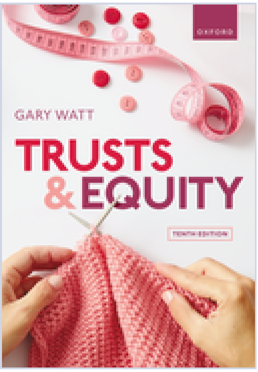

Trusts & Equity (10th edn)

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15. The equitable personal liability of strangers to the trust

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Abstract

Even if a trust beneficiary successfully traces misappropriated trust property, he will only be entitled to a proprietary remedy against a stranger, who retains possession or control of the trust property. The beneficiary's proprietary claim will fail if the stranger received the trust property, but has not retained it. However, the beneficiary (or the trustee) may be able to bring a claim against the stranger personally if the receipt was wrongful. This chapter analyses the circumstances in which a stranger may be personally liable in equity for analogous wrongs. After providing an overview of who strangers are, it examines a number of policy considerations and practical measures designed to give strangers some degree of protection. The chapter also looks at trusteeship *de son tort*, personal liability in equity for receipt, and equitable liability for assistance in a breach of trust.

Keywords: strangers, personal liability, trusteeship, equity, equitable liability, breach of trust, trust property, beneficiary, trustee

Context

The subject matter of this chapter will make sobering reading for any student reader who wants to become a solicitor in relation to the work of trusts, companies, or other matters involving fiduciary duties. Agents who work for trusts are at risk of personal liability in equity if they commit certain wrongs, amongst them knowing receipt of misapplied trust property and dishonest assistance in a breach of trust. In this chapter we will consider the ingredients of each species of equitable personal liability. If all the ingredients for liability are present it will be a recipe for disaster for the unwary professional, especially where liability involves a finding of 'dishonesty'. Such a finding will be fatal to the professional practice of a solicitor and this may be why the decided cases seem to demonstrate, as we will see, a certain judicial reluctance to make such a finding.

Watch the author give a four-minute lecture on the subject of recipient liability *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-recipient-liability?options=showName>*.

15.1 Introduction

The reader will recall from the Chapter 14 that, even where a trust beneficiary has successfully traced misappropriated trust property, the equitable tracing process will only lead to a proprietary remedy against a stranger who still has the trust property in his possession or under his control. If a stranger received trust property, but has not retained it, the beneficiary's proprietary claim will fail. In such a case, the beneficiary (or the trustee)[1] may, however, be able to bring a claim against the stranger personally if the receipt was wrongful. The receipt will be wrongful if the stranger received the trust property for his own benefit knowing that he was doing so against the interests of the true beneficial p. 516 owner (called liability for 'knowing receipt'). The receipt will also be wrongful if, having at first received the property without knowledge that it had been transferred in breach of trust, he later misused it for his own benefit knowing that he was doing so against the interests of the true beneficial owner (called liability for 'inconsistent dealing'). Finally, a stranger may be personally liable as an accessory to a breach of trust even though he never received the trust property at all if he dishonestly assisted in or procured a breach of trust (called 'liability for dishonest assistance'). In this chapter, we are principally interested in the circumstances in which a stranger may be personally liable in equity for 'knowing receipt' of misapplied trust property or 'dishonest assistance' in a breach of trust. The UK Supreme Court has confirmed that in 'either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not', and in the same place their Lordships referred to these two types of personal liability in equity under the informal umbrella term 'ancillary liability'.[2] The 'ancillary' label might be said to obscure the fact that strangers' liability is actually a primary (not secondary) form of liability that is based on the stranger's own wrongdoing (an argument that Professor Worthington has raised against the 'accessory' label).[3]

15.2 Strangers: who are they?

For present purposes, a stranger to a trust is anyone who is not a trustee or beneficiary of the trust, and a stranger to a fiduciary relationship is anyone who is not the principal or fiduciary in that relationship. On one view, a properly appointed agent to a trust or fiduciary relationship is not a stranger to it, but we will include agents within our definition of stranger. However, the fact that agents may be given legitimate control of trust assets means that they are a somewhat special case, as we will see when we consider liability for inconsistent dealing with trust property.

Strangers who make the most attractive defendants are very often solicitors, accountants, banks, and building societies, because they have 'deep pockets' and tend to be well insured, and because it is hard for expert commercial agents of this sort to convince a court that they were ignorant of the wrongful nature of their activities.

Although we are mainly concerned with the liability of strangers, it is implicit from the judgment of the Court of Appeal in *Re Montagu's Settlement Trusts*,[4] a case in which the court was willing to consider an action brought by one beneficiary against the estate of another beneficiary, that personal liability of the sort considered in this chapter might in an appropriate case be extended to beneficiaries. Normally this is not necessary, of course, because of the possibility of impounding the beneficiaries' interest,[5] but, in *Re Montagu's*, the defendant beneficiary, being a deceased life tenant, no longer had any interest under the trust that could be impounded.

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15.3 Considerations of policy and practice

In the light of the fact that commercial agents make attractive targets for claimant beneficiaries, a number of policy considerations and practical measures have been introduced to give strangers some degree of protection.

15.3.1 Policy considerations

Judges bear in mind a number of important policy considerations when formulating the laws to govern the liability of strangers. First, they presume against any rule that will cause an honest, competent, commercial party to be forever looking over his shoulder and watching his back when the efficiency of commerce demands that he should keep his eyes on the task in hand. Second, and related to the first, courts are mindful of the need to ensure a constant flow of persons willing to act as agents to trusts and, because such persons automatically assume contractual and tortious obligations to the trustees, the courts are concerned that they should only become personally liable to the beneficiaries in very limited circumstances.[6] In his seminal judgment in *Barnes v. Addy*,[7] Lord Selborne LC stated that strangers are not to be made liable '*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*',[8] but he held that they may be liable for wrongful receipt of trust property or wrongful assistance in a breach of trust. Third, mindful of the potentially disastrous implications for careers and livelihoods, judges are especially concerned to exercise caution before finding that a person, especially a professional person, has acted dishonestly. Fourth, a basic principle of economic efficiency and justice, that loss should be borne first by those who assume the risk of such loss and are best able to avoid it,[9] inclines the courts to hold that losses flowing from a trustee's breach of trust should be borne first by the beneficiaries, rather than by an innocent third party who happened to have dealings with a rogue trustee.[10] The argument that a fair allocation of risk raises a presumption that the beneficiaries should bear the loss is strongest where beneficiaries have the power to remove their trustees[11] (especially where they are able to do so without bringing the trust to an end).[12]

15.3.2 Practical considerations

Any commercial agent in a real dilemma as to the propriety of a proposed course of action can apply to the court for a 'binding declaration' that the proposed course of action is proper,[13] or for directions as to the
p. 518 best way to proceed. If the declaration ↵ is granted and the agent acts according to its terms, the agent will be immune to any subsequent action brought by a beneficiary, even if the court's guidance is later overturned on appeal or disapproved by a higher court:

> [I]t seems almost inconceivable that a bank which takes the initiative in seeking the court's guidance should subsequently be held to have acted dishonestly so as to incur accessory liability.[14]

Courts are reluctant to exercise their jurisdiction to sanction transactions in advance when there is a risk that to do so might prejudice interested parties. So the judge in *United Mizrahi Bank Ltd v. Doherty*,[15] although accepting that it could not be right for solicitors to be looking over their shoulders when acting for a defendant in a suit for breach of trust, stopped short of allowing the solicitors to take their fees out of money that was the subject matter of the claim. The judge explained that, if the solicitors took their fees prior to the conclusion of the matter, they would assume the risk, albeit a small one, that they might be held personally liable, in the event of their client losing the case, for wrongful receipt of trust money.

Even if a stranger omits to take such precautions and finds himself in court, he can take advantage of another rule of practice: the privilege against self-incrimination. This rule permits a defendant to a civil action to refuse to give evidence that might be used against him in subsequent criminal proceedings. Obviously, a defendant who is accused of dishonest assistance in or procurement of a breach of trust runs the very real risk of a criminal action being brought against him.[16] The privilege against self-incrimination has been described as an '*archaic and unjustifiable survival from the past*',[17] but, as a result of the enactment of the Human Rights Act 1998, it may be likely to remain.[18]

15.4 The nature of strangers' equitable liability

If the defendants are still in possession of misapplied trust property, the beneficiaries will seek to assert a proprietary claim in the manner discussed in Chapter 14. However, to recover assets or monies '*which the defendants have paid away the plaintiffs must subject them to a personal liability to account*'.[19] A person who knowingly receives a beneficiary's or principal's property transferred in breach of trust or fiduciary duty will be personally liable to account to the beneficiary or principal for the amount received plus any personal profits made by the recipient while in possession of the property. A person who dishonestly assists in a breach of trust will be liable for any loss the assistance can be shown to have caused.

p. 519 15.4.1 Personal liability in equity

When trustees appoint an agent, the agent generally assumes personal obligations to the trustees under the common law of agency, contract, and tort. In the ordinary course of events, the agent will not assume direct obligations to the beneficiaries under the trust[20] and the beneficiaries are, generally speaking, unable to bring a common law action against the agent.[21] The agent will only be personally liable in equity to the beneficiaries directly if their conduct is out of the ordinary as being a wrongful receipt of trust property or wrongful assistance in a breach of trust.

A personal action against a stranger is most useful where a proprietary claim to recover trust assets or their value in substitute assets will be inadequate. This will be the case if the defendant has no relevant ‘target’ assets in his possession, so that a proprietary claim cannot be brought at all, or if the defendant does have assets in his possession but they have decreased in value or extent while in his hands. As Sir Robert Megarry VC observed:

> Tracing is primarily a means of determining the right of property, whereas the imposition of a constructive trust [by reason of knowing receipt of trust property] creates personal obligations that go beyond mere property rights.[22]

A stranger will also be liable for personal gains made from assisting in or procuring a breach of trust even though he never had possession of trust property. On this basis, a solicitor would have to account for any fees paid to him by a company director for the drawing up of false documents designed to defraud the company. The director would be committing a breach of trust and the solicitor would be assisting in it.

From the claimant’s point of view, the downside of personal liability against a stranger is that the claimant will have to ‘join the queue’ of other personal claims against the defendant’s estate in the event of the defendant’s death or insolvency.

15.4.2 Is it liability ‘as a constructive trustee’?

The fact that strangers are said to be personally liable in equity ‘*to account as constructive trustees*’[23] does not mean that strangers are liable because they actually are trustees; rather, they are liable *as if* they were trustees. The description ‘*is nothing more than a formula for equitable relief. The Court of Equity says that the defendant shall be liable in equity, as though he were a trustee.*’[24] That is the standard view of the courts, but it has been subject to academic criticism. A compelling alternative is advanced by Professor
p. 520 ↵ Worthington, who argues that crucial distinctions should be drawn between the different species of equitable liability:

> In the context of dishonest assistance and knowing receipt, dishonest assisters are seen to be fiduciaries, and knowing recipients to be trustees on receipt of the property and fiduciaries on acquisition knowledge.[25]

Professor Worthington also distinguishes equitable liability from accessory liability of the sort that exists in the common law of contract and tort. The common law, she observes,

> focuses on a mental element and a conduct element, considering the details of the relationship between the accessory and the primary wrongdoer to establish whether the accessory, although not a principal wrongdoer, should nevertheless be made liable.

Equity, in contrast, focuses on 'the relationship between the accessory and the managed property'.[26]

15.5 Trusteeship *de son tort*

[I]f one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with the trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong—i.e. a trustee de son tort, or, as it is also termed, a constructive trustee.[27]

A number of features distinguish the constructive trustee *de son tort* from the stranger who is liable for knowing receipt or dishonest assistance. The former takes it upon himself to act for the benefit of the beneficiaries of an existing trust, he does not purport to act in his own right, and, if he properly discharges the trust that he has assumed, he will not be liable: a trustee *de son tort 'is just as much accountable and on substantially the same principles as the express trustee*'.[28] The latter, on the other hand, does not purport to act for the beneficiaries; he acts on his own account, and the nature of his liability 'as a constructive trustee' is essentially independent of the express trust: it simply arises at the moment of the knowing receipt or dishonest assistance.[29]

The fact that a trustee *de son tort* does not act in his own right, but in the right of another, means that a trustee *de son tort* cannot rely upon the passage of time to bar a claim against him. In this respect, a trustee *de son tort* resembles an express trustee, who is never able to plead passage of time to prevent a trust beneficiary from recovering property from him.[30] A trustee *de son tort* has even been referred to as an actual[31] or de facto trustee.[32]

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15.6 Personal liability in equity for receipt of trust property

Under this heading, we are concerned with what Lord Nicholls referred to as '*the liability of a person as a* recipient *of trust property or its traceable proceeds*'.[33] His Lordship asserts that '[r]*ecipient liability is restitution-based*', but neither the Privy Council nor the UK Supreme Court has so far found an opportunity fully to explain what this means. The law concerning the personal liability of a recipient of trust property is in a decidedly unhealthy state and much in need of treatment by the highest court at the earliest opportunity; in fact, the problems are so entrenched that they may require a legislative solution.[34] Nearly everything about this head of liability is controversial, including theories as to its present nature and ideas as to its future reform. Most commentators agree that liability under this head is merely personal, but while some argue that liability should be based upon the stranger's wrongdoing,[35] others argue that unauthorized receipt of another's wealth is an unjust enrichment that should give rise to strict liability to make restitution (i.e., liability regardless of the recipient's honesty or state of knowledge, albeit subject to the usual restitutionary defence of innocent change of position).[36] Even if recipient liability is fault-based (i.e., not strict), should the element of fault require proof of dishonesty, or should it suffice to prove that the recipient actually knew that the received asset represents misapplied trust property or should it suffice to prove merely that the stranger ought reasonably to have appreciated that he had received trust property in breach of the trust?[37] One commentator sees a silver lining to the cloud of questions hanging over strangers' liability: '*It may be that these unresolved conceptual difficulties are no bad thing as equity seeks flexible tools to rationalise the complex transactional environment of the modern commercial world.*'[38]

15.6.1 Knowing receipt

As things stand, a stranger who receives trust property will only be personally liable in equity if the relevant kind of knowledge and the relevant kind of receipt are proved against him. The relevant kind of knowledge is knowledge of the breach of trust and the relevant kind of receipt is receipt that is beneficial to the stranger. The essence of these requirements is that a stranger will be personally liable in equity if he receives assets for his own benefit knowing that he does so to the detriment of a person with better proprietary title to the assets. The remedy for p. 522 ↵ knowing receipt is essentially compensatory '*notwithstanding that it may also be described as restitutionary*'.[39] Simon Gardner argues that knowing receipt should be seen to be '*simply the usual liability for failure to preserve trust property, applicable to all trustees, given particular application to those who are trustees because they receive illicitly transferred trust property*'.[40]

15.6.1.1 Timing of knowledge

A person who receives property innocently, but later discovers that it was trust property, is liable from the moment he is aware of the true facts.[41] In other words, a recipient is not liable for knowing receipt until he knows about the breach of trust[42] and, if he parts with the property never having discovered that it was trust property, he will escape liability.

15.6.1.2 Degrees of knowledge

One of the more complex aspects of fixing liability on a stranger for knowing receipt of trust property is ascertaining the degree of knowledge that is required to give rise to liability: is it essential that the stranger actually knew of the trust, or is it sufficient that he turned a blind eye to the obvious, or even that he ought to have been suspicious? Presumably, there is a whole spectrum of states of knowledge ranging from actual awareness at one end to complete and utter ignorance at the other. One might have thought it beyond the wit of anyone to produce a comprehensive categorization of types of knowledge, still less to identify knowledge as falling within one of five degrees, but, according to the judges, not even this monumental task is beyond the skills of leading Chancery counsel. In the *Baden* case,[43] counsel submitted that knowledge is of five types for the purpose of liability:

(i) actual knowledge;

(ii) wilfully shutting one's eyes to the obvious (sometimes referred to as 'Nelsonian blindness'[44] or 'blind-eye knowledge'.[45] The House of Lords in *Manifest Shipping Co v. Uni-Polaris Shipping Co* held that a finding of such knowledge requires, first, suspicion that certain facts may exist; and, second,

p. 523 a conscious decision not to investigate the existence of those facts. As Lord Clyde put it, there must be '*a conscious reason for blinding the eye. There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate*'[46]);

(iii) wilfully and recklessly[47] failing to make such inquiries as an honest and reasonable man would make;

(iv) knowledge of circumstances that would indicate the facts to an honest and reasonable man;

(v) knowledge of circumstances that would put an honest and reasonable man on inquiry.

Peter Gibson J adopted the classification, adding the refinement that a stranger in (ii) or (iii) is to be treated as if he had actual knowledge, whereas a person in categories (iv) or (v) is to be treated as having constructive knowledge only. Although the *Baden* case did not concern liability for knowing receipt, but for knowing assistance (as dishonest assistance was then known), his Lordship expressly stated that he could see 'no justification' for treating the two bases of liability differently in this regard.[48]

Millett J adopted the same classification in *Agip (Africa) Ltd v. Jackson*,[49] another case concerned with dishonest assistance, but warned against '*over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only*'.[50] In his Lordship's judgment, '[t]*he true distinction is between honesty and dishonesty. It is essentially a jury question.*'[51] His Lordship suggested that a stranger who suspects wrongdoing, but fails to make inquiries because he does not wish to know the truth (category (ii)), or considers it to be none of his business (category (iii)), acts dishonestly and cannot complain if he is treated as having actual knowledge for the purpose of liability for knowing receipt. In this vein, Scott LJ observed in *Polly Peck International plc v. Nadir (No. 2)*,[52] yet another case concerning assistance rather than receipt, that the *Baden* categories are not '*rigid categories with clear and precise boundaries*' and that '[o]*ne category may merge imperceptibly into another*'.[53] For his Lordship, the real question is whether the stranger should have been '*suspicious of the propriety of what was being done*'.[54] Vinelott J in *Eagle Trust plc v. SBC Securities Ltd*[55] confirmed that liability based on knowledge in categories (iv) and (v) is not appropriate to commercial transactions, because the basis of commercial transactions should be trust and not suspicion.[56] Certainly, a stranger is not expected to entertain every suspicion that might be aroused.

In *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele*,[57] the Court of Appeal held that the
p. 524 *Baden* categories are not particularly helpful in cases of ↵ knowing receipt. In such cases, a single test, asking whether it would be unconscionable for the recipient to retain the benefits of the receipt, is sufficient. This is reminiscent of the older formulation which asks whether the defendant's conscience became 'sufficiently affected for it to be right to bind him by the obligations of a constructive trustee'.[58]

A leading authority on knowing receipt is still *Re Montagu's Settlement Trust*,[59] decided shortly after *Baden*. The action was brought by the remainderman of a trust (the eleventh Duke of Manchester) against the estate of the deceased life tenant, alleging that the life tenant (the tenth Duke of Manchester) had knowingly received trust property from the trustees during his lifetime, which he knew the trustees had transferred in breach of trust. The claim failed, because the situation resulted from an 'honest muddle' involving all concerned, including the failure by the trust solicitor to make a clear inventory distinguishing trust property from property to which the tenth Duke was absolutely entitled. It was held that the tenth Duke might have known in the past that he was not entitled to the property he received, but he was not liable for knowing receipt because he had 'genuinely forgotten' that fact by the date of the receipt.[60]

15.6.1.3 Dishonesty, want of probity, and unconscionability

Staying with *Re Montagu's Settlement Trust*,[61] in that case Megarry VC held that, for the purpose of fixing liability for knowing receipt, the claimant must establish 'want of probity' on the defendant's part. The claimant is not required to prove that the defendant was positively dishonest, but merely to establish that the defendant's actions are not consistent with how an honest person would have acted in his situation. 'Want of probity' literally means 'lacking in proof': the proof that is lacking is proof of honesty. His Lordship held that, of the *Baden* categories, only types (i), (ii), and (iii) would suffice for liability. He doubted that the accusation of negligence implicit in types (iv) and (v) is consistent with an accusation of 'want of probity'. It is notable, though, that even categories (iv) or (v) make reference to honesty.

In *Hillsdown Holdings plc v. Pensions Ombudsman*,[62] Hillsdown was held liable for knowing receipt. It had persuaded the trustees of its employees' pension scheme to transfer a pension surplus to it. Upholding the Ombudsman's decision to require the company to refund the surplus, Knox J adopted the judgment of Megarry VC in *Re Montagu's*:

> In considering whether a constructive trust has arisen in a case of the knowing receipt of trust property, the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of such a trust.[63]

p. 525 ↵ Although there was never any suggestion that the company had acted dishonestly, Knox J held that it had not been as innocent as the defendants in *Re Montagu's* and *Carl Zeiss Stiftung v. Herbert Smith (No. 2)*.[64]

In *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele*,[65] the Court of Appeal confirmed that it is not necessary to prove that a defendant was dishonest in order to fix him with liability for knowing receipt. The liquidators of the bank had sought to recover US$6.79m from the defendant on the basis of personal liability for assistance in a breach of trust or wrongful receipt of trust property. In 1985, A had advanced US$10m to a company controlled by the bank under a false loan agreement. In 1988, A received US$16.79m under the agreement. The claimants argued that A's dishonesty could be inferred from his knowledge of the artificial character of the loan and from his receipt of the unusually high return of 15 per cent compound interest.

At first instance, the court dismissed the claim on the ground that the claimant had failed to prove that the defendant had been dishonest. The Court of Appeal held that it is not necessary to prove that a defendant was dishonest in order to fix him with liability for knowing receipt, but dismissed the appeal on the ground that the state of the defendant's knowledge in 1985 was not such as to make it unconscionable for him to enter into the transaction and, crucially, did not render it unconscionable for him to retain the benefits of the transaction in 1988, notwithstanding the rumours that were then circulating about the integrity of the bank's management.[66] In fact, their Lordships' judgments were concerned as much with 'unconscionable retention' as with 'knowing receipt'. This case can be compared with *Goldspan Ltd v. Patel*,[67] in which a third party received £100,000 in the course of a series of transactions the honesty of which had been called into question. The recipient was permitted to retain the money because he had been owed £100,000 by the transferor. Suppose that, in another case, a fake 'loan' were fabricated as part of a money-laundering scam? Do decisions such as this have the potential to play into the hands of fraudsters?

In *BCCI (Overseas) Ltd v. Akindele*, the defendant escaped liability because he could not be taken to know *for a fact* that the bank had been involved in a breach of trust; he could only be taken to have known that there were rumours to that effect. This raises a nice question: if a defendant has sure and certain knowledge of a rumour or allegation of breach of trust, is his conscience bound so as to give rise to personal liability in equity for knowing receipt? The court in *BCCI (Overseas) Ltd v. Akindele* thought not. It identified the crucial question to be whether the defendant himself had cause to believe the allegation. A similar approach was taken in *Carl Zeiss Stiftung v. Herbert Smith (No. 2)*.[68] An action was brought against one of the largest firms of solicitors in the UK, which was acting in litigation for a West German company against an East German company. Both companies shared a common ancestry before Germany was divided into East and West, but, some time after the division, the East German company alleged that profits made by the West German company had been made using intellectual property ↵ belonging to the East German company. The issue which concerns us arose because the East German company claimed that legal fees paid by the West German company to the firm of solicitors represented money that should have been held on trust by the West German company for the East German company. It was therefore claimed that the partners of the firm were personally liable for wrongful assistance in a breach of trust or for knowing receipt of trust property in breach of trust. The Court of Appeal found that the firm of solicitors had actual knowledge of the allegations made by the East German company against the West German company, but it held that knowledge of a *claim* that a trust existed was not enough to found liability as a constructive trustee.

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The basis of the decision in *Carl Zeiss* appears to be the policy concern that we noted at the start of this chapter, that solicitors and other commercial agents should not be required to be forever '*watching their backs*'.[69] In *Carl Zeiss*, that policy concern was compounded by the policy concern to protect the due process of litigation, because solicitors would cease to act if every allegation were treated as established fact.[70]

None of this should be taken to suggest that a defendant will escape personal liability if it runs the risk of receiving misapplied trust assets. In *Armstrong DLW GmbH v. Winnington Networks Ltd*,[71] a fraudster tricked the claimant into transferring EU carbon emission allowances ('EUAs') to it, which the fraudster then sold on to the defendant. The court held that the defendant was personally liable for unconscionable receipt of misapplied trust property, the relevant trust being the constructive trust under which the fraudster was bound to exercise its legal possession and control of the EUAs for the benefit of the claimant. The finding of unconscionability was based on the fact that relevant personnel of the defendant company knew that the fraudster might not have been entitled to sell (either, applying the *Baden* categories of knowledge, because they had wilfully shut their eyes to the obvious or because they had recklessly failed to make such inquiries as an honest and reasonable person would make[72]).

In *BCCI (Overseas) Ltd v. Akindele*, the Court of Appeal declined to analyse the liability of a knowing recipient in terms of strict liability or the doctrine of notice. Instead, their Lordships held that Chief Akindele was not liable on the ground that his conscience was clear, or, to be more accurate, that he had not been shown

to have acted 'unconscionably'. The problem when judges dispose of cases on the ground of unconscionability, is that a simplistic notion of unconscionability tends to make the law more complex in practice.[73] We saw in Chapter 1 that unconscionability has a very particular meaning in law. It refers to unconscionable reliance upon laws, legal rights, and legal powers. The wrong that is committed when a recipient wrongfully receives property belonging to another is not a wrong of that sort, since it involves no wrongful reliance upon any law, legal right, or legal power. (Unless it be the merely factual power that
p. 527 ↵ accompanies possession of the asset and the appearance of title.) Since the recipient of trust property is not abusing any legal power over the property, it might be best to avoid the language of unconscionability and instead acknowledge a new civil wrong—maybe an equitable tort equivalent to the common law tort of conversion—which could be based on the conscious taking of commercially unacceptable risks with another's property to the prejudice of that other.

15.6.1.4 Overreaching, knowledge, and notice

The *authorized* sale of a trust asset by all of the trustees has the effect of transferring the beneficiaries' interest in the asset to the proceeds of sale. The process is called 'overreaching'. In the case of land, special statutory rules restrict overreaching to cases in which the trustees are at least two in number or a trust corporation.[74] However, in this chapter, we are concerned with the consequences for third parties when trust assets are transferred, whether by sale or voluntary transfer, without authority. In such cases, the doctrine of overreaching has no application.[75] Accordingly, the question of whether or not the purchaser is bound by the beneficiaries' interests will fall to be determined according to the purchaser's state of knowledge or notice. Which it is to be—knowledge or notice—is our immediate concern.

When a person acquires legal title to *land* for valuable consideration in good faith he is generally held to take free of any equitable interests under trusts of which he had no notice. Notice includes notice of matters he *has* discovered (actual notice) or *would have* discovered (constructive notice) by carrying out the ordinary searches that a prudent purchaser would carry out. They include physical inspection of the land and investigation of title, which includes searches of relevant registers of title and interests. Notice is not the same thing as knowledge. A purchaser might have actual knowledge of an interest, but it will not be binding on him unless it is an interest that the usual conveyancing rules require him to take notice of.[76] Conversely, a purchaser:

> may have actual notice of a fact and yet not know it. He may have been supplied in the course of a conveyancing transaction with a document and so have actual notice of its content, but he may not in fact have read it.[77]

The significant distinction between land conveyancing and other commercial transactions, such as the loan arrangement entered into by the defendant in *BCCI (Overseas) Ltd v. Akindele*, is the degree to which the transactions in both cases are governed by established investigation norms. In the majority of commercial transactions involving the transfer of property, the process of investigating whether or not the transferor is entitled to transfer the property is not as sophisticated as that which governs the purchase of
p. 528 land. Nevertheless, if the difference between the 'investigation norms' ↵ governing land transfer and

other transactions is only a matter of degree, there is an argument for applying an adapted, less sophisticated, version of the doctrine of notice to a whole range of commercial transactions.[78] Accordingly, in relation to any transaction, two questions should be asked before it could be established that the defendant transferee did, or did not, have notice of the beneficiaries' interests. First, what investigative techniques do reasonable and honest commercial transferees of certain assets normally employ to determine whether the transferor of those assets was entitled to transfer them? Second, has the defendant complied with those investigation norms?

According to Lord Millett, so long as one accepts that, outside the context of land transfer, the investigation standards of an honest and reasonable person are likely to be undemanding,[79] there may be some scope to apply the doctrine of notice to other commercial transactions: '*There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient.*'[80] However, in the same case, Lord Millett acknowledged that there is:

> powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence.[81]

The strict liability argument is considered next, together with the author's own submission that the strict liability option may be more compelling if, in addition to the change of position defence, the defendant could raise in his defence the fact that he had complied with a recognized set of investigation norms. This would introduce the essence of the doctrine of notice into the strict liability test, without engendering the confusion that would arise from adopting the doctrine directly from orthodox land law.[82]

15.6.1.5 Strict liability—liability without proof of knowledge or wrongdoing

Professor Birks proposed that if one leaves to one side as an independent question the recipient's personal liability for the wrongful nature of the receipt, a stranger who receives another's wealth, whether in the form of equitable or legal benefits, is unjustly enriched and personally liable to make restitution to the person at whose expense the unjust enrichment was acquired.[83] The liability to make restitution is strict, but subject to the usual restitutionary defences, including the recipient's innocent change of position and the claimant's consent.

In essence, Professor Birks' argument is that the restitutionary remedy that was made available to the legal owners in *Lipkin Gorman*[84] should be extended to equitable owners such as beneficiaries under a trust. p. 529 However, even if Professor Birks' analysis is ↵ correct, in which he is by no means isolated,[85] it has to overcome an apparent conflict with the policy that commercial parties should not be required to be forever watching their backs. Nourse LJ in *BCCI (Overseas) Ltd v. Akindele*[86] considered the strict liability approach to be 'unworkable' in practice, but the likelihood remains that an appropriate version of it will be more workable than an approach based on the vague notion of unconscionability adopted in that case. The challenge is to identify an appropriate version of the strict liability approach.

It is submitted that an improved version of the strict liability approach would be one which incorporates a defence based on the defendant's compliance with investigation norms, in addition to the usual defence of change of position. The doctrine of notice is, in essence, a doctrine designed to protect purchasers who have complied with a set of investigation norms; the 'investigation norms' defence can therefore be seen to introduce a version of the doctrine of notice and thereby to offset the draconian character of strict liability. The relevant question in each case would be whether or not the defendant had complied with normal precautionary searches and made normal precautionary inquiries accepted in the industry for transactions of the sort he was engaged in. If he had carried out such inquiries and still had no knowledge of the trust, he will have a valid defence to liability. The defence might be good even if the set of investigation procedures carried out by the defendant is subscribed to only by a subset of the industry. This is similar to the test for medical professional negligence that immunizes a doctor from liability for unorthodox medical practice if he can show that his approach has the support of a responsible body of other practitioners.[87] A recipient, such as Chief Akindele, who acquires assets by a transaction for which he has given consideration, will usually find it easier to demonstrate that he has complied with transaction norms than a recipient who has given no consideration, because a buyer will usually be wary before parting with his money.

While we are on the subject of the giving of contractual consideration, it should be noted that in *Criterion properties plc v. Stratford UK Properties LLC*,[88] Lord Nicholls criticized the reasoning in *BCCI (Overseas) Ltd v. Akindele* on the ground that the Court of Appeal had been wrong to consider the law of knowing receipt in relation to the fully executed contractual transfer of assets in that case. However, Lord Nicholls was the only one of their Lordships to take that view and, although his Lordship purported to approve the reasoning of Lord Scott of Foscote (who delivered the leading speech in *Criterion*), Lord Scott, in fact, acknowledged that the law relating to knowing receipt of assets may be applicable where assets have been transferred by a fully executed contract. Lord Scott dismissed the appeal in *Criterion* on the basis that the contract in that case was merely executory—that is, it had not yet been fully executed by the transfer of the subject matter of the contract.

p. 530 ↵ In Australia, the argument in favour of strict liability based on the reversal of unjust enrichment has been expressly disapproved.[89] There is, it is submitted, one context in which proof of fault should certainly be a prerequisite to liability for receipt of trust property. That is where the claimant is claiming under a trust which was a bare trust at the time of misapplication of the trust property. In such a case the claimant, as beneficiary of a bare trust, had the power to bring the trust to an end before the misapplication of the fund. The beneficiary must therefore be taken to have run the risk of misapplication. Having run the risk that third parties might receive misapplied trust property, the onus should be on the claimant to prove that the recipient received with knowledge of the misapplication.[90]

15.6.1.6 Receipt

As if the nature of the 'knowing' in 'knowing receipt' were not controversial enough, the reader will be dismayed to discover that even the nature of 'receipt' is not without controversy. It is even arguable that, if the trustees wrongfully disclose *information* about the trust to a stranger, the stranger should be treated as having received trust property.[91] However, we will confine our attention to receipt of more familiar assets such as cash and shares. Here the crucial distinction is between 'ministerial receipt' and 'beneficial receipt'. According to Millett J in *Agip (Africa) Ltd v. Jackson*, the essential feature of liability is that '*the recipient must have received the property for his own use and benefit*'.[92] According to his Lordship, this distinction is '*essential if receipt-based liability is to be properly confined to those cases where the receipt is relevant to the loss*'.[93] When a bank cashier passes cash to the security guard to be taken away, the security guard receives the cash in a purely ministerial capacity; he does not take possession of it for his own benefit. If, on the other hand, the cashier had stolen the money from the bank and the guard was his accomplice, there would then be knowing receipt of property transferred in breach of trust, because the security guard receives such money for his own benefit. However, matters become more complicated when we look at receipt by the bank itself. It has long been established that, when a banker takes deposits of customers' monies, he is permitted in the '*ordinary course of trade to make use of them for his own profit*'.[94] The bank becomes absolute owner of the deposit and the customer becomes absolute owner of a debt equivalent in size to the sums deposited plus interest at the account rate. One might have supposed, therefore, that if trustees were to deposit monies with a bank in breach of trust, the receipt by the bank would be beneficial receipt of the sort that may give rise to liability for knowing receipt. However, the authorities suggest a surprising basis for distinguishing ministerial and beneficial receipt in this context. According to Millett J in *Agip*:[95]

> 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.[96]

p. 531 ↵ When a bank pays money, it clearly receives nothing, but when it collects money as agent for a customer, the monies are presumably held in an account for the customer and the bank benefits from their being there. It is hard to read Millett J's statement without concluding that his Lordship regards deposits into a credit balance as being fundamentally different from deposits into an overdrawn account. If the distinction is sound, it would suggest that beneficial receipt is confined to receipt of capital benefits, because, in terms of income (or interest), banks profit more from overdrawn accounts than from accounts in credit. Payments to foreign banks can put yet another obstacle in the way of claimants seeking to show that their trust property has been received by a third party, for there can be no beneficial receipt of trust property in jurisdictions that do not recognise English law's distinction between legal title and beneficial interests in equity.[97]

Another conundrum is to know the proper level of liability where a recipient receives an asset knowing that a fiduciary has fraudulently transferred the asset at an undervalue. Where the asset increases in value after the knowing receipt, is the principal's compensatory claim limited to the amount of the original undervalue or can it include the subsequent increase in the value of the asset? The Privy Council has held that the element of original undervalue ought to be regarded as a part of the true value of the asset so that the post-receipt increase in the value of the whole asset should be allocated proportionally to the defendant's purchased part and the claimant's 'undervalue part'.[98]

15.6.1.7 Liability for inconsistent dealing with trust property

If trustees appoint an agent and transfer trust assets to his care within the terms of the trust, and if the agent receives the trust property lawfully and not for his own benefit, the receipt is purely ministerial and cannot give rise to liability for knowing receipt. If, however, he were subsequently to gamble the assets at a casino in a moment of impetuosity and lose it all, he would be personally liable for having dealt with the trust assets in a manner inconsistent with the trust.[99] In this example, the agent would also have appropriated the trust assets to his own use and benefit, but it seems that this is not necessary for liability for inconsistent dealing. Where an agent appropriates the trust assets to his own use and benefit, he commits a delayed form of knowing receipt in which he knew about the trust (although he need not have known its exact terms) and received the assets from the outset, but did not receive them beneficially until later. Where inconsistent dealing does not involve beneficial receipt or appropriation, it is a head of liability distinct from both knowing receipt and dishonest assistance.

p. 532

15.6.1.8 Is there a difference between receipt from trustees and receipt from absolute owners?

Property law has never considered equitable owners to be as deserving of protection as absolute owners.[100] The explanation for this is largely historical, but there is also a conceptual explanation: when property is held by trustees, the beneficial owner of the property is subject to the risk of trusting.[101] This means that the rights of trust beneficiaries are inherently qualified by the risk that their trustees' behaviour might cause the fund to suffer a loss; in this, and other respects, beneficial interests are 'limited' interests. This limited notion of ownership has implications for tracing and recovering property. Whereas an absolute owner is presumed to intend to recover his property under a resulting trust from a person to whom he has 'unintentionally' transferred it,[102] no such presumption operates in favour of beneficiaries when their trustees transfer trust property contrary to the intentions of the settlor as reflected in the terms of the trust. Professor Birks argued for reform of this state of affairs, hence his support for, amongst other things, the imposition of strict restitutionary liability on recipients of trust property. Supporters of strict liability are committed, at a structural level, to the idea that wealth is deserving of equal protection whether owned absolutely or in trust,[103] considering it to be purely fortuitous in the modern investment environment that the claimant happens to be an absolute owner or a mere beneficial owner.[104] For restitutionary theorists in Birks' mould, problems associated with the claimant's assumption of the risk of loss are sidestepped by approaching the problem exclusively in terms of the just allocation of the defendant's gain or 'enrichment'. The equitable or legal source of that enrichment is regarded as being more or less irrelevant.

In Section 15.7, we will see that acknowledging the fundamental difference between property held on trust and property held absolutely has the merit of elucidating the theoretical basis for the modern formulation of equitable liability for dishonest assistance in a breach of trust.

15.7 Equitable liability for assistance in a breach of trust

This head of liability was dramatically reformed by the decision of the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan*,[105] where Lord Nicholls identified it as a form of 'accessory' or 'secondary' liability arising from assistance in a breach for which the trustee is primarily liable. According to his Lordship, it serves the dual purpose of '*making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion*'.[106]
p. 533 Previously, a stranger who assisted in, or procured, a breach of trust by the ↵ trustees was only liable if he knowingly assisted in a dishonest or fraudulent breach of trust. Since Lord Nicholls's judgment in *Tan*, the focus has shifted from the nature of the breach of trust to the nature of the assistance. Now, it is clear that an accessory will be liable even if he assists in, or procures, an innocent breach of trust. So if a solicitor were to deceive an innocent trustee into breaching his trust, or a director of a corporate trustee were to cause the corporation to commit a breach, the solicitor and director may be personally liable as accessories to the breach, despite the innocence of their respective trustees.

Tan concerned a travel agent company that held customers' monies on trust for the claimant airline whenever customers bought flights on the claimant's aircraft. Instead of simply deducting its commission, the company took advantage of a rolling 30-day credit period to use the airline's money to relieve its own cash-flow problems. This was in breach of the trust which required the agent company to keep the airline's money separate from its own. When the company became insolvent, the airline sought, amongst other things, to fix the managing director of the company with personal liability for assisting in the breach of trust. Lord Nicholls suggested that:

> if anything, the case for liability of the dishonest third party seems stronger where the trustee is innocent, because in such a case the third party alone was dishonest and that was the cause of the subsequent misapplication of the trust property.[107]

On the particular facts of *Tan*, however, where the defendant had complete control of the trustee company, his Lordship imputed the defendant's dishonesty to the company for good measure.

One aspect of the decision in *Tan* remains more controversial than any other: having very reasonably decided that liability does not depend upon the trustee's dishonesty, Lord Nicholls nevertheless decided to keep dishonesty within the total equation, with the result that, today, a stranger will not be liable as an accessory to a breach unless he himself had a dishonest state of mind. Apart from the desire to avoid vague notions of knowledge (and especially the '*Baden* scale' of knowledge), it is not clear why Lord Nicholls was not content that liability should be based on knowing assistance in a breach of trust, which would have brought this head of equitable personal liability in line with the common law tort of knowing interference with contractual rights.[108] Some years earlier, Millett J, as he then was, observed that the basis of the stranger's liability under this head '*is not receipt of trust property but participation in a fraud*'[109] and even earlier than that, Sachs LJ had held, in the *Carl Zeiss* case,[110] that there should be no liability without an element of '*dishonesty or of consciously acting improperly*'.[111] It may have been with this thinking in mind that Lord Nicholls decided to require an inquiry into the honesty or dishonesty of the defendant's state of mind, rather than to abandon dishonesty entirely as an ingredient of liability. But *why* should this head of liability depend upon proof of dishonesty? Is it to reflect the policy that commercial agents should not p. 534 ↵ be personally liable for assisting in a breach of trust except in exceptional cases? This seemed to motivate Lord Selborne when he first formulated liability for knowing assistance in the great age of commerce immediately after the passing of the Judicature Acts.[112] Another possibility is that courts desire to discourage beneficiaries from pursuing actions against wealthy strangers before pursuing actions against their own trustees. Another related explanation may be an unspoken belief that equitable property rights under a trust are less deserving of protection than rights (even a mere contractual right of action) owned absolutely—a belief, in other words, that beneficiaries should bear an appropriate share of the risk that their trustee might commit a breach of trust and should bear an appropriate share of any loss caused if that risk materializes.[113]

Be that as it may, it is clear that, as a result of Lord Nicholls' speech in *Tan*, what had previously been personal liability for 'knowing' assistance became personal liability for 'dishonest' assistance.[114] Even though there is no requirement under this head that the stranger ever took possession of the trust property, there is an argument for limiting accessory liability to situations in which the stranger had, at the very least, some degree of de facto control of the trust property, either by exerting undue influence on the trustee or by controlling the trustee's mind. *Tan* was a case in the latter category; a solicitor who misleads an innocent trustee might fall within the former.

If there had been any doubts about the status of this important decision of the Privy Council, they were put to rest when *Tan* was approved by the House of Lords in *Twinsectra Ltd v. Yardley*.[115] It is notable that Lord Millett, the sole dissentient to the decision, wished to jettison dishonesty as a defining ingredient of liability, and, by implication, to reject his own earlier suggestion that this head of liability is fraud-based, in favour of a return to liability on the basis of the stranger's 'knowing' assistance. The majority held that the defendant, a solicitor acting for a trustee, had not been dishonest and was therefore not liable for dishonest assistance. Lord Millett, rejecting dishonest assistance as a basis of liability, held that the defendant was liable for knowing assistance.

One of Lord Millett's reasons for rejecting dishonesty as a defining ingredient of liability was to bring this head of liability in line with the common law tort of knowing interference with contractual rights under which liability depends upon the defendant's knowledge, and '*negligence is not sufficient and dishonesty is not necessary*'.[116] From an obligations perspective, there is certainly force in the view that procuring or assisting in a breach of another person's trust is at least as wrong as inducing a breach of another person's contract and should not be subject to the higher 'dishonesty' threshold of liability. Lord Millett even suggests that, due to the different thresholds of liability, claimants will be induced to '*spell a contractual obligation out of a fiduciary relationship in order to avoid the need to establish that the defendant had a dishonest state of mind*'.[117]

p. 535 ↵ In *Baden v. Société Générale*,[118] Peter Gibson J identified four elements that must be proved to establish that a stranger is liable as an accessory to a breach of trust. Having updated them to take account of *Tan*, we can say that there must be:

1) 'dishonest'

2) ‘assistance’ in a

3) ‘breach’ of

4) ‘trust’

15.7.1 ‘Dishonest’

Lord Nicholls in *Tan* clearly envisaged an objective test of dishonesty under which the particular defendant is not to be judged by his own subjective standards, but by the objective standards of a reasonable onlooker. The onlooker is permitted to take into account the particular skills and experience of the defendant, and the particular circumstances which the defendant found himself in, but it is for the objective onlooker to determine whether an honest person with the defendant’s characteristics could have acted the same way in the defendant’s position.

Lord Hoffmann followed this objective test in *Barlow Clowes International Ltd (in liquidation) v. Eurotrust International Ltd*.[119] The case concerned a fraudulent off-shore investment scheme operated by Mr Clowes through Barlow Clowes International Ltd during the mid-1980s. He attracted about £140 million, mainly from small UK investors. Most of the money was spent for the personal benefit of Mr Clowes and his associates. Mr Clowes was eventually convicted and sent to prison. Some of the investors’ funds were paid away during 1987 through bank accounts maintained by a company called International Trust Corporation (Isle of Man) Ltd (‘ITC’). In proceedings in the High Court of the Isle of Man, Barlow Clowes (now in liquidation) claimed that the directors of ITC and, through them, ITC itself, dishonestly assisted Mr Clowes and one of his principal associates, Mr Cramer, to misappropriate the investors’ funds. It was held, following *Twinsectra Ltd v Yardley*, that:

> 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 what a trust means [and] it was not necessary to know the ‘precise involvement’ of Mr Cramer in the group’s affairs in order to suspect that neither he nor anyone else had the right to use Barlow Clowes’ money for speculative investments of their own.

The Supreme Court in the case of *Ivey v. Genting Casinos UK Ltd (t/a Crockfords Club*[120] has now approved
p. 536 Lord Nicholls’ approach and confirmed that the objective ↵ test of dishonesty is applicable to both criminal and civil matters. *Ivey v. Genting* concerned a professional gambler who employed a technique of card-spotting to gain an unfair advantage over the Casino. Lord Hughes summarized the test for dishonesty as follows:

> When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.[121]

The last line of that passage effectively overrules *R v. Ghosh*[122] which had previously been the test for dishonesty in criminal contexts.[123] Courts do not judge a defendant by his own moral standards, which is why Robin Hood is liable for dishonest assistance in a breach of trust if he assists Friar Tuck to steal gold from the friary, even though he and Tuck intend to give the money to the poor.[124] In *Starglade Properties Ltd v. Nash*,[125] the Court of Appeal confirmed that the standard by which 'dishonesty' is tested does not vary just because some people might think that the standard is set too high: 'There is a single standard of honesty objectively determined by the court. That standard is applied to specific conduct of a specific individual possessing the knowledge and qualities he actually enjoyed.'[126] In *Tan*, Lord Nicholls held that the relevant question to ask is whether the defendant acted as an honest person would have acted in the defendant's circumstances. This, according to his Lordship, 'is an objective standard',[127] albeit one that takes account of the defendant's personal characteristics. In this way, a junior bank clerk is judged by the standards of the hypothetical honest junior bank clerk and a senior bank manager is judged by the standards of the hypothetical honest senior bank manager.

15.7.1.1 Judicial reluctance to label solicitors 'dishonest'

The House of Lords considered the nature of Lord Nicholls's test for dishonesty in the case of *Twinsectra Ltd v. Yardley*.[128] The defendant, Mr Leach, was a solicitor who had acted as an adviser in a commercial transaction that involved a breach of trust and the question was whether the defendant had dishonestly assisted in the breach. Their Lordships preferred to twist the test for dishonesty out of shape from the one
p. 537 Lord Nicholls ↵ had set out in *Tan* rather than find that the solicitor defendant had been 'dishonest'. Their Lordships were, perhaps, mindful of the implications of such a finding on the solicitor's career including the fact that he would be at great risk of being struck off the professional roll of solicitors. Similar reluctance to label a professional agent 'dishonest' seems to have influenced decisions in other cases.[129] Sometimes, though, the finding that a professional agent is liable for 'dishonest' assistance is irresistible, as it was in *Group 7 Ltd v Notable Services LLP*.[130] Martin Landman was an accountant working within a firm of solicitors. A fraudster client paid him a £170,000 bribe (in the form of a 'fee') to facilitate transactions through the firm's client account deliberately and knowingly in breach of the Solicitors' Accounts Rules. The Court of Appeal held that Landman had no actual knowledge that the moneys were not at the client fraudster's free disposal but that he was dishonest due to 'Nelsonian' or 'blind-eye' knowledge because he had suspicions and made no inquiries to refute them.[131]

Lord Millett, who was the sole dissentient in *Twinsectra*, favoured a quite different approach to that adopted by the majority. For Lord Millett, the proper safeguard against inappropriate application of the 'dishonest' label is to remove dishonesty as a defining ingredient of accessory liability. For Lord Millett, liability should be based on the fact of 'knowing' assistance rather than 'dishonest' assistance. Lord Millett noted that the gravamen of accessory liability is not that the accessory has handled stolen property, but that he has knowingly assisted a person, whom he knows has been entrusted with the control of a fund, to dispose of the fund in a manner that the accessory knows to be unauthorized by the terms of the trust. On this basis, Lord Millett held Mr Leach liable for 'knowing' assistance, because he had put the claimant's monies at the free disposal of Mr Yardley knowing that Twinsectra had entrusted the money to another person, Mr Sims, for a specific purpose only, and that Mr Sims had breached that obligation by paying the money to Mr Leach without ensuring that the obligation was fulfilled.

15.7.1.2 Honesty and negligence should not be confused

In *Republic of Zambia v. Meer Care & Desai (a firm)*,[132] the Court of Appeal held that where the defendant is, say, a solicitor, the test is whether an honest solicitor could have done what the defendant did given the knowledge of the facts that he had. It is not appropriate to apply the benchmark of an honest *and competent* solicitor, because it wrongly applies a test of competency to determine honesty. The difference between negligence and dishonesty is not one of degree. As Lloyd LJ said:

> [I]t is one thing to throw caution to the winds; that is likely to lead to negligent conduct. But even to do that to the nth degree does not involve crossing the dividing line and passing over to dishonesty.[133]

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15.7.1.3 Dishonesty and knowledge

Although, in *Tan*, Lord Nicholls described 'dishonesty' as a necessary and 'sufficient ingredient' of accessory liability, and rejected 'knowledge' as a defining ingredient, and even suggested that '*the* Baden *scale of knowledge is best forgotten*',[134] his Lordship nevertheless relied heavily upon various (*Baden*-like) degrees of knowledge to explain what he meant by dishonesty:

> Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property … an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.[135]

It came as no surprise, then, when, in *Heinl v. Jyske Bank (Gibraltar) Ltd*,[136] Nourse LJ suggested that the *Baden* scale might still be useful in distinguishing different shades of knowledge.

15.7.1.4 Unconscionability

When we considered personal liability for knowing receipt, we criticized the approach currently prevailing in the courts, which is to rely upon ill-defined notions of unconscionability as a basis for imposing equitable liability. The same error has occurred in the context of accessory liability. Consider, for example, the judgment in *Powell v. Thompson*: '*If the third party's conduct has been unconscionable … the third party is liable to be held accountable to the beneficiary as if he or she were a trustee*.'[137] Lord Nicholls disapproved of any such unbridled notion of unconscionability:

> If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, 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.[138]

The reason why equity imposes personal liability on accessories to breach of trust is not to restrain unconscionability; it is merely to follow the law. Equity is simply seeking to provide analogues to personal tortious (and possibly criminal) liability at common law.[139] It is too readily assumed that equity can only be aroused to the cry of 'conscience'.

p. 539 ### 15.7.1.5 Commercially unacceptable conduct

In *Cowan de Groot Properties Ltd v. Eagle Trust plc*,[140] Knox J held that dishonesty is evidenced by '*commercially unacceptable conduct in the particular context involved*'.[141] Lord Nicholls approved this dictum when attempting to capture the flavour of dishonesty in *Tan*, but, in a subsequent case, Lindsay J expressed reservations with this approach to establishing dishonesty in commercial contexts:

> It may, for example, be in one sense 'commercially unacceptable' for a bank to lend money without security or without investigating the title to the security it is offered by its borrower. It may thus be 'unacceptable' because too risky, [and therefore] 'commercially unacceptable', if at all, only in relation to the bank's own position.[142]

15.7.2 'Assistance'

According to Gibson J in *Baden*, proof of 'assistance' is a simple question of fact. The payment of a company's funds by a bank on the instructions of fraudulent directors of the company may qualify as assistance.[143] There is no requirement for the assistance actually to have caused the breach, but it must have been of more than minimal importance. The 'assistance' requirement could be satisfied by proving that the stranger had been involved in an intermediate step in the process leading to the breach of trust.

Assistance seems to mean some kind of purposive conduct designed to advance and promote the unlawful object that breaches the trust. In *Brinks Ltd v. Abu-Saleh & Ors (No. 3)*,[144] the plaintiffs had been the object of a huge bullion heist that had been facilitated by the actions of one of its own employees who was, therefore, in breach of his fiduciary relationship with the claimants. The claimants' case was that Mrs E, as part of the laundering of the proceeds, had accompanied her husband on trips to Zurich, at the instigation of P, one of those convicted of the robbery. The allegation was of accessory liability against Mrs E. The judge found, as a matter of fact, that Mrs E had simply accompanied her husband in the capacity of his wife and that, on these facts, this did not constitute sufficient 'assistance' for the purposes of accessory liability. Lord Millett observed in *Twinsectra* that:

> [m]ost of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money. Mr Leach's wrongdoing is not confined to the assistance he gave Mr Sims to commit a breach of trust by receiving the money from him knowing that Mr Sims should not have paid it to him (though this is sufficient to render him liable for any resulting loss); it extends to the assistance he gave in the subsequent misdirection of the money by paying it out to Mr Yardley's order without seeing to its proper application.[145]

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15.7.3 'Breach'

Before *Tan*, it had to be shown that a dishonest or fraudulent design existed and that the trustee or fiduciary had been a party to it. It had to be something more than a mere misfeasance or breach of trust, which, as we have seen from earlier chapters, can be committed innocently. Since *Tan*, an innocent breach of trust on the part of the fiduciary or trustee will suffice.

15.7.4 'Trust'

If a corporation holds monies on trust, the director of the corporation may be liable for dishonest assistance or procurement of a breach of trust by the corporation; this is what happened in *Tan*. However, '*the trust need not be a formal trust. It is sufficient that there should be a fiduciary relationship between the "trustee" and the property of another person.*'[146] So if a solicitor dishonestly assists a director to breach his duties to a corporation, the solicitor may be liable as an accessory even if he did not know that the corporation was a trustee[147] and, if the corporation was not a trustee, the solicitor may be liable if he dishonestly assisted the director to misapply the corporation's assets. What is not clear is whether a stranger can be liable as an accessory to breaches of trust that do not involve misapplication of any trust property. The answer to this question depends upon which common law analogue is deemed most appropriate to common law liability. If personal liability for dishonest assistance is the equitable analogue of being liable as an accessory to theft, misappropriation or misapplication of trust property ought to be prerequisite to liability. It is probably better, though, to regard dishonest assistance as an equitable analogue to common law conspiracy to defraud[148] or to the common law tort of wrongful interference with another's contract,[149] so that a stranger would be liable if he dishonestly assists in a breach even where trust property is absent. In support of the latter view, it has been held that '*in a case for accessory liability there is no requirement for there to be trust property*' and that '[s]*uch a requirement wrongly associates accessory liability with trust concepts*'.[150] This statement brings us neatly to the final section of this chapter.

15.7.5 Summary

Figure 15.1 provides an algorithmic summary overview of the factors giving rise to the equitable liability of
p. 541 strangers. ↵

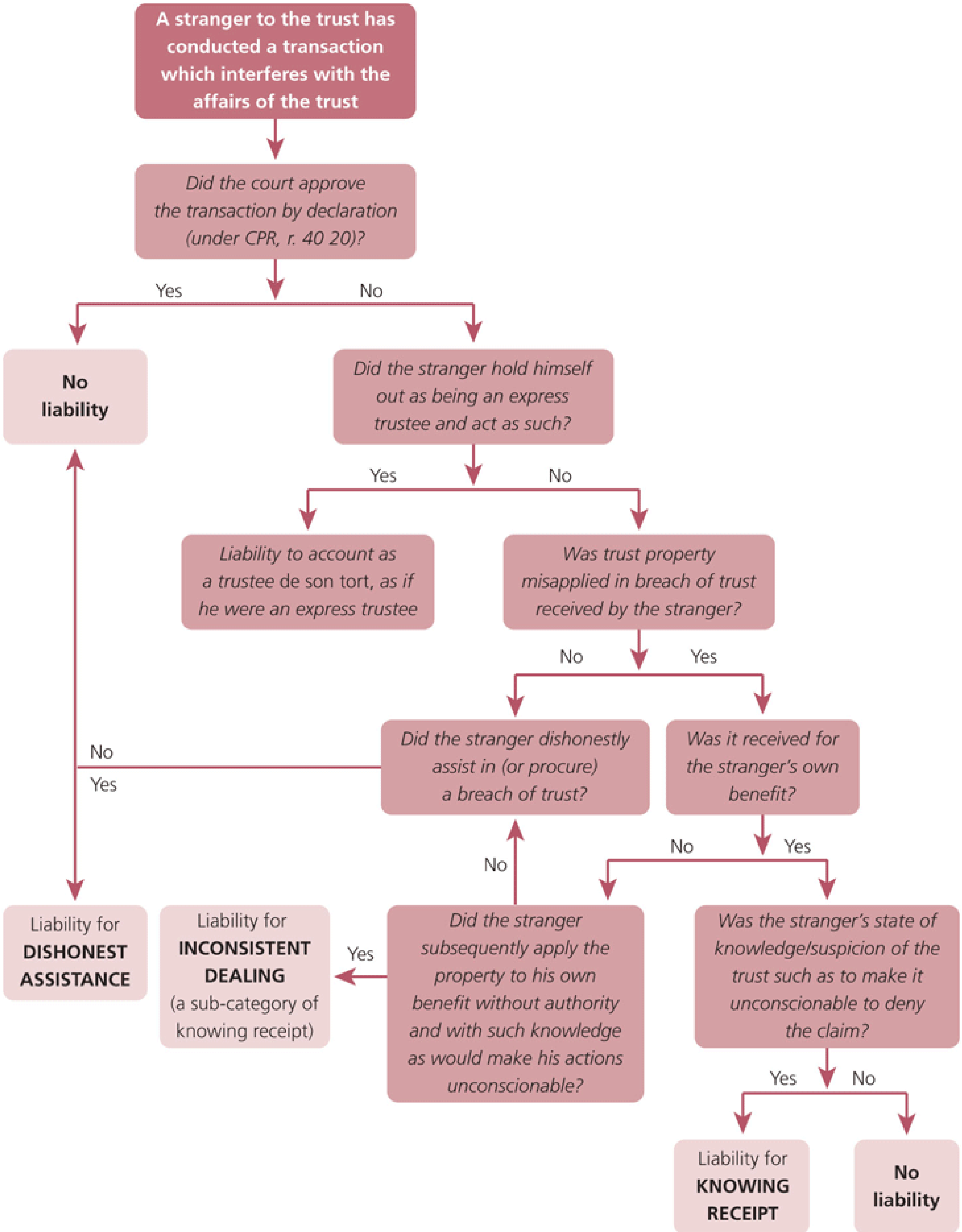

Figure 15.1 The equitable personal liability of strangers: summative flowchart

15.7.6 Should accessory liability for assisting in a breach be a common law tort?

Professor Birks suggested some years before *Tan* that '[t]*here is no respectable modern reason why "knowing assistance" should not be regarded as a tort*'.[151] Support for that view can be found in the speech of Lord
p. 542 Millett in the House of Lords in *Twinsectra Ltd* ↵ *v. Yardley*.[152] Lord Nicholls had made express reference in *Tan* to the tort of procuring a breach of contract, even going so far as to suggest that the '*underlying rationale is the same*' for equitable accessory liability as for common law accessory liability,[153] but his Lordship did not take the step of assimilating the two. Nevertheless, it is surely a step that should be taken at the first opportunity, so as to remove an unnecessary distinction between law and equity.[154] The convergence of equitable liability for dishonest assistance and common law tortious liability has been advanced by recognition in the House of Lords that the partners of a solicitor liable for dishonest assistance may, like a tortious wrongdoer, be held vicariously liable where the acts of dishonest assistance were rendered in the ordinary course of the firm's business.[155] Another advance is the judicial suggestion that the equitable wrong should only be distinguished from tort for the purposes of domestic law and that '*its proper characterisation for the purposes of private international law is as a tort*'.[156]

Test your understanding of this chapter with essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-15-essay-questions-and-problem-scenarios?options=showName>* and accompanying answer guidance *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-15-guide-answers-to-the-essay-questions-and-problem-scenarios?options=showName>*. Further improve your approach by reading general guidance on answering essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-general-guidance-on-answering-essay-questions-problem-scenarios?options=showName>*.

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15.8 Further reading

In addition to the following print sources, expand your learning with web links *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-15-web-links?options=showName>* to further reading on this topic.

ANDREWS, G., 'The redundancy of dishonest assistance' (2003) 67 Conv 398.

BIRKS, P. B. H., 'Misdirected funds: restitution from the recipient' [1989] LMCLQ 296.

BRINDLE, M. J. and HOOLEY, R. J. A., 'Does constructive knowledge make a constructive trustee?' (1987) 61 ALJ 281.

BRYAN, M., 'The Liability of the Recipient' in *Equity in Commercial Law* (S. Degeling and J. Edeleman, eds) (Pyrmont, NSW: Lawbook Co, 2005).

CLARKE, A., 'Claims against professionals: negligence, dishonesty and fraud' (2006) 22 Professional Negligence 70.

DEMOTT, D. A., 'Accessory disloyalty: comparative perspectives on substantial assistance to fiduciary breach' in *Equity, Trusts and Commerce* (P. S. Davies and J. Penner, eds) (Oxford: Hart Publishing, 2017) 253–74.

ELLIOTT, S. B. and MITCHELL, C., 'Remedies for dishonest assistance' (2004) 67(1) MLR 16.

GARDNER, S., 'Knowing assistance and knowing receipt: taking stock' (1996) 112 LQR 56, 85–93.

p. 543 ↵ HARPUM, C., 'Liability for intermeddling with trusts' (1987) 50 MLR 217.

HARPUM, C., 'Accessory liability for procuring or assisting a breach of trust' (1995) 111 LQR 545.

LORD NICHOLLS OF BIRKENHEAD, 'Knowing receipt: The need for a new landmark' in *Restitution Past Present and Future: Essays in Honour of Gareth Jones* (W. R. Cornish et al., eds) (Oxford: Hart Publishing, 1998) at 231.

LOUGHLAN, P., 'Liability for assistance in a breach of fiduciary duty' (1989) 9 OJLS 260.

MITCHELL, C., 'Dishonest assistance, knowing receipt, and the law of limitation' (2008) 72 Conv 226–37.

PANESAR, S., 'A loan subject to a trust and dishonest assistance by a third party' (2003) 18(1) JIBL 9.

PAYNE, J., 'Unjust enrichment, trusts and recipient liability for unlawful dividends' (2003) 119 LQR 583.

RIDGE, P., 'Justifying the remedies for dishonest assistance' (2008) 124 LQR 445.

SALES, P., 'The tort of conspiracy and civil secondary liability' (1990) 49 CLJ 491.

SMITH, L. D., 'Unjust enrichment, property and the structure of trusts' (2000) 116 LQR 412.

SWADLING, W., 'The nature of "knowing receipt"' in *Equity, Trusts and Commerce* (P. S. Davies and J. Penner, eds) (Oxford: Hart Publishing, 2017) 303–30.

THOMAS, S. B., 'Goodbye knowing receipt, hello unconscientious receipt' (2001) 21 OJLS 239.

WALTON, A., 'Accessory liability in equity: the case for unconscionability [instead of dishonesty]' (2019) 25(2) Trusts & Trustees 186–96.

WOODCOCK, A., 'Claims for dishonest assistance with breach of trust, and changes made by *Twinsectra v Yardley*' (2006) 57(3) NILQ 494.

WORTHINGTON, S., 'Exposing third-party liability in equity: lessons from the Limitation Rules' in *Equity, Trusts and Commerce* (P. S. Davies and J. Penner, eds) (Oxford: Hart Publishing, 2017) 331–60. ↵ p. 544

Notes

[1] It has been said that '*public policy positively requires*' a trustee to take action to recover trust property whenever the trustee has misapplied it in breach of trust (*Montrose Investment Ltd v. Orion Nominees Ltd* [2004] EWCA Civ 1032, CA, *per* Waller LJ at para. [24]).

[2] *Williams v. Central Bank of Nigeria* [2014] UKSC 10 at para. [9]; [2014] AC 1189 at 1198.

[3] Sarah. Worthington, 'Exposing third-party liability in equity: lessons from the Limitation Rules' in *Equity, Trusts and Commerce* (Paul S. Davies and James Penner, eds) (Oxford: Hart Publishing, 2017) 331–60 at 358.

[4] [1987] Ch 264.

[5] See Chapter 13.

[6] Lord Selborne in *Barnes v. Addy* (1874) LR 9 Ch App 244.

[7] Ibid.

[8] Ibid. at 251.

[9] See, generally, G. Watt, 'Personal liability for receipt of trust property: allocating the risks' in *Modern Studies in Property Law* (E. Cooke, ed.) (Oxford: Hart Publishing, 2005) vol. III at 91.

[10] *Hunter v. Walters* (1871–2) LR 7 Ch App 75 at 85.

[11] *Saunders v. Vautier* (1841) 10 LJ Ch 354; *Re Brockbank* [1948] Ch 206.

[12] Trusts of Land and Appointment of Trustees Act 1996, s. 19.

[13] CPR, r. 40.20.

[14] *Governor and Company of the Bank of Scotland v. A Ltd* [2001] 1 WLR 751, *per* Lord Woolf CJ at 768D.

[15] [1998] 2 All ER 230. Applied in *AA v. BB* [2021] EWHC 1833 (Ch).

[16] C. Harpum, 'Accessory liability for procuring or assisting a breach of trust' (1995) 111 LQR 545.

[17] *AT & T Istel Ltd v. Tully* [1993] AC 45, HL, *per* Lord Templeman at 53.

[18] The Act requires judges to interpret English law consistently with the European Convention on Human Rights (1953, Cmd. 8969), including Art. 6, which establishes the right to a fair trial.

[19] *Agip v. Africa* [1990] Ch 265, *per* Millett J at 290H (affirmed CA [1991] Ch 547).

[20] Chapter 2, 'Tort'.

[21] *Parker-Tweedale v. Dunbar Bank plc* [1991] Ch 12, CA.

[22] *Re Montagu's Settlement Trust* [1987] Ch 264 at 285.

[23] Ibid. See also Millett J in *Agip (Africa) Ltd v. Jackson* [1990] Ch 265.

[24] *Selangor United Rubber Estates Ltd v. Cradock (a bankrupt) (No. 3)* [1968] 1 WLR 1555, *per* Ungoed-Thomas J at 1582. Approved by Millett LJ in *Paragon Finance plc v. D. B. Thakerar & Co (a firm)* [1999] 1 All ER 400.

[25] Sarah Worthington, 'Exposing third-party liability in equity: lessons from the Limitation Rules' in *Equity, Trusts and Commerce* (Paul S. Davies and James Penner, eds) (Oxford: Hart Publishing, 2017) 331–60 at 358.

[26] Ibid. at 345.

[27] *Mara v. Browne* (1896) 1 Ch 199, *per* Smith LJ at 209; *Soar v. Ashwell* [1893] 2 QB 390; *Burdick v. Garrick* (1870) LR 5 Ch App 233; *Re Barney* [1892] 2 Ch 265; *Williams-Ashman v. Price and Williams* [1942] Ch 219.

[28] *Bishopsgate Investment Management Ltd (in liquidation) v. Maxwell & Anor* [1993] Ch 1, CA, *per* Dillon LJ at 38.

[29] *Selangor United Rubber Estates Ltd v. Cradock* [1968] 1 WLR 1555.

[30] 'No time bars a direct trust as between cestui que trust and trustee' (*Beckford v. Wade* (1810) 17 Ves 87, *per* Grant MR at 97).

[31] *Taylor v. Davies* [1920] AC 636 at 651.

[32] *Dubai Aluminium Co Ltd v. Salaam* [2002] 3 WLR 1913, HL, *per* Lord Millett at para. [138].

[33] *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378 at 382D.

[34] C. Harpum, 'Accessory liability for procuring or assisting a breach of trust' (1995) 111 LQR 545 at 548.

[35] S. Gardner, 'Knowing assistance and knowing receipt: taking stock' (1996) 112 LQR 56 at 85–93.

[36] Lord Nicholls of Birkenhead, 'Knowing receipt: the need for a new landmark' in *Restitution: Past, Present and Future* (W. R. Cornish et al., eds) (Oxford: Hart Publishing, 1999); P. Birks, 'Receipt' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002).

[37] C. Harpum, 'Liability for intermeddling with trusts' (1987) 50 MLR 217; S. B. Thomas, 'Goodbye knowing receipt, hello unconscientious receipt' (2001) 21 OJLS 239.

[38] S. Gardner, 'Knowing assistance and knowing receipt: taking stock' (1996) 112 LQR 56.

[39] *Charter plc* v. *City Index Ltd* [2007] 1 WLR 26, Ch D.

[40] (2009) 125 LQR 20 at 23 (a note on the decision of the Court of Appeal in *City Index Ltd v. Gawler* [2007] EWCA Civ 1382; [2008] Ch 313).

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

[42] *Agip v. Africa* [1990] Ch 265; *Papamichael v. National Westminster Bank plc* [2003] 1 Lloyd's Rep 341 at 375; *Criterion Properties plc v. Stratford UK Properties LLC* [2003] 1 WLR 2108.

[43] *Baden v. Société Générale Pour Favoriser le Développement du Commerce et de l'Industrie en France* [1993] 1 WLR 509, Ch D; [1983] BCLC 325. The case was heard in 1983, but did not appear in the Weekly Law Reports until 10 years later.

[44] Alluding to the famous incident at the Battle of Copenhagen when Admiral Lord Nelson is reputed to have placed a spyglass to his blind eye to avoid sight of a signal calling him to disengage from the Danish fleet.

[45] *Credit Suisse (Monaco) SA v. Attar* [2004] EWHC 374; *Manifest Shipping Co v. Uni-Polaris Shipping Co* [2003] 1 AC 469, HL.

[46] [2003] 1 AC 469 at 481.

[47] See, for example, *Cantor Fitzgerald International v. Edward Bird et al.* [2002] WL 1446181.

[48] *Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France* [1993] 1 WLR 509, Ch D; [1983] BCLC 325 at para. [249].

[49] [1990] Ch 265.

[50] Ibid. at 293.

[51] Ibid.

[52] [1992] 2 Lloyd's Rep 238, CA.

[53] Ibid. at 243.

[54] Ibid. at 244.

[55] [1993] 1 WLR 484.

[56] See, also, *Cowan de Groot v. Eagle Trust plc* [1992] 4 All ER 700.

[57] [2001] Ch 437, considered further later.

[58] *Relfo Ltd (in liquidation) v. Varsani* [2012] EWHC 2168 (Ch), applying *Re Montagu's Settlement Trusts* [1987] Ch 264.

[59] [1987] Ch 264.

[60] Forgetting general knowledge of a fact can excuse a trustee, but forgetting a fact to which the trustee was put on actual notice will not be excused. (See *AON Pension Trustees Ltd v. MCP Pension Trustees Ltd* [2010] EWCA Civ 377; [2011] 3 WLR 455.)

[61] [1987] Ch 264.

[62] [1997] 1 All ER 862.

[63] [1987] Ch 264 at 285.

[64] [1969] 2 Ch 276.

[65] [2001] Ch 437.

[66] Ibid. at 455.

[67] [2012] EWHC 1447 (Ch).

[68] [1969] 2 Ch 276.

[69] *United Mizrahi Bank Ltd v. Doherty* [1998] 2 All ER 230.

[70] See the comments of Pennycuick J at first instance in *Carl Zeiss Stiftung v. Herbert Smith (No. 2)* [1969] 2 Ch 276. See, also, C. Harpum, 'The stranger as constructive trustee' (1986) 102 LQR 114; P. Birks, 'Misdirected funds: restitution from the recipient' [1989] LMCLQ 296.

[71] [2012] EWHC 1; [2012] Ch 156 (Ch).

[72] Ibid. at para. [293]. Note that the descriptors of knowledge types are taken from the *Baden* case.

[73] See Chapter 4.

[74] Law of Property Act 1925, ss. 2 and 27(2).

[75] See further, the argument set out by David Fox in 'Overreaching' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) 95 at 97.

[76] An example is a non-registered land charge (Law of Property Act 1925, s. 199(1)(i)).

[77] *Eagle Trust plc v. SBC Securities* [1993] 1 WLR 484, *per* Vinelott J at 494A/B.

[78] '*There is no obvious reason why the doctrine of notice should not be employed as the test of liability for knowing receipt*' (C. Harpum, 'Liability for intermeddling with trusts' (1987) 50 MLR 217 at 221(iv)).

[79] A point that his Lordship made as the judge at first instance in *El Ajou v. Dollar Land Holdings plc* [1993] 3 All ER 717.

[80] *Twinsectra Ltd v. Yardley* [2002] 2 AC 164 at 194.

[81] [2002] 2 AC 164. Therefore constructive notice 'may not be necessary'.

[82] See *Re Montagu's Settlement Trust* [1987] Ch 264 at 271.

[83] See, for example, P. Birks, 'Receipt' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002).

[84] See Chapter 14.

[85] Notably Lord Nicholls of Birkenhead, 'Knowing receipt: the need for a new landmark' in *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (W. R. Cornish et al., eds) (Oxford: Hart Publishing, 1999) 231 at 238; see, also, P. Creighton and E. Bant, 'Recipient liability in Western Australia' (2000) 29 UWALR 205.

[86] [2001] Ch 437.

[87] *Bolitho v. City and Hackney Health Authority* [1998] AC 232, HL.

[88] [2004] 1 WLR 1846, HL.

[89] *Farah Constructions Pty Ltd v. Say-Dee Pty Ltd* [2007] HCA 22.

[90] G. Watt, 'Personal liability for receipt of trust property: allocating the risks' in *Modern Studies in Property Law* (E. Cooke, ed.) (Oxford: Hart Publishing, 2005) vol. III, 91.

[91] Lord Cohen has stated that information held by a fiduciary was not property '*in the strict sense of the word*' (*Boardman v. Phipps* [1967] 2 AC 46 at 102).

[92] [1990] Ch 265 at 292.

[93] Ibid.

[94] *Burdick v. Garrick* (1869–70) 5 LR Ch App 233 at 240.

[95] [1990] Ch 265.

[96] Ibid. at 292A.

[97] *Byers v. Saudi National Bank* [2022] EWCA Civ 43 [2022] 4 WLR. 22, Court of Appeal (Civil Division), following the decision of the Supreme Court in an earlier stage of the same litigation that a continuing proprietary interest is prerequisite to a knowing receipt claim (*Akers v. Samba Financial Group* [2017] UKSC 6, [2017] AC 424).

[98] *Akita Holdings Ltd v. Attorney General of the Turks and Caicos Islands* [2017] UKPC 7; [2017] 2 WLR 1153, PC.

[99] Ibid. at 291, following *Baden, Delvaux and Lecuit v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1983] BCLC 325, *per* Peter Gibson J at 403.

[100] L. Smith, ‘Unjust enrichment, property and the structure of trusts’ (2000) 116 LQR 412.

[101] G. Watt, ‘Personal liability for receipt of trust property: allocating the risks’ in *Modern Studies in Property Law* (E. Cooke, ed.) (Oxford: Hart Publishing, 2005) vol. III, 91.

[102] See Chapter 5.

[103] P. Birks, ‘Receipt’ in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) at 214.

[104] Ibid. at 214–15.

[105] [1995] 2 AC 378.

[106] Ibid. at 387A.

[107] Ibid. at 384F–G.

[108] *Lumley v. Gye* (1853) 2 E & B 216 (118 English Reports 749).

[109] Millett J in *Agip (Africa) Ltd v. Jackson* [1990] Ch 265 at 292F.

[110] [1969] 2 Ch 276, CA.

[111] Ibid. at 298B.

[112] *Barnes v. Addy* (1874) LR9 Ch App 244.

[113] See the earlier discussion under the heading ‘Receipt’.

[114] J. Snape and G. Watt, ‘A position of trust’ (1995) 92(28) LSG 20.

[115] [2002] 2 AC 164.

[116] Ibid. at 200H–201A. Lord Millett took another discrete step in that direction in *Dubai Aluminium Co Ltd v. Salaam* [2002] UKHL 48, HL, in which his Lordship held, at para. [10], that, because a person may be held vicariously liable for inducing a breach of contract, there is ‘*no rational ground*’ for excluding similar liability in equity.

[117] *Twinsectra Ltd v. Yardley* [2002] 2 AC 164 at 201.

[118] *Baden v. Société Générale Pour Favoriser le Développement du Commerce et de l’Industrie en France* [1993] 1 WLR 509, Ch D; [1983] BCLC 325.

[119] [2005] UKPC 37; [2006] 1 All ER 333; [2005] 1 Lloyd’s Rep 225, PC.

[120] [2017] UKSC 67; [2018] AC 391.

[121] Para. [74] Followed in *LLB Verwaltung (Switzerland) AG v. Group Seven Ltd* [2019] EWCA Civ 614.

[122] [1982] QB 1053.

[123] See, for example, in the context of obtaining money by deception.

[124] Sir Christopher Slade stated in *Walker v. Stones* [2001] Lloyd’s Rep PN 864 at 877, para. [164]: ‘*the penniless thief, for example, who picks the pocket of the multi-millionaire, is dishonest*’.

[125] [2010] EWCA Civ 1314; [2010] All ER (D) 221.

[126] Ibid. at para. [25].

[127] [1995] 2 AC 378, PC, at 389–90.

[128] [2002] 2 AC 164 at 172–3, 196–8.

[129] For example, *Clydesdale Bank plc v. John Workman* [2016] EWCA Civ 73.

[130] [2020] Ch 129.

[131] Applying *Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469, HL.

[132] [2008] EWCA Civ 1007.

[133] Ibid. at para. [146].

[134] [1995] 2 AC 378 at 392F/G.

[135] [1995] 2 AC 378 at 389.

[136] *The Times*, 28 September 1999. See, also, *Brinks Ltd v. Abu Saleh (No. 3), The Times*, 23 October 1995.

[137] [1991] 1 NZLR 597, *per* Thomas J at 613.

[138] [1995] 2 AC 378 at 392D–F.

[139] See the final section of this chapter.

[140] [1992] 4 All ER 700.

[141] Ibid. at 761H.

[142] *HRT Ltd v. J. Alsford Pension Trustees Ltd* (1997) 11(2) TLI 48 (noted in (1997) 6(2) J Int P 83).

[143] *Selangor United Rubber Estates v. Cradock (No. 3)* [1968] 1 WLR 1555 and *Karak Rubber Co v. Burden (No. 2)* [1972] 1 WLR 602.

[144] *The Times*, 23 October 1995.

[145] [2002] 2 AC 164 at 194.

[146] *Baden v. Société Générale Pour Favoriser le Développement du Commerce et de l'Industrie en France* [1993] 1 WLR 509, Ch D, *per* Peter Gibson J at 573E.

[147] Ibid. at 574D ('*a person beneficially interested in trust property held by a corporate trustee can rely on the fiduciary relationship between the directors and the trustee company as well as on the trust affecting the trust property in the hands of the company*').

[148] *Dubai Aluminium Co Ltd v. Salaam* [2002] 3 WLR 1913.

[149] See, generally, *Lonrho plc v. Fayed* [1990] 1 QB 490.

[150] *JD Wetherspoon plc v. Van de Berg & Co Ltd* [2009] EWHC 639 (Ch), approved in *Novoship (UK) Ltd v. Nikitin* [2014] EWCA Civ 908, CA.

[151] P. Birks, 'Civil wrongs: a new world', *1990 Butterworth Lectures* (London: Butterworths, 1991) at 100.

[152] [2002] 2 AC 164 at 200–1.

[153] [1995] 2 AC 378 at 387. Charles Harpum suggests that accessory liability is an equitable 'analogue' of the common law economic torts ('Accessory liability for procuring or assisting a breach of trust' (1995) 111 LQR 545).

[154] See, generally, A. Burrows, 'We do this at common law but that in equity' (2002) 22(1) OJLS 1.

[155] *Dubai Aluminium Co Ltd v. Salaam* [2002] 3 WLR 1913, HL.

[156] *OJSC Oil Co Yugraneft (in liquidation) v. Abramovich* [2008] EWHC 2613 (Comm).

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