

# The End of Knowing Receipt

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## Introduction

The law regarding personal liability for knowing receipt of assets transferred in breach of trust or fiduciary duty has received an extraordinary amount of academic and judicial attention over the past 30 years.<sup>1</sup> Yet despite this flurry of attention (or perhaps because of it), the law in this area remains in a muddled and unsatisfactory state. There are disagreements over the various elements of the cause of action, which stem from a lack of consensus over the basic nature of the liability: is it a form of restitution of benefits received, compensation for losses caused, or something else? Part of the problem is the language used in this area. Words and phrases, such as “the first limb of *Barnes v Addy*”, “liability to account as a constructive trustee”, or even “knowing receipt” itself, tend to obscure more than they reveal. While complex concepts do require specialist terminology, it is possible to speak plainly in this area and reveal more.

A frequently quoted statement of the essential elements of liability for knowing receipt was by Hoffmann LJ in *El Ajou v Dollar Land Holdings plc*:<sup>2</sup>

“This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.”

While succinct, each part of this statement raises questions about the nature and ambit of knowing receipt. What does it mean to “enforce a constructive trust on the basis of

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<sup>1</sup> The modern interest in the subject can be traced to a series of cases in the 1970s and 1980s in which assets were misappropriated from companies by their directors or officers, and perhaps the longest article ever published in the *Law Quarterly Review*: Charles Harpum, “The Stranger as Constructive Trustee” (1986) 102 *LQR* 114-62, 267-91.

<sup>2</sup> [1993] *EWCA Civ* 4, [1994] 2 *All ER* 685, [1994] *BCC* 143, 154; quoted in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] *EWCA Civ* 502, [2001] *Ch* 437, [34]; *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 *SLR* 241, [31]; *Ultraframe (UK) Ltd v Fielding* [2005] *EWCA Civ* 1638 (Ch), [1478]; *First Energy Pte Ltd v Creanovate Pte Ltd* [2006] *SGHC* 240, [53]; *Comboni v Shankar’s Emporium (Pte) Ltd* [2007] *SGHC* 55, [49]; *Zambia v Meer Care & Desai* [2007] *EWCA Civ* 952 (Ch), [515]; *OJSC Oil Co Yugraneft v Abramovich* [2008] *EWCA Civ* 2613 (Comm), [248]; *Zage v Rasif* [2008] *SGHC* 244, [14]; *Arthur v A-G Turks & Caicos Islands* [2012] *UKPC* 30, [32]; *Otkritie International Investment Management Ltd v Urumov* [2014] *EWCA Civ* 191 (Comm), [81].

knowing receipt”? On what basis does liability arise for “a disposal of [the plaintiff’s] assets in breach of fiduciary duty” if those assets were not held in trust? Why is “beneficial receipt by the defendant” required? What degree of “knowledge on the part of the defendant” will suffice?

I must confess that I once believed, as did the late Professor Peter Birks, that liability for knowing receipt was best understood as a form of restitution of unjust enrichment. I was first introduced to the subject as a doctoral student at a seminar at All Souls College in 1992.<sup>3</sup> Enthusiasm for an explanation based on unjust enrichment was running high and was persuasively promoted in the writing of Peter Birks and others at the time.<sup>4</sup> If based on unjust enrichment, there seemed no good reason to insist on knowledge, notice, or some element of fault on the part of the recipient as a condition of liability. Strict liability coupled with the defence of change of position then seemed both logical and inevitable. Peter later retreated from that position, accepting that liability for knowing receipt was based on fault, but with liability for restitution of unjust enrichment as an added string to the plaintiff’s bow.<sup>5</sup>

Much of what follows has been said before, although not all in one place. The law in this area is not (or least does not have to be) as complicated as it appears. Some basic principles can be stated, and although some are controversial, these are set out below in the hope that this might help resolve some of the uncertainty and controversy in the area. Perhaps that is too much to expect, but at least it cannot hurt to state things as clearly and simply as possible, and at least hope not muddy the waters any further.

Simply stated, liability for knowing receipt is nothing other than liability for breach of trust. It arises because the recipient has obtained assets that are held in trust, and after becoming aware of the trust, has failed to perform the basic trust duties to preserve the trust assets and transfer them to either the beneficiaries or the proper trustees. This requires actual knowledge of the trust or the circumstances giving rise to it. Notice is insufficient. This is not a form of restitution of unjust or wrongful enrichment, so it should not matter whether the assets were received for the recipient’s own benefit. The recipient is an actual trustee and not just being treated as if that was true. This is not a form of accessory or secondary liability. It

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<sup>3</sup> See P Birks (ed), *The Frontiers of Liability* (OUP Oxford 1994) Part I.

<sup>4</sup> *ibid*: see the following essays in that collection: P Birks, “Gifts of Other People’s Money” (31); C Harpum, “The Basis of Equitable Liability” (9 at 24-25); W Swadling, “Some Lessons from the Law of Torts” (41).

<sup>5</sup> P Birks, “Receipt” in P Birks and A Pretto (eds), *Breach of Trust* (Hart Oxford 2002) 213.

is fundamentally different from liability for knowingly assisting a breach of trust or fiduciary duty.

Liability for knowing receipt depends upon receiving trust assets and holding them in trust. Therefore, if the recipient obtains title free of the trust as a bona fide purchaser or through indefeasibility of registered title, liability for knowing receipt is not possible. Where assets were not held in trust prior to receipt, but were misappropriated from a company in breach of fiduciary duty, liability for knowing receipt is not possible unless a trust arises.

None of this precludes the possibility of a separate claim for restitution of unjust enrichment. However, there is no need to recognise a new equitable cause of action to achieve this. The recipient of misappropriated trust funds can be personally liable at common law for restitution of the value of those funds, subject to the defences of bona fide purchase and change of position.

### **Breach of Trust**

The most important contribution to this area of law in recent years is an essay by Professor Charles Mitchell and Dr Stephen Watterson called “Remedies for Knowing Receipt”.<sup>6</sup> They demonstrate convincingly that liability for knowing receipt cannot be explained in terms of unjust enrichment, but is the liability for failing to perform a duty to “restore the misapplied trust property.”<sup>7</sup> Where I depart from them is in their reluctance to describe this as a breach of trust. This reluctance was not shared by Mr Simon Gardner, who described knowing receipt as “liability for breach of trust”,<sup>8</sup> and went on to say:<sup>9</sup>

“‘[K]nowing receipt’ is simply the usual liability for failure to preserve trust property, applicable to all trustees, given particular application to those who are trustees because they receive illicitly transferred trust property. The cognisance requirement in ‘knowing receipt’ is no more than a reminder that, before a trustee who loses trust property will thereby breach his duty to preserve it, he must have been aware (or could have been aware, or whatever standard is chosen) of the need to preserve it, i.e. of the facts giving rise to the trust.”

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<sup>6</sup> C Mitchell and S Watterson, “Remedies for Knowing Receipt” in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Oxford 2010) 115; referred to below as “Mitchell and Watterson”.

<sup>7</sup> *ibid* 132; *Arthur v A-G Turks & Caicos Islands* [2012] UKPC 30, [37]. Also see M Bryan, “Recipient Liability under the Torrens System: Some Category Errors” in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Oxford 2008) 340, 342-44.

<sup>8</sup> S Gardner, “Moment of Truth for Knowing Receipt?” (2009) 125 LQR 20, 22.

<sup>9</sup> *ibid* 23.

Mitchell and Watterson base their approach on the nature of the accounting process through which trustees can become personally liable to pay for the value of misapplied trust assets even in the absence of an allegation of breach of trust:<sup>10</sup>

“Because the main liability of a knowing recipient is to perform his primary duty of restoration in just the same way as an express trustee, it is a distinctive form of liability which cannot be collapsed into other forms of liability which arise in the law of wrongs or the law of unjust enrichment.”

Having discussed this at length with Charles Mitchell, this is a point over which we agree to disagree. This may be only tangentially related to the issues at hand since it concerns the liabilities of all trustees and not just knowing recipients. However, in pursuit of the goal of speaking plainly, the liability of the knowing recipient is most usefully explained simply as liability for breach of trust.<sup>11</sup>

Beneficiaries are entitled to an account from their trustees because maintaining and providing accounts are primary trust duties. No allegation of breach of duty is required. The account can then be falsified (by striking out unauthorised dispositions) or surcharged (by adding assets which the trustees failed to obtain), leading to a personal liability to pay.<sup>12</sup> In either case, the adjustment depends on a breach of duty by commission or omission. A trustee who properly performs the trust is never personally liable to pay for losses to the trust. As Lindley LJ said in *Re Chapman*, “a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong.”<sup>13</sup> It is true that an authorised disposition might be struck out if the trustees failed to keep adequate records and are therefore unable to prove that it was authorised, but again, that liability arises from a breach of their duty to maintain adequate records.

Breach of trust, like many other breaches of duty, does not require dishonesty or neglect. Honest, well-meaning trustees may be strictly liable for unauthorised dispositions of the trust assets.<sup>14</sup> Having undertaken a duty to perform the trust, they can be liable for failing to do so. The office of express trustee can be onerous. However, it is a startling proposition to

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<sup>10</sup> Mitchell and Watterson, 136.

<sup>11</sup> Mitchell and Watterson describe it (at 136) as “specific or substitutive performance of his primary duty.”

<sup>12</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [1513]-[1517]; *Glazier v Australian Men’s Health (No 2)* [2001] NSWSC 6, [38]; reversed [2002] NSWCA 22, [13]; R Chambers, “Liability” in P Birks and A Pretto (eds), *Breach of Trust* (Hart Oxford 2002) 1, 16-20.

<sup>13</sup> [1896] 2 Ch 763, 775 (CA).

<sup>14</sup> *Eaves v Hickson* (1861) 30 Beav 136, 54 ER 840; *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373 (PC).

say that trustees who have properly performed the trust could yet become personally liable to dig into their own pockets.

This startling proposition becomes even more startling when applied to knowing recipients. According to Mitchell and Watterson, their liability to pay is generated neither by wrongdoing nor unjust enrichment, and since they have not undertaken the office of express trustee, it cannot be explained in terms of consent. If true, we are left in search for some other explanation why people who have done no wrong, received no benefit, and made no undertaking or agreement, can or should be liable to pay. This is difficult to justify to other lawyers or judges, let alone to a lay person subjected to that liability, and creates a justifiable fear that something has gone wrong with the analysis.

The better explanation is that people who know they hold assets transferred to them in breach of trust are under trust duties to preserve those assets and restore them to the proper persons. Any other use of the assets is unauthorised and a breach of trust, which may lead to a liability to pay.

The knowing recipient's liability to pay can be generated by the accounting process without an allegation of breach of trust.<sup>15</sup> The duty to account arises on proof that the recipient received the trust assets and acquired knowledge of the beneficiaries' claim.<sup>16</sup> Presumably, there is no duty to account before those two conditions are satisfied, so the beneficiaries would bear the onus of proving (with the aid of the normal litigation discovery process) that the recipient still held trust assets when sufficient knowledge of the breach was acquired. At that point, the onus would shift to the recipient to account as trustee for any subsequent dealings with those assets.

### **Source of the Knowing Recipient's Duties**

Explaining the liability to pay in terms of breach of duty helps, but does not provide a complete solution because it does not explain the source of the duty breached. Knowing recipients do not consent to the office of express trustee and have not undertaken the duties associated with it. When they become aware of the trust they do not thereby assume all of the duties of an express trustee, but become subject only to the duties to preserve the trust assets

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<sup>15</sup> *Green v Weatherill* [1929] 2 Ch 213, 222-23; Mitchell and Watterson, 136.

<sup>16</sup> *Green v Weatherill*, *ibid.*

and restore them to the proper persons. If the proper persons cannot be identified, the duty to preserve trust assets appears to include the duty to invest trust money in an interest-bearing bank account.<sup>17</sup>

While it can be risky drawing analogies with other areas of law, this is somewhat similar to the duty of care that can be imposed on a bailee of goods, even though the bailee has had no direct dealings with the owner and may even be a finder of the goods.<sup>18</sup> As Blanchard J said in *R v Ngan*:<sup>19</sup>

“At common law any person who finds an item of property and takes possession of it on behalf of the true owner as a temporary custodian is treated as a bailee of that property and is under an obligation to keep it safe and return it to the owner (if that is possible).”

And in *P & O Nedlloyd BV v Utaniko Ltd*, Mance LJ said:<sup>20</sup>

“[A]s a matter of principle and because the essence of bailment is the bailee’s voluntary possession of another’s goods, an owner’s remedies cannot necessarily be confined to situations involving either a direct bailment or a sub-bailment. A’s goods may come into the possession of B as a voluntary bailee in other circumstances.... When ascertaining the scope of bailment in contemporary legal conditions, there is general wisdom in Professor Palmer’s observation that: ‘The important question is not the literal meaning of bailment but the circle of relationships within which its characteristic duties will apply. For most practical purposes, any person who comes knowingly into the possession of another’s goods is, prima facie, a bailee.’”

Similarly, the knowledge that one has obtained title to an asset that is held in trust for another carries with it the limited duties to preserve the asset and get it back where it belongs. The beneficiaries of the trust cannot enforce all their rights under the express trust against the knowing recipient. Most of those rights are rights *in personam* that can be enforced only against the express trustees who have voluntarily undertaken the corresponding duties to perform the trust with care, loyalty, etc. However, the beneficiaries’ right to have the trust assets held and managed by properly appointed trustees can be enforced more generally against others.<sup>21</sup>

It is tempting to explain the recipient’s duties to preserve and restore trust assets on the basis of consent, since those duties (or at least the liability for their breach) depend on

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<sup>17</sup> *Evans v European Bank Ltd* [2004] NSWCA 82, 61 NSWLR 75, [162]; Mitchell and Watterson, 138-40.

<sup>18</sup> *Newman v Bourne & Hollingsworth* (1915) 31 TLR 209.

<sup>19</sup> [2007] NZSC 105, [2008] 2 NZLR 48, 59 at [15].

<sup>20</sup> [2003] EWCA Civ 83, [2003] QB 1509, [26]; quoting N Palmer, *Bailment* (2nd edn Sydney 1991) 1285.

<sup>21</sup> See R Nolan, “Equitable Property” (2006) 122 LQR 232, 233: “a beneficiary’s core proprietary rights under a trust consist in the beneficiary’s primary, negative, right to exclude non-beneficiaries from the enjoyment of trust assets.”

knowledge of the trust. The comparable duties of the bailee were explained on the basis of “an assumption of responsibility” by Lord Pearson, giving the advice of the Privy Council in *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd*.<sup>22</sup>

“[B]oth in an ordinary bailment and in a ‘bailment by finding’ the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods.... [A]lthough there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiffs’ goods, in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so...”

This is perhaps the best we can do, but the duties of the knowing recipient look like they were imposed by operation of law rather than having been voluntarily undertaken. They arise even if the knowing recipient was an active participant in a scheme to misappropriate assets from the trust, clearly with no intention whatsoever to undertake any trust obligations towards the beneficiaries. They can also arise when the defendant honestly receives the assets and only later discovers the breach of trust. That is different from the honest finder who chooses to take possession of a lost item, but not unlike someone who accepts goods unaware they were delivered by mistake.

Turning to the law of wrongs does not help, because the duties to preserve and restore trust assets arise even if the recipient is honest and fully intends to perform them. It is tempting to say that they arise because the recipient’s conscience is affected by knowledge of the trust,<sup>23</sup> but that is merely a conclusion and does not explain why it is affected. If conscience requires the preservation and restoration of the trust assets, it can only be because there are duties to do so. The appeal to conscience does not help identify the source of those duties nor the precise conditions that must exist before they arise.<sup>24</sup>

The law of unjust enrichment might explain why the trust arises in cases where the assets were not held in trust before receipt or where the assets received are the traceable proceeds of the assets originally misappropriated from the trust.<sup>25</sup> It could be said that the

<sup>22</sup> [1970] 3 All ER 825, 831, 832 (PC). Also see R Stevens, *Torts and Rights* (OUP Oxford 2007) 10-11.

<sup>23</sup> *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] EWCA Civ 502, [2001] Ch 437, 455.

<sup>24</sup> P Birks, “Receipt” in P Birks and A Pretto (eds), *Breach of Trust* (Hart Oxford 2002) 213, 226.

<sup>25</sup> *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, appears to rule out this possibility, at least in cases where the assets were misappropriated from a trust; see J Penner, “Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds” in R Chambers, C Mitchell, and J Penner (eds), *The Philosophical Foundations of the Law of Unjust Enrichment* (OUP Oxford 2009) 306. For the contrary position, see P Birks, “Property, Unjust Enrichment, and Tracing” (2001) 54 *Current Legal Problems* 231; A Burrows, “Proprietary Restitution:

recipient has been unjustly enriched at the expense of the trust beneficiaries by receipt of those assets. However, this does not explain the superadded duty of care that arises when the recipient acquires knowledge of the trust. That duty arises because the recipient knows he or she is holding assets in trust and it does not matter whether the trust is express, resulting, or constructive nor why it has arisen.<sup>26</sup>

### Knowledge or Notice

Many of those who have argued that liability for knowing receipt is based on fault have also said that recipients can be liable even if they did not know that the assets were transferred to them in breach of trust but had only notice of that fact.<sup>27</sup> Professor Charles Harpum wrote:<sup>28</sup>

“Because the issue in cases of knowing receipt is essentially a proprietary one, a recipient of trust property may be liable as a constructive trustee if he failed to make the inquiries that he ought to have made, even though he acted in good faith. It is taken for granted in the cases that constructive notice of the impropriety of the transfer suffices for liability, and the emphasis is on whether the circumstances were such as to put the recipient on inquiry.”

Millett J (as he then was) said in *Agip (Africa) Ltd v Jackson*:<sup>29</sup>

“[T]he person who receives for his own benefit trust property transferred to him in breach of trust ... is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust, or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property and in the second as from the time he acquired notice.”

This was quoted with approval by the Supreme Court of Canada, in *Citadel General Assurance Co v Lloyds Bank Canada*,<sup>30</sup> where La Forest J went on to say:<sup>31</sup>

“[R]elief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient’s enrichment unjust.”

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Unmasking Unjust Enrichment” (2001) 117 LQR 412; R Chambers, “Tracing and Unjust Enrichment” in J Neyers, M McInnes, and S Pitel (eds), *Understanding Unjust Enrichment* (Hart Oxford 2004) 263.

<sup>26</sup> S Gardner, “Moment of Truth for Knowing Receipt?” (2009) 125 LQR 20, 24.

<sup>27</sup> D Fox, “Constructive Notice and Knowing Receipt: An Economic Analysis” (1998) 57 Cambridge LJ 391.

<sup>28</sup> Charles Harpum, “The Stranger as Constructive Trustee: Part 2” (1986) 102 LQR 267, 273.

<sup>29</sup> [1990] Ch 265, 291. There was no appeal on the issue of knowing receipt: [1990] EWCA Civ 2, [1991] Ch 547, 567.

<sup>30</sup> [1997] 3 SCR 805, 152 DLR (4th) 411, [42].

<sup>31</sup> *ibid* [49].

Later in an *obiter dictum* in *Twinsectra Ltd v Yardley*, Lord Millett said:<sup>32</sup>

“Liability for ‘knowing receipt’ is receipt-based. It does not depend on fault. The cause of action is restitutionary and is available only where the defendant received or applied the money in breach of trust for his own use and benefit: see *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291-292; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 386. There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient, and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence.”

The most notable exception to this trend is the judgment of Megarry VC in *Re Montagu’s Settlement Trusts*,<sup>33</sup> in which a person had received assets in breach of trust and disposed of them with notice, but no knowledge of the breach. Megarry VC held that personal liability for knowing receipt “primarily depends on the knowledge of the recipient, and not on notice to him; and for clarity it is desirable to use the word ‘knowledge’ and avoid the word ‘notice’ in such cases.”<sup>34</sup>

In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*, Nourse LJ said, “The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.”<sup>35</sup> The reference to knowledge might be taken as an endorsement of Megarry VC’s view, and this is how it has been interpreted in at least one subsequent case.<sup>36</sup> However, Nourse LJ also stated that it is unnecessary to distinguish “between actual and constructive knowledge” in this context.<sup>37</sup> Since constructive knowledge includes “knowledge of circumstances which will put an honest and reasonable man on inquiry”, it appears to extend to notice without knowledge.<sup>38</sup>

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<sup>32</sup> [2002] UKHL 12, [2002] 2 AC 164, 194 at [105]. Also see *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [87], [2003] 2 AC 366, 391; P Millett, “Tracing the Proceeds of Fraud” (1991) 107 LQR 71, 80-83.

<sup>33</sup> [1987] 1 Ch 264.

<sup>34</sup> *ibid* 285.

<sup>35</sup> [2000] EWCA Civ 502, [2001] Ch 437, 455.

<sup>36</sup> In *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm), [247], [2003] 1 Lloyd’s Rep 341, Judge Chambers QC said that “in *Akindele*, the application of the precept to the facts of that case seems to leave little room for manoeuvre. The case ... makes it pretty clear that the type of knowledge that is required is actual rather than constructive knowledge. Such a requirement does away with the suggestion of a balance having to be struck between the relative urgency of a transaction and the degree of notice required: if you know, you know.”

<sup>37</sup> [2000] EWCA Civ 502, [2001] Ch 437, 455.

<sup>38</sup> *ibid* 454.

All agree that liability for knowingly assisting a breach of trust or fiduciary duty requires actual knowledge (perhaps with an added element of dishonesty).<sup>39</sup> There are two different reasons (revealed in the quotations above) why the receipt of assets might justify imposing liability on the basis of notice without knowledge: one because it involves the receipt of property and the other because it involves the receipt of a benefit. However, as discussed below, neither reason justifies a reduction from knowledge to notice, and if it did, there would be no reason to stop at notice: strict liability should be the logical result.

### **Bona Fide Purchase**

Since liability for knowing receipt depends on receiving assets held in trust, it cannot arise if recipients take the assets free of the trust as bona fide purchasers for value without notice. This will not change if they later acquire notice or knowledge of the breach. They are free to continue to use and enjoy the assets as they please and can sell them to others who know of the breach of trust.<sup>40</sup> Otherwise, the defence of bona fide purchase would fail to protect them adequately, and a well publicised breach of trust would destroy the market value of the assets. Knowledge only matters if the recipient is still holding the assets in trust when that knowledge is acquired.

If the purchasers have notice of the breach of trust and are therefore not protected by the defence of bona fide purchase, that does not necessarily mean that they can be personally liable for knowing receipt. Although the trust will survive the transaction, recipients with notice may honestly be unaware of the breach and in that case should not be personally liable for disposing of the assets in breach of trust. These are two different questions, as Megarry VC pointed out in *Re Montagu's Settlement Trusts*:<sup>41</sup>

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

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<sup>39</sup> *Air Canada v M & L Travel Ltd* [1993] 3 SCR 787, 108 DLR (4th) 592; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4, [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333; *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650, 355 DLR (4th) 333.

<sup>40</sup> *Wilkes v Spooner* [1911] 2 KB 473, 487 (CA).

<sup>41</sup> [1987] 1 Ch 264, 285; quoted with approval in *Arthur v A-G Turks & Caicos Islands* [2012] UKPC 30, [34].

This language was criticised by Lord Millett (writing extra-judicially) as “unhelpful”: “Tracing is not a means of determining property rights; it is not even confined to proprietary claims: while the constructive trust does not necessarily attract personal obligations at all.”<sup>42</sup> Nevertheless, there is a fundamental difference between the beneficiaries’ proprietary interest in the trust assets (or their traceable proceeds) and their personal claim against the recipient for failing to preserve those assets and restore them to the proper parties.

It is one thing to purchase an asset and find out it is less valuable than expected. The purchaser will usually have a claim against the vendor for breach of warranty of title. However, it would be going too far to increase the purchaser’s woes by adding personal liability to the beneficiaries of the trust. We are willing to enforce property rights generally against others (subject to rules protecting honest buyers) because they do not impose positive obligations against others, but only negative limitations on their use or enjoyment of things.<sup>43</sup> Setting the standard at notice can be regarded as consistent with this (although registration statutes usually provide greater levels of protection). To impose positive obligations normally requires consent, wrongdoing, or at least a level of knowledge that permits the recipient to make a choice whether to incur that liability or not. Notice short of knowledge does not suffice.

If, as Harpum suggested (above), notice is sufficient for liability because “the issue in cases of knowing receipt is essentially a proprietary one”,<sup>44</sup> there would be no good reason why notice should be required in cases where the recipient is a donee. Although we often refer to the defence of bona fide purchase as the “doctrine of notice”, it should not be forgotten that notice is entirely irrelevant when assets are acquired by a donee. Taken to its logical conclusion, a justification based solely on the priority rules governing equitable interests would lead to the conclusion that liability for knowing receipt should be strict, subject to the defence of bona fide purchase.<sup>45</sup>

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<sup>42</sup> P Millett, “Restitution and Constructive Trusts” (1998) 114 LQR 399, 403.

<sup>43</sup> *Rhone v Stephens* [1994] UKHL 3, [1994] 2 AC 310.

<sup>44</sup> Charles Harpum, “The Stranger as Constructive Trustee: Part 2” (1986) 102 LQR 267, 273.

<sup>45</sup> See P Millett, “Tracing the Proceeds of Fraud” (1991) 107 LQR 71, 81-82.

### Indefeasibility

If the bona fide purchaser is immune to liability for knowing receipt, the same must also be true when the asset received is registered title to land and the recipient is protected by the indefeasibility provisions of the registration statute. The increased protection provided by registration may mean that liability for knowing receipt is not possible even if the recipient has actual knowledge of the breach at the time. In a Torrens system, where indefeasibility is denied to a registered proprietor guilty of actual fraud, this depends on how the courts define fraud. It is not fraud to know that the land was held in trust,<sup>46</sup> nor that registration will destroy the beneficiaries' interest in the land.<sup>47</sup> There is no duty to inquire into the possibility that the land is being transferred in breach of trust,<sup>48</sup> but it had long been understood that it is fraud to know or suspect a breach of trust.<sup>49</sup>

Recently, Australian courts have decided that it is not fraud for the registered proprietor to obtain land knowing it was transferred in breach of trust so long as the trustees were not guilty of fraud. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court of Australia said that Torrens fraud means “actual fraud, moral turpitude” and if the trustee is not guilty of “actual fraud”, then “the other parties are in no worse position.”<sup>50</sup>

In *LHK Nominees Pty Ltd v Kenworthy*,<sup>51</sup> land was purchased at half price from a trust company by its agent, who knew this was a breach of trust. Since there was no proof he had deceived the directors of the trust company, he obtained an indefeasible title. Murray J said “there would be no capacity to defeat the indefeasibility of title conferred by the Act by reason merely that title to the land was acquired in circumstances in which the recipient knew that the transfer to him was in breach of trust.”<sup>52</sup>

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<sup>46</sup> e.g. Land Titles Act 2000 (Alta), s 203; Land Transfer Act 1952 (NZ), s 182; Land Titles Act (Sing), s 47; Transfer of Land Act 1958 (Vic), s 43.

<sup>47</sup> *RM Hosking Properties Pty Ltd v Barnes* [1971] SASR 100, 103.

<sup>48</sup> See n 46.

<sup>49</sup> *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 (PC); also see *Arthur v A-G Turks & Caicos Islands* [2012] UKPC 30, [40].

<sup>50</sup> [2007] HCA 22, 230 CLR 89, [192].

<sup>51</sup> [2002] WASCA 291, 26 WAR 517; leave to appeal dismissed [2003] HCATrans 426.

<sup>52</sup> *ibid* [185].

This is probably not the law outside Australia.<sup>53</sup> It is at least inconsistent with the law of knowing assistance as developed by the Privy Council. In *Royal Brunei Airlines Sdn Bhd v Tan*, Lord Nicholls said that it is dishonest to participate in breach of trust, even if the trustee is acting honestly:<sup>54</sup>

“Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something, he would rather not know, and then proceed regardless.”

There has been some debate over whether a claim for knowing receipt falls within the “*in personam* exception” to indefeasibility.<sup>55</sup> This may seem plausible if liability for knowing receipt is seen as a form of restitution of unjust enrichment.<sup>56</sup> The debate then turns to the question whether “the important functions of land registration would be stultified if knowing receipt were allowed to operate against a registered purchaser.”<sup>57</sup> A majority of the Victoria Court of Appeal thought that this would indeed be the consequence. In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*, Tadgell JA said that liability for knowing receipt “would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes.”<sup>58</sup> This was cited with approval in an *obiter dictum* of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,<sup>59</sup> and so this problem seems to be resolved in Australia.

If liability for knowing receipt is understood as liability for breach of trust, then the problem created by the *in personam* exception does not arise in this context. A recipient who

<sup>53</sup> See *Arthur v A-G Turks & Caicos Islands* [2012] UKPC 30.

<sup>54</sup> [1995] UKPC 4, [1995] 2 AC 378, 389. Also see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333.

<sup>55</sup> This phrase was coined following a comment made by Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569 at 585, [1967] NZLR 1069 (PC), that the principle of immediate indefeasibility “in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant”.

<sup>56</sup> See Law Commission *Land Registration for the Twenty-First Century* (LC254, 1998) [3.48]. Also see M Bryan, “Recipient Liability under the Torrens System: Some Category Errors” in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Oxford 2008) 340.

<sup>57</sup> M Conaglen and A Goymour, “Knowing Receipt and Registered Land” in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Oxford 2010) 159, 174.

<sup>58</sup> [1998] 3 VR 133, 157 (CA).

<sup>59</sup> [2007] HCA 22, 230 CLR 89, [193]-[196].

obtains indefeasible title free of the trust cannot be a trustee and cannot be subject to the trust duties to preserve and restore trust assets.

It should not be assumed that a claim for knowing receipt will lie against a registered proprietor who obtained title by fraud. Although the recipient holds only a defeasible title and the trust will survive registration, he or she may be unaware of the trust. For example, it is fraud to submit a document for registration knowing that it was executed improperly, and its registration will not defeat any existing trust of the land.<sup>60</sup> However, if the proprietor later disposes of the land and dissipates the proceeds in ignorance of the trust, there is no reason why he or she should be liable for breach of that trust.

### **Beneficial Receipt**

If liability for knowing receipt is not restitutionary and is not based on unjust enrichment, there is no reason why it is necessary that the assets were received for the recipient's own benefit. If assets are misappropriated from a trust for A and transferred to a recipient in trust for B, this is a simple question of priorities.<sup>61</sup> If the recipient holds the assets subject to two inconsistent trusts, one will take priority over the other (usually, but not always, depending on which trust arose first).<sup>62</sup> If the recipient of assets in trust for B knows that they were previously held in trust for A and transferred in breach of that trust, then it must be a breach of the trust for A if the recipient deals with them inconsistently with it, even if the actions are taken in obedience to the trust for B.

It has been assumed that receipt for one's own benefit is a requirement for liability, and it is perhaps this assumption that leads to the conclusion that notice would be sufficient for imposing liability.<sup>63</sup> However, if benefit is the key, then liability should be restitutionary and limited to the actual benefit obtained by the recipient. Also, there is no good reason to stop at notice, as Lord Millett noted in *Twinsectra Ltd v Yardley* (above).<sup>64</sup> Strict liability, subject to the defence of change of position is a far more sensitive means of achieving that

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<sup>60</sup> *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483, 497-98.

<sup>61</sup> This is essentially what happened in *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102.

<sup>62</sup> *Abigail v Lapin* [1934] AC 491 at 505, 51 CLR 58 (PC).

<sup>63</sup> *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805, 152 DLR (4th) 411; *Gold v Rosenberg* [1997] 3 SCR 767, 152 DLR (4th) 385.

<sup>64</sup> [2002] UKHL 12, [2002] 2 AC 164, 194 at [105].

goal. It can protect honest, well-meaning recipients who did not benefit from their receipt of the assets but nevertheless had notice of the breach of trust. Conversely, it can permit liability in cases where the assets were spent without notice of the trust, but on necessary expenditures that have left the recipient with a surviving enrichment at the beneficiaries' expense.<sup>65</sup>

### Company Assets

If liability for knowing receipt is liability for breach of the trust duties to preserve the trust assets and restore them to the proper persons, then it cannot arise unless the assets are held in trust. Knowledge or notice of a breach of fiduciary duty is insufficient in the absence of a trust. The extension of liability to cases involving the misappropriation of company assets by directors and officers makes sense only if a trust arose by operation of law when the assets were received (or at some earlier or later stage).

Where company assets have been transferred pursuant to a contract with the company, the first and most important question is whether the contract is binding on the company. This is an issue concerning the actual or ostensible authority of the company's agents, which has nothing to do with knowing receipt.<sup>66</sup> It is true that similar questions may be involved. Agents do not have authority to deal fraudulently with their principal's assets, and anyone who knows of the fraud cannot be relying on the agent's ostensible authority.<sup>67</sup> However, over the last 30 years, there has been a tendency to ignore this fundamental question of the validity of the contract and jump straight into the law of knowing receipt.

This problem was identified by the House of Lords in *Criterion Properties plc v Stratford UK Properties LLC*, where Lord Nicholls said:<sup>68</sup>

“If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of 'knowing receipt' by B do not arise. So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be

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<sup>65</sup> See *Heperu Pty Ltd v Belle* [2009] NSWCA 252, 258 ALR 727.

<sup>66</sup> R Stevens, “The Proper Scope of Knowing Receipt” [2004] LMCLQ 421.

<sup>67</sup> P Watts, “Authority and Mismotivation” (2005) 121 LQR 4, 7.

<sup>68</sup> [2004] UKHL 28, [2004] 1 WLR 1846, [4].

accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position. B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct on his part. B's accountability, in this regard, will be 'strict'."

As Lord Nicholls pointed out, if the contract is voidable, the company will have a proprietary claim to any recoverable assets obtained by the other party to that contract.<sup>69</sup> This must also be true where the contract is void or where there is no contract and company assets are simply misappropriated and transferred to the recipient. If the recipient is holding assets in trust for the company, then (and only then) does the possibility of liability for knowing receipt arise.

If assets have been transferred pursuant to a voidable contract that has not been avoided, there is no trust but merely a power to avoid the contract and thereby create a trust. The power to recover assets through rescission is an equitable interest in the recoverable assets (sometimes called a "mere equity"), but it is not beneficial ownership under a trust.<sup>70</sup> The recipient is bound by the contract until it is avoided. Rescission may have retroactive effect so that the trust is deemed to have arisen at the outset, but that cannot retroactively turn the actions of the recipient at a time when there was no trust into a wrongful breach of trust. As Lord Millett said (writing extra-judicially):<sup>71</sup>

"In all these cases the beneficial interest passes, but the plaintiff has the right to elect whether to affirm the transaction or rescind it. If he elects to rescind it, it is usually assumed that the beneficial title reverts in the plaintiff, and the authorities suggest that it does so retrospectively. But the recipient cannot anticipate his decision. Pending the plaintiff's election to rescind, the recipient is entitled, and may be bound, to treat the payment as effective. It is well settled that the plaintiff's subsequent rescission does not invalidate or render wrongful transactions which have taken place in the meantime on the faith of the receipt.... Pending rescission the transferee has the whole legal and beneficial interest in the property, but his beneficial title is defeasible. There is plainly no fiduciary relationship. The defeasible nature of the transferee's title should not inhibit his use of the property."

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<sup>69</sup> There was no discussion of the rescission of the contract of sale in *Arthur v A-G Turks & Caicos Islands* [2012] UKPC 30, but the claim was brought by the Crown as vendor seeking to recover the land sold on the basis that Her minister had acted in breach of fiduciary duty by arranging the sale at a price significantly below market value. The must be understood as a claim to rescind the transaction.

<sup>70</sup> P Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] NZ L Rev 623, 637-48; R Nolan, "Dispositions Involving Fiduciaries: The Equity to Rescind and the Resulting Trust" in P Birks & F Rose (eds), *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (London 2000) 119, 132; R Chambers, "Tracing and Unjust Enrichment" in J Neyers, M McInnes, and S Pitel (eds), *Understanding Unjust Enrichment* (Hart Oxford 2004) 263, 300.

<sup>71</sup> P Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399, 416.

If there is no trust pending rescission, there cannot be any duties to preserve trust assets and restore them to the company. The absence of trust would not, however, preclude an action for knowingly assisting a breach of fiduciary duty.

### Unjust Enrichment

In the quotation from the *Criterion* case, above, Lord Nicholls raised the possibility of a personal claim for unjust enrichment. It should not be assumed that he was referring to liability for knowing receipt. Writing extra-judicially, he suggested that courts should recognise an additional form of personal liability to make restitution of unjust enrichment operating concurrently with liability for knowing receipt.<sup>72</sup> This has been supported by Lord Walker writing extra-judicially and others.<sup>73</sup>

Lord Nicholls envisaged a new personal claim in equity.<sup>74</sup> Lord Millett suggested that the common law was not up to the task,<sup>75</sup> but it is not clear why that should be so. In most cases, it will be necessary to show that the assets transferred to the recipient are the traceable proceeds of the assets misappropriated from the trust. It has long been assumed that equity's tracing rules are superior to those of the common law, but it seems only a matter of time before the tracing rules are seen simply as rules of evidence that are the same regardless of the nature of the claim involved.<sup>76</sup> If equity is not needed for the tracing process, and the claim is merely for the value of the assets received, there seems no reason why this cannot be done at common law.

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<sup>72</sup> Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in WR Cornish and others (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Oxford 1998) 231.

<sup>73</sup> Lord Walker, "Dishonesty and Unconscionable Conduct in Commercial Life—Some Reflections on Accessory Liability and Knowing Receipt" (2005) 27 Sydney L Rev 187, 202; P Birks, "Receipt" in P Birks and A Pretto (eds), *Breach of Trust* (Hart Oxford 2002) 213; S Gardner, "Moment of Truth for Knowing Receipt?" (2009) 125 LQR 20, 24.

<sup>74</sup> Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in WR Cornish and others (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Oxford 1998) 231, 238.

<sup>75</sup> P Millett, "Tracing the Proceeds of Fraud" (1991) 107 LQR 71, 76-80.

<sup>76</sup> See *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, 113, 128-29, per Lord Steyn and Lord Millett; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [1461]-[1464]; *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] 1 SCR 504, 304 DLR (4th) 292, [75]-[85]; P Birks, "The Necessity of a Unitary Law of Tracing" in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Oxford 1997) 239; L Smith, *The Law of Tracing* (Clarendon Oxford 1997).

In most cases where funds have been misappropriated from a company, they were not held in trust prior to the misappropriation. The company will have a claim at common law for restitution of unjust enrichment, or as we still like to think of it, an action for money had and received. There is no need to turn to equity except to assert a proprietary interest in assets in the recipient's hands or to make a claim based on knowing receipt of those assets.

The same principles should apply in cases where assets have been misappropriated from a trust.<sup>77</sup> While the beneficiaries do not have a direct claim at common law against the recipient, the trustees can sue at common law to recover money paid by mistake or in breach of trust. That claim is a trust asset which the trustees are required to realise. The beneficiaries can compel them to do their duty, and if necessary, have them replaced or possibly even bring the action with the trustees joined as defendants.<sup>78</sup>

In the important but difficult case of *Lipkin Gorman v Karpnale Ltd*,<sup>79</sup> the House of Lords recognised both the right to restitution of unjust enrichment and the defence of change of position. The facts are well known. Mr Cass, a partner in a firm of solicitors, misappropriated funds from the firm's client trust account and gambled their traceable proceeds away at the defendant's club. Although the monies paid to the defendant were undoubtedly trust funds, no equitable claims were made against it. The trust funds could no longer be traced and had been spent by the defendant honestly and in ignorance of the trust. So, the solicitors brought a common law claim for money had and received and succeeded, subject to the defendant's partial defence of change of position.

The case is difficult because the House of Lords held that Cass, as a partner with authority to draw on the trust account, had obtained legal title to the money withdrawn.<sup>80</sup> How then was the defendant enriched at the solicitors' expense if Cass owned the money he paid to the defendant? The case becomes easier to understand if seen as a claim by trustees to recover the value of trust assets paid to the defendant in breach of trust. While Cass was the legal owner of the money he paid to the defendant, he was a trustee of the money paid. It

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<sup>77</sup> S Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 LQR 56, 86; S Gardner, "Moment of Truth for Knowing Receipt?" (2009) 125 LQR 20, 24.

<sup>78</sup> M Smith, "*Locus Standi* and the Enforcement of Legal Claims by *Cestuis Que* Trust and Assignees" (2008) 22 Trust L Int 140; *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597, 609-10; *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, 79 (PC).

<sup>79</sup> (1991), [1988] UKHL 12, [1991] 2 AC 548.

<sup>80</sup> *ibid* 573.

cannot make a difference that he paid the traceable proceeds of money withdrawn from the trust account rather than paying directly from that account. His fellow trustees had a common law right to restitution of the value of that money (and an equitable duty to realise that claim).

There are three different potential claims against a recipient of assets transferred in breach of trust: (a) an equitable property claim to the assets or their traceable proceeds (which might be regarded as restitution of unjust enrichment),<sup>81</sup> (b) an equitable personal claim for knowing receipt (which might be regarded as the equitable equivalent to damages for breach of duty), and (c) a common law personal claim for restitution of unjust enrichment. The first two belong to the beneficiaries and the third to the trustees. There is no need to give the beneficiaries a new equitable claim for restitution of unjust enrichment, since they can compel the trustees to assert their common law claim.

It has been suggested that the right to restitution of unjust enrichment will render the action for knowing receipt “otiose”<sup>82</sup> or “irrelevant”.<sup>83</sup> However, they operate by different rules to achieve different goals. Knowing receipt does not require benefit to the recipient and unjust enrichment does not require wrongdoing.

### Constructive Trusteeship

Very little has been said so far about knowing or dishonest assistance of a breach of trust or fiduciary duty. They have long been linked in our minds by Lord Selborne LC’s famous statement in *Barnes v Addy*:<sup>84</sup>

“Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

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<sup>81</sup> L Smith, “Unjust Enrichment, Property and the Structure of Trusts” (2000) 116 LQR 412, 435.

<sup>82</sup> *ibid* 413.

<sup>83</sup> S Gardner, “Knowing Assistance and Knowing Receipt: Taking Stock” (1996) 112 LQR 56, 86; S Gardner, “Moment of Truth for Knowing Receipt?” (2009) 125 LQR 20, 24.

<sup>84</sup> (1874) LR 9 Ch App 244, 251-52.

It is true that both forms of liability may arise in the same case, but it has been unhelpful and perhaps a source of confusion to refer to recipients and assistants both as constructive trustees or to treat their liabilities as merely two limbs of the same tree.

Knowing assistants are liable as constructive trustees. Receipt of trust assets is not a condition of liability. They are not actual trustees, but by dishonestly participating in a breach of trust, they become subject to the same personal liabilities as if they were, including the liability to give up any profits derived from their wrongdoing.<sup>85</sup> In this context, “constructive trustee” does not mean that knowing assistants are trustees of constructive trusts, but rather that they are only constructively trustees. As Mitchell and Watterson say:<sup>86</sup>

“A dishonest assistant is liable for his own wrongdoing, no less than a person who commits the tort of procuring a breach of contract, but at the same time, dishonest assistance is a ‘secondary’ wrong in the sense that it is defined by reference to the commission of a wrong by another person.”

In contrast, knowing recipients are actual trustees, and they are liable for breach of their own duties as trustees. The language of constructive trusteeship is unhelpful. We are perhaps reluctant to drop the label “constructive” because the recipients have not been expressly appointed to that office. However, people can become trustees in a variety of different ways. Whether a trust is express, constructive, resulting, or statutory, its trustee is a real trustee, and on becoming aware of the trust, is expected to perform the minimum duties expected of all trustees. A trustee must preserve the trust assets, and when required, transfer them to the proper parties.

Another important difference is that it is possible to knowingly assist a breach of fiduciary duty, even in the absence of any trust.<sup>87</sup> In contrast, liability for knowing receipt requires the receipt of trust assets. This important difference has been long overlooked in cases involving the misappropriation of company assets, but as discussed above, the recipient of non-trust assets may hold them subject to a new trust arising on or after receipt, in which case a claim for knowing receipt becomes possible.

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<sup>85</sup> *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8, 132 CLR 373; *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [2015] QB 499; M Clapton, “Gain-Based Remedies for Knowing Assistance: Ensuring Assistants do Not Profit from their Wrongs” (2008) 45 *Alberta L Rev* 989; P Ridge, “Justifying the Remedies for Dishonest Assistance” (2008) 124 *LQR* 445.

<sup>86</sup> Mitchell and Watterson, 152.

<sup>87</sup> *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8, 132 CLR 373; *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650, 355 DLR (4th) 333.

In *Williams v Central Bank of Nigeria*,<sup>88</sup> the UK Supreme Court rejected an argument that there was a significant difference between knowing assistance and knowing receipt for the purposes of the Limitation Act 1980. In 2010, Williams claimed that \$6 million had been misappropriated from an express trust and paid to the defendant bank in 1986, and that the defendant was a party to the fraud. The court held that the claim was barred by the six-year limit on “an action by a beneficiary to recover trust property or in respect of any breach of trust” and did not fall within the exception for “an action ... in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy”.<sup>89</sup>

Lord Sumption JSC decided that, like knowing assistants, knowing recipients are not “true trustees”.<sup>90</sup>

“The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately. ... There may also, in some circumstances, be a proprietary claim. But all this is simply the measure of the remedy. It does not make him a trustee or bring him within the provisions of the Limitation Act 1980 relating to trustees.”

The distinction between “true trustees” and other trustees is difficult. It is easy to understand why knowing assistants are not true trustees, since they do not hold assets in trusts and are only being treated as if they were trustees for a limited purpose. However, knowing recipients are actual trustees with trust duties to preserve the trust assets and restore them to the proper persons. It is true that they do not have the usual powers and duties of investment and management, but that is also true of a great many express trustees. For example, in a typical conveyancing transaction, the lender will advance the mortgage proceeds to a solicitor to hold on bare trust for the lender with no power to use the money at all until certain conditions are fulfilled.<sup>91</sup> The typical *Quistclose* trust is a bare trust for the lender coupled with a power to use the trust money for an agreed purpose,<sup>92</sup> and custodian trustees might simply hold the trust assets to the order of the managing trustees. While these

<sup>88</sup> [2014] UKSC 10, [2014] AC 1189.

<sup>89</sup> Limitation Act 1980 (UK), s 21. Many Canadian limitation statutes use similar language: see AH Oosterhoff, R Chambers, and M McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (8th edn, Carswell Toronto 2014) [17.3.3].

<sup>90</sup> [2014] UKSC 10, [2014] AC 1189, 1208 at [31].

<sup>91</sup> See *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58, [2014] 3 WLR 1367.

<sup>92</sup> See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

bare trustees have none of the usual powers or duties of many express trustees to invest and manage the trust assets, it is hard to imagine that they are not “true trustees” for limitation purposes.

Knowing assistants are liable for their involvement as an accessory to a breach of trust by the express trustee and so the cause of action against them accrues from the date of that breach. In contrast, knowing recipients are not liable for the express trustees’ breach, but are liable for their own breach of trust, which occurs later when they become aware that they are holding assets under a bare trust to preserve and restore them to the proper persons and then decide to use those assets contrary to the terms of that trust. It looks like a “fraudulent breach of trust to which the trustee was a party”,<sup>93</sup> but that is not to say that *Williams v Central Bank of Nigeria* was wrongly decided. There may be good reasons for imposing a six-year limitation period on claims against knowing recipients, but it is difficult to justify that on the basis that they are not true trustees.

### Conclusion

Liability for knowing receipt is liability for breach of trust, pure and simple. It has taken me a long time to discover this basic truth. Professor Lionel Smith began to see the light long before I did. He questioned the momentum in favour of an explanation based on unjust enrichment, and saw that liability for knowing receipt was based on wrongdoing. In 1998, he wrote, “It appears that the best view of knowing receipt is that it is equity’s analogue to the common law’s claim in conversion.”<sup>94</sup>

I found the analogy to conversion difficult, because it did not explain why knowledge or notice should be required for liability in equity. Liability based on notice seemed the worst of all possible worlds. Honest, well-meaning people can be caught by notice of things they might have discovered with more care. It does not provide a sufficient reason to make them personally liable if they have received no benefit from use of the trust assets, and if they are enriched, there seems no good reason to require it.

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<sup>93</sup> Limitation Act 1980 (UK), s 21.

<sup>94</sup> L Smith, “W(h)ither Knowing Receipt” (1998) 114 LQR 394, 394. Also see L Smith, “Unjust Enrichment, Property, and the Structure of Trusts” (2000) 116 LQR 412.

The better analogy is to bailment. The recipient, as trustee, is a custodian of the trust assets, with the duties to preserve and restore them to the proper persons. By making this plain, Professor Mitchell and Dr Watterson have helped us make a great stride forward in this area of law.

So why is this the end of knowing receipt? Because there is nothing special about it. All trustees, upon learning of the trust, have duties to preserve the trust assets and account to the beneficiaries. The knowing recipient is, like every other trustee, subject to those basic trust duties. Personal liability for breach of trust depends on knowledge of the existence of the trust, but that is true of all trusts, whether express, resulting, or constructive.

In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson suggested that there is no trust until the trustee becomes aware of it:<sup>95</sup>

“Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.”

However (as I have argued elsewhere),<sup>96</sup> the trustee’s ignorance of the trust should not prevent it from arising, but will preclude personal liability for breach of the trust. This would mean that a trust does not cease to exist just because the trust assets are misdirected to an honest recipient who is unaware of the trust. On either view, there is nothing special or different about the knowledge required for knowing receipt that sets that liability apart from the personal liability of any other trustee or connects it to the liability of the knowing assistant.

Similarly, there is nothing special about receipt in this context. All trusts require subject matter and no one becomes an actual trustee until he or she receives the trust assets. When concerned with the initial creation of an express trust, we usually refer to this as the constitution of the trust.

The generality of the concept of receipt has the potential to mislead. It appears to many to be akin to, or even an instantiation of, the enrichment required to trigger liability for unjust enrichment. However, despite frequent assertions to the contrary, there is no good

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<sup>95</sup> [1996] UKHL 12, [1996] AC 669, 705.

<sup>96</sup> R Chambers, “Distrust: Our Fear of Trusts in the Commercial World” (2010) 63 *Current Legal Problems* 631, 645-49.

reason why liability should depend on the benefit to the recipient. Also, we routinely receive assets that are not held in trust. So, the mere receipt of misdirected assets is not sufficient unless they are held in trust by the recipient when knowledge is acquired. A successful defence of bona fide purchase or indefeasibility of registered title negates that possibility. The receipt of assets not previously held in trust cannot trigger liability for knowing receipt unless a trust arises upon or after receipt.

A person can become liable for knowing receipt of non-trust assets that were misappropriated from a company (or other principal) by an agent acting in breach of fiduciary duty, but only if a new constructive or resulting trust arises when the assets are received or perhaps later upon rescission of the transaction. Knowledge of the breach of fiduciary duty is required, not because it triggers some special form of liability, but because it establishes knowledge of the trust or of the facts that gave rise to it. An understanding of the law of trusts is not required for someone to know that the receipt of misappropriated assets gives rise to duties to preserve and return those assets to their rightful owner. In much the same way, the duties imposed on a finder of lost goods do not depend on a working knowledge of the law of bailment.

Since liability for knowing receipt of non-trust assets transferred in breach of fiduciary duty is not some special form of accessory liability, but merely the ordinary liability for breach of the trust that arises on or after receipt, there is no good reason to confine it to cases involving a breach of fiduciary duty. The receipt of assets misappropriated by theft or fraud should also suffice, provided that a trust arises and the recipient has knowledge of the misappropriation. In *Evans v European Bank Ltd*, the New South Wales Court of Appeal held that the traceable proceeds of a credit-card fraud were held by the recipient on resulting trust for the victims.<sup>97</sup> This followed the *obiter dictum* of Millett J (as he then was) in *El Ajou v Dollar Land Holdings plc*.<sup>98</sup> In that case, the fraud on the plaintiff was perpetrated through the bribery of his agent. Millett J also considered the plight of the other victims:<sup>99</sup>

“[T]he plaintiff’s fiduciary ... committed a gross breach of his fiduciary obligations to the plaintiff, and that is sufficient to enable the plaintiff to invoke the assistance of equity. Other victims, however, were less fortunate. They employed no fiduciary. They were simply swindled. No breach of any fiduciary obligation was involved. It would, of course, be an intolerable reproach to our system of jurisprudence if the plaintiff were the only victim who

<sup>97</sup> [2004] NSWCA 82, 61 NSWLR 75.

<sup>98</sup> [1993] 3 All ER 717 (Ch D); reversed on other grounds [1993] EWCA Civ 4, [1994] 2 All ER 685.

<sup>99</sup> *ibid* 712-13 (Ch D).

could trace and recover his money. Neither party before me suggested that this is the case; and I agree with them. But if the other victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves... There is thus no distinction between their case and the plaintiff's. They can rescind the purchases for fraud, and he for the bribery of his agent; and each can then invoke the assistance of equity to follow property of which he is the equitable owner. But, if this is correct, as I think it is, then the trust which is operating in these cases is not some new model remedial constructive trust, but an old-fashioned institutional resulting trust. This may be of relevance in relation to the degree of knowledge required on the part of a subsequent recipient to make him liable.”

The receipt of the traceable proceeds of theft or fraud should give rise to a trust for the victims, even in the absence of a breach of fiduciary duty.<sup>100</sup> The recipient's knowledge of that theft or fraud should be sufficient to trigger personal liability for breach of her or his duties as trustee to preserve the assets and restore them to the victims.

Lawyers and judges will continue to use the familiar language of knowing receipt. Old habits are hard to break and not all habits are bad. Specialist terminology is useful and efficient, but only if those who use it both understand and agree on its meaning. If we do continue to use that language, we need to understand that we are simply asking whether the defendant is personally liable for breach of trust. The answer to that question depends on whether the defendant (a) held assets in trust, (b) had knowledge of the trust or the circumstances giving rise to it, and then (c) failed to perform the duties to preserve the trust assets and transfer them to the beneficiaries or to the trustees who were properly appointed, willing, and able to perform the trust.

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<sup>100</sup> R Chambers, “Trust and Theft” in E Bant and M Harding (eds), *Exploring Private Law* (CUP Cambridge 2010) 223.