



The Law of Trusts (12th edn)

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## p. 387 15. Third party liability for breach of trust and fiduciary obligations



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### Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter considers third party liability for breach of trust and fiduciary obligation. It begins by considering third party liability for procuring a breach of trust, followed by third party liability for assisting a breach of trust, and the relevant remedies. Next, it considers remedies for knowing receipt and knowing dealing, the conditions of liability, and the relevant remedies. Finally, issues pertaining to limitation of actions are considered, as well as third party liability for breach of fiduciary obligation.

**Keywords:** procuring breach of trust, dishonest assistance, knowing assistance, knowing receipt, knowing dealing, limitation period

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- Limitation of actions
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**15.1** In his famous lectures on Equity, Maitland traced the historical evolution of the rights of a *cestui que trust*, or trust beneficiary (at 122). By an incremental process, the trustee's liabilities were extended to persons beyond the trustee:

*The trust will be enforced not only against the trustee who has accepted it and his representatives and volunteers claiming through or under him but also against persons who acquire legal rights through or under him with knowledge of the trust – nor is that all; it will be enforced against persons who acquire legal rights through or under him if they ought to have known of the trust.*

**15.2** Seen in this light, third party liability is not some esoteric incident of trust and fiduciary law, but an essential part of the machinery by which the law protects the interests of the beneficiary or principal (the person to whom the fiduciary duty is owed).

**15.3** Lord Selborne LC's statement of the law on third party liability for breach of trust in *Barnes v Addy* (1874) is regarded as something of a classic, although as we shall see, it does not perfectly capture the current law (at 251, emphasis added):

*[The responsibility of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found ... actually participating in any fraudulent ← conduct of the trustee to the injury of the cestui que trust. But ... 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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**15.4** The emphasised portion of the quotation above has become known as the 'two limbs of the rule in *Barnes v Addy*'. The first describes third party liability in situations where they receive trust property—or the law on 'knowing receipt' and 'knowing dealing'. The precise conditions under which third parties become liable for receiving trust property are not spelt out in Lord Selborne's dictum above—we shall have to consider that in detail later on in the chapter. The second describes third party liability for assisting a breach of trust—

or the law on ‘dishonest assistance’, sometimes also called ‘knowing assistance’. In this chapter, we deal with the second limb first, followed by the first limb, then certain issues relating to limitation periods and third party liability for breach of fiduciary obligation.

## Liability for procuring/assisting a breach of trust

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### Procuring a breach of trust

15.5 Third party liability for procuring a breach of trust is *a fortiori* to assisting in a breach. The leading case is *Eaves v Hickson* (1861), which we considered earlier (13.112). It will be recalled that the father, one William Knibb, presented a forged marriage certificate to the trustee, causing the trustee to distribute shares of the estate to Knibb’s illegitimate children, in the belief that they were legitimate and therefore entitled under the trust. Knibb’s liability for procuring the breach of trust was quantified by Sir John Romilly MR (at 141) as ‘so much of the trust fund as shall not be recovered from his children’. This liability was personal, in the sense that it was not attached to any of Knibb’s assets in particular.

15.6 It is also noteworthy that Knibb’s liability was not premised on the trustee’s breach being dishonest in any way—the trustee in this case was wholly innocent, though the strictness of the rules on breach of trust meant that he was liable (in an ordered fashion—after the children and Knibbs) as well.

### Assisting a breach of trust

15.7 The principles governing liability for assisting, or being an ‘accessory’ to, a breach of trust were reviewed by the PC in *Royal Brunei Airlines Sdn Bhd v Tan* (1995). Mr Tan was the principal shareholder and director of BLT, a company which was Royal Brunei Airlines’ general travel agent in certain locations. Under the airline’s agreement with BLT, the proceeds of ticket sales were to be held on trust for the airline. The proceeds, however, were never paid into a separate trust account, but into BLT’s current account, and the money was used for BLT’s general business purposes. The PC denied that an accessory could only be liable if the trustee was engaged in a dishonest or fraudulent design himself. That view derived from Lord Selborne LC’s statement in *Barnes v Addy* (1874) that an accessory was not liable ‘unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees’. The PC decided that the accessory’s liability should turn on his own dishonest participation in the breach, whether the trustee committing the breach did so dishonestly or not.

15.8 What does ‘dishonesty’ mean? Lord Nicholls said (at 389) that although honesty has a strong subjective element, the standard of liability was objective:

Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual ... 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 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 ...

Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.

**15.9** The PC found Mr Tan liable. He had assisted in the breach of trust by 'causing or permitting' BLT to undertake the transactions in breach of trust in full knowledge that the moneys were to be held on trust, and that amounted to dishonest conduct. BLT was also dishonest, since Mr Tan's state of mind as its director was to be imputed to the company.

**15.10** In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (1999; aff'd 2001, CA), the defendant, a Nigerian businessman, was found not liable for dishonest assistance for entering into a share purchase agreement with BCCI (which was part of a scheme by which directors of BCCI defrauded it) simply because the agreement was in some respects unusual or artificial and he benefited from a high rate of interest on the transaction.

**15.11** After some wobbles in the case law (*Twinsectra v Yardley* (2002); *Barlow Clowes v Eurotrust International* (2005); *Abou-Rahmah v Abacha* (2006); *Statek Corp v Alford* (2008)), the UKSC has affirmed in *Ivey v Genting Casinos (UK) Ltd* (2017), [62], that the standard of dishonesty set out by Lord Nicholls in *Royal Brunei* is the correct standard. In the recent case of *Group Seven v Nasir* (2019), the Court of Appeal considered the standard of dishonesty to be settled by the dicta of Supreme Court in *Ivey v Genting Casinos*.

**15.12** Third parties or agents to the trust are not liable as accessories when they negligently, but not dishonestly, fail to discover that the transaction in which they participate is a breach of trust (*Royal Brunei* per Lord Nicholls at 392):

[B]eneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly

**15.13** In *Agip (Africa) Ltd v Jackson* (1990; aff'd 1991, CA), the test of 'dishonesty' was applied to a solicitor and an agent who managed companies set up entirely for the purpose of receiving moneys obtained by fraud and then passing them on to unknown others. The only purpose of the companies was to make it difficult to detect the fraud and to follow the money that had been fraudulently obtained. With respect to finding a third party dishonest, Millett J said (at 293):

*It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know' ... or because he regarded it as 'none of his business' ... that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge.*

**15.14** In *Agip*, there was evidence that the defendants might have believed that they were assisting in a scheme, not to defraud a company, but to avoid the currency exchange controls of Tunisia. Millett LJ said (at 295):

*[I]t is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even the identity of its victim.*

**15.15** This perspective was not adopted by Rimer J in *Brinks Ltd v Abu-Saleh* (1995). He found a woman not liable as an accessory for knowingly assisting her husband in a dishonest scheme, because she believed she was participating in a tax evasion exercise, which was false, rather than helping to transfer the proceeds of a robbery from England to the Continent, which was what was really going on. Rimer J's approach was disapproved by the PC in *Barlow Clowes* ([28]): 'Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or even what a trust means.'

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**15.16** In the CA decision in *Lipkin Gorman v Karpnale Ltd* (1992—the case went to the HL, but the decision on accessory liability did not form part of the appeal) a law firm sought to hold its banker liable because it allowed a partner of the firm, one Mr Cass, who was addicted to gambling, to withdraw money from the firm's client account for that purpose. The CA decided that given the contract between the banker and its client, the bank could not be liable unless it was in breach of its contract to its client to operate and monitor the account properly. In this case Cass's withdrawals were perfectly valid within the terms of the bank's contract with its customers—Cass had full authority to draw on the client account. And although the bank manager knew that Cass was a gambler, this was not a sufficient reason to suspect that he was looting the client account, and the CA held that it would impose an excessive burden on bankers to monitor all of their accounts to pick up suspicious withdrawals.

**15.17** In *Finers v Miro* (1991) a firm of solicitors sought directions from the court concerning assets it held on trust for a client. The solicitors suspected that some portion of the assets represented the proceeds of a fraud the client allegedly committed by unlawfully transferring assets from a US company, now in liquidation. The

CA directed the solicitors to inform the liquidator of the US company that they held assets that might be assets of the company. But for the strong suspicion of fraud, informing the liquidator would amount to a breach of their fiduciary duty of confidence to their client. The CA based its decision in part on the fact that the knowledge of the solicitors was now such that should they dispose of any of the property to the defendant they might well be liable as accessories to a breach of trust, following *Agip*. Banks are now subject to a mass of legislation that requires them to take action where they are suspicious that a customer is laundering the proceeds of crime, including rules that make it an offence to ‘tip off’ a customer who is or might be under investigation, and so banks must act very carefully in such circumstances (see eg *Bank of Scotland v A Ltd* (2001); for an overview, see Gleeson (1995)).

**15.18** In *Group Seven v Nasir* (2019), the Court of Appeal considered whether the test of dishonesty in *Tan* was subject to a requirement of a ‘minimum content’ of knowledge. That is, should the defendant know certain things, at a minimum, about the design of the principal wrongdoer? The court was of the opinion that the test for dishonesty ([104]) ‘should not be complicated by the introduction, as a matter of law, of a minimum content of knowledge which must be satisfied’.

**15.19** Thus far the discussion has focused on dishonesty and the standard of knowledge. What amounts to assistance? In *Quince v Varga* (2008), a decision of the Queensland Court of Appeal, Douglas J found Carol Varga and Clinton McLaughlan liable for knowingly assisting Francis McLaughlan’s breach of trust. Francis was the husband and father of Carol and Clinton respectively. An undischarged bankrupt, Francis became a trustee of investment funds from one Nerida Quince. In breach of trust, Francis transferred these funds to his family trust’s bank account. The trustee of the McLaughlan family trust was Clinton, and Carol was the principal, a kind of trust protector. These funds were subsequently disbursed for family expenses and dissipated.

**15.20** What role, exactly, did Carol and Clinton, as principal and trustee of the family trust, play in Francis’ breach of his (separate) trust? As trustee, Clinton had control over the trust’s bank account. He was involved in the receipt and subsequent disbursement of the funds (when they were disbursed for family expenses). This was true as a matter of law, even though the court found that Francis had *de facto* control of the family trust’s bank account, and Clinton was accustomed to taking instructions from him. Carol, as principal, was found by the court to have knowledge of the relevant transactions in and out of the bank account. In sum, Douglas J characterised ([60]) Carol and Clinton’s assistance as ‘their involvement with the establishment and operation of the CHT and their standing by while he used the money to those ends when they could have stopped him’. They ‘turned a blind eye to [Francis’] fraud’ ([60]). Searching for a test for what might constitute assistance, Douglas J concluded that no case thus far has comprehensively addressed the issue, but that ‘it is generally taken to mean any action by the stranger taken with the intention of furthering the trustee or fiduciary’s fraudulent and dishonest purpose’ ([56]). On these facts, this threshold was met, even though Carol and Clinton’s involvement could only be described as passive. Indeed, from the descriptions used, ('turning a blind eye' when they 'could have stopped him'), it seems their wrongdoing was not in acting, but in failing to act.

## Remedies for dishonest assistance

**15.21** What remedies are available against a dishonest assistant? This issue was considered in some detail by Lewison J in *Ultraframe v Fielding* (2005) ([1600]):

*I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he himself has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary.*

**15.22** Parsing Lewison J's statement of the law, we see that there are two main remedies available to a beneficiary seeking to hold a dishonest assistant liable. First, a compensatory remedy for loss caused as a result of the breach of trust. The dishonest assistant is jointly and severally liable with the trustee for this, and the Civil Liability (Contribution) Act 1978 will apply as between them (13.73). A precise causal link between the assistance and the loss is not required. As Tuckey LJ in *Casio Computer v Sayo* (2001) put it, 'loss caused by the breach of fiduciary duty is recoverable from the accessory. This is the relevant causal connection for this purpose.'

**15.23** Second, a gains-based remedy for profits that the dishonest assistant has made as a result of his assistance in the breach is available. This was confirmed by the Court of Appeal in *Novoship v Nikitin* (2014). Here, a direct causal connection is required. In *Novoship*, the court found that there was an insufficient causal connection between profits made by Mr Nikitin and his dishonest assistance. The court further held that whether the but-for test of causal connection or an 'effective cause' test is used is a 'question of the application of common sense'. This causal connection between profit and assistance is important, as the dishonest assistior is not a trustee or fiduciary, a point that was made in *Novoship v Nikitin* (2014) ([107]):

*In our case Mr Nikitin was not a fiduciary as regards either NOUK or the ship owning companies. He is not sued for a breach of fiduciary duty. He is sued because he has committed an equitable wrong. Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy. We recognise that these rules do not apply to the case of a fiduciary sued for breach of a fiduciary duty; but that is because the two cases are different.*

**15.24** It is the dishonest assistant's own profits that are liable to be disgorged, assuming the relevant causal connection is made out. The dishonest assistant is not liable to disgorge the profits made by the trustee or fiduciary in breach. This point was made by Lewison J in the extract above, and affirmed at first instance by Christopher Clarke J in *Novoship v Nikitin* (2012).

## Third-party recipients of trust property or its traceable proceeds

**15.25** Where trust property is misapplied, someone obviously receives it. The beneficiary has the right to claim the property back from a subsequent recipient, because he retains equitable title to the property unless the recipient is a bona fide purchaser for value of a legal title to the property without notice. Besides merely 'following' the trust property into the hands of third-party recipients, also known as 'strangers' to the trust,

the beneficiary may trace his equitable interest in the property into the proceeds of exchanges. This was considered in detail in **Chapter 12**. Finally, the beneficiary may have a *personal* claim against recipients of trust property or its traceable proceeds for its money value. We will discuss this in detail here, but a few things should be said now so as to clearly distinguish the claims against third parties.

p. 394 **15.26** The plaintiff will be able to rely only upon a personal claim against the recipient of trust property or its proceeds (if such a claim is available, **15.29 et seq**) if the recipient has destroyed or dissipated the trust property or proceeds, as no proprietary claim can be made. Obviously this personal claim will be significantly valuable only if the recipient is solvent. By contrast, a proprietary claim is most valuable in the case of the recipient's insolvency, because if the beneficiary can establish a proprietary right to property held by the recipient, that property does not form part of the recipient's estate in bankruptcy.

**15.27** The preceding personal claim must be distinguished from the personal liability for being an accessory to a breach of trust considered earlier (**15.7 et seq**), although the recipient of trust property might also be an accessory. Therefore, against a stranger to the trust, the beneficiary may have three claims in respect of the misapplication of trust property. (1), a proprietary claim for the actual trust property or traceable proceeds that the stranger retains; (2), a personal claim to restore the trust, ie pay over money to the value of the trust property or traceable proceeds he received and then dissipated, ie spent as his own for his own purposes; and, (3), a personal claim for his being an accessory to the breach.

**15.28** Notice in particular the different basis and scope of liability between liability for 'knowing assistance' and liability for 'knowing receipt'. (For a very fine analysis of liability for knowing receipt and its difference from liability for knowing assistance see Mitchell and Watterson (2010).) The former is a kind of wrong, akin to the tort of inducing breach of contract, where the defendant is liable for participating in another's breach of duty—the assistant cannot breach the trust, only the trustee can, but he is liable for assisting the trustee in doing so. This can be a very extensive liability indeed, making the assistant liable for much more than the value of any trust property he might have received (if he received any at all), since the scheme of misapplication in which he assisted may have sent large amounts of trust property to others besides himself. The latter is not a kind of secondary liability at all; if a recipient of trust property knows that he receives it in breach of trust, or later finds this out, but uses the property for his own benefit in violation of the beneficiary's interest anyway, then he himself breaches a 'custodian' trustee relationship imposed upon him by law and only he can breach the trust in this way, because only he has title to the trust property that he ought to hold on behalf of the beneficiaries.

## Knowing receipt and knowing dealing

**15.29** A recipient of trust property transferred in breach of trust or its traceable proceeds will be personally liable to account for his handling of that property, just like the breaching trustee is, if he knowingly deals with the property as his own, ie inconsistently with the beneficiaries' equitable title to it. That is, he will be liable to dig into his own pocket and restore to the beneficiaries the money value of the property he spends as if it were his own. There are two sorts of case: the first occurs when a person receives trust property or its traceable proceeds *knowing* that it was transferred in breach of trust; clearly he should hold the property for the benefit of the beneficiaries—normally, this would involve returning the property to the trustees, unless it was clear

p. 395 that the trustees had fraudulently breached the trust, in which case the recipient should apply to the court for directions. If he acts properly in this way, the recipient will not be personally liable. If, however, he acts otherwise, treating the property as his own or in any other way acting inconsistently with the rights of the beneficiary, then he will be personally liable to restore the money value of whatever is lost. In essence, then, this recipient will have no obligations to carry out the terms of the trust himself, but must hold the property to the order of the rightful trustees of the trust and, if he acts otherwise, will be personally liable for doing so. Mitchell and Watterson (2010) put it this way:

*Liability for knowing receipt is a distinctive, primary, custodial liability, which closely resembles the liability of express trustees to account for the trust property with which they are charged.*

**15.30** In view of this, we can understand why the knowing recipient is traditionally called a constructive trustee. He is not an express trustee, of course, because he did not agree to hold the property on trust when he received it; rather, equity imposes upon him the duty of custodian trusteeship.

**15.31** Swadling (2017), 322–326, disagrees with this way of putting it. He doubts, reasonably, whether the recipient really has any duties, even the duties of a ‘custodian’. He suggests that, more realistically, the recipient is liable to a court order to transfer the property to a trustee who will carry out the terms of the trust, and secondarily, is liable for any wrongful dissipation of the trust property.

**15.32** The second case, ‘knowing dealing’, is a minor variation. Where a non-bona fide purchaser receives trust property or its proceeds ignorant of the breach of trust by which it came to him, but then later learns of the breach of trust, then at that point he will be treated the same as the knowing recipient; ie as a custodian trustee. He will not be liable for any untraceable dissipations of the trust property he makes up to that point, but thereafter he is personally liable to restore the trust for any further dissipations of the trust property. Similarly, where a person receives funds perfectly properly as an agent of the trust, but then knowingly deals with the property inconsistently with the trust, he will be personally liable for any loss. A classic case is *Lee v Sankey* (1872). Solicitors received the proceeds of the sale of trust property and held it for further investment, and this was perfectly correct under the terms of the trust. However, knowing this was a breach of trust they transferred part of the funds to only one of the trustees, who dissipated the whole amount. The solicitors were personally liable for the loss. Because in these cases the constructive trusteeship arises not on the receipt of the trust property or its proceeds, but when the recipient only later learns of the trust, this liability is traditionally called liability for ‘knowing dealing’.

**15.33** A similar but distinct case is *Andrews v Bousfield* (1847). The case involved someone who had received a loan of the trust funds. Inconsistently with the terms of the trust, the borrower paid moneys to the trustees, which were lost. He was liable to repay the loan again, this time properly. The case is not really one of knowing dealing, because the money he paid to the trustees was not trust property. The correct way to view the case is that a debtor cannot effectively discharge his debt to the trust if he knowingly pays the trustees in circumstances where the payment would not be consistent with the trust terms. He is treated as making a payment to the trustees personally for their own benefit, not a payment to them as trustees that discharges his debt to the trust.

## What counts as receipt?

**15.34** In most cases it is clear what the defendant received, usually money or some other trust asset, whether directly, or indirectly, as when the trustee transfers money into the recipient's bank account. In *Quince* the court held ([48]–[53]) that money applied to the benefit of the mother was not received by her, that is when the father used trust funds to pay her son's school fees, relieving her of the liability to do so, and paying off other of her debts. She was held to be liable for deposits into her bank account, and the purchase of a car for her. This reasoning can be questioned. Recall (2.38) that a trustee is able to *apply* trust money for the benefit of a beneficiary and this counts as a proper expenditure of trust funds. It is not clear why a third party who knows that the assets are being applied to her benefit should escape liability. Of course, one could argue that by, for example, telling the trustee what debts she wants paying from trust money, or choosing the car the trustee will pay for, she is participating in the breach of trust and can be held liable for knowing assistance, though as we have discussed this seems to amount to a 'passive' form of dishonest assistance (15.20).

## The current standard of knowledge

**15.35** In preceding paragraphs we referred to *knowing* receipt and dealing. What does the recipient need to know to be fixed with the liability of a custodian trustee? The law governing the knowledge required is extraordinarily confused, largely because in a series of cases the courts did not appear to distinguish between liability for assisting a breach of trust, liability for knowing receipt or dealing, and the knowledge or notice that would prevent someone from being a bona fide purchaser of trust property, ie the knowledge which would make a purchaser for value *proprietarily* liable to the beneficiaries as a holder of trust property (see Harpum (1986)). Secondly, the issue had not reached the HL in a long time, nor has it yet been addressed by the UKSC, and there are conflicting opinions in the CA. In the case of *BCCI v Akindale* (2000) the CA tried to start afresh from first principles, but the decision is unsatisfying. First, we will undertake a brief review of the law leading up to *Akindale*.

**15.36** In *Baden v Société Générale* (1992), Peter Gibson J distinguished five categories of knowledge (at 250):

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

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**15.37** Knowledge in all of these categories is sufficient to fix the defendant with 'notice', the standard of cognisance that applies in determining whether a person has 'notice' of a breach of trust or the beneficiary's rights. Category (i), actual knowledge, is narrower than 'actual notice' (recall 2.66 et seq), but actual notice might cover categories (i), (ii), and (iv), as covering facts that would be apparent if all available information were taken into account. The 'constructive' knowledge described in (iii) and (iv) appears to be equivalent to a narrower version of constructive notice, with (iii) adding an element of dishonesty or 'want of probity', as it is sometimes put. Categories (i) to (iii) together might be regarded as 'dishonest' knowledge showing a want of

probity, whereas knowledge in (iv) and (v) would not, because the defendant may fail to draw the right inferences or inquire appropriately because he was foolish or otherwise unreasonable, but not actually dishonest (see *Agip*, per Millett J, at 15.13).

**15.38** The past authorities do not indicate a uniform standard of cognisance that will fix a recipient of trust property or its proceeds with the obligation to hold the property as a custodian trustee. In *Re Montagu's Settlement Trusts* (1987), Megarry VC was unwilling to fix a volunteer recipient of chattels in breach of a family trust, who later sold them, with personal liability to repay their money value. He held that even if the recipient had once known that the chattels were property of the trust, he would not be personally liable where he had honestly forgotten that they were. Megarry VC clearly distinguished between notice and knowledge; only the latter was sufficient for acquiring personal liability as a recipient, custodian trustee. Megarry clearly regarded personal liability as liability to account 'as a constructive trustee', ie on the traditional basis that the recipient himself breaches his custodian trusteeship, or to put it in an alternative way, wrongfully dissipates the trust property in his hands (15.47).

**15.39** In *Agip and El Ajou v Dollar Land Holdings plc* (1993), Millett J appeared to hold that something less than actual knowledge is sufficient. While Millett J seemed to adopt a lower requirement for knowledge than did Megarry VC, he still applied a 'fault' standard, in that to be liable the recipient must fall below the standard of conduct of an honest and reasonable person. In *Westdeutsche Landesbank*, Lord Browne-Wilkinson specifically approved *Re Montagu's*.

**15.40** The sort of inquiry such a person should undertake must be adapted to the particular circumstances of dealing; notice, as it applies to land transfers because of the standard practices of inquiry, should not apply to transactions for which there is no such practice. As Millett put the point in *Macmillan Inc v Bishopsgate Trust plc* (No 3) (1995) (at 782):

[The plaintiff] attempted to establish constructive notice on the part of each of the defendants by a meticulous and detailed examination of every document, letter, record or minute to see whether it threw any light on the true ownership of the [relevant] shares ← which a careful reader—with instant recall of the whole of the contents of his files—ought to have detected. That is not the proper approach. Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper.

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**15.41** In three decisions of the CA—*Houghton v Fayers* (2000); *Bank of Credit and Commerce International v Akindele* (2000); *Brown v Bennett* (1999)—a requirement of some kind of knowledge was applied. All courts cited Hoffmann LJ's formulation in *El Ajou v Dollar Land Holdings plc* (1994) at 154:

[T]he 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 received are traceable to a breach of fiduciary duty.

**15.42** This passage would appear to indicate that the defendant must have some actual or ‘naughty’ knowledge of the offending transaction, but in *Houghton*, Nourse LJ, delivering the judgment of the court, went on to say (citing *Belmont Finance Corp v Williams Furniture Ltd (No 2)* (1980)) that the defendant would be personally liable for receipt if he knew or *ought to have known* the money was paid in breach of fiduciary duty, thus adopting a standard of constructive knowledge.

**15.43** We now turn to *Akindele*, which is now regarded as the leading case. The defendant, Chief Akindele, a Nigerian businessman, entered into a transaction with International Credit and Investment Company (Overseas) Limited (ICIC) (a company controlled by the BCCI group) to ‘purchase’ shares of BCCI Holdings for \$10m, though upon the payment of the \$10m the shares would continue to be held in the names of the present holders. Following a minimum period of two years, the defendant could require the ‘sale’ of the shares, to be arranged by ICIC, such that the defendant would receive a price equivalent to \$10m plus 15 per cent interest per annum compounded annually. (The defendant was also entitled under the agreement to acquire any shares issued pursuant to a rights issue by BCCI holdings, which he did on one occasion, at a cost of \$330,680.) Despite the framing of the transaction as the sale of BCCI Holdings shares, it was understood by all concerned that the transaction was essentially to be regarded as an investment vehicle by which the defendant could earn a high rate of interest if he left his money with ICIC for a minimum period of two years. The transaction, however, formed part of a fraudulent scheme of the claimant’s employees, under which the receipt of the defendant’s money, combined with the fact that he was not registered as owner of the shares during the period of the investment, meant that the employees were able falsely to represent that a dummy loan to a third party was performing normally. In due course, following the expiry of the two year period, the defendant enforced his rights under the agreement, receiving a payment of \$16.679m.

p. 399 **15.44** The plaintiffs sought to establish the defendant’s personal liability as a ‘knowing recipient’ of money fraudulently paid in breach of fiduciary obligation. Nourse LJ, giving judgment for the CA, undertook a review of the authorities governing the requisite degree and character of knowledge necessary to fix a recipient with personal liability to restore the value of the assets received. He held that, while a defendant need not be found to have acted dishonestly in receiving the trust property, he must have known something about the breach of trust to be liable; however, he expressed ‘grave doubts’ about the usefulness of the *Baden* categories of knowledge in determining personal liability for receipt. He said (at 455):

*What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in *Belmont* (No 2), the recipient can ‘conscientiously retain [the] funds against the company’ or, in the words of Megarry VC in *Re Montagu’s Settlement Trusts*, ‘[the recipient’s] conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee’. But if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.*

*For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led.*

**15.45** With respect, this is really very unsatisfactory. The term ‘unconscionable’, like ‘unfair’ or ‘unjust’, gives absolutely no guidance to a court trying properly to characterise the sorts of facts that must be in place for the recipient’s duty of custodianship to arise. A defendant’s behaviour must be unconscionable, unfair, or unjust *according to law*. The whole point of paying attention to the facts and decisions in the past cases is to acquire some understanding of what ‘unconscionable’ receipt or dealing amounts to. The end of the exercise cannot be the declaration of a standard—that the receipt must be ‘unconscionable’—which assumes a prior grasp of the result this exercise was intended to provide; this is to beg the whole question. The *Baden* scale is not by any means perfect, but it does fulfil the useful function of pointing out some of the different ways and extents to which a defendant might have acquired knowledge of a breach of trust, and therefore requires a judge to appreciate that the question whether the defendant’s awareness in the case before him is sufficient to make his treatment of the property as his own ‘unconscionable’ will often require a fairly subtle and nuanced appreciation of the particular facts in their surrounding context.

**15.46** Nourse LJ is further mistaken to think that his declaration of a single test of knowledge for knowing receipt by reference to unconscionability is a proper parallel to Lord Nicholls’ adoption of a standard of dishonesty for knowing assistance. ‘Dishonest’, unlike ‘unconscionable’, is much less a legal term of art, and it was to a common, member-of-a-jury understanding of dishonesty that Lord Nicholls appealed. Even so, as we p. 400 have seen (15.8), he then went on to elaborate in some detail what should count as dishonest; Nourse LJ here undertakes no similar effort with a term that is much less likely to have any commonly well-grasped sense.

## Dishonest dissipation

**15.47** In summary, it is probably fair to say that as things stand at the moment, a recipient who has given value for trust property will fail to be a bona fide purchaser if he has actual knowledge or some sufficiently strong suspicion of the breach of trust to ‘affect his conscience’. What counts as suspicious will presumably vary according to the normal modes of carrying out the specific kind of transaction in issue, ie whether he purchases land, securities, chattels, and so on. Where he is fixed with knowledge of a breach of trust, so that even if he purchased the legal interest in the trust property for value he would not count as a bona fide purchaser, thus making him liable to the beneficiary’s proprietary against the trust property, it is not clear if

the recipient is thereby also immediately personally liable to account because of this knowledge; simply because the recipient might have some sort of ‘constructive knowledge’ of the breach of trust that does not equate to the sort of knowledge which would make it ‘unconscionable’ to ‘retain the benefit of the receipt’, in other words, to have been able to deal with the property received as his own.

**15.48** In the recent decision of *Papadimitriou v Crédit Agricole Corp* (2015), Lord Sumption did equate the test for notice in the context of the bona fide purchaser defence with knowledge in knowing receipt ([33]):

*Whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same.*

However, as Swadling (2017) points out, the point was unnecessary for the decision, and the case was a Privy Council decision (meaning that lower English courts should not follow it if it is inconsistent with another decision that would otherwise be binding on that lower court).

**15.49** So we seem to be left with the CA decision in *Akindale*. Nevertheless, it is probably wisest to make reference to the range of views expressed by different judges that we have seen, as even if Nourse LJ’s ‘unconscionability’ test prevails in name, much will have to be done to sort out exactly how knowledge and/or notice are relevant to its application.

**15.50** In *Criterion Properties v Stratford UK Properties* (2004), the HL more or less said that *Akindale* was decided on an entirely faulty legal analysis. Lord Nicholls made the point this way ([4]):

*I respectfully consider the Court of Appeal in Akindale's case fell into error ... 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 misappropriated. 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 accountable for any benefits he may have received from A under the agreement.*

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**15.51** Thus in *Akindale* the CA failed to determine first whether BCCI was bound by the investment agreement with Akindale. Given that the CA did not set that contract aside, it appears that they understood the contract to be binding on BCCI, in which case Chief Akindale was perfectly entitled to what he received, and no issue of knowing receipt arose. This certainly weakens the authority of *Akindale*, but as we have just discussed, we are probably stuck with its ‘unconscionability test’ until the UKSC visits the issue.

**15.52** It is submitted, however, (see also Swadling (2017)), that the appropriate standard for knowledge here should be 'dishonesty', as set out by Lord Nicholls in *Tan*, including of course wilful blindness and reckless disregard for the beneficiaries' rights. The recipient commits a wrong by dissipating the assets, ie treating them as if they were his own, flouting the rights of the beneficiaries of which he is aware. This would appropriately be called the 'dishonest dissipation' of trust assets. If this logic were adopted, we could get past the terminology of 'knowing receipt' and 'knowing dealing', and focus on the beneficiaries' true grievance, that the recipient spent the assets actually knowing they were the beneficiaries', not his own, or recklessly not caring if they were.

## A continuing proprietary base

**15.53** In the recent High Court decision of *Byers v Samba* (2021), Fancourt J held that the beneficiary must show a continuing proprietary interest at the point of receipt by the knowing recipient to succeed in a claim for knowing receipt. In other words, the property received by the alleged knowing recipient must be trust property. If, at the moment of receipt, the alleged knowing recipient acquired good title to the property, then the claim in knowing receipt will fail.

**15.54** This kind of issue cannot arise under the general law of England and Wales. A transferee who has sufficient knowledge or notice of a breach of trust cannot be a bona fide purchaser for value without notice. The beneficiary's equitable interest will therefore subsist in the transferred property, and the transferee will not have good title unencumbered by any equitable interest. However, this issue can arise in relation to a statutory scheme for registration of title, as under land registration legislation, in which a registered owner may acquire good title despite knowing that the transfer to her might defeat third party rights (see, eg *Midland Bank v Green* (1981)).

p. 402 **15.55** In *Byers*, shares in five Saudi Arabian companies were transferred to the defendant, a Saudi Arabian bank. These shares were transferred by the trustee of a Cayman Islands trust in breach of trust. Fancourt J found that, since Saudi Arabian law (the governing law of the share transfer) does not recognise equitable interests, the claimant's equitable interest in the shares was extinguished as of the moment of receipt. Therefore, Fancourt J concluded that as a matter of English law, no claim in knowing receipt could arise, as trust property was not received by the defendant bank.

**15.56** *Byers* is not likely to be the last word on this issue, for two reasons. First, it is not clear how the decision interacts with the doctrine in *Penn v Lord Baltimore* (1750), where Lord Hardwicke LC, sitting in Chancery, ordered a decree of specific performance in respect of a covenant concerning land on the Pennsylvania-Maryland border. So long as the defendant is in a trusts-law jurisdiction, he can be required to deal with the title to the foreign asset as a court of equity will direct (2.72). Note: such an order does not violate the principle of private international law that courts will not determine title relating to foreign land, for the court is merely ordering the defendant to hold the title, or deal with the title by transferring it to a proper trustee of the trust. The court is not determining whether he has legal title to the asset in the foreign jurisdiction; the order is based on the court's accepting that he does. This has been explained with reference to equity's ability to act *in personam*. According to Lindley LJ in *Commissioners of Inland Revenue v G Angus* (1889) (at 595):

*a judgment for specific performance does not transfer the property to the purchaser ... it did not affect or profess to affect by its decree the property itself; it acted only in personam and compelled the vendor to do whatever was necessary to be done, either in this country or abroad, to transfer the property to the purchaser.*

**15.57** Can this logic be applied to the problem in *Byers v Samba*? One might argue that even though Saudi law did not recognise a continuing equitable interest in the shares, English law would, and on that basis the court could exercise its *in personam* jurisdiction to hold the defendant bank liable for knowing receipt.

**15.58** The second reason is that Fancourt J seemed to limit his reasoning to what he calls ‘pure knowing receipt’ claims, by which the learned judge meant claims where no allegation of dishonesty is pleaded (*Byers* at [116]). Insofar as this repeats Nourse LJ’s holding in *Akindele* that dishonesty is not necessary for a knowing receipt claim to succeed, this terminology can be made sense of. However, it remains unclear if Fancourt J has two kinds of knowing receipt claims in mind—pure and impure ones, and whether different rules might apply in each case.

## Remedies for knowing receipt and knowing dealing

**15.59** A recipient of trust property (or its traceable proceeds) transferred in breach of trust who knowingly deals with the property as his own is liable to dig into his own pocket and restore to the beneficiaries the money value of the property he spends as if it were his own.

p. 403 **15.60** The remedy differs slightly in formulation depending on whether the case is one of knowing receipt or knowing dealing. Where knowing receipt is concerned, the liability is for the value received. Where knowing dealing is concerned, the liability is for the value of the assets dissipated.

**15.61** What about a gains-based remedy? Lewison J in *Ultraframe v Fielding* (2005) thought that the knowing recipient can be made to account for any benefit he has received or acquired as a result of the knowing receipt. However, in line with the law on dishonest assistance, the knowing recipient is not liable to account for benefits received by someone else. In other words, if the trustee is liable to disgorge profits made in breach of trust, this claim cannot be ‘cloned’ and applied to the knowing recipient.

## Limitation of actions

**15.62** The Limitation Act 1980 provides:

21. (1) *No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
- (a) *in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
  - (b) *to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by him and converted to his use.*

**15.63** The application of these subsections, which allow a defendant no statutory limitation period, was considered by the UKSC in *Williams v Central Bank of Nigeria* (2014). By a majority of 4:1, the court held that s 21(1)(b) applies only to those who undertake the obligations of a trustee or a fiduciary in respect of the claimant's property, that is, only to cases where a person who has in a lawful transaction undertaken fiduciary obligations to the claimant, or can be implied to have put himself in a position where he owes such obligations, and then goes on to breach those obligations by wrongfully retaining his principal's property or converting his principal's property to his own use. The rationale for this absence of a limitation period is simply that the trustee or other fiduciary can never hold *adversely* to his beneficiary or principal; his title to the trust assets is always a title held on trust.

**15.64** This clearly covers the case of an express trustee who misappropriates trust property, or a company director who misappropriates company property, because in both of these cases the fiduciary obligation arises independently of, and prior to, the wrong of retaining the principal's property or converting it to his use or holding it inconsistently with the beneficiary's or principal's rights. Similarly, the liability of a trustee '*de son tort*' or *de facto* trustee (13.110), will fall under this subsection, for such a person *de facto* undertakes the obligations of trusteeship.

**p. 404 15.65** However, the section does not apply to persons called 'constructive trustees', i.e. those held 'liable to account as a constructive trustee'. Thus, a knowing recipient will be able to plead a limitation period of six years (s 21(3)), and for others who do not receive trust property transferred in breach of trust but are otherwise subject to the remedial jurisdiction of equity, as are fraudsters in some cases, equity will apply by analogy the limitation periods under the statute that applies to corresponding actions at common law (in this case six years).

**15.66** By a slimmer majority of 3:2 the UKSC decided that s 21(1)(a) applies only to the same defendants who fall under s 21(1)(b), ie express trustees, fiduciaries, or *de facto* trustees. The claimant argued for a broader interpretation of the subsection, under which defendants guilty of dishonest assistance would likewise not have the benefit of a limitation period, but this was denied.

**15.67** As applied to company directors, in *First Subsea Ltd v Balltec Ltd* (2017) the CA decided that no limitation would run where a director fraudulently breached any of his fiduciary duties, in this case forming a company which then bid for contracts in competition with the company of which he was a director. A company director acting fraudulently cannot escape the effect of s 21(1)(b) by not receiving company assets himself directly, but having them transferred to a company that he owns or controls: *Burnden Holdings (UK) Ltd v Fielding* (2016).

**15.68** Cases that fall under s 21(1)(a) and (b), so that no statutory limitation periods apply are, however, subject to the equitable doctrine of laches (pronounced ‘lay-cheese’), or delay. A suit may not succeed in equity if by reason of the claimant’s delay the defendant would be unfairly disadvantaged.

## Secondary liability for breach of fiduciary obligation

**15.69** As we have seen (13.7 et seq), where a fiduciary misappropriates his principal’s property, say where a company director fraudulently draws a cheque from the company bank account in his own favour, equity regards this as equivalent to a breach of trust and the normal breach of trust remedies against third parties, ie for knowing receipt or knowing assistance, will apply. Making third parties liable in the case of a true breach of fiduciary obligation is, however, a more vexed question (see Mitchell (2002); Davies (2015a), 264–269). There are, of course, some breaches of fiduciary obligation that necessarily involve misapplications of the principal’s property, ie breaches of the self-dealing and fair dealing rules, and there would seem to be no objections in principle to making third parties who dishonestly assist such breaches, or receive property via them, to be held liable. The same might be said for those cases in which a fiduciary is properly held to hold an unauthorised profit on constructive trust for his principal, ie those cases in which the unauthorised profit can fairly be said to be a misappropriation of the principal’s property (14.46 et seq, 14.99–14.100). In these cases the analogy with knowing receipt and knowing assistance is straightforward.

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**15.70** For example, in *CMS Dolphin Ltd v Simonet* (2001), Collins J treated a director’s exploitation for himself of a maturing business opportunity ‘as appropriating for himself [the property of his company]’. The new company he formed, which took the benefit of the opportunity (and which was deemed to have his knowledge), was liable either as a ‘participant’ in a breach of trust or alternatively as a knowing recipient of trust property transferred in breach of trust (see also *Comax Secure Business Services v Wilson* (2001); *Dilmun v Sutton* (2004)). While the reasoning that a maturing business opportunity is itself a company’s ‘property’ is questionable—surely it is the assets that are acquired in the exploitation of the opportunity which can amount to the company’s property—the principle upon which the company was found liable seems a straightforward application by analogy of the rules governing secondary liability for breach of trust.

**15.71** Nevertheless, the cases do not speak with one voice. In *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* (1999) the claimant’s competitor was assisted in its purchase of a site for development, a site in which the claimant was also interested, by the unauthorised release of confidential information by the claimant’s agent, which the court treated as a breach of its fiduciary obligation. The CA refused to hold that the competitor held the site on constructive trust for the claimant. Distinguishing *Boardman* on the basis that there the defendants had placed themselves in a fiduciary position vis-à-vis the beneficiaries, the court said that it would be contrary to commercial good sense to hold a competitor, which of course had no prior fiduciary duty to the claimant, liable as a fiduciary for taking advantage of the claimant’s agent’s breach and stripping it of the asset it had acquired. This case seems to suggest that merely knowingly receiving a benefit that would not have come to one but for another’s breach of fiduciary obligation is insufficient to render one liable to the wronged principal. Notice one can analyse this case on the basis that the acquisition of the site for development could be regarded as something that its agent should have acquired for its principal if for

anyone; there seems little doubt that had the agent acquired the site itself, it would have been liable to hold it on trust for the principal. Thus, as a case equivalent to a ‘misappropriation of trust property’ case, it seems to conflict with *CMS Dolphin*.

**15.72** The CA’s decision in *Novoship UK v Nikitin* seems to confirm (at [77]; the trial judge explicitly endorsed the point) that a third party is not accountable for the fiduciary’s own unauthorised gain, ie is not liable to pay over a sum equivalent to the unauthorised gain which the fiduciary himself acquired. *Novoship* also decides that a third party who *dishonestly* participates in a transaction in which the fiduciary acts in conflict of interest, is liable to account for his own gain to the fiduciary’s principal, but the gain must be the causal result of his participation, on conventional principles of ‘but for’ causation. This reasoning coheres with the result vis-à-vis the third parties in *Regal (Hastings)* (14.47 et seq): recall that besides the directors, the company’s solicitor subscribed for shares, and one director subscribed for shares for third parties. Neither the solicitor nor the third party were stripped of their profits, although, on the facts, it could hardly be clearer that the solicitor knowingly participated in and benefited from the scheme, and the third party benefited from the scheme. Neither was the director who subscribed for others liable secondarily for those others’ gains. This was so even though all of them knowingly participated in a scheme that would not have come off but for their participation, and which they were in a position to realise, if they had thought about it, was a scheme reflecting a conflict of interest. But it would be hard to characterise any of these third parties as dishonest.

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**15.73** In *Akita Holdings v AG of the Turks and Caicos Islands* (2017), a government minister of the Turks & Caicos Islands purchased land under a Crown Land Policy scheme, which allowed individuals to first rent and develop land, then buy it if the conditions were satisfied. He obtained a private valuation of the land which showed it to have a much higher value than the price he paid for it under the outdated valuation relied upon by the government. After development of the land, and before he exercised his right to buy the land, the minister transferred the right to the company Akita Holdings, a company jointly owned by him and his brother. Further development continued and the land increased further in value.

**15.74** The UKPC held that Akita, ‘having acquired [the minister’s] right to buy the property at the discounted price, with full knowledge of his breach of fiduciary duty, it is in principle liable to account to the government in the same way as him’, that is, for all the profits the company earned on the development of the land. The decision is arguably correct but the reasoning can be criticised. The court referred to the minister’s ‘breach of fiduciary duty’ without specifying what that was. On the facts it is clear that he breached the fair dealing rule (14.41) by failing to inform the government of the private valuation. By pursuing the minister’s profits, it is clear that any profits he acquired through the increase in the value of his shares in Akita Holdings could also be claimed by the government. So far so simple. The only real question, which was not explored, was whether his brother’s profits from Akita’s developments should also be claimable by the government. Assuming that his brother was ‘dishonest’ on *Novoship* principles, he would be. If that assumption was correct, we would have the correct result. But the court should not have short-circuited this inquiry by treating Akita as a ‘knowing recipient’ of property transferred in breach of fiduciary duty, such that all of Akita’s profits could be claimed by the government. Consider this case. Let us assume that Akita’s shares were owned by the minister and a genuine third party investor, acting in good faith. Why should that person be stripped of her profits, ie the value of her shares, just because those profits were earned by Akita’s development of the land? The right of the principal is to strip *the fiduciary* of any profits he earns in a transaction which breaches his fiduciary

relationship with the principal, not to strip everyone else who might profit from the impugned transaction just because they would not, on a but for causal basis, have earned those profits but for the transaction taking place. If that were the law then a principle in such circumstances would be able to set aside the transaction irrespective of its effect on third parties acting in good faith, and that is clearly not the law.

## p. 407 **Further reading**

Conaglen & Nolan (2013)

Elliot & Mitchell (2004)

Mitchell and Watterson (2010)

Swadling (1994, 2017)

Must-read cases: *Barnes v Addy* (1874); *Royal Brunei Airlines Sdn Bhd v Tan* (1995); *Quince v Varga* (2008); *Novoship v Nikitin* (2014); *Re Montagu's Settlement Trusts* (1987); *Bank of Credit and Commerce International v Akindale* (2000); *Byers v Samba* (2021)

## **Self-test questions**

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1. What is the test for dishonesty in cases of dishonest assistance?
2. Under what circumstances will a recipient of trust property come under a personal liability for knowing receipt?
3. Explain Lord Nicholl's criticism of *BCCI v Akindale* (2001) in *Criterion Properties plc v Stratford UK Properties LLC* (2004).
4. Tom is the trustee of a family trust. He misappropriates \$10,000 of trust money, and pays it into the bank account of his son, Ted, who is ignorant of the source of the money. Ted uses it to buy ten cases of vintage wine; he drinks up five of the cases, and lays down the rest. Ted is then informed of Tom's breach of trust one evening, just after he has decanted four bottles of the wine for a dinner party. You are a lawyer friend of Ted's who has just arrived at the party, and he asks your advice.
5. Max, trustee of the Simpson family trust, ordered his broker, Bob, to invest \$50,000 of the trust fund in junk bonds. Bob complied with the order although he was surprised that a trust fund would permit such a hazardous investment. The bonds were defaulted upon almost immediately, becoming worthless. Advise Bob.
6. Jean, in full knowledge that the transaction is in breach of trust, allows Tracy the trustee to buy her a painting from an art dealer for \$40,000, and use trust funds to clear her OCBC overdraft of \$15,000. Two months later the painting is sold by Jean at auction for \$27,000. Six months after that the beneficiaries of the trust discover this transaction and bring a claim against Jean for \$55,000 plus interest. Advise Jean.
7. KS was the director of Fortune Ptd Ltd (Fortune) from 2004 until 2020. From 2005 he made annual payments of \$25,000 from Fortune's bank account to the bank account of Sure Services Pte Ltd (Sure), a company controlled by KS and his brother ZF. In Fortune's accounts these payments were recorded as expenditures for 'professional

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services' but Sure never provided any services to Fortune, and KS and his brother siphoned off most of the funds received by Sure from its bank account for their personal use. In 2015 KS's wife was facing personal financial difficulties and KS sold 10,000 shares Fortune owned in Graft plc for \$100,000 which he then used to pay off his wife's creditors. In 2017 the market price of Graft shares had declined and KS was able to purchase with his own money 10,000 Graft shares in Fortune's name for \$30,000. KS hoped that these share transactions would not come to light and never altered Fortune's accounts to show the original sale and subsequent repurchase, representing in the accounts that Fortune had continued throughout to own 10,000 shares of Graft. In 2020 KS was removed as a director of Fortune and the new director discovered the preceding facts. Advise Fortune.

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