# *GREAT INVESTMENTS* AND GOOD RETURNS: KNOWING RECEIPT AS AN EQUITABLE WRONG INDEPENDENT OF CONTRACT

OLIVIA C MORRIS*

*Obiter dicta by Lord Nicholls in* Criterion Properties plc v Stratford UK Properties LLC *suggest that in circumstances where a director contracts on a company's behalf and transfers company property pursuant to that contract, any resultant claim is to be singularly determined by principles of company and agency law. Therefore, a claim in equity for knowing receipt is irrelevant. Whilst a Full Federal Court in* Great Investments Ltd v Warner *appears to adopt a similar approach, this article argues that the Australian judgment is distinguishable, and seeks to retain knowing receipt as a viable and important source of liability whether or not property is transferred to a knowing recipient pursuant to a contract binding on the company. It argues that there are clear doctrinal reasons that justify knowing receipt's characterisation as a freestanding equitable wrong, as well as the availability of remedies reflective of this wrong that are more extensive than the return of the value of the misappropriated property. Nonetheless, it recognises the practical difficulties that a subsisting contract may pose to a successful pursuit of a claim for knowing receipt.*

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* BEcon, LLB (Hons I, Medal) (Syd), BCL Candidate (Oxf). I would like to thank Jamie Glister, Matthew Conaglen and Mitchell Cleaver for their helpful comments on an earlier draft of this article. Any errors are my own.

## I Introduction

When an errant director misappropriates their company's property, what can the company do to recover it? In particular, what if the property is transferred under a contract entered into by the director on the company's behalf? This scenario, relatively common in insolvency litigation, raises a raft of possible claims against the receiving counterparty. This article focuses on just one: the first limb of *Barnes v Addy*,[1] better known as 'knowing receipt'. A problem that has arisen in this setting is the role of contract and agency law in determining the company's claim.

Knowing receipt is a personal claim that responds to the unconscientious receipt of trust property or property held subject to a fiduciary obligation. The claim has always been assumed to be available not only to beneficiaries, but also to companies whose property has been misappropriated by fiduciary agents, such as directors.[2] To what extent do or should the principles of knowing receipt differ in each context? Some academic commentary submits that the principles do differ and that the basis for the distinction essentially lies in the law of agency.[3] Generally speaking, a trustee is not an agent for a beneficiary and, because a trust is not a distinct legal entity, it is the trustee and not the beneficiary who is personally bound by the contract. For this reason, the beneficiary may have a personal claim for knowing receipt against a third party irrespective of whether the contract under which property has been transferred has been set aside — after all, the beneficiary is not personally bound by the contract and the entitlement of the trustee to apply trust property depends on the terms of the trust.[4] In contrast, where a director transacts on behalf of the company, the director will ordinarily act as its agent, and the company and the third party

[1] (1874) LR 9 Ch App 244 ('*Barnes v Addy*').

[2] See below n 13.

[3] See, eg, Matthew Conaglen and Richard Nolan, 'Contracts and Knowing Receipt: Principles and Application' (2013) 129 (July) *Law Quarterly Review* 359, 359–60.

[4] Ibid 360–9.

will come into direct legal relations. For this reason, it has been suggested that the contract constitutes a bar to any personal claim by the company against the third party.[5] This article examines whether this distinction is sound. It argues that knowing receipt is an equitable doctrine governed by principles independent of contract: the unconscientious receipt of trust property is a wrong which equity may correct irrespective of whether the company is bound. However, this article also examines the difficulties a company may face in establishing a claim for knowing receipt in circumstances where an errant director has contracted on the company's behalf.

In England, certain obiter remarks of Lord Nicholls in *Criterion Properties plc v Stratford UK Properties LLC* ('*Criterion Properties*') in 2004 support the position that a subsisting contract constitutes a bar to knowing receipt.[6] In Australia, some case law is said to have substantiated this view, with the 2016 decision of a Full Federal Court in *Great Investments Ltd v Warner* ('*Great Investments*') being particularly relevant.[7] The significance of this judgment is threefold. First, the Court affirmed the existence of a strict liability claim in Australia available to a company where its property has been transferred away by a director without authority ('Strict Liability Claim').[8] Second, the Court stated in obiter that where a contract binds the company, the company must rescind the contract 'to recover rights, or their value' transferred under it.[9] Third, knowing receipt is said to be required if the company seeks the remedy of consequential losses or an account of profits.[10] What remains rather oblique, however, is the interaction between these three avenues of recourse.

This article is only concerned with the second and third points. On one reading of the judgment, it may be argued that any contract between the company and the counterparty needs to be rescinded prior to the company bringing a claim for knowing receipt, because the contract's subsistence means the property has not been 'misappropriated' — a constituent element of knowing receipt.[11] In response to this argument, this article advances two lines of reasoning. First, it puts forward a positive doctrinal argument for why knowing receipt should be understood as a freestanding equitable wrong. As such, knowing receipt is not only *not* barred by contractual relations, but may offer more extensive remedies, in congruence with the tort of conversion, than those

[5] Ibid 365–6.

[6] [2004] 1 WLR 1846, 1848 [4] ('*Criterion Properties*').

[7] (2016) 243 FCR 516 ('*Great Investments*').

[8] Ibid 529–30 [52]–[55] (Jagot, Edelman and Moshinsky JJ).

[9] Ibid 529 [52]–[53], 530–1 [56]–[58].

[10] Ibid 529 [53].

[11] See, eg, Conaglen and Nolan (n 3) 367, 375.

available pursuant to rescission. Second, it explains why an exclusive focus on contract and agency law principles is juridically and doctrinally deficient. The interaction between rescission and knowing receipt is clarified as a matter of election, rather than the former constituting a formal prerequisite for the latter claim.

Part II describes the legal context in which knowing receipt operates and the lack of authority for requiring rescission prior to bringing a knowing receipt claim. Part III discusses knowing receipt's conceptual basis, arguing that the claim is a distinctive form of equitable wrongdoing attracting remedies that should align with the tort of conversion. Part IV identifies three material differences between the cases of *Criterion Properties* and *Great Investments* that highlight the Federal Court's intention to retain knowing receipt's important place in the law of ancillary liability. Part V explains the absence of any principled reason for rescission to precede knowing receipt and the remedial incoherence that could result if rescission were regarded as a conceptual bar to further equitable relief. Part VI departs from the preceding analysis of *whether* a contract acts as an in-principle bar to knowing receipt, and considers the practical difficulties that a contract poses to a company successfully establishing its claim. Whilst the contract's validity and knowing receipt's viability will often stand and fall together, this article concludes with an analysis of the exceptions to this stated position. It concludes that knowing receipt remains an important and necessary source of liability in a contemporary commercial environment, and a valuable claim in a company's arsenal for relief.

## II Legal Context

Knowing receipt is a prominent form of equitable intervention in cases concerning misappropriated property, but it is just one of several claims at law and in equity that a company may have available to it.[12] This part seeks to clarify the place of knowing receipt in this legal context and its distinctive qualities, and to identify three other overlapping claims. It also highlights the lack of precedent for requiring rescission as a precondition to bringing the claim.

### A *Knowing Receipt*

First, the broad components of knowing receipt require a brief overview. Justice of Appeal Gleeson neatly summarised them as follows:

[12] *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 740–4 [36]–[51] (Leeming JA) ('*Fistar*'); Mark Leeming, 'Overlapping Claims at Common Law and in Equity: An Embarrassment of Riches?' (2017) 11(3) *Journal of Equity* 229, 234–6.

1 the existence of a trust, or a fiduciary duty, with respect to property (trust property);[13]

2 the misapplication of trust property by the trustee or fiduciary;

3 the receipt of trust property by the third party;

4 knowledge by the third party, at the time he or she received the relevant property, that it was trust property and that it was being misapplied or, in the case of breach by a fiduciary, that the trust property was transferred pursuant to a breach of fiduciary duty.[14]

Receipt must be beneficial and not merely ministerial;[15] and the act of transfer must itself be in breach of a fiduciary obligation,[16] so merely entering the contract in breach of duty will not be enough.[17]

There exists an ongoing ancillary debate about *which* duties can relevantly be described as 'fiduciary' and which cannot. However, for the purposes of knowing receipt, it appears that any breach of a director's duties is sufficient to satisfy element 2 of the claim.[18]

It is the fourth element, the third party's knowledge at the time of receipt, that has been most controversial. In Australia, the third party must, at the very least, have knowledge of the circumstances that would have indicated the facts

[13] It has always been assumed, though not decided, that liability can extend to fiduciaries who are not trustees: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 141 [113] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*'). Yip has made a normative argument that knowing receipt should not apply in the company law context, but this is outside this article's scope: see generally Man Yip, 'Third Parties' Liability for Receipt of Misapplied Corporate Assets: The Relevance of Knowing Receipt?' (2017) 11(3) *Journal of Equity* 293.

[14] *Simmons v New South Wales Trustee and Guardian* (2014) 17 BPR 33717, 33732 [88].

[15] *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265, 292 (Millett J) ('*Agip*').

[16] *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 106–7 [160]–[161] (Spigelman CJ) ('*Evans*'); *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ) ('*El Ajou*'); *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch), [200]–[201] (Nugee J).

[17] See Conaglen and Nolan (n 3) 364.

[18] See Matthew Conaglen, 'Interaction between Statutory and General Law Duties Concerning Company Director Conflicts' (2013) 31(7) *Company and Securities Law Journal* 403, 407; *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439 (Williams ACJ, Fullagar and Kitto JJ). Cf *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 520–4 [2714]–[2733] (Carr AJA) ('*Westpac Appeal*').

of the fiduciary's breach of duty to an honest and reasonable person (known as the fourth level of the *Baden* scale).[19]

### B *Proprietary Claim*

Knowing receipt is traditionally classified as a form of *personal* equitable liability.[20] Most significantly, it is available where property was initially received by the defendant but has subsequently been dissipated. However, it is sometimes conflated with another overlapping claim: the strict 'specific' or 'persisting property' claim ('Proprietary Claim').[21] This arises where the property or its traceable proceeds are still extant in the defendant's hands.[22] The Proprietary Claim allows the company to recover that property in specie.[23] The claim does not depend on the defendant's state of mind.[24] It can exist in the same factual circumstances as knowing receipt but is not generally regarded *as* knowing receipt,[25] though the two claims have not always been treated as discretely as perhaps they should be.[26]

[19] *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575–6 [250] (Peter Gibson J). See also *Farah* (n 13) 163–4 [176]–[177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 398 (Gibbs J), 412 (Stephen J, Barwick CJ agreeing at 376–7) ('*Consul Development*'). Cf *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 454–5 (Nourse LJ) ('*Akindele*').

[20] See *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 366 [280] (Finn, Stone and Perram JJ) ('*Grimaldi*').

[21] See ibid 358–9 [251]; *Fistar* (n 12) 741–2 [42]–[44] (Leeming JA); *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, 285 (Megarry V-C) ('*Montagu*'); *Arthur v A-G (Turks and Caicos Islands)* [2012] UKPC 30, [34] (Sir Terence Etherton for the Court) ('*Arthur*'); Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 208 ('*Accessories*').

[22] See *Montagu* (n 21) 272–3, 276 (Megarry V-C), discussed in *Farah* (n 13) 152–3 [140] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); Dietrich and Ridge, *Accessories* (n 21) 205–8.

[23] *Arthur* (n 21) [34] (Sir Terence Etherton for the Court); *Fistar* (n 12) 741–2 [42]–[44] (Leeming JA), citing *Grimaldi* (n 20) 358–9 [251] (Finn, Stone and Perram JJ).

[24] Dietrich and Ridge, *Accessories* (n 21) 208.

[25] See *Crossman v Sheahan* (2016) 115 ACSR 130, 182–3 [258]–[261] (Ward JA) ('*Crossman*').

[26] See, eg, *Super 1000 Pty Ltd v Pacific General Securities Ltd* (2008) 221 FLR 427, 472 [213] (White J); *Commonwealth v Davis Samuel Pty Ltd [No 7]* (2013) 282 FLR 1, 303 [2189]–[2190] (Refshauge J) ('*Davis Samuel*'); *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580, 623 (Southwell J).

### C *Conversion*

The company could have a strict liability claim in tort for the conversion of its property.[27] This claim will lie if the company was in possession of its personal property, and that property was then wrongfully interfered with.[28] The defendant's mere receipt of the property will not necessarily be enough. 'Some act of positive misconduct' is needed[29] and must amount to an 'absolute denial and repudiation of the plaintiff's [possessory] right'.[30]

### D *Strict Liability Claim*

Lastly, *Criterion Properties* and *Great Investments* have identified (in obiter) a Strict Liability Claim, based on the law of unjust enrichment, where a company's property is transferred without authority.[31] The Federal Court did not pin down the precise juridical basis for the claim, being more concerned to confirm its existence than with a historical analysis of the forms of action or bases for relief in Chancery (which had jurisdiction over companies)[32] from which the claim derives. Therefore, the relevant 'unjust factor' that underpins the claim remains controversial but is outside the scope of this article.[33] Relief can be proprietary in nature, if the recipient still has the assets, or additionally, and irrespective of whether the recipient still has the assets, personal.[34]

[27] See, eg, *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd [No 2]* (2010) 13 HKCFAR 479, 525 [123] (Lord Neuberger NPJ) ('*Akai*').

[28] Sarah Green and John Randall, *The Tort of Conversion* (Hart Publishing, 2009) 58–9.

[29] Ibid 30.

[30] Sir John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, ed WTS Stallybrass (Sweet & Maxwell, 7th ed, 1928) 394, quoted in ibid 65.

[31] *Great Investments* (n 7) 529 [52]–[53], 531 [58]–[59], 533–4 [68]–[69] (Jagot, Edelman and Moshinsky JJ); *Criterion Properties* (n 6) 1848 [4] (Lord Nicholls).

[32] James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 287.

[33] See generally Robert Stevens, 'The Proper Scope of Knowing Receipt: *Criterion Properties v Stratford UK Properties*' [2004] (4) *Lloyd's Maritime and Commercial Law Quarterly* 421; William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28(4) *Oxford Journal of Legal Studies* 627; Pauline Ridge, 'Modern Equity: Revolution or Renewal from Within?' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 251, 260–4; Edelman and Bant (n 32) 287–91; *Farah* (n 13) 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[34] *Great Investments* (n 7) 531 [60] (Jagot, Edelman and Moshinsky JJ); *Criterion Properties* (n 6) 1848 [4] (Lord Nicholls).

It is necessary to clarify the role of rescission — the ability to set aside a transaction that is subject to some defect in its formation[35] — in relation to each of the claims described above. A binding contract is of critical relevance to the Strict Liability Claim and the Proprietary Claim. First, in respect of the Strict Liability Claim, the director's ability to contractually bind the company, as a matter of agency law, determines whether the claim will be enlivened.[36] That is to say, if the director had authority to contract on the company's behalf and there was no relevant defect in the contract's formation to enliven rescission, the Strict Liability Claim will not be available. Alternatively, the director could have had authority to contract and transfer the property, but by reason of the manner in which she exercised that authority — in breach of her duties to the company — the contract is able to be set aside (rescinded).[37] If rescission can be effected, the Strict Liability Claim will be available. However, there are many circumstances in which rescission is barred: for example, where restitutio in integrum cannot be achieved; the contract is affirmed; there is delay in bringing the claim;[38] or the counterparty is a bona fide purchaser for value without notice.[39] In these cases, the company cannot seek restitution pursuant to the Strict Liability Claim. This is in accordance with the important principle of affording primacy to contract in unjust enrichment.[40] The contract provides a remedy that the Strict Liability Claim need not override.[41]

[35] 'Rescission' is sometimes used to refer to the termination of a contract, discharging the parties' future obligations. This is not the sense referred to in this article. See, eg, the use of 'set aside' in *Dunbar Bank plc v Nadeem* [1998] 2 FLR 457, 468–9 (Morritt LJ). Cf *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 277–9 (Kitto J), 291 (Menzies J) ('*Latec*'). But see generally Birke Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68(2) *Cambridge Law Journal* 324.

[36] *Criterion Properties* (n 6) 1848 [4] (Lord Nicholls).

[37] Ibid; *Great Investments* (n 7) 531 [58]–[59] (Jagot, Edelman and Moshinsky JJ). See also *Load v Green* (1846) 15 M & W 216; 153 ER 828, 830 (Parke B for the Court).

[38] See generally Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2nd ed, 2014) chs 18, 23–4. There are several other bars to rescission: at chs 25–7.

[39] See *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 142 (Dixon J) ('*Richard Brady Franks*'), cited in *Great Investments* (n 7) 530 [56] (Jagot, Edelman and Moshinsky JJ).

[40] See Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd ed, 2015) 134–41; Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991) 247, 247–9; Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge University Press, 2019) 145–6.

[41] Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 (April) *Law Quarterly Review* 273, 291. See also JH Baker, 'The History of Quasi-Contract in English Law' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 37, 38.

Rescission is similarly relevant to the Proprietary Claim because the contract's viability determines whether the company has a subsisting proprietary interest in the property. In circumstances where a director has entered and executed a contract in breach of duty, and the counterparty is not a bona fide purchaser for value without notice, 'the owner has no proprietary interest in the original property; all he has is the "mere equity" of his right to set aside the voidable contract'.[42] The company would need to exercise its equitable right to have the contract (and transfer) rescinded in order to recover the property pursuant to the Proprietary Claim under a constructive (or resulting) trust.[43]

In contrast, rescission will not enliven a claim for conversion if the counterparty's receipt and use of the relevant property was authorised by a presently binding, but voidable, contract. The recipient cannot be held liable for conversion 'by reason of a later avoidance of his title at general law'.[44] As long as the contract was binding at the time of the alleged conversion, the company could not be said to have had superior rights in the relevant property at law.

In contradistinction, the current state of Australian authority suggests that rescission is not needed in relation to knowing receipt and its absence does not preclude the claim's success. Several cases step around the issue. For example, in *Kalls Enterprises Pty Ltd (in liq) v Baloglow*, rescission was simply irrelevant to the knowing receipt claim because the pertinent contract was not directly between the company and the counterparty/knowing recipient.[45] Rescission is also irrelevant in circumstances where a director simply steals company property, and then purports to enter into a contract in relation to it, as the property is impressed with a constructive trust from the moment of theft.[46] However, in the precise circumstances that this article seeks to address — where the property has been directly transferred pursuant to a binding contract with the knowing recipient — obiter by a Full Federal Court in *Grimaldi v Chameleon Mining NL [No 2]* ('*Grimaldi*') explicitly states that 'the mere form

[42] *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep Bank 436, 461 [99] (Potter LJ) ('*Twinsectra*'). Nothing was said on appeal to undermine this analysis: see generally *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

[43] *Twinsectra* (n 42) 461–2 [99] (Potter LJ).

[44] *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195, 213 [80] (Allsop P and Handley AJA) ('*Perpetual Trustees*').

[45] (2007) 63 ACSR 557, 578 [106]–[108], 591–5 [176]–[199] (Giles JA, Ipp JA agreeing at 597 [210], Basten JA agreeing at 599 [230]); *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 619–22 [4783]–[4796] (Owen J) ('*Bell Group*'). Cf *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, 214 [184], 217 [197], 220 [206] (Ipp, Owen and McKechnie JJ) ('*Hancock*').

[46] *Bell Group* (n 45) 623 [4801] (Owen J); *Black v S Freedman & Co* (1910) 12 CLR 105, 110 (O'Connor J). See also *Davis Samuel* (n 26) 225 [1565] (Refshauge J); *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286, 302–3 [82]–[84] (Giles JA) ('*Robins*').

of the transaction "cannot stay the hand of equity" for the purposes of recipient liability under *Barnes v Addy*.[47] This is supported by a fairly long line of persuasive obiter or authority to similar effect.[48] The next part offers an explanation as to why this is so.

## III Knowing Receipt: A Distinctive Equitable Wrong

Knowing receipt's characterisation as an 'equitable wrong' accords with this article's overarching argument that knowing receipt is independent from contract. This part argues that knowing receipt is best understood as a claim seeking to redress the 'wrong' of interference with property that is the subject of a fiduciary obligation ('Fiduciary Property'). This is not uncontroversial. The nature and source of liability for knowing receipt has been long debated. Some commentators consider it to be part of the law of restitution that seeks to vindicate property rights.[49] Still others believe that it falls within the law of unjust enrichment,[50] or view the claim as deriving from trust obligations that arise upon receipt of misappropriated property.[51] Nonetheless, there exist two arguments supporting the 'equitable wrong' view. First, the primary competing models to the equitable wrong model have either been debunked or lack support in Australian jurisprudence. Second, the model of equitable wrongdoing submitted is both consonant with obiter in *Great Investments* and

[47] *Grimaldi* (n 20) 364 [276] (Finn, Stone and Perram JJ), quoting *Robins* (n 46) 300 [65] (Mason P).

[48] *Endresz v Commonwealth* (2019) 273 FCR 286, 326–7 [128]–[130] (Rares and Markovic JJ) ('*Endresz*'); *Australasian Annuities Pty Ltd (in liq) (recs and mgrs apptd) v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302, 332–3 [124]–[129] (Neave JA), 372 [311] (Garde AJA); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153–4 (McLelland AJA) ('*Greater Pacific*'); *Robins* (n 46) 300 [65]–[67], 301 [73]–[74] (Mason P); *Crossman* (n 25) 182–3 [258]–[261] (Ward JA); *Davis Samuel* (n 26) 302 [2184]–[2186] (Refshauge J); JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 860–1 [23-555].

[49] See, eg, Keith Mason, JW Carter and GJ Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd ed, 2008) 129; Virgo (n 40) 645.

[50] See, eg, Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 231, 238–9; Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] (3) *Lloyd's Maritime and Commercial Law Quarterly* 296, 341; PJ Millett, 'Tracing the Proceeds of Fraud' (1991) 107 (January) *Law Quarterly Review* 71, 85. Cf Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 213, 223.

[51] See, eg, Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 115; Robert Chambers, 'The End of Knowing Receipt' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 1.

is doctrinally consistent with what the claim seeks to deter:[52] the fiduciary's wrongful interference with the company's Fiduciary Property *and*, I argue, the knowing recipient's interference with the company's Fiduciary Property. Importantly, this conception of wrongdoing aligns, in some respects, with the tort of conversion — a finding that supports the availability of consequential losses in equity.

### A *Other Models*

The two primary competing models to the 'equitable wrong' model are that knowing receipt is a species of unjust enrichment or that it is a form of trust relationship that requires the bare trustee (the recipient) to return the property to the beneficiary company.

The unjust enrichment theory has already been debunked in Australia as there are several key differences between knowing receipt and the law of unjust enrichment. Principally, the former is fault-based whereas the latter is strict. The High Court has explicitly recognised this in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah*'), where it rejected the abandonment of the 'knowledge' requirement for knowing receipt, as well as the recognition of a strict liability claim arising on the same principles as knowing receipt.[53] Further, unjust enrichment does not require wrongdoing or depend on the defendant's state of mind; rather, it concerns defective transfers of value and the defendant's state of enrichment. In contrast, knowing receipt is grounded in the beneficial receipt of Fiduciary Property, whether or not the third party is enriched.[54] *Great Investments* also confines its unjust enrichment analysis to the Strict Liability Claim.[55] Knowing receipt is regarded as having an alternative source, as it is said to generate different remedies. The unjust enrichment model is thus unsound.

[52] See *Consul Development* (n 19) 397 (Gibbs J); Pauline Ridge, 'Monetary Remedies for Equitable Participatory Liability: General Principles and Current Questions' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 197, 201. But see Peter Devonshire, 'Account of Profits for Accessory Liability: Still in the Thrall of Fiduciary Doctrine?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 251, 256.

[53] *Farah* (n 13) 150–1 [134], 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Great Investments* (n 7) 530 [55] (Jagot, Edelman and Moshinsky JJ); *Fistar* (n 12) 744 [52]–[53] (Leeming JA), 751 [90]–[93] (Sackville AJA).

[54] *Quince v Varga* [2009] 1 Qd R 359, 381 [51]–[52] (Douglas J, Holmes JA agreeing at 366–7 [5], Mackenzie AJA agreeing at 367 [6]); *Agip* (n 15) 292 (Millett J).

[55] *Great Investments* (n 7) 529–30 [53]–[55], 533–4 [68]–[69] (Jagot, Edelman and Moshinsky JJ).

Support for the 'true trust' model is also slim. Its central thesis is that knowing recipients become actual trustees, at least of a bare trust, upon consensual receipt of trust property.[56] They are thereby subject to a custodial duty to reconvey the property and to restore the trust.[57] However, knowing recipients do not accept the obligations of trustees. For instance, the very act of receipt would be in breach of the duty to avoid a conflict of interest. It has also been accepted that referring to a knowing recipient as a 'constructive trustee' is descriptive only and does not mean that the recipient is actually subject to a constructive trust.[58] The recipient may be liable to account in a manner similar to that of a trustee, but that does not mean the recipient is actually a trustee.[59] Furthermore, the primary advocates of this model purposefully confine their analysis to misapplied trust property, as opposed to misapplied company property,[60] because a company does not retain equitable title to misappropriated property. Thus, a constituent element of a trust — trust property — is missing. Indeed, *Great Investments* contemplates remedies for knowing receipt that fall outside the trust model.[61] Consequential losses are not conventionally recoverable for breach of trust.[62] Trustees are liable to make restitution to the trust estate but are not liable for losses that go beyond the harm suffered to it.[63]

### B *Equitable Wrongdoing*

Having put the other two models to one side, knowing receipt's characterisation as an equitable wrong can now be considered. Indeed, knowing receipt is often

[56] See Mitchell and Watterson (n 51) 129–30.

[57] Ibid 132–5.

[58] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409 (Millett LJ) ('*Paragon Finance*'); *Williams v Central Bank of Nigeria* [2014] AC 1189, 1197–8 [9] (Lord Sumption JSC, Lord Hughes JSC agreeing) ('*Williams*'). See also *Great Investments* (n 7) 534 [74] (Jagot, Edelman and Moshinsky JJ).

[59] *Williams* (n 58) 1208 [30]–[31] (Lord Sumption JSC, Lord Hughes JSC agreeing).

[60] See Mitchell and Watterson (n 51) 128.

[61] *Great Investments* (n 7) 529 [53] (Jagot, Edelman and Moshinsky JJ).

[62] Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8(3) *Journal of Equity* 235, 235, 238 ('Consequential Loss'); Jamie Glister, 'Knowing Receipt' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart Publishing, 2020) 217, 225 ('Knowing Receipt').

[63] Glister, 'Knowing Receipt' (n 62) 225. There is an underlying assumption being made here that a trustee's 'reparative' liability for wilful default does not extend to indirect losses incurred by the trust estate. There are not enough available words to venture into this discussion further, but see *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1, 64–7 [338]–[349] (Edelman J); Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40(1) *Melbourne University Law Review* 126, 146–51.

referred to as a wrong,[64] though its precise character remains unsettled both juridically and in academic commentary. Three characterisations have risen to prominence: the wrong of dishonest participation in a breach of trust,[65] the wrong of inconsistent dealing,[66] and the wrong of interference with equitable proprietary rights.[67] All three conceptions of wrongdoing are, however, deficient.

Dishonest participation in a breach of trust refers to a wider wrong that encompasses dishonest assistance with a breach of fiduciary duty,[68] as well as, potentially, procurement or inducement of breach.[69] Knowing receipt is, however, distinguishable from these other strains of third-party liability. Unlike the species of dishonest participation described above, knowing receipt merely requires beneficial receipt of Fiduciary Property. The recipient can be liable despite being completely passive.[70] Swadling agrees that this 'participative' characterisation of knowing receipt is difficult to digest, as the later recipient of traceable 'trust' assets can be liable without ever having come into contact with the trustee.[71]

Swadling regards the wrong as 'a species of inconsistent dealing', lying in the subsequent dissipation of the property with knowledge.[72] On his view, the gist of the action is not receipt, but the later dealings with the property received in a manner inconsistent with the trust on which they were originally held.[73] However, 'dissipation cannot be the essence of the wrong'[74] in light of *Akita Holdings*

[64] See, eg, *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, 130 [110] (Lloyd LJ); *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, 527 [84] (Longmore LJ for the Court) ('*Novoship*'); Jamie Glister and James Lee, *Hanbury and Martin: Modern Equity* (Sweet & Maxwell, 21st ed, 2018) 694.

[65] Lord Nicholls (n 50) 243–4; James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 193–204 ('*Gain-Based Damages*').

[66] William Swadling, 'The Nature of "Knowing Receipt"' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 303, 328–30 ('The Nature of "Knowing Receipt"').

[67] See, eg, Lionel Smith, 'W(h)ither Knowing Receipt?' (1998) 114 (July) *Law Quarterly Review* 394, 395.

[68] *Barnes v Addy* (n 1) 252 (Lord Selborne LC).

[69] Note that other equitable forms of liability against third parties involved with breaches of fiduciary duty exist beyond the two limbs of *Barnes v Addy* (n 1): *Grimaldi* (n 20) 356–8 [242]–[248] (Finn, Stone and Perram JJ); *Farah* (n 13) 159–61 [161]–[164] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[70] Swadling, 'The Nature of "Knowing Receipt"' (n 66) 327.

[71] Ibid. See, eg, *El Ajou* (n 16) 690 (Nourse LJ).

[72] Swadling, 'The Nature of "Knowing Receipt"' (n 66) 328–30.

[73] Ibid.

[74] Glister, 'Knowing Receipt' (n 62) 227.

*Ltd v Attorney General (Turks and Caicos Islands)* ('*Akita*'), where the land was never dissipated by the knowing recipient yet the Crown was still successful in its claim for knowing receipt.[75]

The third theoretical basis for knowing receipt is as a claim for wrongful interference with the claimant's equitable property rights.[76] On this view, where a contract is binding, the company has no equitable proprietary interest in the Fiduciary Property that has been misappropriated and, therefore, no claim for knowing receipt. A number of difficulties emerge from this approach. First, where a director simply misappropriates Fiduciary Property (not pursuant to a contract), the company can bring a claim against the knowing recipient notwithstanding that, unlike a beneficiary, it has no equitable interest in the Fiduciary Property. Indeed, in *Farah*, the High Court stated that 'in this field equity devised protections for the holders of equitable interests and *those to whom fiduciary duties are owed*'.[77] The position and interests of companies are thus distinguished from those of beneficiaries. Second, a claim for knowing receipt is distinct from the Proprietary Claim. As discussed in Part II, the knowing receipt claim is not derived through the Proprietary Claim as a kind of existing trust continued and kept on foot.[78] Accordingly, knowing recipients are not trustees and knowing receipt does not actually impose a constructive trust; constructive trusteeship is just 'a formula for equitable relief'.[79] Australian case law has gravitated towards this characterisation of knowing receipt as a freestanding claim 'irrespective of whether the claimant can claim (after rescission) … a prior title to the property'.[80]

It is submitted that knowing receipt is not a property rights-based claim. It is a claim for the wrongful interference with Fiduciary Property, and the 'wrong' should be understood as an equitable wrong broader than mere receipt: if the recipient utilises Fiduciary Property in some further way, either by dissipating it, investing it,[81] or perhaps using it to raise finance,[82] it also includes the wrong of knowing 'utilisation'. It is this further wrongful act that enlivens the remedy

[75] [2017] AC 590, 597 [14] (Lord Carnwath JSC for the Court) ('*Akita*'), discussed in ibid.

[76] See, eg, *Montagu* (n 21) 285 (Megarry V-C); Joachim Dietrich and Pauline Ridge, '"The Receipt of What?": Questions concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31(1) *Melbourne University Law Review* 47, 52 ('The Receipt of What?').

[77] *Farah* (n 13) 157 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (emphasis added).

[78] See above nn 21–6 and accompanying text.

[79] *Paragon Finance* (n 58) 409 (Millett LJ).

[80] *Grimaldi* (n 20) 366 [281] (Finn, Stone and Perram JJ).

[81] See, eg, ibid 311 [13]–[16].

[82] See, eg, *Akita* (n 75) 594 [6] (Lord Carnwath JSC for the Court).

of an account of profits or of consequential losses which a Full Federal Court has said are both available in *Great Investments*.[83] Both the wrong of receipt and the wrong of utilisation can be understood as part of the broader wrong of knowing receipt — the wrongful interference, whether active or passive, with Fiduciary Property.[84]

This conception of wrongdoing is addressed at law by the tort of conversion,[85] which has led Smith to assert that knowing receipt is 'equity's analogue' to conversion.[86] It is submitted that the conceptual similarity between the claims warrants remedial coherence between them. Nonetheless, analogies must be approached with caution and significant differences do exist between the two claims that need to be addressed.[87] For one, the knowing recipient 'need not have done anything at all', apart from receiving the property,[88] whereas conversion demands positive action interfering with another's right to exclusive possession.[89] It is also an oversimplification to say that the 'essence'[90] of both claims is the same. Conversion concerns interference with superior property rights at law.[91] In contrast, the claimant company whose property has been misappropriated has no superior title relative to the knowing recipient unless the disposition was void.[92] The company is left with a mere equity to rescind, and even if that were to be exercised and blossom into a full equitable interest, this is not sufficient to establish 'superior' title to the

[83] *Great Investments* (n 7) 529 [53] (Jagot, Edelman and Moshinsky JJ).

[84] See *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 571 [121] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

[85] There exists an anterior debate about the basis of tort law. It should be understood here as a response to wrongdoing, as opposed to a regulatory cost-minimisation mechanism: Gregory C Keating, 'Is the Role of Tort To Repair Wrongful Losses?' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 367, 367–70.

[86] Smith (n 67) 394.

[87] See Yeo Tiong Min, 'The Right and Wrong of "Knowing Receipt" in the Law of Restitution' (Yong Pung How Professorship of Law Lecture, Singapore Management University, 19 May 2011) 13–14 [27].

[88] Swadling, 'The Nature of "Knowing Receipt"' (n 66) 328.

[89] *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253, 1257–8 (Millett J); *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1084 (Lord Nicholls).

[90] Smith (n 67) 395.

[91] See, eg, *Anderson Formrite Pty Ltd v Baulderstone Pty Ltd [No 7]* [2010] FCA 921, [326] (Graham J).

[92] Cf *Great Investments* (n 7) 530 [56], 534 [70]–[71] (Jagot, Edelman and Moshinsky JJ); *Frazer v Walker* [1967] 1 AC 569, 584–5 (Lord Wilberforce for the Court); *Breskvar v Wall* (1971) 126 CLR 376, 385–6 (Barwick CJ). In obiter, Lord Neuberger NPJ canvassed the possibility of an alleged knowing recipient who lacks legal title exercising a *scintilla temporis* upon sale sufficient to ground 'beneficial receipt': *Akai* (n 27) 530 [143].

property.[93] Rather, knowing receipt operates to protect property interests, more broadly, that once were in the control of fiduciaries.[94] Further, conversion is strict, whereas knowing receipt is fault-based, suggesting that the latter claim must have a more nuanced conceptual basis and application.[95] Smith explains this away by arguing that conversion developed differently and, in taking over the work of detinue, had to impose liability strictly.[96]

It is more instructive to abandon efforts to rigorously align the two claims, and to acknowledge that knowing receipt's fault element is key to its characterisation of wrongdoing instead. Unlike conversion, knowing receipt's protection of Fiduciary Property encompasses passive, as well as active, acts of wrongdoing. The requirement that the recipient have knowledge of the director's breach of duty renders the recipient liable for receipt. The recipient can then commit a further 'wrong' because of *their own* knowing interference with the property. The former justifies liability upon receipt, and the latter justifies the grant of equitable relief in relation to the recipient's own misconduct. Knowing *receipt* is therefore somewhat of a misnomer which fails to capture the extent of wrongdoing caught by the equitable claim. Furthermore, the 'knowledge' element is essential in circumstances where Fiduciary Property is being protected. Unlike conversion, which is only concerned with the location and protection of title, knowing receipt seeks to redress conscious interference with equitable rights in respect of Fiduciary Property that are less readily ascertainable. Knowledge is therefore essential.

Notwithstanding their differences, the high-level similarity between conversion and knowing receipt offers sound doctrinal reasons for the remedies against a knowing recipient to be as extensive as those available against a tortfeasor for conversion.[97] The measure of damages for conversion is ordinarily the value of the goods converted, as well as any proven consequential loss borne

[93] There is considerable uncertainty about whether and when rescission revests either legal or equitable title in the rescinding party. Whilst at law legal title to chattels automatically revests upon election to rescind for fraud, in equity it is unclear if equitable title revests upon election, or if this is in the court's discretion: see, eg, *Alati v Kruger* (1955) 94 CLR 216, 223–4 (Dixon CJ, Webb, Kitto and Taylor JJ); *Latec* (n 35) 290–1 (Menzies J); *Robins* (n 46) 301 [73]–[74] (Mason P). See also O'Sullivan, Elliott and Zakrzewski (n 38) 330–47; Sarah Worthington, 'The Proprietary Consequences of Rescission' (2002) 10 *Restitution Law Review* 28.

[94] See *Farah* (n 13) 142–5 [116]–[120] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[95] See Dietrich and Ridge, 'The Receipt of What?' (n 76) 60.

[96] Smith (n 67) 396.

[97] See James Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 (July) *Law Quarterly Review* 375, 377–8; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 317 [90]–[91] (Kirby J).

indirectly as a result of the conversion.[98] Both general and special damages may be awarded for loss of use where the property converted is profit-earning.[99] As explained by the Earl of Halsbury LC,

> where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages.[100]

In the context of user damages, Denning LJ explains the reason for this award as follows:

> If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission.[101]

Similarly, a knowing recipient should not be entitled to the gratuitous use of the company's property, knowing it has been misappropriated and, to use Lord Sumption JSC's language, 'is therefore at all times wrongful and adverse to the rights of [the company]'.[102] Where the knowing recipient has utilised the property beyond mere receipt, it would be strange to dissimilarly limit relief to a restorative amount only addressing the company's deprivation of its property. If the tortious claim offers relief that reflects the property's utilisation, the equitable remedy should be able to as well. Otherwise, a level of incoherence arises in the remedies available to redress similar wrongs,[103] and equitable relief may not be appropriately 'fashioned to fit the nature of the case and the particular facts'.[104]

98 *J & E Hall Ltd v Barclay* [1937] 3 All ER 620, 623 (Greer LJ), cited in *ACN 116 746 859 v Lunapas Pty Ltd* [2017] NSWSC 1583, [162] (Slattery J); *Hillesden Securities Ltd v Ryjack Ltd* [1983] 1 WLR 959, 963 (Parker J); *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420, 471–2 [195]–[199] (Giles JA); Glister, 'Consequential Loss' (n 62) 248.

99 *Sadcas Pty Ltd v Business and Professional Finance Pty Ltd* [2011] NSWCA 267, [78] (Giles JA, Whealy JA agreeing at [82], Handley AJA agreeing at [83]).

100 *The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet'* [1900] AC 118, 116. See also *One Step (Support) Ltd v Morris-Garner* [2019] AC 649, 671 [30] (Lord Reed JSC).

101 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 254, quoted in Green and Randall (n 28) 192.

102 *Williams* (n 58) 1208 [31] (Lord Sumption JSC, Lord Hughes JSC agreeing).

103 See *Akai* (n 27) 525 [123], 533–4 [151]–[155] (Lord Neuberger NPJ); *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390, 436 [4] (Arden LJ).

104 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman International*').

An account of profits should equally be available against a knowing recipient.[105] Whilst a tortfeasor could not be liable to account for profits because it is an equitable remedy, it would be unprincipled to allow a knowing recipient to retain a benefit gained from knowingly profiting off trust property.[106] Equity has the benefit of remedial flexibility, enabling an account to be awarded. Knowing recipients should therefore be required to disgorge gains traceable to the misappropriated property (and therefore the *fiduciary's* wrongdoing), as well as profits that are referrable to their own wrongdoing.[107] However, this award should be limited by principles of causation. To find otherwise elides the position of the recipient with the assistant/procurer/inducer.[108] Unlike the operative role that these other accessories play in a breach of trust, the typical recipient is 'merely' an outside third party participating in the breach.[109] Their undeserved profit should still be disgorged, though not to an extent reflecting the trustee/fiduciary's original breach.

### C *Testing the Model*

First, it is necessary to confront authority that rejects the characterisation of knowing receipt as fault-based liability arising from the wrongful receipt and/or utilisation of property. In *Byers v Samba Financial Group*, Fancourt J assessed whether a transferee who obtains title to property free from a beneficiary's equitable interest (viz under a statutory scheme for registration of title) can be liable for knowing receipt.[110] The claimant argued that because knowing receipt addresses the *wrongful* receipt of property, the transferee's good title did not preclude a claim for knowing receipt.[111] His Honour disagreed, determining that the essence of the claim is the recipient's *unauthorised* receipt of

[105] Cf Devonshire (n 52) 255–6.

[106] Dietrich and Ridge, 'The Receipt of What?' (n 76) 66. See also *Consul Development* (n 19) 397 (Gibbs J); *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 669 (Toulson J); Jamie Glister, 'Accounts of Profits and Third Parties' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 175, 189 ('Accounts of Profits').

[107] *Novoship* (n 64) 527 [84] (Longmore LJ for the Court).

[108] See generally *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 36–9 [84]–[92] (Gageler J).

[109] Cf *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd [No 2]* [1984] WAR 32, 40 (Brinsden J); *Grimaldi* (n 20) 357 [243] (Finn, Stone and Perram JJ), cited in Glister, 'Accounts of Profits' (n 106) 175.

[110] [2021] EWHC 60 (Ch), [5], [90]–[117] ('*Byers*'), affd *Byers v Saudi National Bank* [2022] 4 WLR 22.

[111] *Byers* (n 110) [89] (Fancourt J).

property.[112] However, Fancourt J's reasoning is decidedly English. His Honour considers the second limb of *Barnes v Addy*, 'dishonest assistance', to be the fault-based claim, as distinct from knowing receipt.[113] In Australia, the opposite is said to be true: in *Grimaldi*, a Full Federal Court held that 'recipient liability should be seen as fault based and as making the same knowledge/notice demands as in assistance cases'.[114]

Nonetheless, it is difficult to positively test the characterisation of knowing receipt as an 'equitable wrong'. I have not found a case where consequential losses have been awarded,[115] and whilst an account of profits is often said to be available against knowing recipients,[116] it is difficult to identify a clear case where the quantum awarded was not merely related to the return of the property's value (and therefore the 'wrong' of receipt), but rather where a more far-reaching disgorgement to account for the recipient's further wrongful act was necessitated. The case of *Grimaldi* came close.[117] The knowing recipient was required to disgorge the proportion of income made in a mining project corresponding to the misappropriated funds invested into the purchase of the mining tenements.[118] However, this could be construed as merely being a sum traceable to receipt.[119] Alternatively, the award being enlarged on appeal to include expected future earnings for the entire duration of the project, subject to a possible allowance in favour of the knowing recipients,[120] could be construed as redress for the recipient's own misconduct. Nonetheless, the case cannot offer decisive support.

The next case that appears promising is the Privy Council's decision in *Akita*.[121] A government minister, acting in breach of fiduciary duty, sold Crown land at an undervalue to a company jointly owned by himself and his brother.[122] The company was held to be a knowing recipient.[123] The Crown was successful

112 Ibid [109]–[110].

113 Ibid.

114 *Grimaldi* (n 20) 363 [267] (Finn, Stone and Perram JJ).

115 The possibility has been considered: see *Thomas v Arthur Hughes Pty Ltd* [2016] NSWSC 1861, [15], [20]–[25] (Black J).

116 *Novoship* (n 64) 522–3 [68], 527 [86], 533 [107] (Longmore LJ for the Court); *Grimaldi* (n 20) 450–1 [725]–[727] (Finn, Stone and Perram JJ); Glister, 'Accounts of Profits' (n 106) 189–90.

117 *Grimaldi* (n 20).

118 Ibid 450–1 [727] (Finn, Stone and Perram JJ).

119 Glister, 'Knowing Receipt' (n 62) 224.

120 *Grimaldi* (n 20) 453 [740] (Finn, Stone and Perram JJ).

121 *Akita* (n 75).

122 Ibid 593–4 [1]–[5] (Lord Carnwath JSC for the Court).

123 Ibid 597 [16].

in obtaining personal relief for an account of profits which included discrete gains the company had made in utilising the property as security to raise finance.[124] However, the form and extent of relief was not disputed before the Privy Council,[125] so it cannot be a particularly strong source of authority on this point. Nonetheless, the case can be interpreted as lending support to the claim's characterisation as a twofold equitable wrong encompassing, broadly, any misuse of the claimant's property.

Another useful test of knowing receipt's status as an 'independent' wrong is to identify cases where a claim was brought for knowing receipt notwithstanding the existence of a binding contract. Indeed, there was no mention of a need to rescind the underlying transaction in *Akita* or in *Cowan de Groot Properties Ltd v Eagle Trust plc*.[126] In that case, the directors of a company, acting in breach of duty, sold several properties to a second company at an undervalue.[127] Three of the properties were then onsold and the company sued the counterparty for knowing receipt.[128] The claim ultimately failed because the counterparty lacked sufficient knowledge to ground knowing receipt.[129] In spite of that, the fact that the agreement was no longer rescindable, as the properties had been sold to bona fide third parties, was not argued by counsel or contemplated by Knox J to be a bar to knowing receipt. Similarly, in the litigation giving rise to *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* ('*Bell Group*'), agreements that had conferred a security interest over the majority of Bell Group's assets on the defendant banks were rescinded as part of the order for relief, but this was not considered a necessary precondition to satisfy the claim.[130]

These cases, in affording primacy to relief for knowing receipt, can be interpreted as supporting the claim's status as a freestanding equitable wrong. However, they do not address the obiter dicta in *Criterion Properties* that suggest otherwise. The next part analyses *Criterion Properties* and argues that Australian authority continues to interpret knowing receipt as an important autonomous source of accessorial liability.

124 See ibid 595 [8]–[9], 598 [18].

125 Ibid 596 [12].

126 [1992] 4 All ER 700.

127 Ibid 752 (Knox J).

128 Ibid 750–3.

129 Ibid 760–1.

130 See *Bell Group* (n 45) 746–8 [8749]–[8755], 888–9 [9652]–[9654] (Owen J); *Westpac Appeal* (n 18) 393 [2171]–[2172] (Drummond AJA, Lee AJA agreeing at 192 [1099]).

## IV Distinguishing between the Case Law

There exist three crucial distinctions between *Criterion Properties* and *Great Investments* that evidence the Federal Court's preservation of knowing receipt as an important freestanding claim for equitable wrongdoing in Australia. First, the Federal Court does not consider a director's breach of duty to necessarily mean the director acts without authority.[131] The 'breach' element of knowing receipt can therefore be present notwithstanding the contract's subsistence and is, to an extent, detached from contract and company law which govern the contract's validity. Second, the Court confines the rescission requirement to cases concerning the Proprietary Claim or the Strict Liability Claim, as opposed to personal relief for knowing receipt. Finally, the Court reinforces the relevance of knowing receipt as an equitable wrong in stating that remedies, beyond restitution, are available in relation to it.

In *Criterion Properties*, the chairman and the managing director of Criterion entered into what is known as a 'poison pill' agreement with Criterion's joint venture partner, Oaktree.[132] The agreement essentially disincentivised a hostile takeover by conferring a put option on Oaktree if there was a change in Criterion's management or control.[133] Criterion applied for summary judgment declaring the agreement to be unenforceable.[134] This was granted at first instance.[135] Justice Hart determined the agreement to be contrary to Criterion's commercial interests and an improper exercise of power by Criterion's directors.[136] Oaktree could not rely on Criterion's directors' apparent authority because any representation of Criterion's directors' authority was negated by Oaktree's actual knowledge of the directors' breach of duty.[137] As a result, Oaktree's position was analogous to that of a knowing recipient of the contractual rights conferred under the put option and they could not enforce it.[138] The Court of Appeal reversed Hart J's judgment, finding that a trial was needed, but treated the critical issue as being whether it was 'unconscionable' for Oaktree to hold Criterion to the agreement.[139] Criterion appealed to the

131 *Great Investments* (n 7) 541 [98] (Jagot, Edelman and Moshinsky JJ).

132 *Criterion Properties* (n 6) 1849 [8], 1851 [15] (Lord Scott).

133 Ibid 1850–1 [14]–[15].

134 *Criterion Properties plc v Stratford UK Properties LLC* [2002] 2 BCLC 151, 160 [13] (Hart J) ('*Criterion Properties (First Instance)*').

135 Ibid 173 [39].

136 Ibid 166 [23].

137 Ibid 161 [16], 173 [38].

138 See ibid 173 [38]–[39].

139 *Criterion Properties plc v Stratford UK Properties LLC* [2003] 1 WLR 2108, 2119 [30], 2122 [38], [40]–[41] (Carnwath LJ, Brooke LJ agreeing at 2123 [42]).

House of Lords, where its application for summary judgment was again dismissed, though on different grounds.[140]

Lord Scott, delivering the primary judgment, held that the case was not concerned with knowing receipt.[141] The poison pill agreement had not yet been performed. Until that happened, the agreement was only executory, and nothing had been 'received' by Oaktree to satisfy a claim for knowing receipt.[142] The relevant issue was simply whether the directors had authority to enter the agreement and, therefore, whether the agreement was binding on Criterion.[143] Lord Scott doubted whether the directors could have actual authority to enter the agreement,[144] implying that the directors' duty to act in the company's best interests circumscribed the scope of their authority. This was so notwithstanding evidence having been accepted at first instance that the directors were acting in good faith.[145] Generally, it has been assumed that a director's *scope* of authority is separable from her *abuse* of said authority.[146] Lord Scott's approach suggests that those questions are not distinct, meaning breach of fiduciary duty will take the director outside the scope of her actual authority.[147] His Lordship also doubted whether Oaktree could rely on apparent authority, as the contract was clearly not in Criterion's interests.[148] It was therefore 'very difficult for the [counterparty] to assert with any credibility that he believed the agent did have actual authority' to enter the agreement.[149]

Lord Nicholls, with Lord Walker agreeing, agreed with Lord Scott but went further in obiter: if the contract was binding, that would be a complete answer to Criterion's knowing receipt claim.[150] Alternatively, if the agreement could be

140 *Criterion Properties* (n 6) 1855–7 [27]–[33] (Lord Scott, Lord Nicholls agreeing at 1847 [1], Lord Rodger agreeing at 1857 [34], Lord Walker agreeing at 1857 [35], Lord Carswell agreeing at 1857 [38]).

141 Ibid 1855 [27].

142 Ibid.

143 Ibid 1856 [30].

144 See ibid 1855–6 [28]–[29].

145 See *Criterion Properties* (*First Instance*) (n 134) 166 [23] (Hart J).

146 See *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 984 (Millett J); *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775, 792 (Scrutton LJ); *Reckitt v Barnett, Pembroke and Slater Ltd* [1928] 2 KB 244, 257 (Scrutton LJ); Peter Watts, 'Authority and Mismotivation' (2005) 121 (January) *Law Quarterly Review* 4, 7.

147 Jenny Payne and Dan Prentice, 'Company Contracts and Vitiating Factors: Developments in the Law on Directors' Authority' [2005] (4) *Lloyd's Maritime and Commercial Law Quarterly* 447, 452–3. Cf *Stobart Group Ltd v Tinkler* [2019] EWHC 258 (Comm), [467]–[468] (Russen J).

148 *Criterion Properties* (n 6) 1856 [31] (Lord Scott).

149 Ibid.

150 Ibid 1848 [4] (Lord Nicholls, Lord Walker agreeing at 1857 [35]).

set aside, Oaktree would be accountable for any benefits received under the agreement (pursuant to the Strict Liability Claim).[151] In either case, Oaktree's 'unconscionable' conduct was irrelevant and knowing receipt was out of the picture.[152] Unlike Lord Scott, who concentrated on the executory state of the agreement, Lord Nicholls went so far as to say that he believed *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*[153] was wrongly decided on this point.[154] In that case, the question of whether the director had the requisite authority turned on a test of 'unconscionability' similar to the test of liability for knowing receipt.[155] Consequently, some subsequent case law has interpreted Lord Nicholls' obiter to mean that company and agency law should be determinative of *any* claim concerning a company's transfer of property pursuant to a purported contract.[156]

Turning now to *Great Investments*, where Mr Wong, a director of Bellpac Pty Ltd, transferred company bonds to numerous appellants under a power of attorney.[157] Up until the appeal, the parties mistakenly devoted their submissions to liability based on knowing receipt.[158] The Federal Court accepted the appellants' concession that the issue on appeal was simply one of want of authority.[159] The Court considered the concession to be justified, in accordance with 'a consistent and coherent pattern across the law' allowing restitution where an unauthorised transfer is made.[160] Significantly, the Court only cites Lord Nicholls, suggesting that the distinguishing factor between the cases — that *Criterion Properties* concerned an executory agreement, whereas *Great Investments* did not — is not to the point.[161] Mr Wong was simply held to have

[151] Ibid.

[152] Ibid 1848 [4]–[5].

[153] *Akindele* (n 19).

[154] *Criterion Properties* (n 6) 1848 [4] (Lord Nicholls).

[155] *Akindele* (n 19) 455–8 (Nourse LJ, Ward and Sedley LJJ agreeing at 458).

[156] *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm), [367]–[368] (Popplewell J); *Ford v Polymer Vision Ltd* [2009] 2 BCLC 160, 176–7 [54] (Blackburne J). Other cases have confined *Criterion Properties* (n 6) to its facts: see, eg, *Akai* (n 27) 531–2 [147] (Lord Neuberger NPJ, Ma CJ agreeing at 494 [1], Bokhary PJ agreeing at 494 [2], Chan PJ agreeing at 494 [3], Ribeiro PJ agreeing at 494 [4]).

[157] *Great Investments* (n 7) 524 [17] (Jagot, Edelman and Moshinsky JJ).

[158] Ibid 529 [52].

[159] Ibid.

[160] Ibid 532 [64]. See also at 530–4 [56]–[69].

[161] See ibid 531 [59], 533 [69]. In any event, an Australian court is unlikely to approach executory contracts in the same way. Acting Justice of Appeal Drummond considered the concept of 'receipt' to include choses in action, or contractual rights, that are created upon the making of an executory contract for the transfer of assets: *Westpac Appeal* (n 18) 392–3 [2165]–[2170].

not had the requisite actual authority to transfer company property to repay his personal debts,[162] satisfying the Strict Liability Claim. Further, the appellants' submission that they could assume — pursuant to statutory assumptions in the *Corporations Act 2001* (Cth) — that Mr Wong properly performed his duties to Bellpac was rejected, as the assumptions could not confer the required authority.[163] The transfers were therefore void, but title did actually pass due to registration of the appellants as the owners of the bonds.[164] Orders were made to rectify the register and to cancel the misapplied bonds.[165]

Mr Wong had simply misappropriated the property and had not purported to contract on Bellpac's behalf. Therefore, the relevance of contractual obligations between the parties was not in issue. Nonetheless, the Court addressed, in obiter, the counterfactual scenario. This is where the Court's approach diverges from the House of Lords' dicta in three material respects.

### A *Distinguishing Breach from Authority*

First, the Court states that a presently binding, but voidable, contract can exist, affirming that a director can bind their company in breach of duty.[166] Justice Dixon in *Richard Brady Franks Ltd v Price* is quoted to this effect:

> Under the general law of agency it is a breach of duty for an agent to exercise his authority for the purpose of conferring a benefit on himself … But, at the same time, if his act is otherwise within the scope of his authority it binds the principal in favour of third parties who deal with him bona fide and without notice of his fraud …[167]

As Part VI(B) will explain, the intersection of fiduciary obligation with agency law is not as simple as Dixon J's aphorism suggests. This area of the law 'remains in a state of flux'.[168] Nonetheless, this dictum supports the view that applies in some circumstances (for example, in some cases of self-dealing): where the counterparty is not a bona fide purchaser or has notice of the director's fraud,[169]

[162] See *Great Investments* (n 7) 531 [60] (Jagot, Edelman and Moshinsky JJ).

[163] See *Corporations Act 2001* (Cth) s 129(4), discussed in ibid 540–1 [97]–[99].

[164] *Great Investments* (n 7) 534 [71] (Jagot, Edelman and Moshinsky JJ).

[165] Ibid 529 [50], 554 [146].

[166] See ibid 541 [98].

[167] *Richard Brady Franks* (n 39) 142, quoted in ibid 541 [99].

[168] *Bell Group* (n 45) 623 [4801] (Owen J).

[169] Neatly, the degree of knowledge required to have notice encompasses the degree of knowledge required for knowing receipt: *Great Investments* (n 7) 544–6 [110]–[122] (Jagot, Edelman and

the contract is binding for the moment, but voidable. In contrast to Lord Scott, the Federal Court appears to prefer a two-step approach that disentangles questions of actual authority from breach of that authority. The upshot of this is that the existence of the contract does not necessarily coincide with there being no breach of duty by the director. The contract can stand despite the breach.

### B *Rescission and the Proprietary Claim*

The Federal Court states that until the contract is rescinded, it provides 'the right for the recipient to retain the benefit',[170] and that whilst the contract stands, 'the issue is one of rescission and re-vesting of a benefit'.[171] Therefore, if the company wants restitution of the benefit that passed under the contract, or its value, pursuant to the Strict Liability Claim or the Proprietary Claim, rescission is required. Knowing receipt is not needed to claw back the property that passed under the contract. Is the Court also saying that the contract justifies receipt, precluding any claim for knowing receipt as long as it stands? It is submitted that this is not the Court's view, in its second departure from Lord Nicholls' obiter. The cases cited in support of the proposition that the contract justifies receipt concern the *Proprietary Claim*, not personal relief.

First, there is *Daly v The Sydney Stock Exchange Ltd* ('*Daly*') which concerned a loan made by the plaintiff to a stockbroking firm.[172] The firm subsequently went into liquidation and the plaintiff alleged that her money had been defalcated by the firm as a fiduciary *and* was held on constructive trust for her benefit.[173] Justice Brennan held that the plaintiff could not insist on an equitable interest in the property that she had transferred, or its traceable proceeds, until the contract was rescinded.[174] The lender, or vendor, is not permitted to keep the contract on foot whilst at the same time purporting to claim title to the property that the contract confers. If the contract had been avoided, the Court could declare a constructive trust over the property, but otherwise proprietary relief was refused.[175]

Moshinsky JJ). Therefore, the non-bona fide purchaser with notice of the fraud is also likely to be a knowing recipient.

170 Ibid 530 [57].

171 Ibid 531 [58].

172 (1986) 160 CLR 371, 375 (Gibbs CJ) ('*Daly*').

173 Ibid 376–7.

174 Ibid 388–9.

175 Ibid 389–90 (Brennan J). See also *Lonrho plc v Fayed [No 2]* [1992] 1 WLR 1, 11–12 (Millett J); *Guinness plc v Saunders* [1990] 2 AC 663, 698 (Lord Goff) ('*Guinness*').

Second, the Court considered *Hancock Family Memorial Foundation Ltd v Porteous*, where money was lent by the company to a director allegedly in breach of fiduciary duties.[176] The company sought equitable relief in the form of a constructive trust over traceable property.[177] However, the loan contracts were not rescinded and, in any event, rescission was likely to be barred.[178] The Court of Appeal held that *Daly* was determinative of the claim: the company could not assert equitable title to the money lent.[179]

Rescission is required prior to bringing the Proprietary Claim. If this were not the case, the claimant company could recover under the contract of loan, and also seek a proprietary remedy. One may argue that since the Proprietary Claim demands rescission, the personal claim for knowing receipt should as well (particularly as knowing receipt's historical origins can be traced to the Proprietary Claim).[180] However, knowing receipt has since developed a distinct juridical personality. It comes into its own when the Proprietary Claim is inapplicable — when the property has been dissipated. Unlike the Proprietary Claim, which is title-based, knowing receipt simply provides 'a personal remedy to compensate for loss suffered'.[181] The court's discretion in moulding equitable compensation for knowing receipt mitigates any potential issue of double recovery.

The case law supports distinguishing between the two claims.[182] Obiter in *Grimaldi* states that until the contract is rescinded, 'the company will not ordinarily be able to bring a proprietary claim against the recipient *as distinct from a personal one*'.[183] This obiter was substantiated in *Endresz v Commonwealth* ('*Endresz*'), where a Full Federal Court accepted that 'a voidable, but presently unavoided, transaction … does not give the injured party a *proprietary* claim against the knowing recipient' but that '[t]he injured party had a *personal* claim … until the transaction was avoided'.[184] Further, as discussed in Part III(A), a knowing recipient is not actually a constructive trustee required

176 *Hancock* (n 45) 202 [12], 215 [189] (Ipp, Owen and McKechnie JJ).

177 Ibid 206–7 [47]–[54].

178 Ibid 215–16 [190]–[196].

179 Ibid 220 [206].

180 Charles Harpum, 'Liability for Intermeddling with Trusts' (1987) 50(2) *Modern Law Review* 217, 220, citing *Hill v Simpson* (1802) 7 Ves Jr 152; 32 ER 63, *M'Leod v Drummond* (1810) 17 Ves Jr 152; 34 ER 59.

181 *Grimaldi* (n 20) 366 [280] (Finn, Stone and Perram JJ).

182 See above nn 47–8.

183 *Grimaldi* (n 20) 360 [254] (Finn, Stone and Perram JJ) (emphasis added). See also at 364–5 [276]–[277].

184 *Endresz* (n 48) 327 [130] (Rares and Markovic JJ) (emphasis added).

to reconvey trust property. Therefore, it is relatively clear that the Federal Court was referring to the need to rescind a contract to pursue proprietary relief.[185]

### C *Knowing Receipt's Extensive Remedies*

The final point of departure from Lord Nicholls' obiter is in the Court's treatment of knowing receipt's remedies. The Court states that knowing receipt remains necessary where consequential losses or an account of profits are sought, and is unnecessary where the company only seeks 'to recover rights, or their value, transferred without authority'.[186] Yip questions whether the Court meant that knowing receipt is 'practically unnecessary' or 'legally unnecessary'.[187] The Court surely meant the former because, as discussed above, the recovery of the property's value can be effected pursuant to either the Strict Liability Claim or knowing receipt.[188] The remedy for knowing receipt — equitable compensation equivalent to the monetary benefit of the property received — can in practice be very similar to the Strict Liability Claim's restoration of the property transferred to the company.[189] The remedy formulated under either claim would be

[185] In any event, it may eventually be the case that rescission will not be considered a necessary precondition to the grant of proprietary relief. In *Grimaldi* (n 20), the Federal Court suggested that a remedial constructive trust may be imposed where it is the appropriate form of relief, notwithstanding the contract's subsistence: *Grimaldi* (n 20) 364–6 [277]–[281], 378 [342] (Finn, Stone and Perram JJ), citing *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 (Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Robins* (n 46) 300 [65] (Mason P). Cf O'Sullivan, Elliott and Zakrzewski (n 38) 346–7.

[186] *Great Investments* (n 7) 529 [53] (Jagot, Edelman and Moshinsky JJ). 'Rights' should be understood here as 'proprietary rights'. Edelman, writing extrajudicially, has advanced a powerful argument for the restitution of rights, and not just their value, where it is necessary to restore the plaintiff to its previous position: see generally James Edelman, 'Restitution of (Property) Rights' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook, 2013) 37.

[187] Yip (n 13) 311.

[188] See also *Akai* (n 27) 534 [155] (Lord Neuberger NPJ); *ACI Operations Pty Ltd v Tallant* [2013] NSWSC 367, [36]–[37] (Lindsay J). The court would have to reconcile the temporal discord between the claims. Liability for unjust enrichment is generally measured at the point of receipt: *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 606 [118]–[119] (Lord Nicholls), 609 [132] (Lord Scott) ('*Sempra*'); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); whereas the value to be returned for knowing receipt may be measured at receipt, at dissipation, or at the judgment date: see *Akai* (n 27) 532–4 [148]–[155] (Lord Neuberger NPJ); *Re Estate of Rothko*, 372 NE 2d 291, 297–8 [8] (Cooke J for the Court) (NY, 1977); *Greater Pacific* (n 48) 154 (McLelland AJA).

[189] See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 529 [26] (Gleeson CJ, Gaudron and Hayne JJ), quoting *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ).

subject to monetary adjustments necessary to effectively remedy the misappropriation.[190] For example, under both heads of liability any sums paid under the contract would be returned with interest.[191] It is therefore not pragmatic to bring a claim for knowing receipt in these circumstances because the remedy can be effected pursuant to the Strict Liability Claim, which is easier to satisfy.

As the Court states that knowing receipt's usefulness is only enlivened where the company seeks consequential losses or an account of profits, it is sensible to assume that these remedies are intended to be more extensive than restitution. Indeed, consequential losses are not restitutionary as they redress a loss. An account is more debatable, as it can be characterised as restitutionary if the profits are traceable to the misappropriated property.[192] However, if the account of profits were awarded for discrete profits made as a result of the receipt (as submitted above in Part III(B)) this award would exceed the scope of restitution. The availability of these further remedies could be significant, particularly where losses sustained, or gains made, are of a greater quantum than the value of the misappropriated property. The Federal Court envisions a role for knowing receipt in providing further relief beyond what would otherwise be available pursuant to any other overlapping claim.

The three key takeaways from *Great Investments* suggest that the Court does not approach knowing receipt as a subsidiary form of liability contingent on ineffective or absent contractual relations. The contract is not determinative of whether a breach of duty exists. The contract is only determinative of the Strict Liability and Proprietary Claims for relief. Knowing receipt enables the company to recover further relief outside the ambit of restitution and beyond the mere reversal of immediate gains transferred under the contract.[193]

[190] See *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* (1992) 30 NSWLR 185, 191–4 (Cole J) ('*Spedley*').

[191] One possible distinction between the claims is that if rescission were granted at law, compound interest may be unavailable. But see *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378, 392 (Keely, Hill and Drummond JJ). Cf Matthew Harding, 'Book Review: *The Law of Rescission* by Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski' (2008) 32(2) *Melbourne University Law Review* 762, 765–6. Nonetheless, it may be the case that rescission would only be granted in equity, because the question of whether a director has breached their duties involves an objective determination made by the court: see *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 305 (Wilson J) ('*Whitehouse*').

[192] See Glister, 'Knowing Receipt' (n 62) 224, discussing *Grimaldi* (n 20).

[193] Cf *Sempra* (n 188) 585 [28] (Lord Hope).

## V The Role of Rescission

As discussed in Part II, there is little authority to suggest that rescission is required for a company to bring a claim for knowing receipt in circumstances where its property has been 'contractually' misappropriated. Part III demonstrates that knowing receipt, properly understood as a distinctive equitable wrong, should be satisfiable notwithstanding the existence of a binding contract. Part IV clarifies that the Full Federal Court could not have intended rescission to act as a prerequisite to knowing receipt. This part further explains the absence of any principled reason for rescission to precede knowing receipt. If the element of 'misappropriation' were negatived by the existence of a contract, the company's ability to recover at all would be contingent on principles of company and agency law, leaving no role for equity to play in redressing the recipient's wrongdoing. Equitable relief in the nature of rescission, or equitable relief in response to knowing receipt, should simply be a matter of election for the claimant. Whilst the contract can impact and shape equity's intervention, knowing receipt is simply one of numerous examples where equitable doctrine will not be entirely ousted in the presence of unconscionable conduct.[194]

The doctrinal and practical differences between rescission and knowing receipt do not justify the former preceding the latter. Whilst rescission and knowing receipt have different points of reference — with rescission concerning some defect in formation affecting the claimant's state of mind, and knowing receipt addressing the counterparty's level of knowledge — the differential focus on the claimant's *consciousness* versus the counterparty's *conscience* is of little import in principle or in practice. Just as knowing receipt requires the third party to have a degree of knowledge of the director's impropriety, the right to rescind is also contingent on the third party's knowledge of the fiduciary's breach of duty.[195] Justice Millett has acknowledged this 'close parallel' between cases of bribery that entitle a principal to rescind, and cases of knowing assistance that entitle a principal to reclaim money diverted into its agent's pocket.[196] The differences between these cases lie 'not in the factual background but in the

[194] Other examples include relief against contractual forfeitures: see, eg, *Shiloh Spinners Ltd v Harding* [1973] AC 691, 723 (Lord Wilberforce); and relief against penalty clauses: see, eg, *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, 234 [67]–[68] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

[195] See *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, 499 (Astbury J). It is possible, however, that the *degree* of knowledge required could differ between rescission and knowing receipt: see *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, [205] (Briggs J), quoting *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, 1261–2 (Millett J) ('*Logicrose*').

[196] *Logicrose* (n 195) 1261.

remedy sought'.[197] If rescission were required to come first, it arguably exhausts the remedy available to the company, preventing further remedies of an account of profits or consequential losses being awarded.[198] Alternatively, if rescission is precluded, an obvious injustice follows. A counterparty could receive property beneficially, pay it away with the requisite knowledge, and be free from liability because one of the various bars to rescission prevents the contract from being rescinded. The availability of relief would be precluded simply because the principles of company, agency and contract law coalesce to deem the contract binding. The hand of equity should not be stayed in these circumstances.

Further, the availability of equitable remedies, as opposed to tortious remedies, in respect of wrongful interference with Fiduciary Property, should remain untrammelled by contractual considerations. If the contract binds the company, a claim in conversion cannot lie because the counterparty will have superior title to the property. Consequential losses will therefore be unavailable. This is so even if the company rescinds the contract because liability for conversion cannot arise retrospectively.[199] The conversion claim is therefore at the mercy of the principles of company and agency law. This is principled because the claim is solely concerned with the location and protection of title. The same cannot be said where a knowing recipient dissipates or otherwise utilises misappropriated property pursuant to a voidable contract. The knowing recipient still commits an equitable wrong in their receipt and use of the misappropriated property, despite not committing a *tortious* wrong of conversion. In addition, a knowing recipient should remain accountable for the profits it makes by misappropriating company property. Whilst the recipient is not a trustee, it is accountable in equity just as a trustee or fiduciary would be liable to disgorge gains made in breach of duty.[200] A fiduciary is not precluded from disgorging gains merely because the gains have been made pursuant to a contract.[201] The recipient's wrongdoing should be redressed whether or not the contract stands.

Commentators disagree with the above analysis on two different, though related, grounds. First, Conaglen and Nolan imply that where a contract governing the property's transfer subsists, it eliminates knowing receipt's

[197] Ibid.

[198] See *Aequitas Ltd v AEFC* (2001) 19 ACLC 1006, 1086–7 [430]–[433] (Austin J); *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215, 239 (Dixon CJ, Williams and Taylor JJ).

[199] *Perpetual Trustees* (n 44) 212–14 [76]–[81] (Allsop P and Handley AJA, Campbell JA agreeing at 229 [161]).

[200] See *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [139]–[142] (Lord Millett).

[201] O'Sullivan, Elliott and Zakrzewski (n 38) 35–8.

central element of 'misappropriation'.[202] However, the authors do not contemplate the possibility of a director binding a company, pursuant to actual authority, in breach of duties owed to it.[203] The meaning of 'misappropriation' is that a transfer is tainted by a breach of duty.[204] Once the agent's authority is cleaved from breach, the contract's subsistence does not necessarily mean that the property has been validly appropriated. A legal act can be valid without being immune from equitable challenge.[205] Second, those who regard knowing receipt as a claim for wrongful interference with equitable proprietary rights regard rescission as a necessary prerequisite to revest equitable title in the company. However, as discussed in Part III(B), a company does not need to assert equitable title in the misappropriated Fiduciary Property to pursue a claim for knowing receipt. Indeed, in the *Bell Group* litigation, the banks, who were found to be knowing recipients, argued that they had not wrongfully 'received' the property because it was transferred pursuant to binding contracts.[206] This submission was rejected by Owen J and was not disturbed on appeal.[207] Justice Owen considered the property 'dealt' with to still be 'trust property' because a fiduciary obligation remained attached to it.[208] Where the counterparty is a knowing recipient, its conscience is 'sufficiently affected to justify the intervention of equity'.[209]

Even if these criticisms were valid, the company's mere equity to rescind may offer an adequate response to both arguments. In relation to the former, it is relevant that a contract can be disaffirmed by commencing proceedings. A pleading can implicitly rescind a transaction.[210] In the cases considered in Part III(C), where rescission was not contemplated in awarding compensation for knowing receipt notwithstanding the existence of a binding contract,[211] it is conceivable that the court presumed that the companies seeking relief for

[202] Conaglen and Nolan (n 3) 379.

[203] See below Part VI(B).

[204] See *Evans* (n 16) 106–7 [160]–[161] (Spigelman CJ).

[205] See Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st ed, 2018) 112–13; Rohan Havelock, 'Reconciling Equitable Claims with Torrens Title' (2019) 41(4) *Sydney Law Review* 455, 455–6.

[206] *Bell Group* (n 45) 618–19 [4782] (Owen J).

[207] Ibid 624 [4804]; *Westpac Appeal* (n 18) 393 [2171]–[2173] (Drummond AJA, Lee AJA agreeing at 192 [1099]).

[208] *Bell Group* (n 45) 623 [4802], citing *Farah* (n 13) 142 [116] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[209] *Bell Group* (n 45) 623 [4802] (Owen J).

[210] *Shalson v Russo* [2005] Ch 281, 321 [120] (Rimer J).

[211] See above nn 121–30.

knowing receipt had impliedly disaffirmed the relevant contracts.[212] In relation to the latter criticism, a company's mere equity to rescind may suffice to support a claim for knowing receipt. Rescission in equity is an act of the court, rather than a party's election. Disaffirmation of a contract on an equitable ground (including because of a director's breach of duty) confers a proprietary right, or power, to rescind.[213] However, it does not otherwise extinguish the contract or effect rescission: 'consequential orders are the process by which [the] equity is administered'.[214] In practice, in circumstances where rescission may be effected, a modern court is not likely to look narrowly at the factual matrix at hand. It will recognise that in circumstances where a counterparty is also a knowing recipient, a range of flexible equitable remedies are enlivened, and the court's ability to reverse the transaction (by way of rescission) need not be the automatic relief granted.[215] Consequential losses or an account of profits could also be appropriate forms of relief.

The contract is therefore not 'a reason why the recipient can retain the benefit' where a claim is brought for knowing receipt.[216] Rescission is just one mechanism by which equity manifests its remedial response. The company can elect to rescind the contract (at law) or obtain a court order for rescission (in equity), or it can elect to pursue relief for knowing receipt.[217] The availability of rescission at law does not preclude the company from pursuing potentially superior relief available in equity. Indeed, the coterminous availability of different equitable remedies has been recognised by the courts on multiple occasions.[218] For example, in *Robinson v Abbott*, the Supreme Court of Victoria awarded monetary relief in equity in circumstances where rescission at law could not be effected.[219] This remedial choice is particularly relevant in circumstances where there is no 'fraudulent' misrepresentation at law entitling the company to

212 See, eg, *Davis Samuel* (n 26) 225 [1567] (Refshauge J).

213 See generally Häcker (n 35).

214 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732, 739 [16] (Warren CJ, Santamaria and Beach JJA).

215 See FMB Reynolds, 'Agency' in HG Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 33rd ed, 2018) vol 2, 1, 54–5 [31-074].

216 *Great Investments* (n 7) 530 [56] (Jagot, Edelman and Moshinsky JJ).

217 See *Warman International* (n 104) 559, 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, 521–7 (Lord Nicholls for the Court); Stephen Watterson, 'An Account of Profits or Damages? The History of Orthodoxy' (2004) 24(3) *Oxford Journal of Legal Studies* 471, 471.

218 See, eg, *Hill v Rose* [1990] VR 129, 143 (Tadgell J).

219 (1893) 20 VLR 346, 368, 370 (Holroyd J).

rescind, but the director's breach of a fiduciary obligation nonetheless warrants equitable intervention.[220]

Finally, the purposes of rescission — to take proper account of the rights of third parties and to prevent double recovery[221] — can equally be taken into account by a court moulding relief for knowing receipt. Both options offer an equitable response to the misappropriation, but they remain independent avenues of recourse. This is not to say, however, that they do not interact. In *Wollongong Coal Ltd v Gujarat NRE Properties Pty Ltd*, the claimant company, WCL, was precluded from being awarded personal relief for knowing receipt because it had affirmed and discharged the contract entered into on its behalf.[222] Remedies for knowing receipt were unavailable because the company could not both 'approbate and reprobate'.[223] It could not realise the value of the property transferred to it under the agreement and also seek equitable compensation to recover the value of the loan. Whilst knowing receipt was satisfied,[224] WCL had essentially already elected which course of action it wished to pursue. Perhaps the result would have been different if WCL had sought discrete profits made by the knowing recipient in utilising the moneys advanced, but this did not arise on the facts. The interaction between contract and knowing receipt is thus more nuanced than perhaps previously thought. However, as long as it is accepted that knowing receipt remains a freestanding form of liability, a contract cannot constitute an absolute bar.

## VI The Practical Difficulties Posed by a Binding Contract

This article concludes with a two-part analysis of the practical effect of a subsisting contract on a claim for knowing receipt. Part VI(A) analyses how, in circumstances where a director, in breach of her fiduciary duty, purports to contract on behalf of the company, the contract makes it difficult — though not impossible — to successfully raise a claim in knowing receipt. This analysis is distinct from *whether* the contract automatically precludes a claim in knowing

220 See, eg, ibid 365–8, cited in *Spedley* (n 190) 193–4 (Cole J).

221 *Robins* (n 46) 302–3 [82] (Giles JA), quoted in *Grimaldi* (n 20) 365 [277] (Finn, Stone and Perram JJ).

222 [2020] NSWSC 254, [126], [133], [175]–[177] (Rein J) ('*Wollongong Coal*'). This judgment has recently been reversed on appeal, but the primary judge's reasoning in relation to knowing receipt was not revisited: *Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61, [90], [92], [94] (Bathurst CJ, Bell P and White JA).

223 *Wollongong Coal* (n 222) [175]–[177] (Rein J).

224 Ibid [126].

receipt by providing a basis to retain the benefit, which has been considered up until now. In the majority of cases, the question of whether a director has the authority to contract, and the question of whether the elements of knowing receipt are satisfied, will stand and fall together. Part VI(B) clarifies that in some circumstances a contract (and transaction) impugned by a director's breach of duty can nonetheless stand and will not preclude a claim for knowing receipt. The upshot of this analysis is twofold. First, it proves that it is still important to understand the conceptual basis of knowing receipt as a freestanding equitable wrong, because a subsisting contract will remain relevant in some cases. Second, it demonstrates that in these cases, which primarily concern directors who act in good faith but in breach of fiduciary duty, knowing receipt is needed most. Therefore, the analysis in *Great Investments* is further justified as a principled and important judgment maintaining knowing receipt as an independent source of liability.

### A *Standing and Falling Together*

Generally, a director will not possess the authority to bind a company in breach of duty — a constituent element of knowing receipt.[225] Therefore, the two claims will often stand and fall together. This is so whether the director's authority is actual or apparent. Each will be considered in turn.

The scope of a director's actual authority is not boundless. It will be a rare case where an express grant of authority is construed as authorising a director to act in breach of duties owed to the company. There are two reasons for this. First, express grants are subject to the ordinary rules of contractual construction.[226] These rules are not favourable to a grant of power being construed widely enough to encompass a breach of a director's duties.[227] Similarly, implied authority attached to a director's role is also not unlimited. A managing director, who generally has the greatest degree of implied authority, has no usual power to enter into a transaction that is not 'ordinary' in light of the company's business,[228] and individual directors have no usual authority to unilaterally

[225] Conaglen and Nolan (n 3) 360–1; Dietrich and Ridge, 'The Receipt of What?' (n 76) 56; Yip (n 13) 302.

[226] HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 10th ed, 2001) 649 [13.030].

[227] See, eg, *Great Investments* (n 7) 537–9 [82]–[93] (Jagot, Edelman and Moshinsky JJ).

[228] See, eg, *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* (1989) ASC ¶55-714, 58412 (Young J).

bind a company.[229] Therefore, a director acting in breach of her duty to the company will generally not have the actual authority to contract on its behalf. Second, it is well settled that a director who knowingly and dishonestly transacts in breach of duty is unauthorised to do so both at law and in equity.[230] This is because, at law, actual authority conferred on a director is 'subject to a condition that the authority is to be exercised honestly and on behalf of the principal'.[231] If the director's transfer of company property is dishonest and deliberately or recklessly contrary to the company's interests, it cannot be authorised. The source of actual authority is the consensual relationship between principal and agent,[232] and a dishonest director must know that she acts without her principal's consent.[233] Similarly, equity imposes duties on directors to act in good faith and for proper purposes. Equity will impugn a director's conduct where it is contrary to the purposes for which the relevant power was given but, unlike at law, dishonesty need not be proven.[234] Therefore, directorial conduct is qualified and can be disqualified both at law, pursuant to the principles of agency, and in equity, which imposes greater implied limits on the exercise of a director's powers.[235] In most cases where a director 'behaves badly', she will have no authority to do so in either sphere: these limits will coincide and the relevant contract will be void both at law and in equity.[236] Conversely, where a director acts with reasonable care and skill, and honestly for the benefit of the company, 'they discharge both their equitable as well as their legal duty to the company'.[237]

229 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 205 (Dawson J) ('*Northside*'). See also *Camelot Resources Ltd v Macdonald* (1994) 14 ACSR 437, 443 (Santow J). Cf *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279, 361 (McGarvie, Marks and Beach JJ) ('*Brick and Pipe*').

230 Howard Bennett, *Principles of the Law of Agency* (Hart Publishing, 2013) 98.

231 *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421, 439 (O'Connor J). See also *Tobin v Broadbent* (1947) 75 CLR 378, 392–4 (Latham CJ), 401 (Dixon J); *Sweeney v Howard* (2007) 13 BPR 24381, 24396–8 [55]–[58] (Windeyer J); Watts and Reynolds (n 205) art 23; Peter Watts, 'Actual Authority: The Requirement for an Agent Honestly To Believe that an Exercise of Power Is in the Principal's Interests' [2017] (4) *Journal of Business Law* 269, 270 ('Actual Authority'); GE Dal Pont, *Law of Agency* (LexisNexis Butterworths, 2nd ed, 2008) 18. But see Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133 (January) *Law Quarterly Review* 118, 132–3 ('Corporate Attribution and Agency'). See generally ibid 98–9, 110–12.

232 Ford, Austin and Ramsay (n 226) 649 [13.030]; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 132 (Clarke and Cripps JJA).

233 R de SS, 'Limits of Principal's Liability on Contracts Made by His Agent' (1928) 77(2) *University of Pennsylvania Law Review and American Law Register* 271, 273.

234 See Bennett (n 230) 98–9.

235 Watts, 'Actual Authority' (n 231) 273.

236 See, eg, *Netglory Pty Ltd v Caratti* [2013] WASC 364, [361] (Edelman J) ('*Netglory*').

237 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, 435 (Lindley MR).

The upshot of the director's general inability to bind the company in breach of duty is that no contract comes into being to bind the company as principal. Generally, this means that title to property transferred under the contract never passes, and therefore nothing is 'received' to ground knowing receipt. The director's lack of actual authority precludes the equitable claim, whereas if the director *does* possess actual authority, it is unlikely she committed a breach of duty grounding knowing receipt.

Similarly, a recipient/counterparty cannot generally rely on a director's *apparent* authority to execute a contract and transfer company property in circumstances where that director is acting in breach of duty. Apparent authority is essentially a representation by the company to the counterparty that the director has the authority to contract on its behalf, thereby estopping the company from denying the effect of its representation.[238] In circumstances where a director is acting in breach of duty and outside the scope of her actual authority, it is generally unfeasible for a counterparty to credibly enforce its reliance on a representation of such authority.[239] The case of *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd [No 2]* is illustrative of this proposition.[240] The executive chairman and CEO of a company, Mr Ting, entered into a 'remarkable and questionable' transaction with a Thai bank, effectively borrowing USD30 million to pay off another company's loan liability (of which Mr Ting was also a director).[241] The bank conceded that Mr Ting could not have had actual authority to enter into the transaction, but submitted that it relied on Mr Ting's apparent authority to commit the first company to the transaction, given his senior position.[242] Lord Neuberger NPJ rejected the bank's argument, finding that Mr Ting did not have apparent authority in respect of such a peculiar and significant transaction and that even if he had been clothed with such authority, the bank's reliance on that authority was irrational.[243] Further, though without deciding the point, the Court suggested that if the bank was irrational in relying on Mr Ting's apparent authority to transact, it was also behaving unconscionably for the purposes of knowing receipt.[244] Lord Neuberger NPJ considered the state of mind to prove rational 'reliance' on the director's apparent authority as coincidental with the bank's

238 Conaglen and Nolan (n 3) 363–4; Ford, Austin and Ramsay (n 226) 650 [13.040].

239 See *Criterion Properties* (n 6) 1856 [31] (Lord Scott); *Akai* (n 27) 505–6 [49]–[52] (Lord Neuberger NPJ); *Yoo v Toppro Pty Ltd* [2016] NSWSC 670, [32] (Black J).

240 *Akai* (n 27).

241 Ibid 494 [5], 496 [14], [16], 517 [92] (Lord Neuberger NPJ).

242 Ibid 505 [46], 513 [77].

243 Ibid 517 [94].

244 Ibid 528–9 [134]–[137].

'knowledge' of the director's impropriety for the purposes of knowing receipt.[245] Therefore, the counterparty's ability to rely on the director's apparent authority, which determines the contract's fate, stands and falls with knowing receipt.[246]

### B *Is It All Futile?*

If it is the case that a contract's viability will generally stand and fall with knowing receipt, is the analysis thus far moot? Is the status of knowing receipt as a freestanding, equitable wrong insignificant in practice? It is submitted that there are three key exceptions to the above analysis that reinforce the important role of knowing receipt as articulated in *Great Investments*. First, in some cases, title to the relevant property will pass notwithstanding the director's conduct being in breach of duty. Second, in narrow circumstances a director's actual authority *will* be sufficient to bind the company despite her breach of duty. Third, there exist further technical exceptions in which a director's authority will be sufficient to bind the company, notwithstanding the director's breach. Until the contract is rescinded it may shape the company's elected approach to seeking relief, but it will not act as an automatic bar to knowing receipt.

First, there are exceptions to the stated rule that if a contract is void (at law) no property passes under it to ground a claim for knowing receipt. In some circumstances, title in the underlying property will nonetheless pass and, though equity will not deny the effect of a transaction effective at law, it can be called in aid to render the transaction voidable. For example, title can pass by virtue of registration,[247] if the property transferred is money,[248] or if delivery of a chattel was coupled with sufficient intention to pass title, notwithstanding the contract's divestment of legal force.[249] A transaction is 'capable of conferring rights on third parties even though the transaction was an abuse of the powers

[245] Ibid 528 [135]. See also Bennett (n 230) 112. Cf Rebecca Lee and Lusina Ho, 'Reluctant Bedfellows: Want of Authority and Knowing Receipt' (2012) 75(1) *Modern Law Review* 91, 100. But see the state of knowledge required in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 465–6 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *British Marine plc v Wollongong Coal Ltd* [2015] FCA 403, [213] (Buchanan J); *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2020] 2 All ER 294, 310 [75] (Lord Kitchin for the Court).

[246] See *Akai* (n 27) 531–2 [147] (Lord Neuberger NPJ).

[247] See, eg, *Great Investments* (n 7) 534 [70]–[71] (Jagot, Edelman and Moshinsky JJ).

[248] David Fox, 'The Transfer of Legal Title to Money' (1996) 4 (Autumn) *Restitution Law Review* 60, 69–70.

[249] O'Sullivan, Elliott and Zakrzewski (n 38) 17.

of the company'.[250] The availability of knowing receipt in these cases is demonstrative of equity's emphasis on substance over form.

Second, it is submitted that knowing receipt comes into its own in circumstances where a director *is* able to bind a company in breach of duty. A director's ability to do so has been the subject of considerable juridical confusion and academic disagreement. *Great Investments* takes the view that it is possible, reinforcing a long line of case law that draws a clear distinction between 'want' of authority and 'abuse' of authority.[251] One could assume that this distinction is reserved for trustees, who have the legal capacity to transfer property regardless of their impugned conduct. However, the seminal case of *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* makes no such distinction, with Browne-Wilkinson LJ stating that 'the position of a company is analogous to that of a human being who has fiduciary powers': 'their capacity to transfer flows from their status as human beings, not from the powers conferred on them'.[252] The Full Federal Court confirmed this reasoning in stating that a 'company director can act in breach of duty independently of whether the act was authorised'.[253]

Nonetheless, it will be a narrow case in which a director's conduct could be authorised at law, but impugnable in equity. Three conditions would broadly need to be satisfied. First, the director's implied actual authority would have to extend beyond the conventional scope of authority. The scope of a director's authority can vary depending on the facts and can be enlarged, particularly where the board continually acquiesces to a director's exercise of authority on the company's behalf.[254] Second, the director would have to honestly believe her actions to be in the company's best interests, given that this is a condition of her

[250] *School Facility Management Ltd v Governing Body of Christ the King College* [2020] PTSR 1913, 1949 [121] (Foxton J), quoting *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] 1 Ch 246, 303 (Browne-Wilkinson LJ) ('*Rolled Steel*'). See also *Re David Payne & Co Ltd* [1904] 2 Ch 608, 613–14 (Buckley J).

[251] See *Great Investments* (n 7) 541 [98]–[99] (Jagot, Edelman and Moshinsky JJ); *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 585–6 (Lord Denning MR), 589–91 (Lord Wilberforce), 594 (Lord Pearson) ('*Hely-Hutchinson*'); *Macmillan Inc v Bishopgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 984 (Millett J); *Greater Pacific* (n 48) 149 (McLelland AJA); *Grimaldi* (n 20) 359–60 [254] (Finn, Stone and Perram JJ); *Whitehouse* (n 191) 294–5 (Mason, Deane and Dawson JJ); *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666, 679–80 (Samuels JA) ('*Winthrop*'); *Glover v Willert* (1996) 20 ACSR 182, 186 (McPherson JA); Worthington, 'Corporate Attribution and Agency' (n 231) 139.

[252] *Rolled Steel* (n 250) 303. See also *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, 493 (Lord Browne-Wilkinson).

[253] *Great Investments* (n 7) 541 [98] (Jagot, Edelman and Moshinsky JJ). See also *Northside* (n 229) 163 (Mason CJ); *Challenge Foundation of New South Wales Ltd v Windgap Foundation Ltd* [2002] NSWSC 313, [11] (Bryson J).

[254] See, eg, *Brick and Pipe* (n 229) 361–2 (McGarvie, Marks and Beach JJ).

agency.[255] Third, it will depend on the precise nature of the breach.[256] Nolan has identified that a director's duty to act in good faith and for proper purposes circumscribes the scope of a director's authority in equity.[257] In contrast, cases involving self-dealing do not, and render the contract merely voidable.[258] Nolan states that this is because breaches that concern an improper purpose or lack of bona fides occur in the *exercise* of the director's authority, whereas cases of self-dealing occur where the director makes some flawed decision *in the* exercise of that authority.[259] Indeed, it is in precisely these circumstances that equity has historically intervened. As Viscount Haldane LC opined in *Nocton v Lord Ashburton*:

> A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently … an obligation … and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power.[260]

Justice Einfeld affirmed this in *Combulk Pty Ltd v TNT Management Pty Ltd*, stating that 'agents can be authorised to conduct themselves in a manner which equity regards as inconsistent with the principal's interests'.[261] This was not the view advanced in *Criterion Properties*, where knowing receipt was considered to be entirely irrelevant if the general rules of company and agency law deemed the contract to be valid.[262] The House of Lords did not contemplate some secondary role of equity to offer further potential relief. Rather, Lord Scott considered the limits of fiduciary duty to be implicit within the general law of agency.[263] This conflation leaves no room for the distinction between scope and abuse of authority.

255 See, eg, *Hogg v Cramphorn Ltd* [1967] 1 Ch 254, 266–9 (Buckley J).

256 See generally RC Nolan, 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge Law Journal* 293.

257 Ibid 295. This 'rule' is subject to exceptions: see below nn 274–86 and accompanying text.

258 Nolan (n 256) 321–2. See also Raymond Davern, 'Impeaching the Exercise of Trustees' Distributive Discretions: "Wrong Grounds" and Procedural Unfairness' in David Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 437, 442–52. Cf James Edelman, 'The Fiduciary "Self Dealing" Rule' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 107; Watts and Reynolds (n 205) [8-221].

259 Nolan (n 256) 321.

260 [1914] AC 932, 954, quoted in *Westpac Appeal* (n 18) 203 [1180] (Lee AJA).

261 (1992) 37 FCR 45, 54.

262 *Criterion Properties* (n 6) 1848 [4] (Lord Nicholls).

263 Ibid 1856 [30]; Payne and Prentice (n 147) 449–51.

The Australian context is, however, distinguishable. This is best illustrated by the considerable case law involving directors improperly exercising their statutory power to make share allotments.[264] In these circumstances, the disposition is voidable, not void, and it is necessary to seek the intervention of equity to set aside the allotment at law.[265] Unlike an express or implied grant of authority, the power to issue shares is derived from statute and creates an item of property at law.[266] The statutory power is not susceptible to the limiting effect of principles of contractual interpretation. This may also explain a sole director/shareholder of a proprietary company being able to bind their company in breach of duty, as they derive their authority exclusively from the clear words in s 198E of the *Corporations Act 2001* (Cth).[267]

Worthington disagrees with Nolan, suggesting that the case law is irreconcilably inconsistent in its treatment of different 'categories' of breach, finding contracts to be sometimes void, and at other times voidable.[268] However, a considered look into the cases cited favours Nolan's view. The 'inconsistent' cases can often be resolved as follows: where there was more than one 'type' of breach — for example, an instance of self-dealing *and* bad faith[269] — the breach that affected the scope (bad faith) trumped the self-dealing as an initial invalidating act at law.[270] Therefore, it is possible that a managing director, acting honestly, for an authorised purpose (at law), and with a broad remit of actual

264 See, eg, *Winthrop* (n 251); *Bamford v Bamford* [1970] 1 Ch 212; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 ('*Harlowe's Nominees*'); *Whitehouse* (n 191).

265 *Harlowe's Nominees* (n 264) 493–4 (Barwick CJ, McTiernan and Kitto JJ); *Whitehouse* (n 191) 294–5 (Mason, Deane and Dawson JJ).

266 See *Corporations Act 2001* (Cth) s 124(1)(a); *Whitehouse* (n 191) 299 (Wilson J), 311–12 (Brennan J), quoting *Mosely v Koffyfontein Mines Ltd* [1911] 1 Ch 73, 84 (Farwell LJ). Cf *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 179 [19] (McHugh, Gummow, Hayne and Callinan JJ).

267 See, eg, *Netglory* (n 236) [363]–[392] (Edelman J).

268 Sarah Worthington, 'Agents Behaving Badly' (Current Legal Issues Seminar, Supreme Court of Queensland, 10 September 2015) 14, 17. On failure to disclose an interest, see, eg, *Guinness* (n 175) 697 (Lord Goff); *Hely-Hutchinson* (n 251) 585 (Lord Denning MR), 594 (Lord Pearson); *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162, 170–1 [18], 183 [53] (Chadwick LJ) ('*Harrison*'). On contracts involving bribery, see, eg, *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 528–9 (Mellish LJ); *Logicrose* (n 195) 1260–2 (Millett J); *Armagas Ltd v Mundogas SA* [1986] 1 AC 717, 742–3 (Goff LJ); *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351, 2363–4 [38]–[39] (Tuckey LJ); *Tigris International NV v China Southern Airlines Co Ltd* [2014] EWCA Civ 1649, [143] (Clarke LJ). On improper purpose, see, eg, *Richard Brady Franks* (n 39) 142 (Dixon J); *Hambro v Burnand* [1904] 2 KB 10, 19–22 (Collins MR); *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch), [131] (Proudman J).

269 *Harrison* (n 268) 175 [29] (Chadwick LJ).

270 *Re York Street Mezzanine Pty Ltd (in liq)* (2007) 162 FCR 358, 370 [41] (Finkelstein J).

implied authority, could validly contract on her company's behalf, but by reason of a conflicted purpose render the contract voidable in equity.[271] It is in these circumstances, where a contract survives a director's breach of duty, that equity comes into its own. At law, the director's honest purpose, and the contract's unimpeachability, limit the available relief. Equity steps in to regulate the fiduciary obligation according to normative ethical and commercial standards, notwithstanding the form of the transaction, and notwithstanding that the relevant 'fraud' does not include dishonest conduct.[272] Equity cannot be prevented from responding to a director's conflict and a counterparty's knowing receipt, and will be enlivened, notwithstanding that this undermines the security of the agreement.

It is submitted that this distinction can also be understood as existing between exercises of authority that *only* benefit the director as agent, and decisions that may also be for the principal's/company's benefit. Cases of self-dealing are therefore voidable because of their nuanced motive and effect. This is why they can be validated by shareholders, and this coherently accords with the principle arising in the different context of corporate attribution that a director 'guilty of fraudulent conduct which is not *totally* in fraud of the corporation, and by design or result … partly benefits the company', will have her knowledge of the transaction attributed to the company.[273]

Lastly, it is also worth noting the other technical exceptions to the general rule that a director's ability to bind the company will stand and fall with the company's ability to successfully bring a claim for knowing receipt. Some of these exceptions would only arise in narrow factual matrices. Three instances are notable.

First, the counterparty could acquire knowledge of the director's breach of duty in the period between contracting and receipt of the property.[274] As the counterparty is only disentitled from assuming that a contract has been validly executed (in accordance with the 'indoor management rule') if they had the knowledge of the agent's impropriety at the time of entering the transaction,[275] the contract could bind both parties but still render the counterparty liable as a

[271] See, eg, *Hely-Hutchinson* (n 251) 584–6 (Lord Denning MR).

[272] See *Vatcher v Paull* [1915] AC 372, 378 (Lord Parker for the Court).

[273] *Beach Petroleum NL v Johnson* (1993) 43 FCR 1, 32 (von Doussa J) (emphasis added).

[274] Yip (n 13) 315.

[275] *Corporations Act 2001* (Cth) s 128(4). The 'indoor management rule' allows a counterparty to assume that anyone who appears to be a director has been duly appointed and has authority to exercise the powers and duties customarily exercised by a person in that position: see *Morris v Kanssen* [1946] AC 459, 474–6 (Lord Simonds).

knowing recipient.[276] Analogously, a director could have authority to bind the company at the time of contracting, but not to transfer the property pursuant to the agreement.[277]

Second, a director could bind the company in breach of duty by executing a document that is deemed to be duly sealed by the company itself, as opposed to being entered into by an agent acting on the company's behalf.[278] This is outside the law of agency.[279] The counterparty's knowledge of the director's impropriety does not necessarily disentitle it from assuming that the contract has been properly executed and is thus binding.[280] In the seminal Australian case of *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*, Occidental could rely on the statutory assumption that where a document is affixed with the company's seal and witnessed by two directors with actual authority to do so, it has been duly executed.[281] Brick and Pipe was bound notwithstanding that Occidental knew the directors were not otherwise acting in accordance with the company's constitution.[282]

Third, the most promising exception is where a knowing recipient subsequently sells the property to a bona fide purchaser. Arguably, the receipt of *sale proceeds* derived from this transaction is sufficiently traceable to the trust property to ground knowing receipt.[283] In these cases, the contract will be of no relevance to knowing receipt's viability. It continues to function as a fault-based, equitable claim, addressing the wrongful receipt and/or utilisation of property the subject of fiduciary duty. This reasoning garnered some indirect support

[276] See *Akai* (n 27) 532 [147] (Lord Neuberger NPJ). Justice Parker suggested this was a possibility in *Akierman Holdings Pty Ltd v Akerman [No 2]* (2020) 147 ACSR 63, 83–4 [125]–[127]. This argument bears similarities to the doctrine of *tabula in naufragio*: see generally Jamie Glister, 'Trust Money and the Combination of Bank Accounts' (2018) 134 (July) *Law Quarterly Review* 478, 491–4; JB Ames, 'Purchase for Value without Notice' (1887) 1(1) *Harvard Law Review* 1, 14–16.

[277] Yip (n 13) 315.

[278] See *Corporations Act 2001* (Cth) ss 127(1)–(2); R Carroll, '"Duly Sealed" Documents and Knowledge of Directors' Breach of Fiduciary Duty' (1993) 23(1) *University of Western Australia Law Review* 173. See generally Ian M Ramsay, GP Stapledon and Kenneth Fong, 'Affixing of the Company Seal and the Effect of the Statutory Assumption in the Corporations Law' (1999) 10(1) *Journal of Banking and Finance Law and Practice* 38, 49.

[279] See *Northside* (n 229) 160 (Mason CJ).

[280] See, eg, *Brick and Pipe* (n 229) 362–5 (McGarvie, Marks and Beach JJ); *Greater Pacific* (n 48) 149 (McLelland AJA).

[281] *Brick and Pipe* (n 229) 365 (McGarvie, Marks and Beach JJ). The case concerned the *Corporations Act 1989* (Cth) s 164(3)(e), as enacted. For the equivalent section today, see *Corporations Act 2001* (Cth) s 129(6).

[282] *Brick and Pipe* (n 229) 362–5 (McGarvie, Marks and Beach JJ).

[283] Lee and Ho (n 245) 97; *Akai* (n 27) 530 [141] (Lord Neuberger NPJ).

from a Full Federal Court in *Endresz* in relation to knowing assistance.[284] The appellants submitted that in circumstances where the relevant impugned transactions were void, liability under *Barnes v Addy* could not apply.[285] The Court rejected this approach, remarking that a third-party recipient to a void transaction could not be 'discharged from equitable liability'.[286]

The conclusion that a contract's subsistence does not necessarily bar a claim for knowing receipt is not, as Conaglen and Nolan suggest, a 'Pyrrhic victory'.[287] They say that the counterparty/recipient could simply counterclaim for breach of contract based on the agent's improper performance, leading to a circuity of action or a set-off of the claims against each other.[288] However, a counterparty who is a knowing recipient possesses a degree of knowledge of the agent's breach of duty, and therefore cannot assume that the agent was properly performing his duties.[289] It would appear contrary to the concepts of reliance and mitigation in contract law, which entitle the promisee to assume that the promisor properly performs the contract,[290] to award damages for the director's improper performance in these circumstances.[291] Rather, the 'avoidable loss' rule should be enlivened, preventing compensation for a breach known to the counterparty that could have been avoided.[292]

Further, even if the principles of set-off did apply, the claims may not be equivalent. In *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd*, the knowing participant was successful in claiming damages for breach of contract because of the company's failure to execute binding put and call deeds that had not been rescinded.[293] The company counterclaimed against the knowing participant, but its net provable loss was a fraction of the sum owed under the deeds.[294] Whilst set-off was required, the action was not considered circuitous and the set-offs were not equivalent, making the 'victory'

284 *Endresz* (n 48) 326–7 [128]–[130] (Rares and Markovic JJ).

285 Ibid 325 [120].

286 Ibid 326–7 [128].

287 Conaglen and Nolan (n 3) 365.

288 Ibid 366.

289 Cf *Corporations Act 2001* (Cth) s 129(4).

290 *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68, 77 (Devlin J).

291 See Wayne Courtney, 'Contract Damages and the Promisee's Role in Its Own Loss' (2019) 42(2) *Melbourne University Law Review* 406, 426–33.

292 See ibid 432; *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501, 582–3 [364] (Finn J); *Tasman Capital Pty Ltd v Sinclair* (2008) 75 NSWLR 1, 8 [72] (Giles JA), cited in JD Heydon, *Heydon on Contract* (Lawbook, 2019) 960 [26.680].

293 *Greater Pacific* (n 48) 154–5 (McLelland AJA).

294 Ibid.

far from 'Pyrrhic'. As such, knowing receipt could remain a valuable source of relief, particularly if consequential losses or an account of profits were available.

The existence of these exceptions to the general rule that a contract is void in light of a breach of duty are limited but important. It is not uncommon in the period before a company's insolvency for a director to bind the company to a transaction in the legitimate belief that it will advance the company's interests, despite ultimately being in breach of duties owed to the company as a whole, including its creditors. Therefore, the positive case put forward thus far that knowing receipt is a unique and distinct source of liability in equity is not made in vain.

## VII Conclusion

The purpose of this article has been to examine the conceptual basis of knowing receipt and to defend its unique status as a freestanding form of equitable liability. The upshot of this analysis is that the existence of contractual relations between a company and a counterparty/recipient does not necessarily debar the fault-based claim, though it may still have an influence on the order for relief ultimately granted. In practice, the viability of contractual relations between the company and the counterparty will often parallel the viability of a claim for knowing receipt. However, where a director does bind a company in breach of duty, different equities for relief will be generated for the company's benefit and rescission need not be automatically ordered.[295] For example, if the director has acted for an improper purpose, and the counterparty is not a bona fide purchaser for value without notice, the company will have both a mere equity to rescind *and* an equitable right to remedies for knowing receipt, assuming that the elements of that claim are satisfied. The two avenues for relief may be interrelated (as the improper purpose could constitute the breach of duty grounding knowing receipt) but they nonetheless remain 'juridically distinct' and a matter of election.[296] The interaction between these interweaving bodies of principle is therefore not black and white.

This article develops this argument by identifying sound doctrinal reasons for why knowing receipt warrants the award of non-restitutionary remedies for wrongdoing. It then clarifies the judgment in *Great Investments*, which presents a logical and coherent response to the difficulties that transpire where distinct liability rules arise both at law and in equity on the same facts. In this respect,

[295] See generally Jessica Hudson, 'One Thicket in Fraud on a Power' (2019) 39(3) *Oxford Journal of Legal Studies* 577; *Rolled Steel* (n 250) 303 (Browne-Wilkinson LJ).

[296] Hudson (n 295) 598.

the Federal Court is said to depart from Lord Nicholls' obiter in its validation of knowing receipt as a valuable claim available to a defrauded company.

The Federal Court resuscitates the claim in a modern commercial context, enabling a company to obtain relief in circumstances where its property has been both wrongfully misappropriated *and* misused. As a result, even though it is conceded that the principles of company and agency law will often render the contract void (and therefore irrelevant), it remains important to examine why the contract's potential viability should nonetheless not prevent a finding of wrongful misappropriation, and make relief available on that account.