Redefining Accessory Liability: *Royal Brunei Airlines Sdn Bhd v Tan*

1. *Introduction*

The imposition of a constructive trust on third parties involved in a breach of trust or fiduciary duty has been the subject of considerable difference of opinion among both judges and commentators. The source of the modern law in this field is the statement of principle given by Lord Selborne LC sitting in the Chancery Court of Appeal in *Barnes v Addy*:[1]

> [S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers ... unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[2]

This statement has been seen as setting out two distinct sources of liability[3] which have come to dominate subsequent discussion of the law: "recipient liability" and "accessory liability".[4] The recent decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*[5] provides a fresh and principled reappraisal of accessory liability by a court at the highest level. Given that Australian authorities in this area are presently in a state of disarray,[6] the arguments for a reappraisal of the Australian law along similar lines are persuasive.

The facts of the case are as follows. The defendant controlled Borneo Leisure Travel Sdn Bhd, being its founder, managing director and principal shareholder. BLT entered into an agreement with Royal Brunei Airlines Sdn Bhd to act as its general agent for the sale of passenger and cargo transportation. Under the terms of the agreement, BLT was to hold the proceeds of the

---

1 (1874) LR 9 Ch App 244.

2 Id at 251–2.

3 The distinction between the two sources of liability was first noted by Jacobs P (in dissent) in *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443 at 459.

4 See Birks, P, "Misdirected funds: Restitution from the Recipient" (1989) *Lloyds Maritime & Commercial LQ* 296. Traditionally, the two heads of liability have been referred to as "knowing receipt or dealing" and "knowing assistance" (see, eg, Baker, P V and Langan, P St J (eds), *Snell's Principles of Equity* (28th edn, 1982) at 194–5). However, in light of recent decisions, the use of these terms may be misleading.

5 [1995] 3 WLR 64. The members of the Judicial Committee of the Privy Council were Lord Goff of Chieveley, Lord Ackner, Lord Nicholls of Birkenhead, Lord Steyn and Sir John May. The decision was handed down by Lord Nicholls of Birkenhead.

6 The only High Court decision on the point, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 is inconclusive. In subsequent cases, State courts have taken a variety of approaches, although they have tended to favour the narrower basis for liability advocated by Stephen J in *Consul Development* at 412: see *Green v Bestobell Industries Pty Ltd* [1982] WAR 1; *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* [1983] 2 QdR 508; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157; *Adams v Bank of New South Wales* [1984] 1 NSWLR 285; *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1988) 78 ALR 193; *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580; *Beach Petroleum NL v Johnson* (1993) 115 ALR 411; cf *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132.

sale of tickets on trust for RBA. However, instead of paying the proceeds of the ticket sales into a trust account, they were paid into BLT's general current account, and used to meet ordinary business expenses. Tan, as controller of BLT, was taken to have authorised this misapplication of trust property. After the agency was terminated, RBA, seeking to recover the amount owed by BLT, brought an action against Tan on a number of grounds including accessory liability. In the lower courts there was some disagreement as to:

i what the requirement that the relevant breach of fiduciary duty be pursuant to a "dishonest and fraudulent design" entailed; and,

ii whether BLT's breach of trust was dishonest and fraudulent.

Although the appeal to the Privy Council could have been decided on other grounds,[7] the issue which it addressed was whether the liability of a third party, as an accessory to a breach of fiduciary duty, was dependent on the breach itself being pursuant to a dishonest and fraudulent design on the part of the fiduciary.[8]

2. *The Decision*

As the Privy Council observed, the cause of much of the difficulty in this area of law has been the tendency of courts, at least since the decision in *Selangor United Rubber Estates Ltd v Cradock (No 3)*,[9] to concentrate on the technical aspects of the application of the rule, rather than engaging in a fuller examination of the underlying principles.[10] An opportunity to remedy this situation was presented in *Tan*. Although the primary issue was whether, for accessory liability to arise the breach of fiduciary duty must be fraudulent and dishonest, the Privy Council examined all aspects of accessory liability. Three innovations resulted:

i Abolition of the requirement that the breach of fiduciary duty be dishonest and fraudulent;

ii Clarification of the basis for imposing liability on the third party;

iii Exploration of the scope of dishonesty and the consequent abandonment of the five-point classification of knowledge developed by Peter Gibson J in *Baden v Société Générale SA*.[11]

Their Lordships refrained from dealing with recipient liability, although passing comments indicate that a restitution-based approach was favoured.[12]

---

7 It was observed that being controller of BLT, Tan's dishonesty might be imputed to it thus making its breach dishonest too: *Tan* above n5 at 76.

8 Id at 68.

9 [1968] 1 WLR 1555.

10 *Tan* above n5 at 70. Comments to similar effect were made by Peter Gibson J in *Baden v Société Générale Pour Favoriser le Développment du Commerce et de L'Industrie en France SA* [1993] 1 WLR 509 at 573. See also Harpum, C, "The Stranger as Constructive Trustee (Part 1)" (1986) 102 *LQR* 114 at 145; Halliwell, M, "The Stranger as Constructive Trustee Revisited" (1989) *Conveyancer & Property Lawyer* 328 at 334. The fact that, at least in England, no case dealing with the rule in *Barnes v Addy* has gone beyond the Court of Appeal is at least partly responsible for this.

11 Id at 575–6.

12 The restitution-based approach was expounded by Birks, above n4. Recipient liability is also an area of considerable debate with a number of differing rationales proposed for imposition of a constructive trust under this head. A number of these rationales are examined in Cope, M, *Constructive Trusts* (1992) at 391–400.

A. *Dishonest and Fraudulent Design*

The requirement that, for accessory liability to arise, the breach of trust or fiduciary duty be pursuant to a "dishonest and fraudulent design on the part of the trustee [or fiduciary]" had its origins in Lord Selborne LC's judgment in *Barnes v Addy*.[13] In subsequent decisions, this requirement has been taken for granted, with judges seeking to define what "dishonest and fraudulent" means rather than questioning whether it is an appropriate criterion for imposing third party liability.[14] Furthermore, the fact that the fiduciary's breach had to be dishonest and fraudulent was seen as a reason for making liability of the third party dependent on dishonesty and fraud on their part.[15] This moral equivalence of the fiduciary and third party was based on the requirement that the third party be *implicated* in the fiduciary's dishonest and fraudulent design.[16] Thus, the liability of the third party assisting in a breach of fiduciary duty was viewed as that of an "accessory" to fraud, with the fiduciary's dishonest and fraudulent design being the primary source of liability.[17]

Despite the widespread acceptance of the requirement for a dishonest and fraudulent design on the part of the fiduciary, there were a number of difficulties with this position. First, there were decisions predating *Barnes v Addy* in which the liability of third parties, who could not be classified either as recipients of trust property or trustees *de son tort*, did not depend on the existence of a dishonest and fraudulent breach of trust.[18] This led some commentators to suggest accessory liability might in some circumstances arise even if the

---

13 Above n1 at 252 (see passage quoted above).

14 *Soar v Ashwell* [1893] 2 QB 390 at 394–5, 396, 405; *Selangor* above n9 at 1580, 1590; *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 at 270, 273–4; *Consul Development* above n6 at 408; *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 at 1006; *Baden* above n10 at 574.

15 *Carl Zeiss Stiftung v Herbert Smith (No 2)* [1969] 2 Ch 276 at 298; *Belmont* id at 267; *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 293; *Eagle Trust Plc v SBC Securities Ltd* [1993] 1 WLR 484 at 491, 496. A number of commentators have also stressed this connection: see Sullivan, G R, "Assisting Fraudulent Conduct as a Basis for Constructive Trusteeship" (1984) 5 *Co Lawyer* 242 at 243; Harpum above n10 at 147, 154; Brindle, M J and Hooley, R J A, "Does Constructive Knowledge Make a Constructive Trustee?" (1987) 61 *ALJ* 281 at 286; Millett, P J, "Tracing the Proceeds of Fraud" (1991) 107 *LQR* 71 at 84; Norman, H "Knowing Assistance — a Plea for Help" (1992) 12 *Legal Studies* 332 at 334, 339, 348.

16 This requirement has its origins in Lord Selborne LC's statement that liability "be extended in equity to others who are not properly trustees, if they are found ... actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*": see *Barnes v Addy* above n1 at 251.

17 Brindle and Hooley, above n15 at 284–6 and Birks, above n4 at 334–8. Brindle and Hooley (at 283) also suggested that liability for knowing assistance might be in some ways similar to that for the tort of conspiracy, although they noted (at 285) that there are considerable differences in the application of the two doctrines; see also *Belmont* above n14 at 269–70, *Adams* above n6 at 290–1.

18 *Harnett v Yielding* (1805) 2 Sch & Lef 549; [1803–13] All ER 704 at 708; *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216; *Attorney-General v Corporation of Leicester* (1844) 7 Beav 176 at 179; 49 ER 1031 at 1032; *Andrews v Bousfield* (1847) 10 Beav 511; 50 ER 678; *Alleyne v Darcy* (1854) 4 Ir Ch Rep 199; *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840; *Charlton v Coombes* (1863) 4 Giff 382; 66 ER 754; see also *Midgley v Midgley* [1893] 3 Ch 282 which was decided after *Barnes v Addy*.

breach of fiduciary duty was innocent.[19] Harpum drew a distinction between liability for knowing assistance and liability for knowing inducement, only the former requiring the fiduciary's breach to be dishonest and fraudulent.[20]

Second, there was no adequate reason why, if a constructive trust was being imposed on a third party, its imposition should depend on the conduct of the fiduciary. Thomas J in *Powell v Thompson*[21] held that, because the issue was one of balancing the interests of the third party and the beneficiary, the conduct of other persons should be irrelevant. Furthermore, as Loughlan observed, the requirement for a dishonest and fraudulent breach could lead to anomalous and unfair results: a third party could escape liability even if they knew that they were assisting in a breach of fiduciary duty, provided that the fiduciary was innocent of dishonesty.[22] Therefore, she argued that the policy objective underpinning imposition of liability for knowing assistance — protection of persons who were vulnerable by virtue of the fiduciary relationship — was not met.[23]

In *Tan*, the Privy Council adopted these criticisms of the requirement for dishonesty and fraud on the part of the fiduciary, holding that the liability of the accessory to a breach of fiduciary duty depended only on whether it was at fault. Thus, whether the fiduciary was dishonest and fraudulent was irrelevant: it made no sense for third party liability to be dependent on the conduct of the fiduciary.[24] Furthermore, their Lordships observed that the case for imposing liability on a third party is even stronger where it is at fault and the fiduciary is innocent, because of the closer causal connection between the third party's conduct and the loss.[25] However, the distinction drawn by Harpum between inducing (or procuring) a breach and assisting in a breach was rejected.[26] At first glance, a distinction between liability for knowing inducement (which does not depend on dishonesty on the part of the fiduciary), and liability for knowing assistance (which does), would appear to reflect the varying strength of the causal link between the third party and the loss in real cases: generally, where the third party knows of a potential breach of fiduciary duty but the fiduciary does not, the conduct of the third party leading to the breach is likely to constitute inducement rather than mere assistance. Indeed, it may be possible to refine the definition of inducement so that all conduct of a third party with knowledge of a potential breach, where the fiduciary is innocent, might be

---

19 Hayton, D, "The Baden Delvaux Case: Constructive Trusteeship and Constructive Knowledge" (1983) 4 *Co Lawyer* 177 at 178; Meagher, R P and Gummow, W M C, *Jacobs' Law of Trusts in Australia* (5th edn, 1986) at 306–7. See also passing comments made by Moffitt P in *Adams* above n6 at 292.

20 Harpum, above n10 at 141–4. Harpum (at 144) noted, however, that in some situations there may be no real distinction between assistance and inducement. See also Gummow J in *Elders Trustee and Executor Co* above n6 at 238.

21 [1991] 1 NZLR 597 at 613.

22 Loughlan, P L, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 *Oxford J Leg Studies* 260 at 267. Loughlan's arguments on this point were adopted by Birks, above n4 at 339.

23 Loughlan, ibid. A similar conclusion was arrived at by Elias although it was based on different policy considerations — namely reparation of losses caused through fault: see generally Elias, G, *Explaining Constructive Trusts* (1990) passim.

24 *Tan* above n5 at 69. The approach of the Judicial Committee was very similar to that of Thomas J in *Powell* (above n21) which they approved at 70.

25 *Tan* id at 69.

26 Ibid.

construed as inducement, thus effectively filling the gap left by the knowing assistance head of liability. However, such an approach would be unnecessarily complex. The approach of the Privy Council is far more straightforward.

The primary consequence of the rejection of the requirement that the fiduciary's breach be dishonest and fraudulent, was the undermining of the "moral equivalence" argument for making dishonesty on the part of the third party the touchstone of their liability.[27] This therefore demanded a reappraisal of accessory liability as a whole.[28] In the light of this decision, the term "accessory" should be interpreted, not as connoting the moral equivalence of the fiduciary and third party, but as referring to the fact that the liability of the third party is derivative, arising out of the fact of a breach of fiduciary duty.[29]

B. The Basis for Accessory Liability

The constructive trust imposed on accessories to a breach of fiduciary duty is remedial in nature.[30] However, rather than being a remedy affording the beneficiary specific restitution, because trust property need not pass into the accessory's hands, it is essentially a means of calculating the accessory's liability as if they themselves are a trustee (or fiduciary)[31] in breach of duty.[32]

A number of competing policy considerations were addressed by the Privy Council in its examination of the basis for accessory liability. On the one hand, there is a need to protect the fiduciary relationship from interference by third parties:[33] the beneficiary is entitled to expect that the fiduciary will be

---

27 Of all the advocates of the abolition of the requirement that the fiduciary's breach be dishonest and fraudulent, all but Birks also argued for a broader basis for the third party's liability than just dishonesty. Loughlan (above n22 at 268–70) and Elias (above n23 at 81) argued that liability should be based on "negligence" and Thomas J in *Powell* (above n21 at 610) held that it should be based on "unconscionability" in the broad sense.

28 *Tan* above n5 at 70.

29 Another consequence of the abolition of the dishonest and fraudulent breach requirement would be that the liability of agents who do not claim the property for their own benefit may be dealt with purely under the knowing assistance head of liability. This would seem to solve some of the difficulties noted by Tan, Y L, in "Agent's Liability for Knowing Receipt" (1991) *Lloyds Maritime & Commercial LQ* 357 passim, without having to resort to the knowing receipt head of liability.

30 Hayton, D, "Personal Accountability of Strangers as Constructive Trustees" (1985) 27 *Mal LR* 313 at 313–4; Austin, R P, "The Melting Down of the Remedial Trust" (1988) 11 *UNSWLJ* 66 at 79; Halliwell, above n10 at 335.

31 This led Thomas J to use the phrase "constructive fiduciary" to describe the accessory in *Markwell Bros* above n6 at 525.

32 *Selangor* above n9 at 1582. See also Hayton, above n30 at 314; Meagher and Gummow, above n19 at 310–1; Hayton, D, "The Stranger as Constructive Trustee" (1987) 46 *Camb LJ* 395 at 395–6; Oakley, A J, *Constructive Trusts* (2nd edn, 1987) at 89; Millett, above n15 at 83. As constructive trustee the accessory is liable to account for profits which they obtain as a result of the breach of duty, and to compensate any losses suffered by the beneficiary: see the discussion in Harpum, above n10 at 118–9. Loughlan and Elias both argue that the justification for imposing constructive trust liability on accessories is to make good (or repair) losses suffered by the beneficiary as a result of the breach of duty: see Loughlan, above n22 at 261; Elias, above n23 at 26ff, 80–1. This has led Loughlan to question the appropriateness of making the third party account for profits: see Loughlan, above n22 at 264–5. Whether such an approach will eventually be adopted is uncertain.

33 The Privy Council drew an analogy with the protection of contractual relationships at common law: see *Tan* above n5 at 71.

permitted to fulfil their obligations without deliberate intervention by third parties.[34] Therefore, their Lordships rejected the idea that no liability should be imposed on accessories to a breach of fiduciary duty. On the other hand, there is some need to protect third parties dealing with fiduciaries. If the risks of dealing with fiduciaries are too great, everyday business would be impeded,[35] and the task of the fiduciary would be almost impossible because few would be willing to deal with them. For these reasons, their Lordships also rejected the possibility that accessories should be strictly liable for losses suffered by beneficiaries,[36] concluding that the only other possibility was liability based on whether the third party was at fault.[37]

Although relevant, except to dismiss the extreme possibilities, policy considerations have proven to be of limited usefulness in determining the basis for accessory liability. In order to determine the level of fault appropriate for the imposition of constructive trust liability on accessories, it is necessary to look to the equitable principles underlying constructive trusts. Meagher, Gummow and Lehane suggest that the equitable concept of fraud is the foundation for the imposition of the constructive trust as a remedial device.[38] Fraud in equity is multifaceted, underlying a variety of doctrines both remedial and otherwise.[39] Nevertheless, it is of some assistance in assessing the appropriateness of the doctrines which have been suggested as informing the appropriate level of fault for accessory liability. In *Tan*, the Judicial Committee examined two such doctrines: dishonesty, and negligence.[40]

i. Dishonesty

In *Tan*, the Privy Council took it for granted that dishonesty is sufficient for the imposition of liability on accessories to a breach of fiduciary duty. Dis-

---

34 *Tan* ibid. See also *Consul Development* above n6 at 397. Loughlan goes further, basing her thesis not on the expectations of the beneficiary, but simply on the fact that the beneficiary is vulnerable to exploitation by both the fiduciary and third parties: see Loughlan, above n22 at 261, 263; Loughlan, P L, "Comment on Recent Developments in the Law — Fiduciary Liability and Constructive Trust" (1989) 7 *Otago LR* 179 at 185.

35 *Tan* above n5 at 71. See also *Barnes v Addy* above n1 at 252; *DPC Estates* above n3 at 459–60.

36 A number of commentators have also noted that the beneficiary is to some extent protected because they can often bring actions in equity against the fiduciary or recipients of trust property. Furthermore, the fiduciary may also bring actions against the accessory on behalf of the beneficiary. See Hayton, above n30 at 313; Hayton, above n32 at 398; Birks, above n4 at 335.

37 *Tan* above n5 at 71.

38 Meagher, R P, Gummow, W M C and Lehane, J R F, *Equity, Doctrines and Remedies* (3rd edn, 1992) at 341. See also Meagher and Gummow, above n19 at 284. It is arguable that English law also recognises restitutionary principles as a foundation for the imposition of constructive trusts: see particularly Birks, above n4 passim. However, it is clear that accessory liability, at least, is not restitutionary in nature: Birks, above n4 at 334; Rickett, C E F, "Strangers as Constructive Trustees in New Zealand" (1991) 11 *Oxford J Leg Studies* 598 at 601. (Interestingly, Edmund-Davies LJ in *Carl Zeiss* above n15 at 300 suggested that unjust enrichment may come within the general equitable concept of fraud or as he puts it "want of probity").

39 Meagher, Gummow and Lehane, id at 336.

40 *Tan* above n5 at 71. Other doctrines have been suggested: in *Powell* above n21 at 610, Thomas J suggested that the touchstone of liability should be "unconscionability". This approach was rejected by the Privy Council because it was uncertain to what extent (if any) unconscionability was broader than the concept of dishonesty which it formulated: Tan above n5 at 76. See also *Equiticorp Holdings Ltd v Hawkins* [1991] 3 NZLR 700 at 728 per Wylie J.

honesty as a basis for liability has long been recognised in equity as an aspect of the equitable notion of fraud.[41] Both in equity and at common law, liability for dishonesty is not dependent on any antecedent relationship between parties. As was observed by Lord Haldane LC in his celebrated decision in *Nocton v Lord Ashburton*, the law recognises a universal duty of honesty: "[H]onesty in the stricter sense is by our law a duty of universal obligation .... If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention."[42] Although in equity, as at common law, dishonesty has traditionally been referred to primarily in the context of liability for misrepresentation,[43] there is scope for broader application of this concept. Indeed, assistance in the breach of fiduciary duty would appear to be an excellent example of a situation where a stranger "intervenes in the affairs of another", although instead of involving misrepresentation, the intervention involves the subversion of an existing relationship to which the beneficiary is exposed. Consequently, failure to comply with the universal obligation of honesty forms a cogent source of accessory liability.

That dishonesty is sufficient for liability is also directly supported by a considerable body of precedent.[44] Furthermore, given the close relationship between dishonesty and knowledge,[45] a dishonesty-based approach to accessory liability is not inconsistent with the cases where the court concentrated on the accessory's knowledge rather than their honesty.

ii. Negligence

Equity has never had a doctrine of negligence based on duties of care in the common law sense.[46] However, a doctrine of "negligence", very similar to the

---

41 *Nocton v Lord Ashburton* [1914] AC 932 at 951–2. However, unlike the common law, in which the concepts of fraud and dishonesty are coextensive, the equitable concept of fraud is the source of a number of other doctrines (such as the in the rule in *Keech v Sandford* (1726) Sel Cas t King 61; 25 ER 223) in which, because of overriding policy reasons, the honesty of the defendant is not relevant. This has given rise to the concept of "equitable" or "constructive" fraud: *Nocton v Lord Ashburton* at 953–5. See also Meagher, Gummow and Lehane, above n38 ch 12 for a discussion of the role of fraud in equity.

42 Meagher, Gummow and Lehane, id at 954.

43 Dishonest (or fraudulent) misrepresentation founds liability at common law for the tort of deceit as well as rendering contracts induced by the misrepresentations voidable. Equity has a concurrent jurisdiction allowing the representee to take advantage of equitable remedies including the constructive trust: *Nocton* above n41 at 952. See also Meagher, Gummow and Lehane, above n38 at 337–8.

44 Most cases since *Carl Zeiss* have held that dishonesty is sufficient to found accessory liability, the question being whether negligence may also be a source of liability. Authorities predating *Carl Zeiss* which directly endorse basing liability of the accessory specifically on dishonesty are rarer, most (like *Barnes v Addy* itself) referring to the knowledge of the accessory: but see *Gray v Lewis* (1869) LR 8 Eq 526 at 543–4 where the courts referred to the failure of the defendants to meet the requirements of honesty.

45 *R v Sinclair* [1968] 1 WLR 1246 at 1249 which was cited with approval in *Baden* above n10 at 574. The relationship between knowledge and dishonesty is dealt with below.

46 In this respect, the following statement by Wylie J in *Equiticorp Holdings* above n40 at 727 is apposite: "[I] cannot accept that because a trustee may be liable in negligence to his beneficiary, negligence on the part of a third party in not being aware of a breach of trust should be sufficient to found an entirely different cause of action based on totally different principles and with a totally different historical background. We have not yet reached the stage where the conventional ingredients of causes of action can be ignored for the purpose of enabling the Courts to arrive at some ill-defined and undisciplined objective of being

common law doctrine of negligence, was developed in a line of cases dealing with imposition of constructive trusts on accessories to a breach of duty.[47] Before dealing with the Privy Council's examination of negligence as a basis for accessory liability, it is worthwhile to examine how this doctrine of negligence arose in the context of constructive trust liability.

The source of this doctrine of negligence is the decision of Ungoed-Thomas J in *Selangor*. In that case, he applied the doctrine of *constructive notice* to the requirement set out in *Barnes v Addy* that the third party receive trust property or assist in a breach of duty with *knowledge*,[48] thus deriving the concept of *constructive knowledge*. Constructive notice was originally a purely equitable concept[49] founded in equity's jurisdiction to intervene in dealings with property on grounds of fraud.[50] It was a qualification of the equitable defence of bona fide purchaser (of a legal interest) for value without notice, which could be raised against assertions of prior equitable interests.[51] Under the doctrine of constructive notice, a purchaser would be deemed to have notice of any interest (and therefore unable to raise the defence against it) which they would have discovered but for the fact that they wilfully abstained from inquiry,[52] or were grossly negligent[53] in that they failed to make inquiries which a reasonable prudent person ought to have made.[54] It was in essence

---

fair." See also comments to similar effect by Hayton, above n32 at 395; Halliwell, above n10 at 335. The concept of negligence is not however foreign to equity. Trustees and company directors owe their beneficiaries and companies respectively, an equitable duty to "to take reasonable care" in the conduct of their business: see *Charitable Corporation v Sutton* (1742) 2 Atk 400 at 405; 26 ER 642 at 644 (trustees); *Overend and Gurney Co v Gibb* (1872) LR 5 HL 480 (directors). Failure to do so is often referred to as "negligence" or "gross negligence": *AWA Ltd v Daniels t/a Deloitte Haskins & Sells* (1992) 10 ACLC 933 at 1016–8; *Daniels t/a Deloitte Haskins & Sells v Anderson* (1995) 16 ACSR 607 at 658–9, 752–5. Equitable liability for negligence is distinct from that at common law in two respects. First, the standard of conduct expected is not as high in equity: *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427–8. Second, the duty arises not from any concept of proximity, but from equity's concern that trustees and directors who are vested with wide-ranging powers with respect to their beneficiary's or company's interests exercise their powers prudently. This doctrine should not be extended to cases of accessory liability because the position of the third party is in no way analogous to that of a trustee or director.

47 See particularly *Selangor* above n9 at 1578–91 per Ungoed-Thomas J and *Baden* above n10 at 572–87 per Peter Gibson J. This doctrine was applied in *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602 and *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 798.

48 *Selangor* above n9 at 1582–3, 1590.

49 *English & Scottish Mercantile Investment Co v Brunton* [1892] 2 QB 700 at 707.

50 Browne, D (ed), *Ashburner's Principles of Equity* (2nd edn, 1933) at 62; Harpum above n10 at 123. (Note that fraud is used in its broad equitable sense here). Application of the doctrine outside the property context has been the source of numerous difficulties: for example with regard to notice of a company's public documents: see *Ernest v Nicholls* (1857) 6 HLC 401; *Royal British Bank v Turquand* (1856) 6 El & Bl 327; 119 ER 886.

51 *In re Montagu's Settlement Trusts* [1987] Ch 264 at 277, 279; *Eagle Trust* above n15 at 504. Although nowadays reference is usually made to the *doctrine* of bona fide purchaser for value without notice, it is important to keep in mind that it is a *defence* (see for example *Pilcher v Rawlins* (1872) LR 7 Ch App 259 at 267, 269) and thus cannot be a foundation for liability.

52 *Jones v Smith* (1841) 1 Hare 43 at 55; 66 ER 943 at 948.

53 *Ware v Lord Egmont* (1854) 4 De GM & G 460 at 473–4; 43 ER 586 at 592; *Bailey v Barnes* [1894] 1 Ch 25 at 34–5; *Oliver v Hinton* [1899] 2 Ch 264 at 274.

54 *Bailey* id at 35. See generally Browne, above n50 at 61–2; Harpum, above n10 at 124; Meagher, Gummow and Lehane, above n38 at 253.

merely an objective form of notice, not the source of a duty to inquire.[55] Thus the doctrine of constructive notice was a qualification of the defence of bona fide purchaser for value without notice in the sense that the defence would only be available against interests which a reasonable, prudent person would not have discovered in the course of the inquiries they ought to have made. It was never a source of liability.

Given that the doctrine of constructive notice had not previously been a basis for imposing liability, and given its origins, one must conclude that Ungoed-Thomas J misapplied the doctrine in *Selangor* by using it to extend accessory liability. There appear to be two bases for this misapplication. First, Ungoed-Thomas J did not adequately distinguish between accessories and recipients.[56] Whereas recipient liability is related to the doctrines dealing with recognition of subsisting equitable interests like priorities and tracing,[57] accessory liability is not. Consequently, he seems to have allowed reasoning more appropriate to recipient liability to colour his formulation of a test dealing with accessory liability.[58] Second, he did not draw a distinction between knowledge and notice, using the two concepts interchangeably.[59] Although, the ordinary meanings of the two words are similar, a number of authorities have drawn a distinction between the underlying concepts they represent.[60] The distinction appears not to be in the level or type of cognisance (to use a neutral word), rather it is in the applicability of the concepts to different doctrines.[61]

Nevertheless, *Selangor* was followed by Brightman J in *Karak Rubber Co Ltd v Burden (No 2)*[62] and Mills QC (sitting as deputy judge) in *Rowlandson v National Westminster Bank Ltd.*[63] In *Baden* Peter Gibson J reformulated the *Selangor* test shifting the emphasis towards a negligence-type test for liability more obviously based on a duty of care (in the common law sense).[64] He appears

---

55 *Bailey* id at 35; *Eagle Trust* above n15 at 494.

56 In *Selangor* above n9 at 1579, 1580, Ungoed-Thomas J treated the references to receipt in *Barnes v Addy* together with those dealing with trustees *de son tort* as comprising one category of liability and the references to assistance as comprising the other. Thus when he came to analyse the prior authorities at 1581–9, he based his test for accessory liability on cases dealing with recipient liability.

57 Harpum observed that tracing cases strongly influenced the early development of recipient liability: see Harpum, C, "Liability for Intermeddling with Trusts" (1987) 50 *Mod LR* 217 at 220.

58 See Harpum, above n10 at 152–3; Hayton, above n30 at 319; Brindle and Hooley, above n15 at 282; Birks, above n4 at 323, 336; Norman, above n15 at 337.

59 *Selangor* above n9 at 1582–3.

60 *Mildred Goyeneche & Co v Maspons* (1883) 8 App Cas 874 at 885; *English & Scottish Mercantile Investment Co v Brunton* above n49 at 707–8; *Cresta Holdings Ltd v Karlin* [1959] 1 WLR 1055 at 1057–8; *Carl Zeiss* above n15 at 296; *Montagu* above n51 at 277; *Eagle Trust* above n15 at 493–4. Knowledge and notice have however in other cases been used interchangeably leading some commentators to doubt the distinction: see Birks, above n4 at 299. However, as Sachs LJ observed in *Carl Zeiss* above n15 at 296, the distinction was not significant in most of these cases.

61 Thus, whereas knowledge is relevant to the assessment of a person's honesty, notice is relevant when dealing with the subsistence of prior equitable interests. The discussion of Megarry VC in *Montagu* above n51 at 277 points to this conclusion.

62 Above n47.

63 Above n47.

64 In *United States Surgical Corporation* above n6 at 256 Moffitt P, Hope and Samuels JJA

to have reinterpreted the objective test of knowledge (or more properly notice) applied by Ungoed-Thomas J in *Selangor* as a test of knowledge with an additional duty to inquire.[65] Furthermore, he held that the standard of inquiry should be that of the reasonable person at common law.[66] However, the new test retained some elements of the objective knowledge test: failure to meet the standard of inquiry expected of the reasonable person would not automatically result in liability; it would result in the imputation of the knowledge which the third party would have obtained had they met the standards of the reasonable person.[67] In a number of places, Peter Gibson J treated the test more as an objective test of knowledge:[68] clearly, he did not distinguish between his approach and that of Ungoed-Thomas J in *Selangor*.

The main practical effect of this reformulation was the shift in the onus of proof from the third party to the beneficiary. In the context of the defence of bona fide purchaser for value without notice, it is necessary for the person seeking to raise the defence to prove that they did not have constructive notice of the prior equitable interest.[69] Thus, the third party must prove, on balance of probabilities, that inquiries would have been fruitless, and therefore notice of the truth should not be imputed to them. Under the reformulated test in *Baden*, Peter Gibson J held that in order to show that the breach of duty to inquire caused the loss to the beneficiary, it is necessary for the beneficiary to prove on balance of probabilities that inquiries would have led to the truth.[70] The ramifications of such a shift in the onus of proof are serious. Millett J in *Agip (Africa) Ltd v Jackson* went out of his way to point to the problems

---

noted the dangers inherent in incorporating a duty into the equitable doctrine of constructive notice.

65 *Baden* above n10 at 582, 586. It appears that in formulating the duty to inquire, his Honour borrowed concepts from cases dealing with duties of care imposed by Bills of Exchange legislation: see 582–6 where references were made to *John Shaw (Rayners Lane) Ltd v Lloyds Bank Ltd* (1944) 5 LDB 396; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, as well as *Selangor* above n9 at 1599; and *Karak* above n47 at 629–30, where the courts were dealing with common law actions for negligence, rather than actions for the imposition of constructive trust.

66 *Baden* id at 577. Peter Gibson J cited *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 where Megarry J stated: "It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as law." Although, as noted above, the reasonable person may have a role to play in equity in the limited context of gross negligence (see above n46; cf Meagher, Gummow and Lehane, above n38 at 51), the implication is clear that Peter Gibson J was referring to the reasonable person in the context of a common law standard of care rather than in any equitable context. Elsewhere, Peter Gibson J expressly equated the inquiries "required" under the equitable test for the imposition of a constructive trust and for the common law test of negligence: see *Baden* id at 611. In *Selangor* id at 1591, Ungoed-Thomas J observed that the level of inquiry relevant to constructive notice and that required at common law pursuant to a duty of care was the same, so the shift in emphasis effected by Peter Gibson J is not surprising. This was criticised by May LJ in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 at 1355.

67 *Baden* id at 586–7.

68 *Baden* id at 575–6, 587.

69 *A-G v Biphosphated Guano Co* (1878) LR 11 Ch 327; *Re Nisbet and Potts' Contract* [1905] 1 Ch 391; *Mills v Renwick* (1901) 1 SR(NSW)(Eq) 173; *Wilkes v Spooner* [1911] 2 KB 473; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216; *Eddis v Chichester Constable* [1969] 1 WLR 385; *United States Surgical Corporation* above n6 at 258. See also Meagher, Gummow and Lehane, above n38 at 257–9.

70 *Baden* above n10 at 586–7.

caused by such an approach, observing that the liability of the third party would depend primarily on whether they were sufficiently inventive to be able to supply a plausible hypothesis as to why their inquiries would have been unsuccessful — a hypothesis which may not be sufficient to prove the third party's case if the onus of proof were on them, but one which would be too difficult for the beneficiary to overturn.[71] He further observed that such an approach had been rejected in the strongest terms by previous authorities.[72]

The constructive trust doctrine of negligence developed by Peter Gibson J in *Baden* comprises a fusion of common law and equitable elements.[73] As such, its precise content is uncertain. Is, as the origins of the doctrine suggest, constructive trust liability based on some equitable duty of inquiry derived from the doctrine of constructive notice? Or is, as the appearance of the doctrine suggests,[74] constructive trust liability based on a duty of care (in the common law sense) owed by the accessory to the beneficiary? Even assuming that the common law and equity have fused since judicature,[75] it is simply not possible to provide adequate answers to these questions. Consequently, because of the dubious origins of this doctrine of negligence, and because of the practical problems posed in burdening the beneficiary with proving that the third party would have discovered the truth had they made appropriate inquiries, the doctrine should be abandoned. Happily, the Privy Council has done so, although perhaps not entirely for the right reasons.

The Privy Council's examination of the sufficiency of negligence as a foundation of accessory liability centred on whether the third party should owe the beneficiary a duty of care in the common law sense. Their Lordships concluded that, because of the relationships between the beneficiary, fiduciary and third party, there was no reason, in the absence of special circumstances, for the third party to owe the beneficiary a duty of care in addition to any contractual, tortious or equitable duties they might owe the fiduciary.[76] Thus, they demonstrated that the constructive trust doctrine of negligence, as it appears in its final form, cannot adequately be based on a common law duty of care. Although their Lordships dealt with the doctrine as it appears in its final form, they did not, with respect, go far enough. In *Selangor*, Ungoed-Thomas J based his test for constructive trust liability on the purely equitable doctrine

---

71 *Agip* above n15 at 295–6.

72 See *Jones v Williams* (1857) 24 Beav 47 at 62; 53 ER 274 at 280 per Romilly MR: "A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry."; cited with approval in *In re Alms Corn Charity* [1901] 2 Ch 750 at 762; *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775 at 789.

73 The fusion is somewhat more subtle than that in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949. In that case, the common law concept of negligence was introduced into the context of the exercise of powers of sale by mortgagees. See Meagher, Gummow and Lehane, above n38 at 51–2.

74 Harpum, above n10 at 125–6 observed that the doctrine as it had been developed was liable to be equated with negligence.

75 In England there is some authority for the fusion of law and equity: see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 particularly 924–5 per Lord Diplock. However, it is unlikely that such an approach will be adopted in Australia: see *GR Mailman and Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80 particularly at 99 per Meagher JA.

76 *Tan* above n5 at 75–6. See also Birks, above n4 at 335–6.

of constructive notice without making any reference to common law duties of care.[77] A recognition that the constructive trust doctrine of negligence is based on this misapplication of the concept of constructive notice is necessary to deal fully with the test established by the *Selangor* line of cases.

The fact that the doctrine of negligence, as it developed in the context of constructive trusts, is not an appropriate basis for accessory liability, does not necessarily mean that basing liability on dishonesty best balances the interests of the beneficiary and third party. However, it does indicate that the concept of dishonesty would be the best starting point for a principled development of a doctrine which balances the aforementioned interests.[78] To that end, the Privy Council's broad description of dishonesty forms a good basis for future development of the law in this area.

C. *Defining Dishonesty*

A number of definitions of dishonesty have been provided in decisions dealing with common law and criminal matters. Given that equity has a concept of dishonesty analogous to that at common law,[79] reference will be made to some of these earlier definitions to put the definition provided by the Privy Council in context. In *Derry v Peek*, Lord Herschell offered the classic definition of dishonesty in the context of deceit: "Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."[80] In *R v Sinclair*, dishonesty was defined more generally as: "to take a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take".[81] From these passages, three elements of the concept of dishonesty may be discerned:

i A mental element: the subjective knowledge of the defendant;

ii An objective element: the objective standard of honesty; and

iii A conduct element: the taking of a risk to the prejudice of another's rights which the defendant is not entitled to take.

In essence, the defendant's conduct is assessed according to the objective standard of honesty in the light of their knowledge. Although, under this test of dishonesty, knowledge is a crucial factor in the assessment of the defendant's conduct, it is not the knowledge of the defendant which is the source of liability but their unacceptable conduct.[82] Thus, according to this definition, reckless acts are a source of liability not because they can be equated in some way with knowledge, but because they constitute unacceptable conduct.[83]

---

77 *Selangor* above n9 at 1582–3, 1590.

78 The fact that fraud is the principle underlying constructive trusts does not, as noted above in n41, necessarily preclude the formulation of a broader basis for liability than dishonesty or strict common law fraud.

79 *Nocton* above n41 at 952.

80 (1899) LR 14 App Cas 337 at 374.

81 Above n45 at 1249 which was cited with approval in *Baden* above n10 at 574. The passage in *Baden* was cited with approval by the Privy Council in *Tan* above n5 at 74.

82 This was recognised by Moffitt P in *Adams* above n6 at 289, 292. See also Millett, above n15 at 84.

83 This was implicit in the statements made by Millett J in *Agip* above n15 at 295.

The Privy Council in *Tan*, identified the three aforementioned elements of the concept of dishonesty and their relationship, formulating the following test of dishonesty:

> [I]n the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this might seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are most concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty can be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.[84]

Their Lordships then proceeded to consider the nature of each element. With regard to the mental element, they observed that knowledge is not the only personal attribute which is relevant: the court will also have regard to the defendant's experience, intelligence and reasons for acting why they did.[85] Nevertheless, it is the knowledge of the defendant which will be the dominant factor in applying the test in most cases.

Although it was understandably unwilling to formulate a definitive standard of honesty, the Privy Council listed a number relevant factors which an honest person would take into account when considering how to act:[86]

i the nature and importance of the relevant transaction;

ii the nature and importance of the defendant's role;

iii the ordinary course of business;

iv the degree of doubt;

v the practicality of the fiduciary or defendant proceeding otherwise; and

vi the seriousness of the adverse consequences to the beneficiaries.

The list of relevant factors structures the discretion of the court only partly, not providing a concrete test of what an honest person would and would not do: ultimately, the standard of honesty is based on community expectation for

---

84 *Tan* above n5 at 73.

85 Id at 73–4. In *Eagle Trust* above n15 at 493–4 Vinelott J suggested that courts might take into account a defendant's inexperience or unreasonably trusting nature when determining whether they have acted honestly.

86 *Tan* id at 74. This objective standard would explain Gibbs J's comment that, "[i]t would not be just that a person who had full knowledge of all the facts could escape liability because his own *moral obtuseness* prevented him from recognising an impropriety that would have been apparent to an ordinary man" (my emphasis): see *Consul Development* above n6 at 398.

the particular context involved.[87] Such a standard would not appear to be any less certain than that of the reasonable person.

The types of conduct in which an honest person might engage would be dictated by the circumstances. Furthermore, the role of the court is not to set specific rules as to how a person should act in a particular situation, but to determine whether their conduct meets the standard of honesty. However, their Lordships did observe that as well as declining to act, an honest person may warn persons with whom they are dealing of the possible dangers involved in the transaction,[88] or may even carry out investigations.[89]

In most cases it will be clear whether an accessory has been honest or not, given that certain types of conduct, such as recklessness or wilful shutting of ones eyes, are hallmarks of dishonesty. However, the question will be more difficult, as was noted by their Lordships,[90] where there is doubt as to whether a particular transaction involves a breach of trust.[91] It is in such situations, where there are suspicious circumstances,[92] that the requirements of honesty may demand that a third party intending to assist a trustee in a particular transaction carry out investigations before providing their assistance.[93] However, it is vital that the distinction be drawn between the investigations which should be carried out by an honest person and those expected of the reasonable person under a duty to inquire.[94] Furthermore, under an honesty-based approach it would be the failure to investigate before assisting which would found liability, not the information that would have been discovered had reasonable investigations been carried out.

Given the abandonment of knowledge as the basis for liability, it is not surprising that the Privy Council suggested that the *Baden*[95] scale of knowledge

---

87 Their Lordships referred to Knox J's comment in *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 761 that the issue in the commercial milieu is whether the defendant is "guilty of commercially unacceptable conduct in the particular context involved": *Tan* above n5 at 74.

88 As the solicitors did in *Barnes v Addy* above n1 itself.

89 *Tan* above n5 at 74.

90 Ibid.

91 As in, eg, *Carl Zeiss* above n15; *United States Surgical Corporation* above n6.

92 What the necessary level of suspicion might be is uncertain. Perhaps, as Slade LJ suggested in *Nihill v Nihill* unreported, 22 June 1983 at 13, if it is probable (as opposed to merely possible) that a transaction is in breach of trust, then an honest third party would investigate. This test is similar to the probability test for criminal complicity applied by the House of Lords in *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350. On the other hand it may be more appropriate for the necessary level of suspicion to vary depending on the other circumstances of the case.

93 This would explain why in a number of cases the courts referred to suspicious circumstances and the making of inquiries: *Gray* above n44 at 543: "I am of the opinion that the transaction was one of so unusual and extraordinary a character that it became their duty to inquire and investigate as to the rights of this company to enter into such a transaction ...". See also *Barnes v Addy* itself above n1 at 252, 254.

94 The distinction between honesty and reasonableness and the fact that it was not adequately dealt with in the test for liability developed in *Baden* was noted by Brindle and Hooley, above n15 at 289.

95 *Baden* above n10 at 575–6. The five types of knowledge are: "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of

is best forgotten in the context of accessory liability.[96] While the first three categories of knowledge on the scale would come within the scope of dishonesty, in the sense that a person who assisted in a breach of fiduciary duty with one of the first three types of "knowledge" would almost certainly be considered dishonest, they by no means cover all possible situations of dishonesty.[97] Also, the scale only deals with knowledge and investigation: other personal attributes of the third party and other types of conduct are marginalised. Therefore, the *Baden* scale is poorly adapted for the assessment of liability based on dishonesty.

3. *Conclusion*

In *Tan*, the Privy Council provided the following succinct statement of the redefined accessory liability principle: "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation".[98] Applying this principle to the facts, their Lordships held that BIT had committed a breach of trust in using trust funds for ordinary business purposes. Tan, accepted that he assisted BIT with full knowledge in that breach of trust. Therefore, he was dishonest and consequently liable as a constructive trustee under the accessory liability principle.

The Privy Council's redefinition of accessory liability in *Tan* is to be welcomed in Australia.[99] In providing a principled basis for accessory liability their Lordships have eliminated much of the ambiguity in the law which had arisen in the past 25 years. Furthermore, by defining the elements of dishonesty they have provided a sound basis for future development of the law in this area.

PHILIP PODZEBENKO*

---

circumstances which would put an honest and reasonable man on inquiry".

96 *Tan* above n5 at 76. In most cases since *Baden* the courts have tended to use the *Baden* scale merely as a guide: see *Elders Trustee and Executor Co* above n6 at 239; *Montagu* above n51 at 278; *Agip* above n15 at 293.

97 In *Agip* above n15 at 293; *Eagle Trust* above n15 at 493, 496; and *Equiticorp Holdings* above n40 at 728, Millett J, Vinelott J and Wylie J respectively observed that it might be possible to draw an inference of dishonesty even in cases where the third party had only knowledge coming within the last two categories. This would also explain the comment made by Stephen J (with whom Barwick CJ agreed) that, "[i]f a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust *the case may well be different*, as it clearly will be if the defendant has consciously refrained from enquiry for fear lest he learn of fraud" (my emphasis): *Consul Development* above n6 at 412.

98 *Tan* above n5 at 76.

99 Happily, it has recently been approved in *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR par 41-466 at 41,721–2. Also, it is interesting to note that the judgment of Moffitt P in *Adams* above n6 at 289–92 prefigures a number of aspects of the Privy Council's decision in *Tan* including the suggestion that the accessory's liability need not depend on the existence of a fraudulent and dishonest design on the part of the fiduciary (at 291); and the basing of liability on the dishonest conduct of the accessory rather than their knowledge (at 289, 292).

* BSc (Hons), LLB (Hons). I would like to thank Professors Patrick Parkinson and Peter Butt and Dr Patricia Loughlan for their helpful comments on various aspects of this article.