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# *Remodelling Knowing Receipt as a Gains-Based Wrong*

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## Abstract
This article analyses the nature of knowing receipt. It finds its previous characterisations as a form of unjust enrichment or trustee-like liability wanting in the face of newer authority and complex commercial situations. It argues that knowing receipt is a gains-based profit-disgorging wrong and this best describes its remedies.

## 1. Introduction

The action in knowing receipt is an invaluable tool in the armoury of the claimant who wants to recover misapplied trust or company property from a stranger to the trust or fiduciary relation. It might be that the trustee or fiduciary is a man of straw or has disappeared or simply that the recipient is easier to sue. Then, provided the claimant can show that the recipient beneficially received property traceable to a breach of trust of fiduciary duty with cognisance of that breach, a personal claim exists.[1]

However, the precise nature of knowing receipt and particularly how this translates into the remedy available – namely quantum – is contested. Various valuable attempts have been made to find a simple, generalised set of principles or tenets that describe knowing receipt well. Such theories, or models, of its structure are useful in that they can be applied to novel circumstances to predict the outcome of cases. They tend to be classic examples of English law inductive reasoning. While the different models do not tend to yield different results with simple fact patterns, when the facts become complex very different outcomes are predicted. These more complicated fact patterns usually come up in commercial cases owing to the more complex transactions they bring.

Previous attempts to model knowing receipt are, however, impaired by trying to fit it into the framework of gains-based unjust enrichment, or loss-based trustee-like liability. That knowing receipt appears gains-based has led to the temptation to characterise it as a species of unjust enrichment, but this is to ignore its basis in fault. But characterising knowing receipt as loss-based like trustees' liability to reconstitute a trust leads to problems in quantification.

Things have moved on. It has been accepted that knowing receipt can disgorge subsequent (or remote) profits as well as the property received.[2] Accordingly, I argue that the best way to

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[1] *El Ajou v Dollar Land Holdings Plc (No.1)* [1994] 2 All E.R. 685 CA.
[2] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] Q.B. 499.

describe knowing receipt in a unified manner – describing all its remedies – is as an independent gains-based profit-disgorging wrong, founded on the fault of the recipient and related to but independent of the equitable proprietary (tracing) claim.

By "best way" what is meant is that the model proposed not only describes existing authority accurately but predicts the outcome of novel circumstances in line with the general purpose and principles of liability for intermeddling with a trust or fiduciary obligation. The model should also suggest possible improvements to the law in the same vein. It must be as simple and elegant as possible while doing so. In this sense these criteria are an application of Occam's Razor.

To show this, I examine the changing views and theories of knowing receipt and how they can or cannot be adapted to new authorities. The process is one of comparison, elimination and development which, it is submitted, leads to the simple and precise gains-based characterisation I advance.

## 2. Preliminary Matters: Equitable Liability

Consider first some preliminary matters. The equitable proprietary claim allows one to retrieve trust property by following it *in specie* into the hands of the recipient providing that the recipient is not the *bona fide* purchaser of the legal interest for value without notice of the breach of trust. Even if passed on, the claimant may elect to trace into property acquired in exchange for the trust property – the *value* from the trust property may still be claimed. This is the "equitable proprietary tracing claim", often simply known as the "tracing claim".

Knowing receipt is the personal claim of money in lieu of claiming the trust property and clearly comes in to its own when the property is passed on by the recipient. In this sense it is indemnificatory. It must therefore be closely related in terms of liability and quantum even if it is an independent action. It is also related to dishonest assistance which is available when the defendant did not receive trust or company property but assisted its misappropriation or some other breach of duty.

"Accessory", for present purposes, is convenient shorthand for those who intermeddle with a trust or fiduciary obligation – knowing recipients and dishonest assistants – and is more precise than the term "constructive trustee", commonly used to describe both but other *personae* too.[3] But equitable proprietary claim recipients can be innocent if they give no value, so labelling them accessories is inappropriate.

All three claims require some degree of awareness of the breach of trust or fiduciary duty. "Cognisance" is a neutral term for this not subject to the baggage associated with the terms of knowledge and notice. It has become popular and is adopted here too.[4] "Notice" is required for the equitable proprietary claim. For knowing receipt, "[t]he recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt".[5] This is a higher standard than notice.[6] The dishonest assistant must know enough to make his behaviour dishonest by the standards of ordinary, honest, people but there is no subjective requirement

[3] Older materials may use "accessory" to refer only to dishonest assistants: E.g. *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 PC at 383.

[4] As declared by Sachs LJ: *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch. 276 CA at 296 and adopted by commentators: e.g. Simon Gardner, "Knowing assistance and knowing receipt: taking stock" (1996) 112 L.Q.R. 56; Charles Harpum, "The stranger as constructive trustee: Part 1" (1986) 102 L.Q.R. 114.

[5] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437 CA at 455.

[6] *Re Montagu's Settlement Trusts* [1987] Ch. 264 Ch; *Akindele* [2001] Ch. 437 CA.

that he be aware that he has behaved dishonestly.[7] "Objective dishonesty", however, requires a higher standard of cognisance than "knowledge".[8] There is a gradually increasing level of culpability.

## 3. Characterisations of Equitable Accessorial Liability

*Lewin on Trusts* puts the matter succinctly: the theoretical basis of knowing receipt has "not yet been rationalised by the higher courts". *Lewin* identifies three models:

*(i) it is a form of restitution for unjust enrichment;*

*(ii) the fault or unconscionability basis: it is a free-standing equitable wrong ("independent liability"); and*

*(iii) the property basis: liability is transmitted from the trust subsisting in the property received ("transmitted liability").*[9]

It is helpful to define and distinguish the terms restitution and disgorgement as they are used in this article because their meanings are not settled.[10] For present purposes (and at the risk of oversimplification), restitution is the simple reversal of a transfer of value. Disgorgement, or account of profits, looks further to associated costs and other external factors and is concerned with net gain.

*Lewin's* last category has spawned variants. Liability might not be so perfectly mirrored of the trust interest but derived in a more limited way. The term "derivative liability" is used to describe looser ways of constructing liability and "transmitted liability" is just a strict variation of it. The precise differences will be explained below. Furthermore, the trust clearly has aspects of both obligation and property.[11] Hence liability may derive from the obligational aspects of the trust rather than the property itself. The amount of trust property received is then less important, particularly as regards quantification of the remedy against the accessory. This variant may also apply to dishonest assistance. Then there is also:

*(iv) "property-derived liability": liability derives from the trust interest in the particular property received; and*

*(v) "obligation-derived liability": liability derives from the wider obligations of the trust or fiduciary relationship.*

The justifications, requirements and consequences of each are unpacked in turn. Then, four complex cases are analysed to see which models fit, so one can see which models are in line with or contrary to authority; if they produce a principled and justified result; and to see if the

[7] *Royal Brunei* [1995] 2 A.C. 378 PC at 289; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 W.L.R. 1476 at [15]–[16]. As for the debate over *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 A.C. 164, Lord Neuberger regarded that as over in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2012] Ch. 453 at [4].

[8] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [1999] B.C.C. 669 Ch at 682. The only criticism of Carnwath J's judgment made by the Court of Appeal is that dishonesty was too high a standard. "Unconscionability", as the Court of Appeal define the standard, does not require that the recipient acts dishonestly, as confirmed in *Starglade Properties Ltd v Nash* [2010] EWHC 148 (Ch) [57], this matter not challenged on appeal: *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314.

[9] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), para.42–028 et seq. In *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 A.C. 164 at [104]–[105] Lord Millett uses "property" and "fault" and to define the bases of knowing receipt and dishonest assistance respectively.

[10] See particularly James Edelman and Steven Elliott, "Money remedies against trustees" (2004) 18 T.L.I. 116.

[11] E.g. Peter Jaffey, "Explaining the trust" (2015) 131 L.Q.R. 377.

tenets of each model can be stated in a simple and elegant manner while still describing the law well. It is convenient to consider theories of transmission and derivation first.

## 4. Transmitted Liability and Derivative Liability

### 4.1 Origins

So there is a breach of trust – or there is a constructive trust fixed over the proceeds of a breach of fiduciary duty[12] – and there is an accessory to the breach. It is commonly said that the accessory will, if meeting the other requirements, be made a "constructive trustee".[13]

"Constructive trustee" immediately insinuates trustee-like liability. But it is, as Arden LJ puts it, a "portmanteau expression … that can be used to define the remedies for different sorts of causes of action, including breach of trust, and different types of relief."[14] Lord Sumption is less generous: "there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees."[15] Some constructive trusts are treated like express trusts but some "were not in reality trusts at all, but merely a remedial mechanism by which equity gave relief for fraud."[16] It is therefore necessary to look behind that expression.

Charles Harpum traced the origin of knowing receipt as evolving from the equitable proprietary tracing claim.[17] There, unless the recipient is a *bona fide* purchaser without notice, he is bound by the equity in the property. The very early knowing receipt case of *Wilson v Moore* (from 1834, some 40 years before the foundational case of *Barnes v Addy*) cited earlier tracing cases as authority and fixed the defendant with liability *in rem* for the property remaining and *in personam* for the property dissipated.[18]

"Constructive trusteeship" suggests the same duties as express trusteeship: *in rem* custodial duties including those to preserve and deliver up the trust property *in specie* married to an *in personam* liability to account for the money value of that which is passed on. This is the essence of transmitted liability for the personal claim: liability is formed strictly from the trust interest extant in the property received. There is a two-step process: the recipient is made a constructive trustee via the proprietary claim, then personal liability follows from this. This explains why knowing receipt liability may be founded on the receipt of traceable proceeds of trust property – still carrying trust obligations – as well as the property itself.[19]

Harpum accepted that not all of the cases agreed and that is was necessary to reject a minority of them for consistency's sake.[20] He was anxious to point out there was no difference in the requisite standard of cognisance of the breach of trust between the knowing receipt and the equitable proprietary claim at this point, which was notice. Indeed, until around the 1980s

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[12] *Boardman v Phipps* [1967] A.C. 46 HL; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] A.C. 250.

[13] *Barnes v Addy* (1873–74) L.R. 9 Ch. App. 244 CA at 251.

[14] *Charter plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] Ch. 313 at [64].

[15] *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189 at [7].

[16] *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All E.R. 400 CA at 409.

[17] Harpum, "The stranger as constructive trustee: Part 1" (1986) 102 L.Q.R. 114; Charles Harpum, "The stranger as constructive trustee: Part 2" (1986) 102 L.Q.R. 267; Charles Harpum, "Liability for Intermeddling with Trusts" (1987) 50 M.L.R. 217, 220.

[18] *Barnes v Addy* (1873–74) L.R. 9 Ch. App. 244 CA; *Wilson v Moore* (1834) 1 My & K 337, 39 E.R. 709. Harpum also cites *Keane v Robarts* (1819) 4 Madd 332, 56 E.R. 728.

[19] *El Ajou* [1994] 2 All E.R. 685 CA at 700.

[20] Harpum, "The stranger as constructive trustee: Part 2" (1986) 102 L.Q.R. 267, 290.

for the most part the courts agreed.[21] Arguments that a higher standard of cognisance, "knowledge", was required came later.[22]

## 4.2 Transmitted Liability Dicta

The very early cases[23] do not spell out the transmission of liability from trustee to recipient. Nonetheless, an explanation was given only slightly later, in the mid-nineteenth century:

> *This wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee ... he becomes subject in a Court of Equity to the same rights and remedies as ... the fraudulent trustee.*[24]

The cases also speak of property being "held upon the same trusts"[25] and "a transmitted fiduciary obligation".[26]

## 4.3 Consequences

Since a trustee's liability to reconstitute a trust where the fund has been wrongly paid away is strict with no need for fault,[27] it follows the same applies for recipient liability, except for the requirement of cognisance of the breach. Harpum's demands of the standard of cognisance must be correct as a matter of pure logic – because with transmitted liability the personal claim derives from the proprietary one which is founded upon mere notice. In this two-step process there can only be one standard. Different standards of cognisance would mean the process is one-step, not requiring intermediate liability in the proprietary claim – and would falsify the transmission theory altogether. Liability could then only be derivative in a looser sense, by means of analogy. This is broadly how the matter is described and explained in *Lewin*.[28]

Moreover, under both transmitted and derivative liability, the limiting principles familiar from the law of damages would not apply in their standard form. It was previously thought that "[c]onsiderations of causation, foreseeability and remoteness do not readily enter into the matter" of the trustee's liability to reconstitute a trust.[29] The obligation was like an "equitable debt", not damages,[30] and was for "restitution" of the property[31] (albeit one must note the ambiguity inherent in the word restitution). Hence the same would apply for knowing receipt.

The remedy for breach of the custodial duty to preserve the trust property has been called "substitutive compensation". It is not a broad measure of losses including consequential losses suffered by the beneficiary; that is "reparative compensation".[32] Reparative compensation is closer to common law damages: the money sum to put the claimant, so far it as is possible, in the place she would have been but for the breach.[33] Substitutive compensation looks to the

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[21] *Karak Rubber Co Ltd v Burden (No.2)* [1971] 1 W.L.R. 602 Ch at 633–634, 636–637; *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555 Ch at 1582–1583; *Belmont Finance Corporation v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393 CA at 405; *Agip (Africa) Ltd v Jackson* [1991] Ch. 547 CA.
[22] Below, on page 9, text from n 53.
[23] *Wilson v Moore* (1834) 1 My & K 337, 39 E.R. 709; *Keane v Robarts* (1819) 4 Madd 332, 56 E.R. 728.
[24] *Rolfe v Gregory* (1865) 4 De G J & S 576, 578; 46 E.R. 1042, 1043.
[25] *Corser v Cartwright* (1875) L.R. 7 H.L. 731 HL at 741.
[26] *John v Dodwell & Co Ltd* [1918] A.C. 563 PC at 569.
[27] Save for the provisions of the Trustee Act 1925, s.61 to excuse trustees under certain circumstances.
[28] *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), para.42–029.
[29] *Re Dawson* [1966] 2 N.S.W.R. 211 New South Wales Supreme Court at 215.
[30] *Ex p Adamson* (1878) 8 Ch. D. 807 CA at 819.
[31] *Ex p Adamson* (1878) 8 Ch. D. 807 CA at 819.
[32] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [53] et seq adopting Elliott's phrases: Edelman and Elliott, "Money remedies against trustees" (2004) 18 T.L.I. 116, 116.
[33] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 HL at 39.

money substitute of the value of the misapplied trust property and no further. However, subsequent authorities have limited the debt- or restitution-like nature of this remedy.

While the value of substitutive compensation cannot be increased by consequential losses, it can be increased or decreased by external events that affect precisely what the substitute is and hence its value. This can be illustrated by the case of *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, a case of a remortgage of land similar in principle and result to *Target Holdings v Redferns*.[34] In *AIB*, the solicitors held £3.3m of loan monies on bare trust. They negligently failed to obtain the first legal charge the lender required. They obtained only a second legal charge, subordinate to the first charge of some £309,000. The property misapplied in breach of trust (ignoring a technicality not considered on appeal) was the entire loan of £3.3m.[35] But because there were no active trust obligations remaining,[36] the substitute was not the whole £3.3m. It was the value lost, namely £309,000. That figure was arrived at by applying principles of causation. Immediately upon the initial breach of trust, the value of the substitute would have been £3.3m. But obtaining the (reduced) security caused the substitute necessary for reconstitution to fall in value. The substitute was the balance between of the security obtained and what should have been obtained, namely £309,000.[37]

There is no place for remoteness, rooted in foreseeability, in substitutive compensation. It is not applicable because it is concerned with consequential losses, out of scope of this remedy. It can only apply, conceptually, to reparative compensation because only reparative compensation is concerned with consequential losses.[38] A message to take from *AIB* is that just because causation applies, it does not follow that the remedy awarded is reparative.[39]

One should also note that reparative compensation appears to fully encompass substitutive compensation because that is always part of the wider consequential losses. It is always at least as large.

## 4.4 Property-Derived and Obligation-Derived Liability

The most extreme form of derivative liability, transmitted liability, suggests a complete mirroring of the trustees' obligations. Given the true trustee will have obligations to manage, invest, provide information and so on, such liability is rather extreme. Clearly one should only mirror the main obligation – to hold to property and to return it.

As well as accepting this, commentators have developed further variants. They are for a large part developed inductively from the remedies awarded and avoid the need for more literal transmission. The process is very simple: if the remedy awarded is always the value of the property received, then since this matches the trustee's duty to account, it is quantified the same way, i.e. it is substitutive compensation.

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[34] *Target Holdings v Redferns* [1996] 1 A.C. 421 HL.

[35] The point was whether the breach of trust was limited only to the £309,000: *AIB v Mark Redler* [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [16].

[36] This appears to be the main test following *AIB* [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [107]. In *Target Holdings* [1996] 1 A.C. 421 HL at 434 the distinction between traditional trusts and bare trusts used for commercial purposes was also given emphasis, unlike in *AIB*.

[37] Note that Mitchell and Watterson's model pre-dates *AIB* [2014] UKSC 58; [2014] 3 W.L.R. 1367 and did not take this into account. See generally below, on page 13, text from n 77.

[38] Steven B Elliott, "Remoteness Criteria in Equity" (2002) 65 M.L.R. 588, 590.

[39] [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [115]–[116].

Charles Mitchell and Stephen Watterson, in advancing their derivative theory of knowing receipt liability, go somewhat further than inductive reasoning. They also rely on the language of "constructive trusteeship" used by the courts to support their views. For them, "this language accurately conveys the distinctive nature of liability for knowing receipt".[40] But, importantly, they do not explicitly rely on theories of transmission and argue explicitly that only a limited number of duties are duplicated. And, crucially, those that are duplicated do yield the same remedies as express trustees' duties, i.e. they lead to substitutive compensation. Moreover, this process looks very closely to the property actually received rather than the broader trust obligations, hence they advance a property-derived model of knowing receipt.

In illustrating this, it is useful to contrast it with a dishonest assistance model. Elliott and Mitchell's theoretical model of dishonest assistance is of liability derivative not of the property received (for there is not necessarily any property received) but of the obligations of the express trustee, i.e. it is obligation-derived. There is then an additional basis of disgorgement (or account of profits) liability as a separate wrong based on fault (independent liability) in respect of any profits the dishonest assistant makes as a result of the dishonest assistance.[41]

Mitchell and Watterson helpfully provide a distinguishing example. Suppose a trustee breaches the trust by misappropriating shares, selling them and giving the proceeds to the accessory. The share price then increases. Under the property-derivative model they advance, liability is calculated by reference to the property passed on, i.e. the value of the money which does not increase. The compensation is substitutive of what was received for the knowing recipient. Under the obligation-derivative model, liability is calculated by reference to the original trust property, i.e. it is for the new, higher share price. This would be the liability for the dishonest assistant, not the knowing recipient. It is reparative.[42]

Conversely, if the shares themselves had been passed on, the knowing recipient would have been liable for the increased value even after parting with them while at a lower value.[43] This is because substitutive compensation looks to what had been passed on and the value required as a substitute for it.

It is possible to discern two quite separate themes these arguments. The first is the reliance on general statements of transmission in the various *dicta* and particularly the frequent use of "constructive trustee" to describe the remedy. The second is the hard-edged use of inductive reasoning to reach the same conclusion where it is observed that the remedies are the same. It is convenient to call them the "soft" and "hard" arguments for derivative liability respectively.

## 5. Independent Liability

There are three deductive arguments from first principles that support an independent basis of equitable accessorial liability. It will be seen that they only succeed in dispatching absolutely

[40] Charles Mitchell and Stephen Watterson, "Remedies for Knowing Receipt" in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart, 2010), p.129. See also Charles Mitchell, "Stewardship of property and liability to account" [2014] Conv. 215.

[41] Steven B Elliott and Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 M.L.R. 16. See *Novoship* [2014] EWCA Civ 908; [2015] Q.B. 499 regards disgorgement from accessories. N.B. This model was later restated by Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.152 as being derivative only insofar as it is founded upon another's primary wrong.

[42] Accommodating the judicial suggestion that the remedy for dishonest assistance extends to consequential losses: *Novoship* [2014] EWCA Civ 908; [2015] Q.B. 499 at [73].

[43] Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.154.

the transmitted liability argument and for the most part the soft argument. The first concerns the non-fiduciary status of accessories; the second how the soft argument for derivative liability knowing receipt has been falsified; and the third the availability of the disgorgement of remote profits.

## 5.1 Limitation and the Non-Fiduciary Status of Accessories

It has been held at the highest level that accessories to a breach of trust, unlike trustees, are not fiduciaries, most recently in *Williams v Central Bank of Nigeria*. Accessories do not take on fiduciary responsibilities voluntarily; instead they act adversely to the trust or prior fiduciary relationship from the outset.[44] This is a significant conceptual shift: it is very hard to say that a non-fiduciary is any kind of trustee, unless the obligations of this "trustee" are greatly attenuated.

Therefore, the transmitted liability *dicta* can mean no more than liability is "as if" the accessory were like a trustee and only in certain respects. The door is thereby opened to finding principled distinctions to modify the liability of accessories vis-à-vis fiduciaries. Equity is not restricted to deriving the rules only from the same principles as those that apply to fiduciaries. The "transmitted liability dicta" in the old cases must therefore be read with this in mind. There has been a significant shift in accepting that accessory liability is less like trustees' liability and that there is more space for the law to reshape that liability in accordance with and justified by the relevant differences.

In *Williams* one respect in which the difference mattered is limitation through the effluxion of time. For express trustees there is no limitation period, but for accessories a six-year time limit is applied.[45] Now one may juxtapose two very different *dicta* concerning accessories. In *Re Bell's Indenture* it was said that the accessory "can be in no better position than an express trustee."[46] But in *Williams* it was said that, in the context of limitation, the decision places accessories "in a better position than defaulting trustees."[47]

Indeed, for the strongest *dicta* in the English authorities, Mitchell and Watterson rely on cases reported between 1844 and 1918, well before the shift in judicial attitude.[48] Because of their careful formulation, this shift does not falsify their theory. But it does militate against their appeals to the soft argument, such as their insistence that:

> *when the courts say that a knowing recipient is "personally liable to account as a constructive trustee", they mean exactly what they say ... Equity fixes them with custodial duties which are the same as some of the duties which are voluntarily assumed by express trustees.*[49]

[44] [2014] UKSC 10; [2014] A.C. 1189. See also *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [141]. *Williams* built on the earlier case of *Paragon* [1999] 1 All E.R. 400 CA which held the same but only considered knowing recipients.

[45] *Williams* [2014] UKSC 10; [2014] A.C. 1189. The express trustee category in this context would also include *trustees de son tort* and de facto trustees because they originally held the trust property consistently with the original trust instead of adversely to it. See also *Paragon* [1999] 1 All E.R. 400 CA.

[46] [1980] 1 W.L.R. 1217 (Ch) 1236. N.B. This case has been overruled: *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 [143].

[47] [2014] UKSC 10; [2014] A.C. 1189 at [118].

[48] Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), pp.130–131: from *Sheridan v Joyce* (1844) 1 Jo. & Lat. 401, 7 Ir. Eq. R. 115 to *John v Dodwell* [1918] A.C. 563 PC.

[49] Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.130.

Instead, rather than dismissing the "fashion" for saying "nothing is added to our understanding of liability for knowing receipt by the language of constructive trusteeship",[50] we should continue to take note of the cautions. Ungoed-Thomas J warned that constructive trusteeship is "nothing more than a formula for equitable relief"[51] and Fletcher Moulton LJ cautioned of the "danger of trusting to verbal formulae."[52] These cautions still hold good. We ought to rely on the hard arguments, matching the remedies, rather than verbal formulae.

## 5.2 Knowledge and Notice

The knockout blow to the transmitted liability theory came from the case of *Re Montagu's Settlement Trusts*.[53] *Re Montagu* concerned the family settlements of the Dukes of Manchester. The tenth Duke received valuable chattels from the ninth Duke's settlement that he was not entitled to absolutely. He disposed of a number of them. They ought to have gone into a resettlement of which the eleventh Duke was a beneficiary. The eleventh Duke sued the tenth's estate. The tenth Duke's solicitor had had actual notice of the trusts, but had forgotten about them. The tenth Duke had relied on his solicitor and did not know of the extant trust. The problem is that a solicitor's notice, actual or constructive, is imputed to his client.[54]

Had the tenth Duke not disposed of the chattels, they could have been claimed in specie via the equitable proprietary claim. This is because the bona fide purchase defence only applies to purchasers, and only to purchasers without notice. The tenth Duke did not qualify because he did not give value, and moreover he had notice. Therefore, applying derivative liability reasoning, the tenth Duke's estate would have been fixed with liability to reconstitute the trust (with a money substitute) as derived from the trustees' duties to do the same.

However, the opposite decision was reached. Because the tenth Duke had not had "knowledge" of the breach of trust, his estate was not held liable. What Megarry V-C did was to establish a difference between "notice" and "knowledge" as standards of cognisance. Particularly, Megarry V-C doubted whether knowledge, as opposed to notice, could ever be imputed.[55]

The distinction was justified by reference to the two different levels of cognisance. The "careless recipient" with notice, like the tenth Duke, would be liable so long as he kept the property and thus did not have to reach into his own pocket, but would be permitted to innocently dissipate it without liability unless and until he knew a great deal more about the wrongdoing.[56] The distinction was approved by the Court of Appeal in *Bank of Credit and*

[50] Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.128.
[51] *Selangor* [1968] 1 W.L.R. 1555 Ch at 1582.
[52] *Re Coomber* [1911] 1 Ch. 723 CA at 728. See also *Bristol and West Building Society v Mothew* [1998] Ch. 1 CA at 16; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41 High Court of Australia [40].
[53] [1987] Ch. 264 Ch.
[54] The imputation process, while also ascribing to the defendant knowledge she does not have, is, at least in this context, considerably different from construction. Imputation takes the defendant's agent's notice and ascribes it to the defendant no matter what. It does not construct it from what the defendant actually knew or what the defendant ought to have known or ought to have taken steps to discover according to a particular standard of behaviour that the courts insist persons are held to. Notice is imputed without asking more.
[55] *Re Montagu* [1987] Ch. 264 Ch at 285. Even in *Karak Rubber* [1971] 1 W.L.R. 602 Ch at 634 – where Brightman J thought mere notice was sufficient to found liability in knowing receipt – he held that it required "actual or constructive notice" conspicuously omitting imputed notice. The discussion of notice concerned knowledge the recipient had closed his eyes to. Note that in respect of only requiring notice to found knowing receipt, *Karak Rubber* has not been followed by more recent authority.
[56] *Re Montagu* [1987] Ch. 264 Ch at 272.

*Commerce International (Overseas) Ltd v Akindele*.[57] *Akindele* has also been followed in other subsequent cases.[58]

While it is readily accepted in the textbooks that *Re Montagu* created a distinction between the personal and proprietary claims,[59] it is less well documented that it falsified the transmitted liability basis of knowing receipt.[60] This basis necessarily demands that the standard of cognisance is notice. Requiring a higher standard to found the action is therefore incompatible. But more widely, the soft argument for derivative liability relies on closeness to the process of transmission of the trust or fiduciary obligations through the receipt of property. It too, is undermined.

There have been two recent cases which could be interpreted to throw doubt on the whole foundation of *Re Montagu*. In *Crédit Agricole Corporation and Investment Bank v Papadimitriou* Lord Sumption stated that "the question what constitutes notice or knowledge is the same."[61] But he did not expressly say whether he meant the process of constructing notice or knowledge from the evidence, or whether the standards of cognisance were the same. He gave a single paragraph concurring judgment which did not separate these points clearly. In *Armstrong DLW GmbH v Winnington Networks Ltd* the first instance judge thought the former. He said that the concepts of notice and knowledge overlapped.[62] But while he thought there was a case for aligning them, he accepted they were distinct and applied subtly different tests for each.[63] Both cases were decided on their particular facts, and the wider considerations discussed in this article were absent from both. For instance, if the judge in *Armstrong* had considered the matter of imputed notice, he may well have made his two tests more divergent accordingly. Since these matters and the consequences of undoing *Re Montagu* were far from fully considered, it is submitted that these cases have not done much to undermine the distinction, which had previously been endorsed at the highest level: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.[64]

## 5.3 Disgorgement

The availability of disgorgement of remote profits has moved this debate on further. *Novoship (UK) Ltd v Mikhaylyuk* was a dishonest assistance case, but the Court of Appeal insisted that the disgorgement remedy applied also to knowing receipt.[65] In *Novoship* the breach of fiduciary duty was by the defendant Mikhaylyuk, who demanded bribes as the price of letting his principal's ships. The defendants Nikitin and Ruperti dishonestly assisted Mikhaylyuk through a scheme where Mikhaylyuk required Ruperti to pay bribes to himself as well as a company

[57] [2001] Ch. 437 CA.
[58] *Charter v City Index* [2007] EWCA Civ 1382; [2008] Ch. 313 at [7]; *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819; [2008] 2 Lloyd's Rep 456 at [43]; *Starglade v Nash* [2010] EWHC 148 (Ch) [57] rev'd *Starglade v Nash* [2010] EWCA Civ 1314 on other matters; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch. 156 at [277]..
[59] E.g. Jill Martin, *Hanbury and Martin, Modern Equity*, 19th edn (London: Sweet & Maxwell, 2012), para.12–016; *Lewin on Trusts*, 19th edn (2015), para.42–064; John McGhee, *Snell's Equity*, 32nd edn (London: Sweet & Maxwell, 2010), para.30–071.
[60] E.g. *Lewin* acknowledges the demand that the standards of cognisance be the same, but does not say that *Re Montagu* [1987] Ch. 264 Ch, holding that they are not, falsifies the theory: *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), para.42–029.
[61] [2015] UKPC 13; [2015] 2 P. & C.R. DG7 [33].
[62] [2012] EWHC 10 (Ch); [2013] Ch. 156 [113].
[63] [2012] EWHC 10 (Ch); [2013] Ch. 156 [122], [123], [132].
[64] [1996] A.C. 669 HL at 707.
[65] [2014] EWCA Civ 908; [2015] Q.B. 499 at [58], [68], [82].

owned and controlled by Nikitin. Nikitin, through that company, chartered ships from Novoship, making a large profit due to favourable market movements.

The court held that account of profits is available in principle, but not on these facts. This is because while causation was required, as well as simple "but for" causation, *effective* causation was required. The effective cause in *Novoship* was the market and Nikitin's skill, where the dishonest assistance gave no more than occasion for the profits.[66] Moreover, it was said that it must it must not be disproportionate to disgorge, and, in any event, the judge retains a discretion whether to make such an order.[67]

The crucial principle is that what is subject to disgorgement is the accessory's subsequent and remote profit, not the trustee's under derived liability. Moreover, the special requirements are quite unlike the trustee's strict liability to account. This liability is most certainly not derivative in any way for that would mean the accessory would be liable for the fiduciary's unauthorised gains. It is completely independent. Theories of derivative liability must explain liability in two parts: (i) derivative in part of the trust obligations (so far as that goes) for the received property; and (ii) independent as regards disgorgement. They are rendered unwieldy and inelegant by the fact they cannot explain the whole liability simply.

## 5.4 Summary: Theories and Principles Surviving these Cases

The transmitted liability theory is falsified, and the soft argument for derivative liability is shown to be of little effect. At best, appeals to the language of "constructive trustee" are little more than the mood music to the real substance of the hard argument. At worst, one should be wary of the language used in early cases. In *AIB*, Lord Toulson dismissed the language of debt-like liability[68] as arising from the insufficiently discriminating language of the times. It was "literary costume".[69] It is suggested that the same applies to the use of "constructive trusteeship".

But the hard argument-based models of derivative liability remain live options. The distinction between property-derived and obligation-derived liability is then critical. Consider again Mitchell and Watterson's example.[70] The distinction does not matter if the knowing recipient receives original trust property. It is when traceable property or only part of the trust property is received it matters.

It is suggested that property-derived option is the right one because the knowing recipient should only be liable for what she receives. The recipient may have limited cognisance of the breach – certainly not enough to make her behaviour amount to dishonesty – and is not required to know the precise details of the breach of trust to be fixed with liability.[71] There is no justification to fix the recipient with more liability than she has greater cognisance of. It seems wrong as matter of first principles and contrary to the thrust of *Re Montagu*.

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[66] [2014] EWCA Civ 908; [2015] Q.B. 499 at [114], [108], applying *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360 CA at 1374 and thereby adopting the contractual approach to causation.
[67] *Novoship* [2014] EWCA Civ 908; [2015] Q.B. 499 at [119].
[68] Above, on page 5, text to n 31.
[69] [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [61].
[70] Above, on page 7, text near n 43.
[71] Knowledge still has constructive elements, the most obvious being that turning a blind eye is no excuse as is failing to make obvious enquiries. See generally *Lewin on Trusts*, 19th edn (2015), paras 42–073 – 42–075.

## 6. Unjust Enrichment

That leads neatly to the unjust enrichment characterisation of knowing receipt – clearly there is a gains-based aspect to knowing receipt liability. Countless statements have been made that knowing receipt liability is restitutionary.[72] It is shown that while this characterisation accommodates its gains-based nature, the precise rules the unjust enrichment approach demands simply do not match the rules of knowing receipt.

### 6.1 Superficial Attraction

The unjust enrichment characterisation neatly solves the "careless recipient" problem. In *Re Montagu*, the tenth Duke was unjustly enriched at the eleventh's expense, and would have been *prima facie* liable. However, he had changed his position *bona fide* to the extent of the dissipation and would be excused to that extent. The careless recipient is liable only for any property that remains in his hands when he acquires the relevant knowledge – change of position is only a partial defence, operating to the extent of the change of position. Once the recipient acquires knowledge of the breach of trust, he can no longer change his position further *bona fide*.[73] The temporal limit of liability-free dissipation in the independent liability model matches precisely the temporal limit of the change of position defence in the unjust enrichment model. Moreover, the defence of *bona fide* purchase, a full defence in property law, is probably also a full defence in unjust enrichment.[74]

### 6.2 Irreconcilable Differences

However, below the surface there are theoretical and practical differences. The most significant is that knowing receipt simply does require fault where unjust enrichment is strict subject to the *bona fide* change of position defence. Also highly significant is that change of position requires a causal, not transactional, link to the property.[75] If a volunteer carelessly receives £1,000 of trust money and spends it on the rent, there is no liability in knowing receipt even after she is made aware of the breach of trust. The residual liability depends on a transactional link. However, she has not changed her position – the rent would have been paid in any event, not but for the receipt. Therefore liability for restitution remains. Conversely, if our careless recipient made a whim purchase from and on account of her new-found wealth, that would constitute a change of position (due to causation being made out), but under the equitable claim she would have to yield up the proceeds irrespective of matters of causation.

It is therefore more accurate to say that there are principles reminiscent of unjust enrichment in knowing receipt rather than that unjust enrichment is a contending model of it.

Moreover, there is now a disgorgement (or account of profits) remedy available in knowing receipt.[76] Now the unjust enrichment framework cannot be the only model of liability. This is

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[72] E.g. *Twinsectra* [2002] UKHL 12; [2002] 2 A.C. 164 at [105]; *Trustor AB v Smallbone (No.2)* [2001] 1 W.L.R. 1177 Ch at [12]; *Royal Brunei* [1995] 2 A.C. 378 PC; Gardner, "Knowing assistance and knowing receipt: taking stock" (1996) 112 L.Q.R. 56, 85.

[73] *Re Diplock* [1948] 1 Ch. 465 CA at 477. Contrast this with the first limb of the bona fide purchaser defence – purchase. The purchase money must be paid. So, if the consideration is £500 and the recipient pays only £400 and *then* acquires notice, he is bound for the entire value: *Story v Windsor* (1743) 2 Atk 630, 26 E.R. 776.

[74] *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 HL; Peter Birks, "The English recognition of unjust enrichment" [1991] L.M.C.L.Q. 473, 486; C C J Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011), para.29–09. Cf *Armstrong v Winnington* [2012] EWHC 10 (Ch); [2013] Ch. 156 at [105]; William Swadling, "Restitution and Bona Fide Purchase" in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (London: UKNCCL, 1997). The debate turns on whether bona fide purchase is merely to rectify defects in title or has a wider application.

[75] *Goff & Jones*, 8th edn (2011), para.27–25.

[76] *Novoship* [2014] EWCA Civ 908; [2015] Q.B. 499 at [82], [93].

because disgorgement is not available in restitution for unjust enrichment. It is only available in restitution for wrongs. The same criticism made of the derivative liability theory of knowing receipt applies here too. Requiring two bases of liability is inelegant and unwieldy.

## 7. Limiting Derivative Liability: Four Complex Cases

Since in simple cases the different models do not yield different results, four complex cases are identified and the remedies sought or awarded in them are analysed to see if they support the models.

### *7.1 Kasikornbank Public Co Ltd v Akai Holdings Ltd*

In *Kasikornbank Public Co Ltd v Akai Holdings Ltd*, the quantum in knowing receipt was very much in issue.[77] Lord Neuberger actually decided the case on the common law basis of lack of authority and the tort of conversion. However, since the case was argued in the alternative in knowing receipt, he embarked on a series of *obiter dicta* concerning how the case would have been decided in equity.

The facts, stated simply, are these. The defaulting fiduciary, one Mr Ting, was director of two companies, Singer NV and what was to become Akai Holdings Ltd ("Akai"). The bank had loaned money to Singer and in an error of judgment had advanced some US$30m upon seriously deficient security. To protect Singer, Ting secured a loan for Akai to discharge that loan held by Singer which was by then on the verge of default. Clearly this was to the manifest disadvantage of Akai because it received nothing in return. Nonetheless, the bank proceeded. If it had not, it would have had to report the first loan's default to the Banks of Thailand and England which would have meant serious commercial difficulties.[78] One may speculate that that led it to ignore the patent defects in the evidence of Ting's authority.[79]

The bank received US$50.1m of shares in Akai Electric (a subsidiary mostly owned by Akai) on pledge as security for a loan representing some 143% of the loan's value. It later returned some 5.5m shares because their value had increased and fewer of them amounted to sufficient collateral. When Akai defaulted on the loan, the shares were worth US$32.9m compared to the accrued debt of US$31.3m. The bank delayed, obtaining various clearances, and then sold the remaining shares for their then market value of US$20.5m. The bank later made good its loss by proving in the insolvency and recovering the balance of the loan.

Lord Neuberger held that given what the bank knew (which included much more than the basic facts recited here), it had acted irrationally and therefore Ting, lacking actual authority, also lacked the requisite apparent authority required to bind Akai to the transaction. Therefore the loan and pledge agreements were void and the bank had converted Akai's property to its own use. In conversion, quantum is measured at the date of the conversion and was therefore US$20.5m.[80]

In the alternative in knowing receipt, supposing derivative liability, the recipient is fixed with the duty to return the property immediately, not to restore it on demand.[81] At that point

[77] [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal.
[78] *Akai* [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal [27].
[79] *Akai* [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal [119].
[80] *Mercer v Jones* (1813) 3 Camp. 477, 170 E.R. 1452; *Henderson & Co v Williams* [1895] 1 Q.B. 521 CA.
[81] Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.118. *Snell's Equity*, 32nd edn (2010) para.30–070 agrees with the initial quantification but supposes a

the shares were valued at US$50.1m. The claimant is entitled to the full sum and a lien over the property.[82] But it would have been an undeserved windfall – had they kept the shares, Akai would have held on to them until they were worthless. They were trying to profit from the wrong done against them.[83]

Lord Neuberger hit upon another method to come to the sum of US$20.5m. He applied *Target Holdings v Redferns*, holding that a form of the doctrine of causation applied.[84] The "losses" were caused by market movements and not the bank's actions; it was perfectly reasonable to wait for clearance to sell. The bank's action, while an intervening cause, was not potent for the purposes of causation hence the sum of US$32.9m was not awarded.[85]

At first blush, one might think that applying causation meant that the remedy awarded was reparative compensation. But that ignores the effect of *AIB* in shaping the principles applying to substitutive compensation. Causation does apply in substitutive situations, but only insofar as it considers external events and how they affect value of the substitute for the property. The principle in *AIB* was that the value of the substitute dropped by the value of the security actually obtained to yield the value of the security not obtained. On the facts of *Akai* this would be extended to reducing the value of the substitute where the custodial duty admits the possibility of market movements reducing the value of the property. This does not seem any great leap: in *AIB* it was noted that where an act was reasonable it would be considered causally potent in affecting the value of the substitute. But where it was not reasonable – such as being dilatory in calling in a debt – it would not be considered causally potent.[86] It was, of course, reasonable to delay in order to obtain clearance.

Professor Charles Mitchell has argued vehemently against the adoption of causation into the principles of substitutive compensation.[87] For him, both trustees' liability for reconstitution and knowing receipt was a strict liability to account for the misapplied property, not subject to any limiting principles. It is ironic that the development of the substitutive compensation remedy in *AIB* has actually made his and Dr Watterson's theory of property-derived knowing receipt more accurate – and indeed an attractive model – in the face of the judicial

restitutionary basis of liability, which means that the value cannot change. Given the circumstances, however, the fall might come under the doctrine of subjective devaluation.

[82] *Re Oatway* [1903] 2 Ch. 356 Ch. Much like in the cases of *Target Holdings* [1996] 1 A.C. 421 HL and *Mothew* [1998] Ch. 1 CA the claimants appear to have pursued the case in the alternative in equity on account of its seemingly more generous rules of quantification.

[83] *Akai* [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal [154].

[84] Note that Lord Neuberger had to steer around the case of *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28; [2004] 1 W.L.R. 1846, where Lord Nicholls held that cases such as *Akindele* should be dealt with using the common law principles of want of authority and thus in conversion, much as *Akai* was. Lord Neuberger distinguished *Criterion v Stratford* by noting that it concerned an executory, not executed, contract. One might also point to the fact, as Lord Nicholls did not, that in *Akindele* there seems to have been apparent authority and thus the contract would not have been void, and hence an action in conversion would not have succeeded: Matthew Conaglen and Richard Nolan, "Contracts and knowing receipt: principles and application" (2013) 129 L.Q.R. 359. The application of causation had previously been suggested, obiter, in *Brown v Bennett* [1999] 1 B.C.L.C. 649 CA at 657.

[85] *Akai* [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal [151].

[86] *AIB* [2014] UKSC 58; [2014] 3 W.L.R. 1367 at [88] citing *Caffrey v Darby* (1801) 6 Ves. Jun. 488, 31 E.R. 1159.

[87] Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 C.L.P. 307; Mitchell, "Stewardship of property and liability to account" [2014] Conv. 215.

determination that principles of causation apply to knowing receipt. But there is a more problematic case to come.

## 7.2 *BCCI (Overseas) Ltd v Akindele*

*Bank of Credit and Commerce International (Overseas) Ltd v Akindele* is perhaps best-known for Nourse LJ's summary rejection of the invitation to cast knowing receipt into the law of unjust enrichment, as well as being yet another milestone in the debate over the standard of cognisance required of the breach of trust in knowing receipt. However, there is another facet of it, unargued before the courts, that makes it, although not obviously, a difficult case – namely the quantum sought.

Akindele invested $10m in the BCCI group in 1985 by agreement with a BCCI group company, International Credit and Investment Co (Overseas) Ltd ("ICIC") to purchase shares in BCCI Holdings. At the time, BCCI was considered to be a reputable international bank. By 1988 Akindele had heard rumours about the integrity of the BCCI group. Accordingly, he exercised his right to exit the agreement early and was paid $16.7m by BCCI (Overseas) ("BCCI"), representing a $6.7m return on his investment. This was a breach of fiduciary duty because it was not for BCCI to pay – it was for ICIC. ICIC could not afford to pay, hence the scheme.

However, none of it could have traceably come from Akindele's money. Since ICIC could not afford to pay him, one may surmise that any monies traceable to his would have been swallowed by its overdraft rendering tracing impossible, even supposing Akindele's money was held on trust and was not merely a debt. So Akindele received the entire $16.7m traceable to a breach of fiduciary duty. Prima facie, therefore, the entire receipt is recoverable.

Akindele's conduct was not criticised. On the contrary, at first instance, Carnwath J held that Akindele was entitled to "take steps to protect his own interest," i.e. he could get out before the rumours of impropriety crystallised into knowledge of a breach of fiduciary duty.[88] There is a normative imperative here – that people in Akindele's position ought to have an incentive to exit and be allowed to retain what they have earned so far. The alternative would encourage them to leave their funds in such schemes in the hope of higher returns, given that they stand to lose everything if caught either way.

Nonetheless, perhaps the liquidators made a terrible mistake in only claiming $6.7m. But there is a perfectly good principle to explain that figure. It has been seen in the *Akai* case: causation.

It seems clear that, treating knowing receipt as a profit-disgorging gains-based measure, causation can explain the quantum sought. Akindele's alleged behaviour was not the source of the principal sum, but only of his gain. Given his decision to exit early, it can be said that had Akindele known of the truth behind BCCI, he would not have invested in the first place. He would have had the $10m originally invested, but not the additional $6.7m. Put simply, his gain was $6.7m.

It is problematic, however, to fit this analysis into the framework of loss-based substitutive compensation. Akindele received the entire $16.7m traceable to the breach of fiduciary duty. Nothing since the receipt of that money caused the value of its substitute to fall to $6.7m. Since it was not traceable to his initial investment, he did not receive $10m of his money and $6.7m

[88] See n 8.

of misappropriated money. The quantum would still be $16.7m. The facts do not fit this remedy. An anomaly is that an express trustee with liability to account would be able, on simpler facts, to claim a credit for his own money put in.

If one considers the remedy to be reparative compensation, it is still problematic to make the facts fit. BCCI had lost $16.7m when it paid that amount to Akindele. One might argue that $10m of that loss was caused more proximately by its discharging a $10m debt owed by a group company than paying it to Akindele. Then only the $6.7m return on investment paid to Akindele was proximately caused by the breach of fiduciary duty. This is, however, highly artificial. It is much more natural to see the quantum as determined by causation applying to a gains-based measure.

Thus the nub of the problem is revealed. Loss-based measures – even substitutive loss-based measures – simply cannot accommodate this situation. We are told that despite the apparent punitive aspect to disgorgement,[89] equity will stop short of true forfeiture.[90] "The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched."[91] But only a gains-based measure will preclude the forfeiture of $10m – unjustly enriching BCCI's creditors in the plain meaning of the words. Loss-based measures cannot take account of the cross-group transfer.

This problem further explains the attraction of the unjust enrichment characterisation. Subtractive unjust enrichment looks not to the loss but to the defendant's gain. It might deal with this issue, though there are a significant number of technical hurdles to overcome. The question "was the enrichment at the claimant's expense" as conventionally understood was concerned with the claimant's standing to sue, not quantum and so would not reduce the claim to $6.7m.[92] *Goff & Jones* go into a comprehensive analysis from first principles and try to formulate a suitable wider test also governing quantum that elevates that question to looking for a causal connection between the claimant's loss and the defendant's gain.[93] This approach received a recent fillip when it was accepted by a majority of the Supreme Court in *Bank of Cyprus UK Ltd v Menelaou*[94] and it remains to be seen how it develops. But the biggest problem with an unjust enrichment analysis, as noted, is that it is does not require fault, where knowing receipt does.

One might point to a possible anomaly in having such a different measure to the equitable proprietary claim. Why not simply sue Akindele in that claim, which would clearly encompass the higher sum, $16.7m? Then, the argument goes, this recharacterisation is rendered otiose. The answer is "not quite". The situation is simply *Re Montagu* writ large. If there is notice but

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[89] *Re Western of Canada Oil, Lands and Works Co (No.1), Carling's Case* (1875) 1 Ch. D. 115 CA at 123; David Stevens, "Restitution, Property and the Cause of Action in Unjust Enrichment: Getting By With Fewer Things (Part 1)" (1989) 39 U.T.L.J. 258, 279; Kit Barker, "Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law" (2001) 54 C.L.P. 255, 284.

[90] E.g. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1597], quoting Elliott and Mitchell, "Remedies for Dishonest Assistance" (2004) 67 M.L.R. 16, 41.

[91] *Maguire v Makaronis* (1997) 188 C.L.R. 449 High Court of Australia 496 (Kirby J), quoted in *Akai* [2010] HKCFA 63, (2010) 13 H.K.C.F.A.R. 479, [2011] 1 H.K.C. 35 Hong Kong Court of Final Appeal [152] and *Sinclair v Versailles* [2011] EWCA Civ 347; [2012] Ch. 453 at [47].

[92] *Kleinwort Benson Ltd v Birmingham City Council* [1997] Q.B. 380 CA at 392–393. Unlike in the *Akai* situation where it might apply, the doctrine of subjective devaluation could not be used to reduce the quantum from $16.7m to $10m on the facts of *Akindele* [2001] Ch. 437 CA.

[93] *Goff & Jones*, 8th edn (2011), para.6–12 et seq.

[94] [2015] UKSC 66; [2015] 3 W.L.R. 1334. The case was one of reviving subrogation and there were two innovations: (i) bringing reviving subrogation into the framework of unjust enrichment; and (ii) accepting that the enrichment needs not be direct.

no knowledge, dissipation of the property leads to no liability. It is when knowledge is acquired then further dissipation is to no avail.

To flesh this out, consider a *Montagu*-like tweak to the facts of *Akindele*. Suppose that Akindele's solicitor had known of the wrongdoing going on at BCCI but had failed to tell him when he arranged for the $16.7m to be paid over. The solicitor's notice is imputed to Akindele. Akindele then dissipates some of the $16.7m. Later, his solicitor tells him of the wrongdoing. Akindele now has knowledge. He is liable, under the equitable proprietary claim, for however much of the $16.7m that remains in his hands. This might be more or less than the $6.7m profit depending how much is left; indeed it might be zero. However, Akindele would be liable for at least $6.7m in any event because this is the value of the personal claim.[95]

Therefore only treating knowing receipt as based on fault, not unjust enrichment, carrying a profit-disgorging gains-based remedy, leads to what appears to be the correct figure in this situation. This characterisation also works in *Akai*: the bank was disgorged of its gain subject to a reduction proximately caused by market movements.

### 7.3 *Novoship (UK) Ltd v Mikhaylyuk*

*Novoship (UK) Ltd v Mikhaylyuk* has already been introduced. Two aspects of *Novoship* support the case for gains-based, independent liability: First, as noted earlier, the availability of disgorgement is of the accessory's independent profits undermines theories of derivative liability and no more needs to be said of that. Second, and more significantly, disgorgement is a gains-based measure which looks to profits, not gross receipts. Describing both the return of the immediate gain and the subsequent remote gain as species of a general disgorgement remedy simplifies the model and avoids an anomaly in the structure of the law.

Consider the test for disgorgement in *Novoship* – effective causation. This also applies to the quanta *Akindele* and in *Akai*. If Akindele had known enough about the frauds at BCCI, his profit – and only that profit – would have been effectively caused by his wrongdoing. Likewise the gain disgorged in *Akai* was effectively caused by the knowing receipt, save for the reduction in value which was effectively caused by the market movements.[96] So they are both species of disgorgement.

The anomaly arises if knowing receipt liability for the principal sum received remains loss-based on the principles of substitutive compensation (i.e. the rationalisation of *Akindele* as advanced is rejected) but there is also a gains-based remedy. If so, the justification that reparative compensation for wider losses is unavailable is because knowing receipt is peculiarly limited by the value of the property received. This is the *quid pro quo* for the less stringent standard of cognisance required compared to dishonest assistance, where reparative compensation is available.

After *Novoship*, disgorgement is available in knowing receipt. This means the claimant can reach gains above and beyond the property received but still not consequential losses. But if

[95] This claim is alternative, not cumulative, with the surviving value of the equitable proprietary claim because knowing receipt in this situation is indemnificatory.

[96] This is something of a simplification. The missing step is that causation in these cases is something of a value judgement expressed in terms of causation. According to, e.g. Jane Stapleton, "Cause in fact and the scope of liability for consequences" (2003) 119 L.Q.R. 388, 422, this obscures the underlying norms engaged. See also Joshua Getzler, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Peter Birks and Francis Rose (eds), *Restitution and Equity: Resulting trusts and equitable compensation* (London: Mansfield Press, 2000), p.245.

the standard of cognisance in knowing receipt is lower which justifies taking only substitutive compensation, how can it justify taking more, namely an account of profits which goes beyond substitutive compensation for what was received? There is an argument that, by parity of reasoning, account of profits should indeed be available in dishonest assistance – on account of the higher standard of culpability required there – but not in knowing receipt. These normative concerns were not considered in *Novoship*, which pre-dated *AIB* where the difference between substitutive and reparative compensation was emphasised.

On the other hand, if knowing receipt is a gains-based action, access to further gains fits better conceptually. Then the *quid pro quo* for the lower standard of cognisance is not that there is a smaller measure, substitutive compensation, but instead that the remedy looks entirely to the knowing recipient's gains. For the wider losses inflicted upon the trust the beneficiary must look to the more culpable participants. The gains-based characterisation brings a simpler and more elegant justification for the range of remedies seen in the authorities and, in the case of *Akindele*, the remedy argued for.

In this, there is a whiff of the unjust enrichment analysis, where the main difference is requiring traceable proceeds in order to avoid the vexed problem of how much of the enrichment was at the claimant's expense.[97] As such, one might argue that the foregoing is an unjust enrichment analysis that has been forced into an equitable framework.

But, at the risk of repetition, the action is still founded on fault. This, and the requirement of tracing means knowing receipt is still not a species of unjust enrichment. Although the test of effective causation for remote gains does not demand a tracing link it is only a small part of the action and, moreover, it appears to be a stringent test given the facts of *Novoship*, meaning that gains hard to attribute to the wrongdoing are out of scope anyway.

### 7.4 *Arthur v A-G of the Turks & Caicos Islands*

For unregistered land it is uncontroversial that knowing receipt is available. But whether knowing receipt applies to a conveyance of registered land made in breach of trust is a contested issue. One purpose of land registration is that the register is an accurate reflection of title, and hence section 29 of the Land Registration Act 2002 ("LRA") sweeps away any extant equitable interest in the land (unless overriding) when a disposition of registered land is made for valuable consideration. Notwithstanding a recent Privy Council case on the matter, *Arthur v A-G of the Turks & Caicos Islands*,[98] and the Law Commission's suggestion that knowing receipt can survive the LRA,[99] it has not been judicially determined if knowing receipt can found personal liability when land is conveyed in breach of trust.

Conaglen and Goymour argue that the personal claim in knowing receipt is "parasitic" upon the equitable proprietary interest subsisting in the land.[100] Since the equitable interest is swept away by s 29, the personal claim, dependent upon this liability, is also lost. This is transmitted liability of a sort, indeed of an extreme kind. For Conaglen and Goymour, it would be against

[97] Above, on page 16, text near n 92.
[98] [2012] UKPC 30.
[99] Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998), para.3.48.
[100] Matthew Conaglen and Amy Goymour, "Knowing Receipt and Registered Land" in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart, 2010), p.177. See also the commentary referenced above in nn 40, 41.

the policy of the LRA – avoiding the hazards of the doctrine of notice and simplifying the process of conveyancing – to allow the personal claim to survive.

Yet the language of s 29 is in reality much softer. It merely "postpones" the beneficiary's interest behind the purchaser's. Thus Conaglen and Goymour are forced to advance the argument that knowing receipt liability goes against the policy, rather than the letter, of the statute.[101] Moreover, as Dixon says, even if a "proprietary base" is required to found the claim, that is not the same as saying the proprietary base must be a continuing one.[102] This proposition is fortified by the decision in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* where the beneficial interest in the property, defeated by the *bona fide* purchase defence, was reactivated upon the rescission or setting aside of the transferring transaction.[103] The defence does not destroy every aspect of the equitable interest. Indeed, as Dixon points out, the argument that a continuing proprietary base is not required is supported by the primary advantage of knowing receipt – liability after the property is passed on.[104]

Conaglen and Goymour characterise the action in knowing receipt as "vindicatory".[105] But obtaining money in place of the misappropriated property is not primarily vindicatory. Only obtaining the original property *in specie* truly vindicates one's ownership – unless that property is fungible, and land most certainly is not. In these circumstances knowing receipt is primarily indemnificatory. It is difficult to accept the proposition that the policy of the LRA is set against indemnity. Indeed, Conaglen and Goymour's arguments appear to be evenly balanced and their conclusion a value judgement.

Particularly, one is drawn to their arguments about the policy of the LRA being to eliminate the hazards of the doctrine of notice. The main hazard is that an innocent purchaser might be fixed with constructive notice of an undiscoverable encumbrance affecting the land.

Two counter-arguments are advanced. First, as Conaglen and Goymour accept, the burden of proof of knowledge in knowing receipt lies with the claimant whereas the burden of proof of showing an absence of notice lies with the defendant.[106] One should add that knowledge is a more subjective standard, and hence the danger of being found to have cognisance of anything is much lower. Therefore the hazard is vastly reduced.

Second, and much more importantly, the hazard operates to affect the utility of the *land*. Any encumbrance left on the land has negative effects on its alienability, something the law has set its face against.[107] This consideration simply does not apply to personal money liability. It is therefore submitted that the policy of the LRA is not against knowing receipt for registered land. This conclusion is bolstered by the fact that Conaglen and Goymour accept that dishonest assistance is available as against a dishonest recipient of registered land. If a personal remedy is contrary to the policy of the LRA, why do they not criticise dishonest assistance liability for

[101] Conaglen and Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.170.
[102] Martin Dixon, "Knowing receipt, constructive trusts and registered title" [2012] Conv. 439, 445.
[103] [2012] EWCA Civ 195; [2013] Ch. 91.
[104] Dixon, "Knowing receipt, constructive trusts and registered title" [2012] Conv. 439, 445.
[105] Conaglen and Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.172.
[106] Conaglen and Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed), *Constructive and Resulting Trusts* (2010), p.163. See also Michael Bryan, "Notice and knowledge in private law claims" (2010) 3 J. Eq. 31.
[107] E.g. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 HL at 107.

registered land too? Their objections appear only to be sustainable with reference to derivative liability thinking and not the wider norms and principles adumbrated here.

Further in this connexion, that the difference between notice and knowledge is greatest in the case of land is significant. In the conveyancing context, the doctrine of notice is severe, but in other contexts the courts are much less ready to fix a recipient with notice.[108] Since the transmitted liability model of knowing receipt requires the same standard of cognisance for the proprietary and personal claims, the difference created in *Re Montagu* is most difficult for it in the case of land. It is therefore unsurprising if supporters of this model of knowing receipt might look for reasons to exclude land cases from its ambit in order to close the gap between knowledge and notice, required for transmitted liability and the support it lends to the soft argument. But it is simply not necessary to support this extreme position. Mitchell and Watterson's theory certainly does not demand it.

In *Arthur*, a decision was not necessary because the conditions necessary for sweeping away the equitable interest were not met. But should a court allow such a claim, it would tend to support a theory of knowing receipt based on independent liability. It would not be conclusive, because: (i) it would still be possible to decide that outcome on the basis of Dixon's argument that a continuing proprietary interest is not necessary, merely an initial one; (ii) that derivative liability is not strictly transmitted and does not require that two-step transmission; and (iii) it could also be decided on the basis that the statute merely postpones the proprietary interest and does not destroy the personal claim.

### 7.5 Summary

That concludes the studies of the cases. It is true that as a matter of binding precedent the hard argument is not falsified. One must accept the greater desirability of independent fault- and gains-based liability in principle to prefer that model of liability. But, it is submitted, that the arguments advanced justify just that.

## 8. Possible Developments under Independent Liability

Before concluding, it is worth considering, albeit somewhat speculatively, how the action of knowing receipt might be developed if freed from the constraints of property-derivative principles. Tracing imports many restrictions such as the requirement of election, its (general) prohibition of backwards tracing or tracing into a debt[109] and that if an intermediate recipient is a *bona fide* purchaser, a subsequent purchaser with notice is not bound by the equity.[110] It is suggested that if knowing receipt is not strictly derivative of a right of property, these restrictions could be loosened. Rather than treating the property received as carrying of the trust obligations, it should be considered as the yardstick for gains-based quantum even if the property received is not strictly traceable to the trust according to the tracing rules for property. All three rules could be abrogated. Then the rule against double recovery and the rules for contribution will then govern quantum instead.[111]

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[108] *Manchester Trust v Furness* [1895] 2 Q.B. 539 CA. See also *Sinclair* [2011] EWCA Civ 347; [2012] Ch. 453; *Armstrong v Winnington* [2012] EWHC 10 (Ch); [2013] Ch. 156.

[109] *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 PC at 104; cf *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35.

[110] *Wilkes v Spooner* [1911] 2 K.B. 473 CA. The exception is where the property falls into the hands of an existing trustee or constructive trustee.

[111] Contribution under the Civil Liability (Contribution) Act 1978 is available in knowing receipt claims: *Charter v City Index* [2007] EWCA Civ 1382; [2008] Ch. 313.

This is not as outré as it first sounds. Lionel Smith has argued that tracing is a process, not a remedy.[112] Lord Millett endorsed this view in *Foskett v McKeown*.[113] Splitting off the right of property from tracing and putting those rules into the equitable proprietary claim rather than tracing is what would be needed, which fits this characterisation. The Privy Council, in *Federal Republic of Brazil v Durant International Corporation*, signalled flexibility in tracing by permitting backwards tracing in limited circumstances.[114]

Owing to limitations of space, only election will be considered in full. Adherence to the property-derivative rule of election is deleterious to knowing receipt's indemnificatory function, as this hypothetical tracing example shows. Consider *Burn v Morris*.[115] In this case, the claimant's clerk lost a £20 banknote. It fell into the hands of the finder, who paid the defendant £2 to change it into £1 coins. She then dissipated all but £7 of the coins. The claimant recovered the coins and £13 from the defendant (the banknote was passed to the Bank of England as *bona fide* purchaser so no further following was possible).

In fact the case was brought in conversion, not knowing receipt. How the £7 was recovered is not reported, although one might suppose it was via the restitutionary action of money had and received. The reduction of liability in conversion from £20 to £13 was due to the rule against double recovery. Still, why could such a claim not also be possible in knowing receipt?[116] Given knowing receipt's indemnificatory function it seems entirely natural. The answer is that, under property-derivative principles, it would be a double election.

The problem is that remedies involving tracing give rise to what Birks described as the "geometric multiplication of the plaintiff's property".[117] If property held on trust is taken and sold, the claimant must elect either to follow the trust property into the hands of the recipient or to trace its value into the proceeds. She cannot do both.

If one were to allow recovery in the knowing receipt version of *Burn v Morris* then this would be a double election. On the one hand, the claimant would elect to trace into the substitute, the coins, and recover those in the equitable proprietary claim; on the other, she would follow the original property into the hands of the defendant and after its dissipation seek the recovery of its money equivalent. This is all well and good if the party the claimant elects to pursue is solvent, but manifestly unfair if this is not the case. Since both potential defendants are culpable this would amount to excusing one on the basis of a technicality, where the remedial obligations are clearly intended to be joint liability of some kind.

If knowing receipt is underpinned strictly by property-derivative principles, then this double election is utterly impossible. This is because of the justification for access to substitutes is the tracing fiction that they are the claimant's property.[118] Therefore if the substitute belongs to the

[112] Lionel D Smith, *The Law of Tracing* (Oxford: Clarendon, 1997), particularly pp.6–14.
[113] [2001] 1 A.C. 102 HL at 128. See also, e.g. Peter Birks, "Persistent problems in misdirected money: a quintet" [1993] L.M.C.L.Q. 218, 229.
[114] [2015] UKPC 35 at [38].
[115] (1834) 2 Cr. & M. 579, 149 E.R. 891.
[116] Given the appropriate tweaks to the facts so that legal title does not pass; legal title passes with money and other negotiable instruments: *Miller v Race* (1758) 1 Burr. 452, 97 E.R. 398.
[117] Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1989), p.70.
[118] *Taylor v Plumer* (1815) 3 M. & S. 562, 575; 105 E.R. 721, 726: "It makes no difference in reason or law into what other form, different from the original, the change may have been made … for the product of or substitute for the original thing still follows the nature of the thing itself". See Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321, 332 et seq for detailed analysis of this

claimant, then the original property does not and the justification falls away. However, if knowing receipt has an independent basis, this is no obstacle in principle. Then the traceable property can be recovered with the usual justification that it represents the original property. Further, the knowing recipients elsewhere in the chains of substitutions are held liable for any value not recovered. The election rule would not be applied because what is sought does not derive from a right of property. There is no sense in insisting on rules peculiar to the equitable proprietary claim and rooted in a right of property where the remedy is personal. The taking away of the gain is justified by the recipient's knowledge of the wrongdoing.

Then quantum as against each defendant would be limited instead by the rule against double recovery. This is a finer-grained and fairer rule than election. Indeed, election in the proprietary claim can be seen as a blunt version of the rule against double recovery, a reasonable compromise where there are discrete items of property, but ill-suited to a money claim.

Briefly, consider the rule against backwards tracing. If money is taken out of a bank account and then money is paid in, the money taken out is not traceable because there is no strict chronological transactional link. But this rule has already been weakened by *Federal Republic of Brazil v Durant*. Tracing was said to be possible where "the court is satisfied that the various steps are part of a coordinated scheme … a debit appears in the bank account of an intermediary before a reciprocal credit entry."[119] The court was concerned that such techniques should not permit money launderers to escape liability.[120] The court was also concerned not to expand the availability of proprietary remedies "in a way which may have an adverse effect on other innocent parties."[121] This concern does not affect the personal claim in knowing receipt which brings no priority over innocent parties such as unsecured creditors. Hence further loosening may well be justified.

Lastly, consider the intermediate *bona fide* purchaser rule.[122] It is justified by arguments for security of title.[123] Again, in a personal claim the justification does not apply and there seems no reason, other than adherence to strict doctrine, to retain it in knowing receipt. This avoids the problem if money launderers incorporate an innocent dupe in the process which would otherwise defeat the claim.

These developments would be practically impossible under the property-derived theory. But if knowing receipt is independent of the proprietary claim, many of the concerns specific to property are neatly avoided. Therefore the profit-disgorging gains-based model proposed can solve new problems too.

## 9. Conclusion

One theme that has run through this article is the increasing complexity in the factual scenarios presented to the courts. For simple custodial trusts a derivative liability model is perfectly adequate to determine the liability of the express trustee and the knowing recipient alike. However, the times of such simple cases are gone.

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fiction. See also Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Oxford: Hart, 2002), p.126.

[119] [2015] UKPC 35 at [38]. See also, e.g., *Agip (Africa) Ltd v Jackson* [1991] Ch. 547 CA; *Relfo Ltd v Varsani* [2014] EWCA Civ 360; [2015] 1 B.C.L.C. 14.

[120] *Brazil v Durant Corpn* [2015] UKPC 35 at [38].

[121] *Brazil v Durant Corpn* [2015] UKPC 35 at [33].

[122] Above, on page 20, text to n 110.

[123] E.g. *ITS v GP Noble* [2012] EWCA Civ 195; [2013] Ch. 91 at [90] et seq.

Accordingly, I suggest that derivative models of knowing receipt are now obsolete and the broad thrust of modern authority is against them. The law is moving on. Additionally, attempts to repackage knowing receipt into the template of unjust enrichment have been misconceived. But as in those analytical exercises, I agree that a process of inductive reasoning must be attempted to find common, simple and elegant principles that describe desirable and accurate results.

Those common principles should be these. First, liability in knowing receipt is an independent wrong, not derivative of the trust obligations or property except superficially in that a breach of trust or fiduciary duty is required. Second, it is gains-based, not looking to wider losses or trust obligations to maintain a trust fund but to disgorging gains arising from the receipt, including subsequent remote profits effectively caused by its receipt and increases in value of the property received. Third, despite the limited similarities, it is not a species of unjust enrichment.

Even if the proposals for development – which would fully oust the derivative theories – are not accepted, the model proposed still is, it is submitted, the best model for knowing receipt on current authority and as a matter of principle. That is at least until it, too, is surpassed by events – or a better analysis.