipt’ is not likely to be needed and is of questionable benefit; only if there is some justification for imposing a lien or trust over the general assets of a recipient who no longer has any traceable proceeds of the property received would such remedy serve any useful purpose.

3 *An Alternative Analysis of Say-Dee*

Is there an alternative and preferable explanation of *Say-Dee*, if the case is not one of receipt-based liability in equity and hence, a fortiori, does not lend itself to a strict liability unjust enrichment analysis? *Say-Dee* is best analysed as a knowing assistance claim. This is not to say that on the facts as found by the Court of Appeal such a claim would have succeeded, but simply that this is the only principled way in which equitable liability might have been established. In fact, such a claim failed in the High Court on the grounds that even if there had been a breach of fiduciary duty — there was not — it was not dishonest and fraudulent, the fiduciary had not acted as agent for his wife and children and, even if he had, his knowledge of the supposed breach should not be imputed to them, having probably been acquired by the fiduciary before any agency began (and thus being outside its scope). This last conclusion is problematic, but is not the focus of this article.

Equitable liability for knowing assistance arises where a third party wrongfully participates in a breach of trust or fiduciary duty. Importantly, the High Court in *Farah* held that the breach of trust or fiduciary duty must itself be dishonest and fraudulent.¹⁷⁶ With respect, this article disagrees. Whilst this is not the place in which to explore this question fully, it is suggested that such a conclusion was not mandated by *Consul*, nor is it desirable as a matter of principle.¹⁷⁷

The test for whether the third party behaved wrongfully was formulated in *Consul* with respect to the third party's notice of the fiduciary's breach of duty,¹⁷⁸ and in recent Privy Council decisions, according to the conduct of an honest person placed in the third party's circumstances.¹⁷⁹ The High Court in *Farah* suggested that the Privy Council authorities incorrectly conflated knowing assistance liability with a separate and distinct liability for procurement or inducement of breach of trust. For now, then, the test for liability is as set out in *Consul*. The High Court did, however, make one concession to subsequent authorities by adopting the *Baden* terminology of knowledge.¹⁸⁰ The trigger for wrongdoing is whether the defendant had at least level (iv) knowledge on the *Baden* scale, that is, 'knowledge of circumstances which would indicate the facts to an honest and reasonable man.'¹⁸¹

Generally, the remedy for knowing assistance liability will be equitable compensation for the principal's losses resulting from the breach of trust or fiduciary

¹⁷⁶ *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [179] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁷⁷ See, eg, *Consul* (1975) 132 CLR 373, 396–8 (Gibbs J); *Royal Brunei* [1995] 2 AC 378, 384–6; Finn, above n 3, 206, who refers to *Consul* as 'powerful authority' that a dishonest and fraudulent breach of duty is not required.

¹⁷⁸ *Consul* (1975) 132 CLR 373.

¹⁷⁹ *Royal Brunei* [1995] 2 AC 378; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333.

¹⁸⁰ The preference is for a general-principled approach to participatory liability involving a context-specific enquiry as to the third party's wrongdoing in all the circumstances, including their state of knowledge: see above Part III. Whether this is couched in the language of unconscionability or dishonesty does not concern us here. See *Royal Brunei* [1995] 2 AC 378, 392 (Lord Nicholls).

¹⁸¹ *Baden* [1992] 4 All ER 161, 235 (Peter Gibson J); *Farah* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [174]–[178].

duty. Although gain-based personal and proprietary remedies are available in principle,¹⁸² there is little precedent to support anything other than a loss-based remedy. However, significantly, the High Court in *Consul* appeared to regard with equanimity a proprietary remedy (a constructive trust) against a third party where a fiduciary had offered him a business opportunity (to acquire properties ripe for property development) that should first have been offered to the fiduciary's principal.¹⁸³

If the fiduciary in *Say-Dee* had acted as the agent of his wife and children in purchasing the relevant properties, and if his knowledge of the breach of duty was able to be imputed to them, then it could be argued that the wife and children wrongfully participated in the fiduciary's breach of duty by utilising the information that he should have disclosed to his principal (joint venturer). By acquiring the properties at the fiduciary's instigation they furthered the fiduciary's breach of duty. There is little difference between these facts and the facts of *Consul* except that the third parties here acted through the agency of the fiduciary rather than on their own behalf. And the remedial constructive trust awarded in *Say-Dee*, as discussed above,¹⁸⁴ is more compatible with a knowing assistance claim than with a knowing receipt claim.

Are there any impediments in principle to viewing *Say-Dee* in this light? For example, does the interposition of the agency relationship between the third parties and the breach of fiduciary duty change the above analysis? The existence of agency raises two questions. First, does imputed notice suffice to show the defendant's *wrongful* participation in the breach of fiduciary duty? As discussed in Part III, in relation to recipient liability, the notice of an agent should be imputed to their principal where the agent has actual notice of the breach of trust or fiduciary duty and the principles of agency law allow such notice to be imputed. The reasoning applies equally to the knowing assistance claim where the rationale for liability can only be redress for wrongdoing. The third party cannot take the benefits of the transaction achieved through the agency whilst denying responsibility for the actual notice of the agent.¹⁸⁵ There is nothing artificial about treating principals who act through a miscreant agent as 'wrongdoers'. Otherwise, parties acting through agents or hiding behind a corporate veil could escape the consequences of their actions. Further, equity has never insisted on personal moral culpability. Even honest and well-meaning

¹⁸² See, eg, *Consul* (1975) 132 CLR 373, 397 (Gibbs J); *Colour Control Centre Pty Ltd v Ty* (Unreported, Supreme Court of New South Wales, Santow J, 24 July 1995); see also Nicholls, above n 7, 244. Regarding the availability of a proprietary gain-based remedy, see, eg, *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *USSC* [1983] 2 NSWLR 157. A proprietary gain-based remedy in the absence of tracing (such as a remedial constructive trust) is not countenanced in England: see, eg, *Ultraframe* [2005] EWHC 1638 (Unreported, Lewison J, 27 July 2005) [518]–[547].

¹⁸³ (1975) 132 CLR 373.

¹⁸⁴ See above text after n 174 and accompanying text.

¹⁸⁵ See, eg, *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [214] (Tobias JA), citing *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679, 695–7 (Handley JA), in relation to recipient liability (but equally applicable to knowing assistance). This is similar to Finn's point, with which this article agrees, that the greater the level of participation, the less knowledge may be necessary to activate participatory liability: see Finn, above n 3, 215.

fiduciaries are liable for breach of the duties by which they should have abided. The same applies to third parties.

Secondly, is passive involvement in the breach of fiduciary duty sufficient 'participation'? There is no reason in principle why passive facilitation cannot suffice for assistance liability. Although the English Court of Appeal held in *Satnam* that merely benefiting from confidential information disclosed by the fiduciary in breach of fiduciary duty is insufficient for third party liability,¹⁸⁶ this is only correct where the party benefiting is not implicated in any way in the breach of duty. It should be noted however, that the High Court's judgment in *Farah* gives little support for the sufficiency of passive involvement.

In summary then, according to this article's interpretation of *Say-Dee*:

- 1 The conclusion that the third parties had received trust property for the purposes of establishing liability for knowing receipt or in unjust enrichment is not justified.
- 2 The remedial constructive trust is of limited utility in response to knowing receipt and duplicates proprietary relief on the basis of the priority/tracing rules. Had the NSW Court of Appeal engaged in a tracing exercise, it would have recognised the significant barriers to a successful claim. This adds weight to the first proposition.
- 3 If these conclusions appear counter-intuitive, as a result of a perception that 'of course the third parties received property that really ought to have gone to, or belongs to, the principal', then this article would caution against the loose and overly broad meaning of 'property' entailed in such a sentiment. Such a loose sense of 'property' should not be used to drive conclusions *mandating* personal liability at least to make full restitution of the value of the property received and, perhaps even further, a proprietary constructive trust over such property.
- 4 Having said that, both the conclusion as to liability and the proprietary response of a remedial constructive trust in *Say-Dee* could be justified on the facts as found by the NSW Court of Appeal, but they should have been based on the third parties' participation in the breach of duty through the passive facilitation of the breach with full (imputed) notice. However, given the High Court's requirement in *Farah* that the breach of trust or fiduciary duty be dishonest and fraudulent, such an argument is not supported by authority.

VI IS 'STRICT' UNJUST ENRICHMENT-BASED LIABILITY DESIRABLE EVEN IF THERE IS RECEIPT?

Even if one accepts that an unjust enrichment analysis is possible in some of the factual scenarios considered (perhaps, for example, in relation to the simple factual scenario considered in Parts III–IV above), the question remains as to

¹⁸⁶ [1999] 3 All ER 652; see also *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 670–1 (Toulson J).

whether it is *desirable* to apply a strict liability regime to innocent recipients of equitable property.

Apart from the arguments (emphasised by the High Court in *Farah*)¹⁸⁷ as to the weight of established precedent and the violence that would be done to existing authority if unjust enrichment were to be applied, broadly speaking, there are two types of argument that can be made against applying an unjust enrichment analysis to the receipt of equitable property. The first type of argument is essentially conceptual — it focuses upon weaknesses in applying unjust enrichment theory itself to the receipt of ‘equitable’ property, that is, in equating equitable and legal property. The second type of argument is normative — that the application of strict liability in unjust enrichment leads to potentially unjust outcomes for innocent recipients. Each type of argument will be examined in turn.

Different reasons have been articulated by various commentators as to why an unjust enrichment approach is inappropriate for knowing receipt claims in equity. The essence of these arguments, however, is that (albeit for very different reasons) the transfer of *equitable* property interests without the owner’s consent cannot be equated with the standard common law examples to which the unjust enrichment analysis is applied, such as the mistaken payer or the victim of a theft of legal property. Some critics focus on weaknesses in unjust enrichment theory itself, for example, problems in applying the theory to three-party situations,¹⁸⁸ establishing the ‘at the expense of’ element,¹⁸⁹ or identifying an ‘unjust’ factor.¹⁹⁰ Other critics stress the importance of history,¹⁹¹ or conceptual differences between legal and equitable property, and the greater need to protect the security of receipt for recipients of equitable property.¹⁹² For example, Sarah Worthington has emphasised the importance of the relationship between a trustee and a beneficiary and the ‘bundle of rights’ that this entails. Third parties who do not knowingly receive property that is the subject of a trust, cannot be burdened with the obligations of the trustee in relation to that property and their legal title thus prevails over the beneficiaries’ equitable interests.¹⁹³ It is not proposed to revisit these arguments and their strengths and weaknesses. These arguments are not considered decisive one way or the other, in part because many of them emphasise technicalities. They do not necessarily resolve the critical normative question at stake, namely whether an innocent recipient should be liable to make restitution of the value of any trust property received.

¹⁸⁷ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [140]–[147] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). More generally, the Court went on to note that ‘the Court of Appeal’s reasoning did not allege, let alone demonstrate, any inconsistency of principle, any point of practical inconvenience, or any other reason which would justify changing the law in the manner it purported to’: at [148] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁸⁸ See, eg, Virgo, above n 47, 105–12. However, Virgo does support strict liability, albeit on the basis of the vindication of property rights and not the reversal of unjust enrichment: at 647–54.

¹⁸⁹ Smith, ‘Unjust Enrichment, Property, and the Structure of Trusts’, above n 22, 424–5.

¹⁹⁰ See, eg, Watson, above n 16; see also Virgo, above n 47, 653–4.

¹⁹¹ See, eg, Heydon and Leeming, above n 7, 288–9.

¹⁹² See, eg, Grantham and Rickett, above n 92, 285–8: equitable rights may not be capable of reasonable discovery.

¹⁹³ See Worthington, above n 29, 179–89.

On the normative question, this article argues that strict liability has potentially harsh consequences. The discussion will be structured around an example that presents the *contrary* view most starkly. A trustee gives a substantial sum of money to her husband (who is not a beneficiary), who has no idea that the ‘gift’ was improper and who proceeds to spend the money on ‘ordinary everyday expenses’. Hence, no proprietary tracing claim is possible. The trustee is insolvent. Should the recipient repay the money received since he has been ‘enriched’, given that even if he is required to repay, ‘[h]is financial position is the same as it would be if, instead of spending his windfall ... [he had] met his expenses out of other money he already had’?¹⁹⁴ Certainly, this example puts the case for the beneficiary at its most morally compelling. Nonetheless, this is unpersuasive. Indeed, this example is considered to be ultimately misleading as to the normative strength of strict liability. There are three reasons why this is so.

First, the example states that the recipient has expended the money on ‘ordinary everyday expenses’. But this assumes the very facts that may be at issue in the case. Under a strict unjust enrichment claim, the plaintiff *does not have to prove this fact*. Indeed, the plaintiff merely needs to prove that at some point in time, perhaps years ago, the husband received the money. Strict liability requires *the recipient* to prove he spent the money in an extraordinary way in reliance upon its receipt. If he is unable to do so, then he is liable. The onus is on such recipients to prove a relevant change of position or that they were bona fide purchasers. Even applying a generous and easily established change of position (or bona fide purchaser) defence, injustice might still follow. A generous approach to defences could include, for example, not insisting on detailed evidentiary proof of change of position and instead making generous assumptions in favour of defendants,¹⁹⁵ or perhaps even the application of a hardship defence.¹⁹⁶ Nonetheless, even if defences are applied generously, it is not difficult to postulate circumstances in which innocent third party defendants would not be able to discharge the onus of proof and would be required to repay plaintiffs irrespective of the financial consequences.¹⁹⁷ If innocent recipients are

¹⁹⁴ See Nicholls, above n 7, 237. The authors would like to thank the anonymous referee for suggesting this example, which raises the normative question most clearly.

¹⁹⁵ See, eg, *Philip Collins Ltd v Davis* [2003] 3 All ER 808, in which a change of lifestyle amounted to a change of position and the defendants did not need to bring hard evidence of precise expenditure supporting such a change. An impressionistic evaluation was made in order to quantify the change of position. Further, where a defendant is aware of a plaintiff’s mistaken transfer, such that there may be a subsequent, negligent dealing with the property, then there may be a need to balance a defendant’s conduct against the plaintiff’s conduct, so that the negligence of both parties is a relevant consideration for courts seeking to ‘balance the equities’ between defendants and plaintiffs: see, eg, *National Bank of New Zealand v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211. For criticisms of this approach: see, eg, Birks, *Unjust Enrichment*, above n 85, 214–19.

¹⁹⁶ The response that this defence arises as one relevant to resisting a claim for specific performance does not necessarily mean that it cannot be seen as relevant in this context: restitution is itself a form of specific relief, that is, it merely restores the status quo ante.

¹⁹⁷ See, eg, *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 827 (Walker LJ), which seems to accept, by way of dicta, a wide view of the change of position defence, but refuses to consider as relevant, *non-financial* detriment and the burden of repayment on a defendant whose financial circumstances had been reordered. See also *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350, 356 (Priestley, Handley and Sheller JJA), where the defendant’s honest and innocent, but careless, conduct did not preclude liability, due to the narrow

no longer enriched but are unable to prove that this is so, they will, in effect, be required to compensate (that is, act as guarantors for) the plaintiffs' losses! Indeed, the High Court in *Farah* noted that the consequence of adopting 'restitution-based liability' was to reverse and increase the burden of proof,¹⁹⁸ it also questioned 'how there was any justice in permitting restitution against a defendant who received trust property without notice of that fact.'¹⁹⁹

As Finn J noted extra-judicially, strict liability in this context can 'border on the punitive and oppressive (to put it moderately)', a fact that is not altered by the conjuring up of 'that most beguiling and delphic of rubrics, "unjust enrichment"' in aid of that 'unworthy cause'.²⁰⁰ As between an innocent recipient and an innocent owner of equitable property, the benefit of the doubt should lie with the former, especially given the costs and burden of litigation. An extension of potentially harsh property protection regimes is not justified, especially given the statutory retreat from such regimes.²⁰¹

Although the example concerns a volunteer, purchasers are equally subject to a *personal claim if they cannot prove* that they were bona fide.²⁰²

Of course, such criticism applies equally outside the context of recipient liability rules, even to core cases of unjust enrichment such as mistaken payments. Therefore, the consequences of putting the onus on innocent recipients to establish a change of position defence are potentially oppressive *in all cases*. All things being equal, that potential harshness may itself be a reason not to extend the current legal regime to equity.

Secondly, the example concerns money. Yet, as pointed out above, the issue of what, precisely, has been received is not always clear on the facts of the cases. A strict liability approach without a clear focus on the nature of any property that must have been received can be dangerously wide. There is no scope here for a well-meaning sentiment that the defendant received 'something', without any precise understanding of what that is. As the High Court affirmed on appeal, no

approach to good faith conduct adopted by the Court. In such a case, an innocent defendant bearing the onus of proof in establishing a defence is always at a disadvantage and is reliant on a generous application of the defence.

¹⁹⁸ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [140] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁹⁹ *Ibid* [155] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

²⁰⁰ Finn, above n 3, 210. Finn acknowledges that a generous change of position defence goes some way to alleviating these concerns: at 210. However, his preferred solution is a wrongs-based liability only, plus a generous tracing regime which, in the context of money, ought to extend to any advantage or benefit retained: at 211 fn 87. Although this goes a considerable way to harmonising the equitable position with the strict liability regime, the telling difference is that the onus of proof in any tracing exercise would be on the plaintiff.

²⁰¹ Consider, for example, the retreat, via legislative intervention, from equity's extension of proprietary remedies against purchasers with merely constructive notice of a prior interest: see above n 44 and accompanying text. This article also notes the numerous exceptions to the *nemo dat* rule and attempts by courts to ameliorate its effects.

²⁰² If a proprietary claim is brought, and the plaintiff has proved that the defendant still has the property received in breach of trust or its traceable proceeds, then placing the onus on such a defendant to show that they were a bona fide purchaser does not impose the same hardship. *Prima facie*, given the survival of the plaintiff's property, liability can justifiably be imposed in such circumstances. This would, however, be subject to the purchaser making out a defence, including the change of position defence for which this article has strongly argued: see above n 43 and accompanying text.

trust property was received at all in *Farah*, and even if there had been, what precisely was its value — the purchase price, its subsequent value or potential value after redevelopment, with or without an allowance for skill and expertise? To be sure, an account of profits remedy for accessorial wrongdoing also needs to address such questions and an impressionistic assessment may need to be made. Such a remedy is justified for a proven wrong, but not on a strict liability basis.

Thirdly, the example posits an extreme case that challenges the justice of a wrong-based liability regime. But of course, practically speaking, it would be highly unlikely that: (1) a defendant would receive a large sum of money without some suspicion of dishonesty; (2) all of it would be spent on ordinary expenses, without any traceable proceeds remaining; and (3) the defendant could readily repay the money without financial hardship. In any case, it is always possible to provide such challenging hypothetical examples, whatever liability regime is in place. A converse example, should unjust enrichment be adopted, would be where the recipient gambles the money away but has no proof of such expenditure. Such an example, also extreme, illustrates the harshness of strict liability.

In any case, recipients who are innocent of the requisite degree of equitable wrongdoing but are not purchasers will only in exceptional circumstances be left with a large and inappropriate windfall. As discussed above,²⁰³ a claim based upon assertion of the principal's equitable title to property or its traceable proceeds in the defendant's hands is available irrespective of personal liability. Thus, where a clear windfall was received and continues to be evident, there is no problem.²⁰⁴ However, where no traceable property survives, how can it be certain that a recipient can prove that there is no surviving 'benefit'? Given the problems inherent in imposing the risks and costs of litigation upon an innocent recipient, it is argued that imposing liability is only warranted in clear-cut cases where traceable property is identifiable in the defendant's hands, or where the defendant has behaved wrongfully in receiving the trust property. Otherwise, where the contest concerns which of two innocent parties should bear the losses caused by a defaulting fiduciary, it seems to us that the principal who reaps the benefits of the fiduciary relationship should ultimately bear any consequent losses.

A final point needs to be made. Even if unjust enrichment is to be adopted as the preferred model for recipient liability, the questions of when and whether proprietary remedial responses to the liability are appropriate need to be addressed. Proprietary remedies are obviously a desirable response from a plaintiff's perspective in many cases. The predominant views appear to be that notions of property, or remedial discretion, are the best means of approaching questions of proprietary remedies.²⁰⁵ Whether unjust enrichment itself gives rise to proprietary remedies, and in what circumstances, is an unresolved and difficult question. This means, however, that even if unjust enrichment was to

²⁰³ See above Part II.

²⁰⁴ If the tracing rules were applied more generously in relation to the receipt of money, this argument would be stronger: see below n 207 and accompanying text.

²⁰⁵ See above Part IV(B).

become the established basis for personal liability, parties seeking a proprietary remedy may still need to rely on priority/tracing rules, or the commission of a wrong. The advantages of coherence are rather limited if this is so.

VII CONCLUSION

Complexity, confusion and incoherence are not desirable states; any moves to simplify the law in this area must therefore be welcomed. Unfortunately, unjust enrichment does not offer such a solution. The equation of strict liability based on unjust enrichment with equity's recipient liability does not resolve the more complex factual circumstances that are analytically challenging for both heads of liability. However, that conclusion of itself does not take us very far towards resolving some of the open questions in this difficult area of law. It is thus important to offer suggestions that go some way towards resolving uncertainties and, most importantly, simplifying the law. In this spirit, the following three conclusions are drawn by way of summary:

- 1 Where there is a true case of the receipt of trust property (noting the caveat above about information and opportunities)²⁰⁶ in breach of trust or fiduciary duty, there will be proprietary liability where the defendant holds the trust property or its traceable substitute for personal benefit and the defendant is not a bona fide purchaser for value of the legal interest in the trust property without notice of the principal's inconsistent equitable interest.²⁰⁷ Strict liability, in this limited sense of the term in relation to the tracing rules (limited given the existing concessions and in the sense that the principal bears the full onus of proof), should not extend to the recognition of a strict personal liability. Whilst the symmetry of a strict liability personal claim with the proprietary liability of tracing is superficially appealing, it fails to allocate fairly the risks and costs of such liability between the principal and the defendant. The strict personal liability approach, even with a generous change of position defence, is too harsh on innocent recipients bearing the onus of proving a change of position as a result of the receipt.
- 2 Instead, the defendant's personal liability, for the receipt of trust property in breach of trust or fiduciary duty, should be subsumed within the wrong-based participatory liability of knowing assistance. The defendant's liability within this scheme should be determined by a context-specific enquiry that gives due weight to their cognisance of the breach, as well as factors such as the nature of their participation, the degree of their in-

²⁰⁶ See above nn 161–2 and accompanying text.

²⁰⁷ In relation to defendants who purchase an equitable interest without actual notice, it is acknowledged that the rules of tracing may produce harsh and inequitable outcomes. Hence, it makes sense to consider further amelioration of the tracing rules: see above n 43 and accompanying text. From the plaintiff's perspective, Finn's suggestion that tracing be permitted in relation to money where the defendant retains an identifiable benefit even though the actual money received has disappeared, is worthy of further consideration: see Finn, above n 3, 211 fn 87. Although such an approach would mean that the difference between strict liability and the position argued for here becomes essentially only one of onus of proof, this article considers that this is still an important difference.

volvement, and their personal characteristics. Accordingly, the relevant enquiry should be formulated in terms of a broad principle which goes beyond just the defendant's notice or knowledge. Furthermore, where the defendant's participation is through receipt of trust property, then *generally* only actual notice (including imputed actual notice) of a breach of duty by the trustee will suffice for the wrong-based liability to arise. Whether proprietary liability is warranted (outside of the proprietary claims consequent upon tracing and priority) will depend upon the courts' exercise of discretion. However, it is difficult to envisage many circumstances in which this will be appropriate in relation to a *recipient* of trust property who no longer holds traceable proceeds.

- 3 Alternatively, if the inevitable trend of the law is towards the acceptance of a strict liability doctrine in the context of equitable property, then such an approach could only be supported if, in effect, its operation became more 'equitable'. As already indicated above,²⁰⁸ this could be by means of a generous change of position defence and, it is suggest, the reversal of the onus of proof in relation to that defence so that a *plaintiff* must show that there is some surviving enrichment. And, of course, the law would need to pay closer attention than has thus far been the case to identifying precisely what it is that needs to have been received. But if unjust enrichment is still found wanting in these regards, one may question whether it should be adopted at all.

²⁰⁸ See above n 195 and accompanying text.