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The Nature of 'Knowing Receipt'

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I. Introduction

Suppose a trustee holds a parcel of shares on trust for a class of objects. The trust might be fixed or discretionary. For the sake of argument, assume the simplest possible scenario, a fixed trust with one adult beneficiary. In breach of trust, the trustee transfers the shares to the defendant. There are two types of claim the beneficiary might bring against the defendant, one for the return of the shares themselves, which we will call the 'specific' claim, the other a monetary claim for their value, which we will call the 'personal' claim.

The specific claim is undoubtedly strict,[1] subject only to a defence of the recipient being 'equity's darling'. The personal claim, which is the subject matter of this chapter, is, by contrast, fault based, although, as will be seen, there is controversy over the exact level of fault required. For the moment, we will simply refer to the fault requirement as one of 'knowledge'. That 'knowledge' is of the rights having been dissipated in breach of trust. The defendant might have had that knowledge at the point of receipt, or have acquired it later, whilst the rights were still vested in him.[2]

The purpose of this chapter is to examine the various explanations of the personal claim. One is that there are in fact two potential personal claims, one in unjust enrichment, the other in wrongs. This is the view of Lord Nicholls, writing extrajudicially,[3] and Birks.[4] The unjust enrichment claim is strict, though yielding only the value of the rights received and subject to defences of change of position and bona fide purchase. The wrongs-based claim, by contrast, is fault

[1] Details of the specific claim are set out in section III below. It is often called 'proprietary', though this is a misnomer as the rights which the court orders to be returned may well be personal.

[2] *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291 (Millett J).

[3] Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998) 231.

[4] P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002) 213.

based, requiring dishonesty, with relief extending to the beneficiary's loss or the recipient's gains beyond the value of the rights themselves. The wrong, according to Lord Nicholls, is a species of the equitable wrong of dishonest participation in a breach of trust, akin to the common law wrong of inducing breach of contract.[5]

A second view holds that one who receives rights with knowledge of their dissipation in breach of trust becomes a genuine trustee of such rights. In one version of this thesis—that propounded by Mitchell and Watterson—such recipient will become immediately accountable to the beneficiary for what he does with the rights. Should he dissipate them in breach of trust, the beneficiary can falsify the recipient's account, thus rendering the recipient liable to be ordered by the court to reinstate the trust fund, either in the hands of the original trustee or in new trustees or in the beneficiary himself if he is of full age, sound mind and absolutely entitled. Although the payment away will be a breach of trust, the claim is for falsification and is not a claim in wrongdoing.[6] A simpler version of this thesis is put forward by both Gardner[7] and Chambers,[8] who likewise say that one who receives rights with knowledge of a dissipation in breach of trust becomes a trustee of such rights. They argue that the recipient will commit a breach of trust if such rights are transferred by him to someone other than the original trustee or to new trustees or to the beneficiary himself if of full age, sound mind and absolutely entitled. The claim in knowing receipt, they say, is simply the money claim for the wrong of breach of trust.

So far as the first view is concerned, the position adopted in this chapter is that although analysing knowing receipt as claim in wrongs is possible, though not the particular wrong of dishonest participation in a breach of trust, there can be no claim in unjust enrichment on the scenario set out above for the simple reason that the defendant's enrichment, the shares, comes not from the beneficiary claimant but from the trustee. The defendant's enrichment, in other words, is not at the beneficiary's expense. As to the second view, the argument will be made that the knowing recipient is not a trustee and is therefore under no duty to provide an account which can be falsified; nor can he be sued for breach of trust. As indicated above, the best account of the liability we call knowing receipt is that it is an equitable wrong. However, it is not the 'receipt' which is the gist of the action, but the later dealing with the rights in a way which is inconsistent with the terms of the trust on which they were originally held. 'Knowing receipt', therefore, is a misnomer—the liability is better seen as a species of the equitable wrong of 'inconsistent dealing'.

[5] Nicholls (n 3) 243–44. The other form of participatory liability according to Lord Nicholls is the dishonest assistance of a breach of trust.

[6] C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 115.

[7] S Gardner, 'Moment of Truth for Knowing Receipt?' (2009) 125 *LQR* 20.

[8] R Chambers, 'The End of Knowing Receipt' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 1.

II. Two Possible Distractions

At the outset, we must notice two possible distractions. The first relates to rights held beneficially at the point of dissipation. The second concerns the equitable liability known as 'inconsistent dealing'. As already indicated, the second turns out not to be a distraction at all.

A. Rights Held Beneficially

This chapter is only concerned with rights previously held on trust, not those held beneficially at the point of wrongful dissipation. Unfortunately, the distinction between the two has not always been properly drawn. In the past, the specific and personal claims outlined above have also been available in cases concerning persons in fiduciary relations with companies, for example, directors, who cause through a breach of fiduciary duty on their part rights held outright by the corporation to be transferred away. Claims are then brought by the company against the recipient to recover either the rights themselves or their value.

An example is *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,[9] where the defendant, Akindele, entered into a contract with International Credit and Investment Co (Overseas) Co Ltd (ICIC), a company within the BCCI group, for the purchase of shares in the holding company of the group, BCCI Holdings, for US$10 million. The agreement provided that should Akindele wish to sell the shares within two years, ICIC would buy them back at 15 per cent compounded per annum more than he paid. Akindele exercised the option and ICIC repurchased the shares for US$16.679 million. The liquidators of the by now insolvent ICIC claimed the US$6.679 million profit from Akindele on the ground that the whole scheme had been fraudulently entered into by its directors to inflate the apparent worth of the BCCI group. This, they said, meant that the sum claimed had been transferred to Akindele in breach of fiduciary duty and that he was liable as a knowing recipient. At first instance, Carnwarth J rejected the claim, though only on the ground that Akindele had acted honestly throughout—a conclusion which the Court of Appeal refused to set aside, though at the same time taking the opportunity to frame the enquiry not in terms of dishonesty but of 'unconscionability'. Akindele's lack of knowledge of the directors' fraud, it was held, meant it was not 'unconscionable' for him to retain the profit.

This line of authority was, however, decisively rejected by the House of Lords in *Criterion Properties plc v Stratford UK Properties LLC*.[10] Two directors of the

[9] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA); see also *Belmont Finance Corpn v Williams Furniture (No 2)* [1980] 1 All ER 393 (CA); *Eagle Trust v SBC Securities* [1993] 1 WLR 484; *Cowan de Groot Properties v Eagle Trust* [1992] 4 All ER 700; *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 (CA).

[10] *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 (HL).

claimant company purported to enter into a 'poison pill' agreement on its behalf with the defendant company. When the defendant company sought to enforce the poison pill agreement, the claimant sought to have it set aside as against the defendant company as having been procured by the directors of the claimant company in breach of their fiduciary duty. The claim was argued in terms of the defendant company being liable for the unconscionable receipt of rights from the claimant, *scil* the rights under the poison pill agreement. The House of Lords held that the claim was misconceived. Lord Nicholls said:

> 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.[11]

Thus, the issue was seen not as one of the unconscionable receipt of rights but whether the claimant company gave authority for the signing of the poison pill agreement. If it gave actual authority for the signing of the agreement, then there was nothing wrong with the receipt of rights transferred under it. If there was no actual authority, then the question was whether there was apparent (ostensible) authority. However, even if apparent authority was present, it would not avail a counterparty who knew or ought to have known that there was no actual authority. According to Lord Scott:

> If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.[12]

In this respect, but in this respect alone, a test of constructive notice (which is what unconscionable receipt might possibly be)[13] would be relevant in a case where a company is caused by a fiduciary acting in breach of duty to transfer rights it holds beneficially to a third party. It is, however, crucial to understand that this issue does not go to any recipient liability. It is concerned instead with the logically prior question whether the contract, assuming there was such a contract, pursuant to

[11] ibid [4].
[12] ibid [31].
[13] See text to nn 37–44.

which rights were transferred was valid. If the contract was valid, then that would be the end of the matter.

What, however, of the situation where the contract is void on the ground that there was no actual or apparent authority, or there was apparent authority but the recipient knew or ought to have known of the lack of actual authority? Lord Nicholls said that in such cases a strict liability personal claim in unjust enrichment was available to the claimant company:

> If … the agreement is set aside, B will be 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'.[14]

Although this statement was obiter dicta in *Criterion*, it was accepted by the New South Wales Court of Appeal in *Fistar v Riverwood Legion and Community Club Ltd*[15] and by the Full Court of the Federal Court of Australia in *Great Investments Ltd v Warner*.[16] We are not concerned in this chapter with whether such a proposition is correct, save to note that it is not free from criticism.[17] Crucially, however, the unjust enrichment claim in such cases is not caught by the objection made below in respect of rights held on trust immediately prior to their disposition: in cases like *Fistar* and *Great Investments*, the defendant's enrichment was clearly at the claimant's expense since it was the claimant itself which transferred the rights to the defendant, not a third party.

B. Liability for Inconsistent Dealing

The second point to note is the existence of a species of equitable liability known as 'inconsistent dealing'. The leading case is *Lee v Sankey*.[18] Here, a firm of solicitors was employed by will trustees to receive the proceeds of the testator's real estate, which had been compulsorily purchased by a railway company. The solicitors were to hold the money until a suitable investment became available. In breach of their instructions, the solicitors paid over the money to one of the trustees without the authority of the other. The money was then dissipated in breach of trust and, the trustee in breach having died insolvent, a claim was successfully made against

[14] *Akindele* (n 9) [4].
[15] *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81.
[16] *Great Investments Ltd v Warner* [2016] FCAFC 85.
[17] R Stevens 'The Proper Scope of Knowing Receipt' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 421, 425.
[18] *Lee v Sankey* (1873) LR 15 Eq 204.

the solicitors for the loss by the surviving trustee and the trust beneficiaries. Bacon VC held that the solicitors were:

> liable to make good to the trust estate the amount of trust moneys which they received by the authority of the two trustees, and from which they have not been discharged by any act or authority of the same two trustees. It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to cestuis que trust in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing.[19]

Although for many years thought to be simply part of the liability known as knowing receipt, one difference to the scenario posited at the beginning of this chapter is that the receipt by the solicitors in *Lee v Sankey* was perfectly lawful and not a dissipation in breach of trust. This led Millett J (as he then was) in *Agip (Africa) Ltd v Jackson*[20] to state, contrary to the position adopted at the time by the practitioner text *Snell*,[21] that inconsistent dealing was a separate and distinct head of liability from knowing receipt, and that 'much confusion has been caused by treating [knowing receipt] as a single category and by failing to differentiate between a number of different situations'. In his Lordship's view, there were 'two main classes of case':

> The first is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He 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.
>
> The second and, in my judgment, distinct class of case is that of the person, usually an agent of the trustees, who receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the property knowing it to be such, though he will not necessarily be required in all circumstances to have known the exact terms of the trust.[22]

The conclusion this chapter will reach is that though it is right to question whether cases of inconsistent dealing can properly be analysed as a species of knowing

[19] ibid 211.
[20] *Agip (Africa) Ltd* (n 2); see also *Baden, Delvaux and Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1983) [1993] 1 WLR 509, 571–72 (Peter Gibson J).
[21] PV Baker and P St J Langan, *Snell's Principles of Equity*, 28th edn (London, Sweet & Maxwell, 1982) 194, 195.
[22] *Agip (Africa) Ltd* (n 2) 291.

receipt, the best explanation of cases in Millett J's first category is that they are in fact a sub-category of the equitable wrong of inconsistent dealing.

III. The Specific Claim

We will now set out the nature of the specific claim. We do this because if the defendant is *ipso facto* a trustee of the rights he receives, this may go some way to explaining the personal claim as involving the duties of a trustee. The purpose of this section is accordingly to demonstrate that, though commonly described as such, the recipient is not a trustee of the rights he receives but simply liable to be ordered to return them at the suit of the beneficiary.

It is well settled that if in the example given at the beginning of this chapter the defendant still has the shares, he is liable at the suit of the trust beneficiary to be ordered by a court to reconvey them in specie to the original trustees, or to the solely-entitled adult beneficiary himself should he so choose. The same regime will apply to the traceable proceeds of the shares should they have been exchanged for other rights by the time of trial. This claim to the shares or their traceable proceeds will also apply to remote recipients, those who receive from the initial recipient, to those who receive from remote recipients, and so on. The specific claim is strict. In other words, it does not matter what the recipient knew or ought to have known when receiving the shares or their traceable proceeds.

The only defence to the specific claim is that the recipient was 'equity's darling', ie, that in good faith he gave value in exchange for a right recognised by the common law (and shares are such rights) and that he had no notice, actual, constructive, or imputed, that the original transfer was made in breach of trust.[23] It is important to stress that this must be a purchase[24] for value of a legal right; if equitable rights are transferred in breach of trust, for example, where the transferred rights were the subject matter of a sub-trust, bona fide purchase will not avail the recipient, no matter how much value he gave, how much bona fides he possessed, and how little notice he had.

What is the status of the person who still has the shares or their traceable proceeds but who is not equity's darling? It is often said that he is a trustee of such rights. But what sort of trust is this? Is the recipient a trustee of an express trust? Or is it a constructive trust? It is clearly not an express trust. Take the case of an innocent recipient who gives no value. No one would say that they had the same duties as the trustee from whom the rights were received. If, for example, the recipient gave away the shares whilst innocent, it is accepted on all sides that

[23] *Pilcher v Rawlins* (1872) 7 Ch App 259.

[24] Purchase in this context means consensual transfer rather than transfer by operation of law, eg, as on intestacy. Thus, a gift is a 'purchase', which explains the otherwise redundant requirement that the purchase be 'for value'.

he would not be personally liable for breach of trust. Nor would he be liable if he spent the dividends earned from the shares on a holiday for himself. Yet such acts by the original trustee would undoubtedly make him liable to be sued for breach. At best, therefore, the recipient can only be a constructive trustee of a constructive trust, though that still leaves open the question of the content of such constructive 'trust'. It is, however, submitted that the language of trusteeship is inapt even here. The description of the defendant as a trustee seems to be used only to indicate that he does not hold the rights beneficially, that they are encumbered by the ability of the beneficiary to obtain a retransfer.

The description of the recipient as a trustee in such a situation is probably due to a dictum of Lord Lindley in *Hardoon v Belilios*, where he said: 'All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant'.[25] Such thinking was, however, rightly rejected by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*, where he described the proposition that 'where the legal title is in A but the equitable interest in B, A holds as trustee for B' as 'fallacious'.[26] His lordship said:

> There are many cases where B enjoys rights which, in equity, are enforceable against the legal owner, A, without A being a trustee, eg an equitable right to redeem a mortgage, equitable easements, restrictive covenants, the right to rectification, an insurer's right by subrogation to receive damages subsequently recovered by the assured … Even in cases where the whole beneficial interest is vested in B and the bare legal interest is in A, A is not necessarily a trustee, eg where title to land is acquired by estoppel as against the legal owner; a mortgagee who has fully discharged his indebtedness enforces his right to recover the mortgaged property in a redemption action, not an action for breach of trust.[27]

Moreover, the statement in *Hardoon v Belilios* should not be taken out of context. That was a case of an express trust, with shares being vested in the claimant for a third party. The defendant was an assignee of the third-party beneficiary. The claimant trustee was held liable on calls made on the shares and sought an indemnity from the defendant, who sought to escape liability on the ground that he had made no promise to indemnify. The Privy Council held that it did not matter, that it was enough that there was a trustee/beneficiary relationship. The case therefore says nothing about the operation of constructive trusts.[28]

[25] *Hardoon v Belilios* [1901] AC 118, 123.

[26] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 706.

[27] ibid 706–07.

[28] One decision which might be cited in support of the proposition Lord Browne-Wilkinson thought fallacious is the Court of Appeal case of *Independent Trustees Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 (CA), where at [79] doubt is thrown on his Lordship's reasoning by Lloyd LJ. However, this is immediately qualified at [83] by the statement that: 'It may not matter whether the holder of the legal title who is liable to be sued so as to enforce such rights is or is not to be categorised as a trustee. What does matter is the recognition of the right to sue and thereby to enforce those rights, in relevant circumstances'. Moreover, Lloyd LJ relied on an article by Sir Peter Millett

The upshot, therefore, is that there is no need to describe the recipient of rights dissipated in breach of trust as a trustee; it is enough to say that he takes subject to an encumbrance, viz the beneficiary's ability to obtain from the court an order that he reconvey the rights he received. We are perfectly happy to describe other encumbrances in such terms, for example, leases, easements and restrictive covenants over land, so it is difficult to see why the language of trusteeship is needed here.

IV. The Personal Claim

We now turn to the focus of this chapter, the personal claim. If by the time of trial the defendant no longer has the shares or their traceable proceeds, he will be liable at the suit of the beneficiary to be ordered by the court to pay a sum of money to the beneficiary representing the value of the shares if he had knowledge at the point of receipt that the shares were transferred to him in breach of trust and he received the shares beneficially. He will also incur such liability if, though innocent at the point of receipt, he acquired the knowledge later, before dissipating the shares. Like the specific claim, the only defence will be that the defendant was equity's darling, a bona fide purchaser of a legal right for value without notice, actual, constructive, or imputed.

A. Constituent Elements of 'Knowing Receipt'

i. Rights Transferred in Breach of Trust

The first requirement of the liability is that the rights received were originally transferred in breach of trust. As we have seen, rights held beneficially at the point of the impugned transfer are not the subject of this liability.

ii. Knowledge

The second requirement is that the recipient knew, either at the point of receipt, or later whilst they were still vested in him, that the rights received were previously held on trust for the claimant beneficiary and transferred away in breach. There is, however, no agreement on exactly what knowledge means in this context, which is undoubtedly a product of the failure of judges properly to analyse

(as he then was) entitled 'Restitution and Constructive Trusts' (1998) 114 *LQR* 399, where he said, at 404, that the issue was 'essentially a question of semantics' and that it 'probably does not matter if we say that the relationship is not a trust relationship, so long as we call it something else. The trouble is that we have no other name for it'.

the type of liability in question. In *re Montagu's Settlement Trusts*,[29] Megarry V-C, after a careful review of the authorities and much argument, held that knowledge meant exactly what it says, that the defendant must know of the dissipation in breach of trust, or have deliberately shut his eyes to the possibility. This was to be contrasted with 'notice', which included not only what the defendant knew (actual notice), but also what he would have discovered had he made reasonable enquiries and inspections (constructive notice), and the knowledge of his agent (imputed notice). In *re Montagu's Settlement Trusts* itself, the claimants were keen to attribute the knowledge of the defendant's solicitors to the defendant recipient, but Megarry V-C said that whilst that was the right test in relation to disqualifying the defendant from any defence of bona fide purchase for value without notice—which had no possible application on the facts as the recipient was a donee—only conduct amounting to a 'want of probity' would suffice for the personal claim, which required either knowledge or a deliberate closing of the eyes.[30]

On the other hand, many judges do talk in terms of notice. Thus, Millett J in *Agip* said that constructive notice was enough for the personal claim:

> [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.[31]

This was also the view of the Supreme Court of Canada in *Citadel General Assurance Co v Lloyds Bank Canada*, where La Forest J said:

> Relief 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.[32]

The Canadian Supreme Court was there talking of the claim being in unjust enrichment, in which case, as we will see, a fault requirement makes no sense whatever.

Finally, in the recent decision of *Papadimitriou v Crédit Agricole Corp & Investment Bank*,[33] Lord Sumption did exactly what Megarry V-C said could not be done and equated the test for notice in the defence of bona fide purchase with that of knowledge in recipient liability, thus incorporating even imputed notice. He said:

> 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

[29] *Re Montagu's Settlement Trusts* [1987] Ch 264.

[30] ibid 285.

[31] *Agip (Africa) Ltd* (n 2). His Lordship took the same view in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717. The Court of Appeal also adopted a constructive notice approach in *Houghton v Fayers* (2000) 2 ITELR 512 (CA), where Nourse LJ said that the defendant will be personally liable for receipt if he knew or ought to have known that the money was paid in breach of fiduciary duty. It should, however, be noted that constructive notice may well be the correct test in such cases, which all involve rights being held outright before the impugned dissipation.

[32] *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805 [49].

[33] *Papadimitriou v Crédit Agricole Corp & Investment Bank* [2015] UKPC 13 (PC).

> on the footing of knowing receipt, the question what constitutes notice or knowledge is the same.[34]

The point, however, was unnecessary for the decision; moreover, the case was a Privy Council one on appeal from Gibraltar. It is, however, vital to understand that the facts which disqualify a defence of equity's darling and the level of knowledge required for liability for receipt have nothing whatever to do with each other. The first is concerned with the question whether an equitable interest survives a transfer of a legal right which it burdens, which legal right may or may not have been held on trust. Thus, prior to the enactment of the various registration regimes in land law,[35] it was the test used to decide whether titles to land were burdened by prior equitable[36] encumbrances such as restrictive covenants, equitable easements, options to purchase and so on. The latter, by contrast, is concerned with the question whether a court will order a defendant to put his hand in his pocket and pay a sum of money to a trust beneficiary. The confusion in this area is again symptomatic of the fact that no judge has stopped to examine the nature of the liability we call knowing receipt.

Finally, we have the hopeless formulation in the decision of the Court of Appeal in *BCCI v Akindele*,[37] where we are told that the test for recipient liability is whether it would be 'unconscionable for the defendant to retain what he has received'.[38] We have already seen how the House of Lords in *Critierion* held that the Court of Appeal in *Akindele* was wrong to see the case in terms of recipient liability. It is in any case odd for the Court to use the language of 'retention' in cases where the defendant no longer has the right in question. It is even odder, however, to talk about 'unconscionability', relying, as the Court did, on the Privy Council decision in *Royal Brunei Airlines Sdn Bhd v Tan*,[39] where that word was expressly said to be unworkable as a test in the context of assistance liability.[40] Predictably, no one knows what it means. Nor is it possible to know. As Birks pointed out:

> 'Unconscionable' gives no guidance. At one extreme it is unconscionable not to repay what you were not intended to receive. At the other extreme, it is unconscionable to be dishonest. 'Unconscionable', indicating unanalyzed disapprobation, thus embraces every position in the controversy.[41]

[34] ibid [33].
[35] Land Charges Act 1925; Land Registration Act 1925.
[36] Legal encumbrances bound without more.
[37] *Akindele* (n 9).
[38] ibid 455.
[39] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).
[40] ibid 392 (Lord Nicholls): 'It is essential to be clear on what, *in this context*, unconscionable *means*. If unconscionable means no more than dishonesty, then dishonesty is the preferable label. If unconscionable means something different, it must be said that it is not clear what that something different is. Either way, therefore, the term is better avoided in this context' (emphasis in original).
[41] Birks, 'Receipt' (n 4) 226.

Looking to how the word is treated in the courts, unconscionability might be said to exclude constructive notice, and that was certainly the view of Judge Chambers QC in *Papamichael v National Westminster Bank plc*.[42] However, in *Akindele* itself, Nourse LJ said that unconscionability lay somewhere 'between actual and constructive knowledge' in the context of the particular case.[43] As we have seen, this may well be correct in a claim which turns on whether one contracting party can rely on the other's apparent authority. But in the context of recipient liability, the test of 'unconscionability' is best forgotten.[44]

iii. Beneficial Receipt

A lack of understanding of the nature of recipient liability also seems to explain the third requirement, that the defendant's receipt be 'beneficial'. In *Agip (Africa) Ltd v Jackson*,[45] the defendants escaped liability for receipt (but not assistance) because they received the rights as agents and passed them on to third parties according to instructions issued by their principal. Millett J said:

> The essential feature … is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the collecting bank can normally be brought within it. In paying or collecting money for a customer the bank acts only as his agent. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit.[46]

According to Millett J, this was not 'a technical or fanciful requirement. It is essential if receipt-based liability is to be properly confined to those cases where the receipt is relevant to the loss'.[47]

A requirement of beneficial receipt is, however, decidedly odd since, *ex hypothesi*, the recipient will not take the rights beneficially unless he is equity's darling, in which case he will escape liability completely. What Millett J seems to be talking about, therefore, is how the defendant perceives himself to be taking the right.

The requirement can also lead to bizarre results. As *Agip* itself shows, if the defendant is an agent, he is free of recipient liability, no matter that he has actual knowledge that the dissipation is in breach. So, too, if he takes as trustee, another form of non-beneficial receipt. Suppose I hold shares on trust for a claimant. In breach of trust, I transfer those shares to the defendant to hold on trust for my son. The defendant will not, apparently, be liable to a personal receipt claim by the

[42] *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm) [247], [2003] 1 Lloyd's Rep 341.

[43] *Akindele* (n 9) 458.

[44] Unfortunately, despite *Criterion*, some cases still use unconscionability as a test of liability, one example being *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313 (CA).

[45] *Agip Africa Ltd* (n 2) aff'd [1991] Ch 547 (CA).

[46] ibid 292.

[47] ibid.

claimant even if he has actual knowledge of my breach.[48] There is no good reason for the defendant to escape liability here.[49] As seen above, the motivation of Millett J's rule in *Agip* was the protection of banks. However, banks always give value in exchange, so are potentially equity's darlings. It is also important to note that Lord Millett is a supporter of the unjust enrichment analysis of recipient liability,[50] where ministerial receipt is certainly a defence.[51] However, if, as will be argued below, recipient liability is not a species of unjust enrichment, then it may be that the requirement of beneficial receipt is misplaced.

V. Understanding the Liability

What then is it that triggers the liability in knowing receipt? Is it a species of wrongdoing? Is it unjust enrichment? Or is it something else altogether?

A. The Language of Awards

One thing obscuring analysis in this area is the language of the awards made by the courts. Orders to pay money at common law come in various guises: damages, debt, payment of the agreed sum, and money had and received. However, since this is a claim by a beneficiary of a trust, and the common law does not recognise trusts, it is of necessity a claim in equity. Here, money claims are couched in terms of the 'accountability of a trustee'.[52] The language is, however, fictitious. As Ungoed-Thomas J explained in *Selangor United Rubber Estates Ltd v Cradock (No 3)*, a case concerned with liability for assisting a breach of trust, such a defendant is not a trustee, merely 'liable to account *as though he were* a trustee'.[53] Unfortunately, many cases ignore the fiction and speak of the defendant being 'liable to account as a *constructive* trustee'. Indeed, in one of the leading cases of recipient liability, Hoffmann LJ unhelpfully described the claim as one 'to enforce a constructive trust on the basis of knowing receipt'.[54]

The language of accountability 'as if' or (worse) as a 'constructive trustee' poses a number of difficulties of analysis, most especially the fact that it is used to cover

[48] *El Ajou* (n 31) 738 (Millett J); *Savings & Investment Bank Ltd v Fryers* [1990–92] MLR 339, 362.

[49] He will not escape liability in New Zealand (*Gathergood v Blundell & Brown Ltd* [1992] 3 NZLR 643) or in Australia (*Quince v Varga* [2008] QCA 376).

[50] *El Ajou* (n 31) 738–40; *Twinsectra Ltd v Yardley* [2002] 2 AC 164, [105] (HL).

[51] A Burrows, *The Law of Restitution*, 3rd edn (Oxford, OUP, 2011) 558–68.

[52] More recently, there has also been a tendency to use the language of equitable compensation, even, bizarrely, for claims which have as their object the disgorgement of gains: *FHR European Ventures v Mankarious* [2014] UKSC 45 (SC) [1], [6], [7], [22], [33], [41], [42].

[53] *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1583 (emphasis supplied).

[54] *El Ajou* (CA) (n 9) 700.

many sorts of different liabilities. Thus, compensation claims against those who commit the equitable wrong of dishonestly assisting a breach of trust are framed in such terms, as are claims made against those who make gains in breach of fiduciary duty.[55] It is even used in equitable unjust enrichment claims, for example, in cases of undue influence.[56]

At a general level, therefore, it is impossible to work backwards from the language of remedy to deduce what is going on. In this respect, knowing receipt might be a claim in unjust enrichment, a claim in wrongs, or something else altogether. It is like saying there is a money remedy at common law and trying to work out from that fact alone the nature of the cause of action. In our case, the only thing we know is that some sort of analogy is being drawn with the position of a trustee; what we do not know is whether this is at the substantive or remedial stage of the enquiry. In other words, we do not know whether some of the duties of the trustee are being exported to the recipient (substantive), or whether what is at stake is merely a liability to be ordered to do what trustees are sometimes ordered by courts to do, viz, put their hands in their pockets and pay over money to the claimant (remedial).

Of late, courts have eschewed the use of the language of accountability as a constructive trustee in money claims against non-trustees, saying that it has no substantive content and is purely remedial. Thus, in *Paragon Finance Plc v DB Thakerar & Co*, Millett LJ said:

> Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'.[57]

His lordship made similar remarks in *Dubai Aluminium Co Ltd v Salaam*, where he described the 'constructive trust' as 'merely the creation of the court … to meet the wrongdoing alleged: there is no real trust'.[58]

More recently, in *Williams v Central Bank of Nigeria*, Lord Sumption said that cases of assisting a breach of trust and the receipt of rights dissipated in breach involve:

> [P]ersons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by

[55] *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC).
[56] *Allcard v Skinner* (1887) 36 ChD 145 (CA).
[57] *Paragon Finance Plc v DB Thakerar & Co (A Firm)* [1994] 4 All ER 400, 409 (CA).
[58] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 (HL).

> virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not … The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial.[59]

However, despite the courts' recent preference for the language being purely remedial, one question addressed below is whether, in the particular instance of recipient liability, the language of constructive trusts is not a fiction but entirely appropriate, that there really is a trust and duties of trusteeship in such cases. However, we begin with unjust enrichment.

B. A Liability in Unjust Enrichment

Peter Birks originally explained the personal claim for the receipt of rights dissipated in breach of trust as one in unjust enrichment.[60] Liability in unjust enrichment is generally strict, which meant that the fault requirement in a case like *Re Montagu* was immediately out of place, but that was precisely the point of Birks' analysis. Drawing on standard cases of unjust enrichment, in particular, the strict liability of the recipient of a mistaken payment in a case like *Kelly v Solari*,[61] where the claimant insurance company allegedly paid out by mistake to the defendant on a policy which had lapsed, Birks argued that the same rationale applied to the recipient of rights dissipated in breach of trust. In the case of the mistaken payment, strict liability is explained by the law's focus on the lack of the claimant's consent to the transfer, more particularly, its vitiation (due to the mistake). The state of mind of the recipient is neither here nor there, at least when determining the constituent elements of the cause of action.[62] In the case we are discussing, the claimant beneficiary gave no consent whatever to the transfer; he was 'ignorant' of it. According to Birks, that made it an even stronger case for strict liability. Yet the case law requires fault, which, he said, must be a mistake.

Though never abandoning this thesis, Birks later changed his mind in one important respect. This was in his adoption[63] of the view of Lord Nicholls that there are two possible claims in such a scenario: a strict liability unjust enrichment claim and a fault-based claim in wrongs.[64] The claim in wrongs would be relevant

[59] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [9].
[60] P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296.
[61] *Kelly v Solari* (1841) 9 M & W 54.
[62] The defendant's state of mind may, however, be relevant in the context of defences.
[63] Birks, 'Receipt' (n 4) 223.
[64] Nicholls (n 3) 244.

where what was sought was a sum greater than the amount by which the defendant was enriched. For example, the trustee might have lost valuable investment opportunities whilst the trust rights were in the hands of the defendant; the only way through to such losses would be via a claim in wrongs. So, too, with secondary gains.

Let us focus for now, however, on the unjust enrichment explanation of the receipt claim. It suffers from a number of difficulties. The first is that there is no recognised unjust factor. As just seen, Birks based his cause of action on the beneficiary's 'ignorance' of the transfer away of the trust rights, but ignorance has never been acknowledged as an unjust factor, even at common law.[65] At common law, Birks relied on cases such as *Holiday v Sigil*,[66] where the plaintiff dropped a £500 note which was then picked up by the defendant. The claimant brought a successful action for money had and received and the defendant was ordered to pay him £500. However, this is hardly authority for a ground of ignorance at common law. First, no argument was made in the case other than as to the type of evidence admissible to prove the alleged facts. Second, the long-abolished action for money had and received was multi-causal. Though it could be brought for certain cases of unjust enrichment, it was also available for wrongdoing, and even consensual debts. Third, the defendant's enrichment could not be said to be at the claimant's expense. There is no doubt that the defendant was enriched by his taking of the physical note itself, the 'thing', but what he did not receive was the claimant's right with respect to the thing. In this respect, it is different from the cases with which Birks makes a comparison where the claimant's right passes to the defendant. The point has been noted by Chambers. In speaking of the difference between a person to whom a title to a car was transferred as a result of a fraudulently induced mistake and one who received a title from someone who stole the car, he wrote:

> The real difference between us is the source of our enrichment. You received the previous owner's title, the transfer of which was flawed and therefore reversible. In contrast, the true owner of my stolen car retains a title which was never transferred to me. The thief who stole the car thereby obtained a new title (that is, a new right to possession created simply by taking possession). I acquired the thief's title, and my enrichment is not at the owner's expense. While the owner can sue me for wrongful interference with her or his right to possession, this is not a claim for restitution of unjust enrichment. The owner is enforcing a pre-existing right to possession (presumably acquired by consent) and not attempting to reverse the thief's transfer to me.[67]

The position in equity is no different. The precise problem was pointed out by Lionel Smith in 2000.[68] Once again, the defendant is enriched in the example

[65] See further WJ Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 *OJLS* 627.

[66] *Holiday v Sigil* (1826) 2 Car & P 177.

[67] R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, OUP, 2009) 242, 250.

[68] L Smith,' Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *LQR* 412.

posited at the beginning of this chapter; the receipt of the shares is undoubtedly an enrichment. But crucially those rights came not from the beneficiary himself, but from the trustee. As with the case of the thief at common law, it is completely different from *Kelly v Solari*, where the defendant's enrichment undoubtedly came from the claimant. The defendant's enrichment in our case is therefore at the trustee's expense, not that of the beneficiary. According to Smith:

> In the mistaken payment, the defendant is enriched by the receipt of value which the plaintiff used to have but no longer has … But what happens in the case of receipt of trust property? The defendant gets (we may assume) legal title to the trust property; that is something which the beneficiary never had. In some kinds of trust it may be that the trustee itself did not have legal title. But in any case the defendant acquires its interest from the trustee, and so gets something which the beneficiary never had.[69]

Despite this fatal criticism, Birks refused to concede the point,[70] dismissing it as 'technical', in the same way that he dismissed objections I had previously raised to his arguments for ignorance at common law.[71] The reason he thought it technical seems to have been that, for him, there was something called 'equitable title', which was to be contrasted with legal title. In the case of a trust, whilst the trustee had legal title, the beneficiary had equitable title. Thus, in the case posited at the outset of this chapter, there will be a legal title to the shares vested in the trustee, and an equitable title vested in the beneficiary. Moreover, for Birks, these were two versions of the same thing. It was this 'equitable title', which in ways that were never explained, which gave the beneficiary the ability to sue.

However, talk of equitable title behind a trust is mistaken. Although Birks did not fall into the trap of thinking that placing rights on trust involves a splitting of the subject-right into two parts —a legal part, and an equitable part—he misunderstood the nature of a trust, which is not to create an equitable analogue of the right held on trust.[72]

The most obvious illustration of this point is that, as Smith notes in the quotation above, equitable rights can also form the subject matter of a trust. In such a situation, it is impossible to say that the trustee holds the legal right and the beneficiary the equitable right. We would have to instead say that the trustee holds the equitable right and that the beneficiary also holds the equitable right—a clear impossibility.

Moreover, it is not the case that the beneficiary has an equitable version of the trustee's right, for this would mean that English law was in a perpetual state of conflict. Speaking of the rule found in section 25 of the Judicature Act 1873, that

[69] ibid 428–29.
[70] Birks, 'Receipt' (n 4) 233–39.
[71] Swadling (n 65).
[72] It is significant that Birks never thought in terms of rights as enrichment, but only value. It may be this failure on his part which explains his mistake in this area.

in the case of conflicts between law and equity, the rules of equity are to prevail, Maitland said of a trust of a title to land:

> Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here [section 25] of the Judicature Act [1873] would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.[73]

In truth, the rights of the beneficiary of a trust are of a completely different order from those held by the trustee. The rights of the beneficiary are to an account of the exercise of the rights of the trustee and not some attenuated form of the subject-rights themselves. This is made clear by James LJ in *Smith v Anderson*, who defined a trustee as:

> a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*.[74]

The fact that the beneficiary does not have an equitable version of the trustee's right is neatly illustrated by *Schalit v Joseph Nadler*,[75] where a lease of land was vested in trustees on trust for a beneficiary. The beneficiary sought to exercise the remedy of distraint, which was then available to trustees for non-payment of rent by the tenant.[76] The court held that she could not do so:

> The right of the cestui que trust whose trustee has demised property subject to the trust is, not to the rent, but to an account from the trustee of the profits received from the demise … The cestui que trust has no right to demand that the actual bank-notes received by the trustee shall be handed over to him or that a cheque for rent drawn to the trustee shall be indorsed over. What he can require is that the trustee shall account to him, after taking credit for any outgoings or other payments properly chargeable, for the profits received from the trust property.[77]

[73] FW Maitland (eds AH Chaytor and WJ Whittaker) *Equity: A Course of Lectures, revised by J Brunyate* (Cambridge, CUP, 1936) 17. When Maitland speaks of the trustee being the owner of the 'land', he of course means a right with respect to that land, such as a fee simple or a lease.

[74] *Smith v Anderson* (1880) 15 Ch D 247, 275: 'Property' is here used to describe the right held on trust, rather than any physical thing to which it might relate.

[75] *Schalit v Joseph Nadler* [1933] 2 KB 79.

[76] The landlord's right of distraint was abolished with effect from 6 April 2014 by Part 3 of the Tribunals, Courts and Enforcement Act 2007. However, a statutory scheme (Commercial Rent Arrears Recovery) was immediately enacted, though only for commercial premises.

[77] *Schalit* (n 75) 83 (Acton and Goddard JJ). Note that this has nothing to do with the distinction between law and equity, but with the fact that the right to rent is vested in the trustee, not the beneficiary, with the result that, viz a viz the beneficiary, no money is due. Thus, even if there was a 'fusion' of law and equity, the result in this case would have been no different. Another decision in the same vein is *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191, where beneficiaries of trust of shares sought to

Viscount Sumner spoke in similar terms in *Baker (Inspector of Taxes) v Archer Shee*:

> The trustee has the full … property in the whole of the trust fund and the beneficiary has not. … It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of [the court] to enforce the trust and to compel the trustee to discharge it.[78]

We see the same thinking in the decision of the Court of Appeal in *MCC Proceeds v Lehman Brothers*,[79] which involved bearer shares held on trust for the claimant. As shareholders, the trustees had a right to the exclusive possession forever of the share certificates. In breach of trust, they pledged the shares to the defendant as security for a loan by handing over the share certificates to the defendant. The claimant beneficiary brought an action against the defendant for conversion of the share certificates, a tort committed by those who interfere with another's right to the exclusive possession of tangible moveables. The beneficiary's claim was rejected by the Court of Appeal. It was the trustee who had a right to exclusive possession of the share certificates, not the claimant beneficiary, who could not therefore maintain conversion.[80] It is for the same reason that a beneficiary cannot sue a thief of the subject matter of rights held on trust; that is a job for the trustee, though in certain circumstances the trustee must lend his name to the beneficiary should he refuse to sue.[81]

Of course, this objection only holds true for rights previously held on trust. To be fair to Birks, many of the cases he was concerned with, cases such as *BCCI v Akindele*,[82] involved rights held outright, so that the enrichment of the defendant was undoubtedly at the claimant's expense.

Birks further spoke of having to see the package of protection as a whole. In his view, the beneficiary's right to bring an unjust enrichment claim against a recipient from the trustee was connected to the fact that claims in respect of traceable substitutes were only explicable as responding to unjust enrichment.[83] As to this latter proposition, he thought that wrongdoing as an explanation was ruled out following the Court of Appeal's decision in *Jones (FC) & Sons (a firm)*

bring an unfair prejudice action under s 459 of the Companies Act 1985. Such action is only available to the members of a company. The claim was dismissed on the ground, inter alia, that the claimants were not members of the company.

[78] *Baker (Inspector of Taxes) v Archer Shee* [1927] AC 844, 850 (PC).

[79] *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).

[80] The reason they did not bring a claim against the defendant in respect of their own right was that it was liable to be defeated by a plea of bona fide purchase for value without notice. No such defence, however, would have applied on the facts to the right to exclusive possession at law. The defendants, however, had not interfered with that particular right; indeed, they were transferees of it.

[81] These situations are limited. They are described in *Vandepitte v Preferred Accident Insurance Corpn of New York* [1933] AC 20 (PC). For full discussion, see L Tucker, N Le Poidevin and J Brightwell (eds), *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2015) paras 43–01–43-016.

[82] *Akindele* (n 9).

[83] Birks, 'Receipt' (n 4) 216–22.

Trustee v Jones,[84] and that an appeal to the miscellany beyond consent, wrongs and unjust enrichment could not work. That left only unjust enrichment as a plausible explanation.[85] The connection with the personal claim under consideration here was this. If, according to Birks, there had been a substitution by the recipient in our example of the shares, and that substitute was still in the recipient's hands, the claimant could bring a tracing claim, which was, in his view, a proprietary unjust enrichment claim. It would, argued Birks, be inconsistent in such circumstances to deny a personal unjust enrichment claim on our facts.[86]

This, however, is an extremely insecure foundation on which to rest an argument for unjust enrichment as an explanation of recipient liability in cases of breach of trust. The reason is that no one, Birks included, has ever come up with a satisfactory explanation why we allow claims to substitutes. Over a century ago, Maitland said it was excessively generous to trust beneficiaries,[87] and it still is.

Despite these difficulties, Lord Nicholls also argues for an unjust enrichment claim on the facts given above,[88] as does Burrows,[89] and the editors of *Goff and Jones*.[90] However, like Birks, none give a convincing reason why the defendant's enrichment in the case at hand can be seen as at the beneficiary's expense.

C. Knowing Recipient is a Genuine Trustee Who Owes a Duty to Account to His Beneficiary

We saw above that the language of awards that the defendant is liable to account as a constructive trustee is nowadays dismissed by most judges and commentators as pure fiction, designed only to bring the defendant within equity's jurisdiction. Although the defendant is liable to account 'as if he were' or 'as a constructive' trustee, it does not mean he really is a trustee; it is trusteeship by a metaphor. There is not the substance of a trust; the language is purely remedial, much like that of quasi-contract in unjust enrichment claims before the abolition of the forms of action in the mid-nineteenth century.

Mitchell and Watterson, however, argue that in this particular instance the knowing recipient is a genuine trustee of the rights he receives. They say:

> 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. In short, when the courts say that a knowing recipient is 'personally

[84] *Jones (FC) & Sons (a firm) Trustee v Jones* [1997] Ch 159 (CA).
[85] *cf* the appeal to the reasoning of Sherlock Holmes by Lord Millett in *Twinsectra* (n 50) [100].
[86] Birks, 'Receipt' (n 4) 238.
[87] Maitland (n 73) 220.
[88] Nicholls (n 3) 236–39.
[89] Burrows (n 51) 416–31. The enrichment objection is discussed briefly at 428–29.
[90] C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 9th edn (London, Sweet & Maxwell, 2016) paras 8–119 to 8–137.

> liable to account as a constructive trustee', they mean exactly what they say: because of the circumstances in which knowing recipients receive title to the misapplied property, Equity fixes them with custodial duties which are the same as some of the duties which are voluntarily assumed by express trustees.[91]

As a trustee, they argue, the knowing recipient is duty bound to account to his 'beneficiary' for his stewardship of the rights he holds for him on trust. This stewardship duty entails a duty to retransfer the right received to the trustee. If the recipient transfers away the right other than back to the trustee from whom it was received, or to the beneficiary if he or she is of full age, sound mind and absolutely entitled, the beneficiary can falsify the account and ask the court to enforce the trustee's primary duty to reinstate the trust fund. This would be done by an order that the defendant pay over the value of the right and it is this claim to pay money which Mitchell and Watterson argue is the one we call 'knowing receipt'.

The authors stress that this is not a claim for breach of duty; nor is it a claim for unjust enrichment, though they would also allow a strict liability claim for the latter. The difference between the two is that the unjust enrichment claim would be subject to a defence of change of position and would only yield the defendant's gain at the point of receipt. So, in the shares example, unjust enrichment would give the claimant the value of the shares at the date of receipt, whilst the account claim would give the value at the date of claim, which would be of importance where the shares had risen in value in the interim.

Mitchell and Watterson claim two advantages for their thesis. The first is that it is consistent with the language of the courts. The second is that it explains the requirement of knowledge, which in the authors' view is what turns the recipient into a trustee of the rights he receives. There are, however, at least five problems with their thesis.

The first is the paucity of authority for their theory.[92] Not a single decision cited by Mitchell and Watterson is directly on point which, given the number of recipient liability cases, is surprising. They also place much reliance on the strange Australian case of *Evans v European Bank Ltd*[93] where a company, Benford Ltd, which was used as a vehicle to channel fraudulently obtained funds, was held to be a constructive trustee of such funds for the victims of the fraud and thereby fixed with a duty to track down those victims and repay them from the funds it held, and in the meantime invest the funds for them. The case is, however, hardly a strong precedent. First, it relies on the Australian High Court decision in *Black v S Freedman & Co*,[94] which held that a thief holds his title to things he steals on trust

[91] Above n 6, 129–30.

[92] It was, however, adopted subsequently by Sir Terence Etherton, giving the advice of the Privy Council in *Arthur v A-G of the Turks & Caicos Islands* [2012] UKPC 30 (PC). However, the point was obiter. Moreover, the decision did not involve rights previously held on trust but outright. Finally, it also seems to have been decided in ignorance of *Criterion*.

[93] *Evans v European Bank Ltd* [2004] NSWCA 82 (NSWCA).

[94] *Black v S Freedman & Co* (1910) 12 CLR 105 (HCA).

for his victim. This is controversial in the extreme, not least because the victim's title to the stolen goods will be superior to that of his trustee/thief. For that reason alone, the case is unlikely to be followed in this jurisdiction. Second, a receiver had been appointed in respect of Benford, and it was the receiver who was making the argument—against Benford's own interests—that such duties were owed. This meant that the point that Benford was a trustee was hardly contested.

Other cases relied upon involve defendants inducing breaches of trust, which are clearly distinguishable from cases of receipt. Mitchell and Watterson also claim the support of Megarry VC in *re Montagu*, Millett J in *Agip (Africa) Ltd v Jackson*, and Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* for the proposition that, unless the recipient is equity's darling, he must restore the rights to their rightful owner if he still has them. However, not only are such statements obiter dicta, they are also ambiguous, for they could equally well be saying that the defendant is liable to be ordered by a court of competent jurisdiction to restore the rights, which is something less than there being an immediate duty to do so absent any court order.[95]

The second problem is that no explanation whatever is provided why a defendant who receives with 'knowledge' is turned by operation of law into a trustee. We might, with Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[96] say it is a necessary condition, for it would be unreasonable for a person with no knowledge that he had received rights held on trust for another or for a purpose to be fixed with trusteeship duties. However, it does not thereby follow that it is sufficient. The vast majority of trusts arise consensually, with right-holders being bound by the obligations of trusteeship precisely because they have been voluntarily assumed. That will not, of course, be the case here.[97] At the very least, it is incumbent on Mitchell and Watterson to explain why trusteeship duties are being imposed on such a person. At present, their argument does nothing more than imply an 'ought' from a 'can'.

Third, it is difficult to see how Mitchell and Watterson's thesis can be squared with the subsequent decision of the United Kingdom Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.[98] Even if there was a duty to account before payment away, does not payment away mean that the transaction is now 'complete', so that the only claim available is one for equitable compensation? It might be argued that the transaction would only be complete if the rights were returned to the original trustee/beneficiary, but in both the earlier case of *Target Holdings*

[95] Indeed, all Lord Browne-Wilkinson seems concerned with is the continuing enforceability of the right against a recipient who is not equity's darling.

[96] *Westdeutsche Landesbank Girozentrale* (n 26) 709 (HL).

[97] As Lord Sumption said in *Williams v Central Bank of Nigeria*: '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': [2014] UKSC 10 [31] (SC).

[98] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 (SC).

Ltd v Redferns,[99] and in *AIB* itself, the fact that the moneys were paid away to unauthorised persons did not stop the transactions being so adjudged. These, of course, were cases of express trusts, so the proposition should apply a fortiori to a trust which is the creation of the law. Thus, in a case like *re Montagu* where all that remained following the death of the life tenant was an absolutely entitled beneficiary, the Tenth Duke of Manchester, the payment away by the father of the rights he received in breach of trust meant that that transaction was also complete, with the result that the only possible claim against him would have been one for equitable compensation; no claim for falsification of an account would have been available.

Fourth, is it really true to say that there is a duty on the recipient to retransfer the right to the trustee at the point at which knowledge supervenes? A more viable explanation would be that there is at best only a liability to be so ordered, with no duty before judgment. What, for example, if difficult issues of fact were involved as in *BCCI v Akindele*,[100] where a trial was necessary to decide whether the defendant had notice of the dissipation in breach of duty? In such a case, can it really be said that there is a duty to repay before any adjudication on the state of the recipient's state of mind? Moreover, to say, as do Mitchell and Watterson, that there is a duty to restore because restoration will absolve the defendant from any claim in court[101] is nonsensical. Obviously, if a recipient voluntarily restores rights received in breach of trust, then the claimant beneficiary will have nothing left to complain about. But it does not thereby follow that there must have been a duty so to do. To take an example from the law of unjust enrichment, if title to a painting is transferred to me by mistake and I immediately and voluntarily reconvey that title, no claim in unjust enrichment will lie against me. But we cannot read into that fact the proposition that I was under some kind of duty to make specific restitution.

Fifth, and finally, even in the case of express trustees, is it correct to say that the beneficiary has a 'right' to an account without having to go anywhere near a court? Take the case of a beneficiary who alleges that the trustee negligently invested the trust fund and now seeks to surcharge the account with the shortfall. Is it really possible to say that the defendant trustee is immediately bound to pay what a court will only later find due after a trial? Are we seriously saying that all trustees have crystal balls? Whilst it may be true that there is a primary duty on a trustee to produce the trust accounts to certain beneficiaries,[102] falsification and surcharge do not involve the performance of primary duties; they are nothing

[99] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).
[100] *Akindele* (n 9).
[101] Mitchell and Watterson (n 6).
[102] Mitchell and Watterson say that a trustee is under a primary duty to produce accounts, though they present no proof. They simply point to fact that the trustee will be liable for costs of proceedings if he does not produce them and will have to pay costs of accounting too, as opposed to being able to charge it to trust fund: ibid 120, fn 22.

more than court ordered remedies for breach of trust. Indeed, Mitchell and Watterson give the game away when they say that in an action for a common account, the trustee has to justify his records.[103] But this can only mean justify *to the court*. This is clear from their statement that 'evidential presumptions are made against him if he fails to do so'.[104] Such language only makes sense if we are talking about court proceedings, not duties arising before trial. Indeed, Mitchell and Watterson go on to say that 'the accounting process is the conceptual mechanism through which beneficiaries can bring … different types of compensation claim against trustees',[105] which is hardly consistent with any pre-existing duty.

D. Knowing Recipient is a Trustee and Commits a Breach of Trust When He Dissipates the Rights; The Money Award Made Against Him is for Breach of Trust

A view similar to Mitchell and Watterson has been put forward separately by both Simon Gardner[106] and Robert Chambers,[107] save that they are not talking about the enforcement of any 'primary custodial duties' which, for the reasons explained above, is problematic, but instead a secondary duty to pay damages for breach of trust in transferring the rights away other than to the trustee/truly entitled beneficiary. According to Chambers:

> 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 is fundamentally different from liability for knowingly assisting a breach of trust or fiduciary duty.[108]

However, the question once again is why a knowing recipient is a trustee of the rights he receives. Gardner says that the defendant cannot be liable for failing to safeguard the rights he receives unless he knows that the rights he holds are trust rights. This, however, is no justification at all, for, like Mitchell and Watterson, it does no more than imply an 'ought' from a 'can'. Chambers puts forward a more sophisticated argument based on an analogy with the duties of a finder of goods,

[103] ibid 121.
[104] ibid.
[105] ibid 122.
[106] Gardner (n 7) 22.
[107] Chambers, 'The End of Knowing Receipt' (n 8).
[108] ibid 4.

who, he says, is just as much a bailee as one entrusted with their care.[109] But though it is true that a finder has been held to be a bailee and subject to the same duties to care for the goods as a gratuitous bailee,[110] this is an insecure foundation on which to build, for the notion of the finder as bailee was invented purely to allow losers of goods to bring detinue against finders. It is nothing more than a distortion of the forms of action, similar to the idea that claims in unjust enrichment and restitution for wrongs rested on an 'implied contract'; it should not be allowed to change the substance of the matter.[111]

E. A Liability in Wrongs

The best hope of explaining the liability we call knowing receipt is as a species of wrongdoing. However, for the reasons given immediately above the wrong cannot be said to be breach of trust, as the recipient is not a trustee. What other alternatives exist?

We saw above that Lord Nicholls advocated seeing knowing receipt, like assistance of a breach of trust, as a species of dishonest participation in a breach of trust.[112] It is, however, difficult to see how this can work, for the defendant's receipt need not be coterminous with the breach of trust; the rights may have been received many years later and need not have come from the trustee himself. Moreover, the receipt by the defendant may have been purely passive.

Lionel Smith has suggested that knowing receipt is equity's analogue to the common law tort of conversion.[113] His main argument is that both conversion and knowing receipt involve a wrongful interference with proprietary rights.[114] Moreover, such thinking, according to Smith, is consistent with the scenario whereby the recipient only later becomes aware that his receipt was of rights dissipated in breach of trust 'since it presupposes a continuing proprietary right in the plaintiff with which the defendant interferes'.[115] As to the fact that conversion is strict, whilst knowing receipt is fault based, this is explained by the fact the former has to be strict because the common law has no equivalent of the Roman *rei vindicatio* for goods. The only way the common law can enforce rights in respect of goods is through the law of wrongs, and their protection would be too weak with only a fault-based wrong. Equity, by contrast, has the specific claim, which means that it can be 'more sensitive about what counts as wrongful receipt'.[116]

[109] ibid 8–11.
[110] N Palmer, *Bailment*, 3rd edn (London, Sweet & Maxwell, 2009) ch 26.
[111] As witness the inapplicability of the rule that a bailee is estopped from denying his bailor's title in the context of so-called bailment by finding: *Biddle v Bond* (1865) 6 B & S 225.
[112] Nicholls (n 3) 243–44.
[113] L Smith, 'W(h)ither Knowing Receipt?' (1998) 114 *LQR* 394.
[114] ibid 395.
[115] ibid 396.
[116] ibid 397.

Is Smith's analogy with common law conversion convincing? A first difference is that the holder of title to goods needs only one right, whereas the trust beneficiary will need two. The right of a title-holder to goods to exclusive possession binds generally. However, it is not as simple as regards the position of a beneficiary of a trust. Such a person clearly has rights against his trustee, but these are to the due administration of the trust and it is not that right which a claim for knowing receipt can possibly be enforcing. We would therefore have to say that he has another right, viz, that third parties do not knowingly receive rights transferred to them in breach of trust. This is certainly possible, for it is already the case that a trust beneficiary has a right that others do not dishonestly assist the trustee to commit breaches of trust.[117] Moreover, there is likewise a right against third parties that they do not knowingly induce the trustee to commit a breach of trust.[118] And we have already seen how those who receive rights in an authorised fashion, but who then knowingly deal with them inconsistently with the terms of the trust, will be liable to make good losses to the beneficiaries.[119]

However, even if there were multiple rights, a further problem is that the defendant in a knowing receipt claim, as opposed to one who induces or assists breaches of trust, need not have done anything at all. Whilst conversion cannot be committed without some action on the part of the defendant, this is not the case with knowing receipt where, as we have just noted, the receipt can be purely passive. A wrong generally requires some action on the part of the defendant, as witness the common law's general reluctance to impose liability for mere omissions to act.

This raises the vital question whether receipt really is, as the Court of Appeal said in *Novoship (UK) Ltd v Mikhaylyuk*, 'the gist of the action'.[120] Such a proposition is already doubtful when it is remembered that, in the case of innocent receipt, liability may arise later, if and when knowledge supervenes. Might the essence of the liability instead be the subsequent dissipation of the rights with knowledge? Given the availability of a strict liability claim for the specific return of the rights, a claimant will only bring a knowing receipt claim where the rights have already been dissipated, a fact which renders the case law ambiguous, for whether it is receipt or dissipation which is the 'gist' will be hidden from view. However, if it was the dissipation, things become much simpler, for knowing 'receipt' would then be simply a species of inconsistent dealing.

[117] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Twinsectra* (n 50); *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 (PC); *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 (CA).

[118] *Fyler v Fyler* (1841) 3 Beav 550; *Eaves v Hickson* (1861) 30 Beav 136; *re Midgely* [1893] 3 Ch 282.

[119] *Lee v Sankey* (n 18).

[120] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908 [89]; see also *Agip (Africa) Ltd* (n 2) 291, where Millett J said that the knowing recipient was 'liable to account for the property … from the time he received the property'.

It should be stressed that we are not here saying that the recipient is subject to the same duties as the trustee. The trustee may, for example, have been under a duty to invest or to sell. The recipient will be under no similar duty. His duty is simply not to dissipate the rights in a way which is inconsistent with the terms of the trust. In this respect, the wrong is analogous to the common law tort of inducing breach of contract.[121] Strangers to a contract are never duty bound to perform the obligations of the contracting parties. They are, however, under a duty not to knowingly induce a contract party to breach his contract, such duty being owed to the counterparty to the contract. Likewise, one who knowingly receives rights which have been dissipated in breach of trust, or who later discovers they were so dissipated whilst the rights are still vested in them, comes under a duty not to further dissipate the rights in a way which is inconsistent with the original trusts on which they were held.

Such assimilation of knowing receipt within inconsistent dealing would have the advantage of catching the case where rights are received not because of a breach of trust, but equally not because of some authorised disposition by the trustees. Suppose a sole trustee dies intestate, as in *Paul v Constance*,[122] and the rights held on trust pass under the rules of intestacy to his widow. There is no doubt that the widow is liable to be ordered to give up the rights themselves if she still has them. One would have thought that she would be personally liable should she dissipate them with knowledge that they were held on trust, though this comes within neither knowing receipt—because the right was not received by virtue of a breach of trust—nor 'inconsistent dealing'—because the receipt was unauthorised.

Analysing knowing receipt as a species of inconsistent dealing would have a number of consequences. First, it would show that the difficult requirement of 'beneficial receipt' was misplaced. As we have seen, such a requirement only makes sense if knowing receipt is analysed as a species of unjust enrichment. Seeing it instead as a manifestation of the equitable wrong of inconsistent dealing means it has to be removed. Second, it would mean time running not from point of receipt but from the later dissipation. Third, it would mean that there was no claim if the rights were lost without fault on the part of the recipient.

We have already noted the uncertainty surrounding the correct level of fault necessary to trigger liability in knowing receipt. Does analysis as part of a wider wrong of inconsistent dealing help to resolve this issue? Although the case law is sparse, the rule in inconsistent dealing cases is that there must be actual knowledge that the dealing is inconsistent or a deliberate closing of the eyes to that fact. Thus, in *Williams-Ashman v Price & Williams*,[123] Bennett J refused to hold a solicitor liable for inconsistent dealing whose only sin was that he acted honestly but 'incautiously'.[124] The upshot, therefore, is that Megarry V-C was ultimately

[121] *Lumley v Gye* (1853) 2 E & B 216.
[122] *Paul v Constance* [1977] 1 WLR 527 (CA).
[123] *Williams-Ashman v Price & Williams* [1942] Ch 219.
[124] ibid 228.

right in *re Montagu's Settlement Trust* to insist on a high degree of fault, and that those cases which hold that constructive or even imputed notice is enough are wrongly decided.

VI. Conclusion

This chapter has examined the nature of the nature of the equitable liability we call 'knowing receipt'. It has rejected an explanation as one in unjust enrichment for a number of reasons, prime amongst them being that the defendant's enrichment—the receipt of the right dissipated in breach of trust—does not come from the beneficiary. The enrichment, in other words, is not at the claimant's expense. This is not, of course, an issue where rights which are held beneficially by a corporation are misapplied by a fiduciary, but as the House of Lords pointed out in *Criterion Properties plc v Stratford UK Properties LLC*,[125] such cases cannot be analysed in terms of knowing receipt. The notion that the knowing recipient is a genuine trustee of the rights he receives was also rejected for a number of reasons, the chief being that there is no satisfactory reason why he should be a trustee. The recipient is, of course, bound by the rights of the beneficiaries to obtain an order from the court for the return of such rights, but he does not have the custodial duties of a trustee and so is not liable to account to the 'beneficiary'; nor is he liable to pay money for breach of trust. The only viable explanation is a liability in wrongs, though not one of participating in a breach of trust, as the receipt might come after the breach and may well involve no action on the defendant's part. Instead, the liability should be seen as a species of a larger wrong called inconsistent dealing. Such wrong is committed when the recipient deals with the right in a way which he knows is inconsistent with the terms of the trust on which they were originally held, or to which fact he deliberately closes his eyes. It should be stressed that we are not saying that the recipient is a trustee of the rights received, merely that he will commit a wrong should he dissipate them in a way which is inconsistent with the trusts on which they were originally held. What this means, therefore, is that 'knowing receipt' is a misnomer. Receipt is not the gist of the action, but the later, inconsistent, dealing.

[125] *Criterion* (n 10).