Articles

Knowing assistance and equitable compensation

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Should the equitable compensation payable by a knowing assistant be assessed by reference to the loss flowing from the assistance itself, or the loss flowing from the underlying fiduciary breach? In ***Michael Wilson & Partners Ltd v Nicholls****, the High Court confirmed that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. This can be read as indicating that a knowing assistant's compensatory liability is limited to the consequences of the assistance. This is not the traditional position, and it is not the current position in England and Wales. The article argues that the point is still open in Australia, and that it would be consistent with the* ***Michael Wilson & Partners Ltd v Nicholls*** *case to make a knowing assistant liable for the consequences of the underlying fiduciary breach.*

Introduction

This article discusses the amount of equitable compensation payable by a knowing assistant in a breach of trust or fiduciary duty. Specifically, it considers the relationship between an award of equitable compensation made against a knowing assistant and the liability of the trustee or fiduciary.

The question can be stated quite shortly: is a knowing assistant liable alongside the fiduciary for losses that flow from the underlying breach in which he or she assists, or is the assistant liable only for the consequences of the assistance itself? The point is important because awards of equitable compensation may be lower if assistants are only liable for losses caused by their assistance: for example, it may be possible for an assistant to show that the trustee would have gone ahead regardless of the assistance, or to show that the actions of other third parties had a greater causative effect.

Of course, even if the third party is liable only for the consequences of the assistance, that assistance might be so integral to the prosecution of the trustee's scheme in a particular case that it would be appropriate to make the third party liable alongside the trustee for the full amount of any losses. This means the key question is whether a knowing assistant is *necessarily* liable for all the losses flowing from the underlying breach, once a baseline level of assistance has been rendered.[1] This appears to be the current position in

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1 A claimant 'must at least show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been': D Hayton, P Matthews and C Mitchell,

England, but it may not be so in Australia. In Australia, the point may be affected by the High Court decision in *Michael Wilson & Partners Ltd v Nicholls*.[2]

Joint and several liability

First, some ground-clearing. The central question addressed in this article might be put simply as: 'Is a knowing assistant jointly and severally liable with the trustee for loss caused by the breach'? But some care must be taken when referring to joint and several liability in this context. To see why, it is necessary to understand the relationship between (i) the concept of joint and several liability; and (ii) the equity to prevent double recovery.

Consider a dishonest breach of trust, causing loss of $1 million, with knowing assistance by a third party. That assistance could be so vital to the trustee's scheme that, even if an assistant is not necessarily liable in the same amount as the trustee, it would be appropriate to make that particular assistant liable for the full amount. That result could then be effected by several liability between the trustee and the assistant, both in the amount of $1 million, but recognising the equity to prevent double recovery. The same result could also be effected by making the trustee and assistant jointly and severally liable in the amount of $1 million.[3] The point is, findings of joint and several liability between wrongdoers do not automatically tell us whether an assistant is *necessarily* liable for the same amount, and therefore liable for the consequences of the underlying breach rather than the assistance. The same point also works in reverse: the mere fact that awards are made severally does not automatically mean that the liability is different. The amount of a final award made against a defendant can vary for many reasons: an assistant may have assisted in only some breaches, a trustee may have credits he or she can bring into the account, etc. It is therefore important to look closely at the award and the basis for its calculation to see exactly for what the assistant is being made liable. The true question here is not whether liability is joint and several or merely several; instead it is whether the assistant's liability is necessarily calculated by reference to the loss caused by the underlying breach.

Proportionate liability

It is also worth mentioning the possible application of proportionate liability regimes,[4] since a decision to apportion liability among defendants will affect the basic liability of each wrongdoer to the plaintiff. However, the discussion

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Underhill and Hayton: Law of Trusts and Trustees, 18th ed, LexisNexis, 2010, at [98.52]; *Brinks Ltd v Abu-Saleh* [1999] CLC 133; *Brown v Bennett* [1999] 1 BCLC 649 at 659.

2 (2011) 244 CLR 427; 282 ALR 685; [2011] HCA 48; BC201109206.

3 Contribution could also apply between the third party and the trustee, but that does not affect the basic liability of each to the principal: see below n 61.

4 Civil Liability Act 2002 (NSW) Pt 4; Civil Liability Act 2003 (Qld) Ch 2 Pt 2; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) Pt 3; Civil Liability Act 2002 (Tas) Pt 9A; Wrongs Act 1958 (Vic) Pt IVAA; Civil Liability Act 2002 (WA) Pt 1F; Civil Law (Wrongs) Act 2002 (ACT) Ch 7A; Proportionate Liability Act 2005 (NT).

can be relatively brief because many knowing assistance cases will fall entirely outside the operation of these proportionate liability statutes.

It would now be a rare case that applied proportionate liability to the trustee or fiduciary in an Australian knowing assistance case.[5] First, not all breaches of trust or fiduciary duty arise 'from a failure to take reasonable care' within the meaning of the legislation. Those that do not are simply not touched by the regimes,[6] and the breaches of duty normally seen in knowing assistance cases would not often be characterised as careless. More fundamentally, trustees in knowing assistance cases would almost always be excluded from apportionment on the grounds that they must have intentionally or fraudulently caused the relevant loss. Generally speaking, defendants who cause the relevant loss intentionally or fraudulently are excluded from the proportionate liability regimes.[7] As the trustee's breach in a knowing assistance case must be dishonest,[8] it may be the case that a dishonest breach for these *Barnes v Addy* purposes will *always* amount to fraudulent conduct within the meaning of the proportionate liability regimes.[9] Even if there is a gap between the meaning of dishonesty in the equitable sense and the meaning

5 For a more extensive discussion see A Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34 *MULR* 481 at 511–17, coming to similar conclusions but written before *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; 311 ALR 494; [2014] NSWCA 266; BC201406650. See also *Cassegrain v Cassegrain* [2016] NSWCA 71; BC201602544 at [23]-[27], [75]-[85], where a knowing *recipient* sought to argue an apportionable claim.

6 See *George v Webb* [2011] NSWSC 1608; BC201110449 at [325] deciding that a particular breach of trust did not ground an 'apportionable claim' within the meaning of the Civil Liability Act 2002 (NSW) s 34; V J Vann, 'Equity and proportionate liability' (2007) 1 *J Eq* 199 at 213–18.

7 Civil Liability Act 2002 (NSW) s 34A; Civil Liability Act 2002 (Tas) s 43A(5); Civil Liability Act 2002 (WA) s 5AJA; Civil Law (Wrongs) Act 2002 (ACT) s 107E; Proportionate Liability Act 2005 (NT) s 7. Compare Civil Liability Act 2003 (Qld) s 32D; Wrongs Act 1958 (Vic) s 24AM; both of which require a 'finding of fraud'. It could be argued that any breach of duty that can properly be categorised as fraudulent cannot at the same time be based on a failure to take reasonable care. This is the position in South Australia, where the wrongdoing must be 'negligent or innocent' before the claim is apportionable at all: Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) s 3(2)(c). But the other regimes do not take this view.

8 Dishonesty here means 'a transgression of ordinary standards of honest behaviour. It is not necessary to say anything else by way of elaboration, save to confirm that it is not necessary to demonstrate that the person thought about what those standards were': *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; 311 ALR 494; [2014] NSWCA 266; BC201406650 at [124] per Leeming JA, explicitly paraphrasing Lord Hoffmann in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [1999] All ER (D) 99 (Oct); [2006] 1 All ER 333; [2006] 1 WLR 1476; [2005] UKPC 37 at [16].

9 In *George v Webb* [2011] NSWSC 1608; BC201110449, the trustees would not have been excluded if the claim had been apportionable (and would have borne 60% of the loss on an apportionment basis). But the case was decided before the interpretation of dishonesty given (or restated) in *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; 311 ALR 494; [2014] NSWCA 266; BC201406650, and Ward J expressly referred at [260] to the more lenient view of 'dishonest and fraudulent design' taken in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1; 225 FLR 1; [2008] WASC 239; BC200809492. That more lenient view, as expressed by the Court of Appeal in *Westpac Banking Corporation v Bell Group Ltd (No 3)* (2012) 89 ACSR 1; 270 FLR 1; [2012] WASCA 157; BC201206001, was rejected in *Hasler*, and the *Hasler* interpretation was preferred in *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R

of fraud as used in the legislation, which is certainly possible, it remains the case that conduct meeting the first criterion will often also satisfy the second.

Turning to the position of knowing assistants, some acts of assistance can be characterised as failures to take reasonable care and some cannot. Those that cannot will not ground apportionable claims. Again, it would seem that most activities that amount to assistance would not be characterised as careless. Some assistants will also be excluded on the grounds that they intended to cause the loss, or did so fraudulently. But the liability of an assistant in Australia depends on knowledge, not dishonesty. Even if it might be argued that the knowledge must include knowledge *of* dishonesty,[10] that still does not seem to reach the level of fraud required to exclude claims from apportionment. This means that a clear gap exists between the knowledge necessary to ground knowing assistance and the presence of fraud that would exclude a claim from the proportionate liability regimes. Depending on the nature of their activities and their mental state, therefore, some knowing assistants will be covered by those regimes. Nonetheless, it is still important to discuss the general legal rules simply because many assistants will have acted fraudulently, or will have assisted in a way that can cannot be characterised as involving a failure to take reasonable care. In such cases, the general rules will apply.

Liability as a constructive trustee

It is now possible to return to the main point of the article: whether a knowing assistant is liable for the consequences of his or her assistance, or liable for the consequences of the underlying fiduciary breach. Under the old law, a knowing assistant was indeed liable for all the losses flowing from the underlying breach. This was implicit in the language of constructive trusteeship.

It is no longer fashionable in England to speak of third parties as being made liable as constructive trustees.[11] Instead, knowing receipt and what is there called dishonest assistance are usually treated as independent wrongs able to be remedied with accounts of profits or equitable compensation.[12] Yet

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75; [2014] QSC 265; BC201409084 at [92]. Of course, the more lenient the dishonesty requirement, the further away from fraud it will be.

10 Because the trustee's dishonesty must be distinctly pleaded (as well as proved) against the assistant.

11 See, eg, P Birks, 'Trusts in the Recovery of Misapplied Assets' in *Commercial Aspects of Trusts and Fiduciary Obligations*, E McKendrick (Ed), Oxford University Press, 1992, p 149; D Nicholls, 'Knowing Receipt: The Need for a New Landmark in *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones*, W R Cornish et al (Eds), Hart, 1998, p 231; *Paragon Finance Plc v DB Thakerar & Co* (1998) 1 ITELR 735 at 750; [1999] 1 All ER 400 at 409; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 404; [2003] 1 All ER 97 at 129; [2003] 2 All ER (Comm) 451 at 484; [2002] UKHL 48.

12 See, eg, *Aerostar Maintenance International Ltd v Wilson* [2010] All ER (D) 364 (Jul); [2010] EWHC 2032 (Ch); *Templeton Insurance Ltd v Brunswick* [2012] EWHC 1522 (Ch); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91; [2012] 3 All ER 210; [2012] 3 WLR 597; [2012] EWCA Civ 195 at [22]; *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm); *Novoship (UK) Ltd v Mikhaylyuk* [2014] All ER (D) 63 (Jul); [2015] QB 499;[2015] 2 WLR 526; [2014] EWCA Civ 908 at [66]. References to the constructive trustee terminology can still be found; eg, *Credit*

the old terminology was helpful in that it indicated the basis of the third party's liability.[13] A knowing recipient became a constructive trustee of what he or she had received and become chargeable with, whereas a knowing assistant was made a constructive trustee of the *original trust*. It is important to appreciate this latter point, because it shows why the assistant was liable for the consequences of the breach and not the consequences of the assistance.

The straightforwardness of this point means that it is quite difficult to find older authorities touching the subject of the third party's liability. The important question was whether or not the defendant had become a constructive trustee; it was not what the consequences of that decision were. If a defendant was found to be a constructive trustee, he would be equally liable with the true trustees to (in most cases) restore the trust fund. For example, in *Wilson v Moore*,[14] agents of executors helped the executors to misapply estate property. Today the case might be treated as one of inconsistent dealing or knowing assistance. Sir John Leach MR said:

> If [the agents] Messrs Marryat are chargeable, it is because, in the consideration of a Court of Equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will . . . All parties to a breach of trust are equally liable; there is between them no primary liability.[15]

Wilson v Moore was followed in *Cowper v Stoneham*,[16] where the question was whether solicitors of trustees had made themselves constructive trustees through intermeddling. Stirling J said that it was 'not a case of primary liability on the part of the trustees and secondary liability on the part of the solicitors, but that Messrs Stoneham and the trustees are all equally liable'.[17]

The point being made in both cases was that the defendant third parties were just as 'primarily' liable as the defaulting trustees themselves. The liability of the third parties did not depend on the trustees being unable to satisfy a judgment, or indeed on the trustees being pursued at all. Essentially, the cases simply determined that the same liability was owed by the trustees and the relevant third parties. It is true that the cases did not explicitly address the point of the *quantum* of liability as between the trustees and the third parties, but it was implicit in each case that the full loss — the full amount necessary to restore the fund — could be recovered from any defendant.

Agricole Corporation and Investment Bank v Papadimitriou [2015] All ER (D) 104 (Apr); [2015] 2 All ER 974; [2015] 1 WLR 4265; [2015] UKPC 13 at [33].

13 See S B Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *MLR* 16 at 20–3.

14 (1833) 1 My & K 126; (1833) 39 ER 629.

15 Ibid, at My & K 146.

16 (1893) 68 LT 18.

17 Ibid, at 19. Also see *Blyth v Fladgate* [1891] 1 Ch 337, involving a solicitor-trustee who invested money in a poorly-performing security. The question was whether the solicitor's partners were also liable for the loss suffered. Stirling J held that they were, but this was either on the grounds of vicarious liability for the acts of a partner, or on the grounds that all three partners were co-trustees de son tort: see the discussion of the case in *Re Bell's Indenture* [1980] 1 WLR 1217 at 1226–31.

Modern English authorities

Under the old law, a knowing assistant or other accessory to a breach of trust would be made liable for the same loss as the trustee. The position probably remains the same in England today, although the reason for the position has changed. Whereas equal liability used to exist because it was inherent in the nature of constructive trusteeship, that equal liability is now the product of what is essentially a policy choice. Snell puts it like this: 'Since the defendant's fault is serious, he cannot put the claimant to proof of the specific causal connection connection between the assistance he gave and the loss that ensued'.[18] Nonetheless, the point cannot be regarded as wholly settled in England: several modern cases assume equal liability between a trustee and a third party, but only two cases actually decide it, and in neither was the point the subject of close scrutiny.

Grupo Torras SA v Al-Sabah (No 5)

The starting-point for any discussion of the modern English law, and one of only two cases that actually decides that assistants and trustees are necessarily liable to the same degree, is *Grupo Torras SA v Al-Sabah (No 5)*.[19] The case concerned a Spanish company, Grupo Torras, and its parent, the Kuwait Investment Office, both of which were the victims of several large-scale frauds perpetrated by their directors. It was alleged that several third parties had dishonestly assisted these breaches. In response to the submission that a plaintiff must prove that the dishonest assistance has itself caused the loss suffered by the plaintiff, Mance LJ held:

> The starting point in my view is that the requirement of dishonest assistance relates not to any loss or damage which may be suffered, but to the breach of trust or fiduciary duty. The relevant enquiry is in my view what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted. In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss.[20]

Mance LJ actually applied the law as postulated, because (following a baseline finding of the fact of assistance) he only considered whether defendants were dishonest. Ultimately, Mance LJ found that four assistants were not dishonest, and one, Mr Folchi, was. Mr Folchi was a lawyer who had assisted in some of the frauds by carrying out instructions that were obviously questionable. In respect of those frauds, Mr Folchi was liable for the same amounts as were the wrongdoing fiduciaries. An appeal by Mr Folchi failed, and the Court of Appeal expressly agreed with Mance LJ's analysis of the point. However, and perhaps unhelpfully, the Court of Appeal also added the following comment: 'In any case Mr Folchi was, as the judge found on ample

18 J McGhee (gen ed), *Snell's Equity*, 33rd ed, Sweet and Maxwell, 2015, at [30-081].
19 [1999] CLC 1469.
20 Ibid, at 1667. (Mance J had been appointed to the Court of Appeal between the hearing and the decision.)

grounds, a linchpin of the arrangements for all four transactions'.[21] This alternative reason for the result — that Mr Folchi's conduct was sufficient on any model to attract liability for the full amount — perhaps undermines to some degree the authority of Mance LJ's statement of principle.

Trustor AB Ltd v Smallbone

In *Trustor AB Ltd v Smallbone*,[22] Mr Smallbone in breach of fiduciary duty caused payments to be made from Trustor, where he was managing director, to another company that he controlled, Introcom. Introcom then disbursed those funds, including paying some to Mr Smallbone personally. Among other claims, Trustor pursued Introcom and Mr Smallbone for knowing receipt and dishonest assistance. Rimer J refused to grant summary judgment of the dishonest assistance claim against Introcom for conflicts reasons, but he did grant summary judgment in respect of knowing receipt. As regards Mr Smallbone, Rimer J again found liability in knowing receipt but not in dishonest assistance. This was because Rimer J thought that Mr Smallbone should properly be seen as a 'first party' wrongdoer for these purposes, and not as assisting anyone else's breach of duty.[23]

The relevance to the question of an assistant's liability lies in the following paragraph in the Court of Appeal judgment. Scott VC, with whom Buxton LJ and Gage J agreed, said:

> Introcom is liable, as constructive trustee, to account for and repay to Trustor the Trustor moneys that were paid to it. Hence the order for repayment to Trustor of the SEK 166.7 million, the £404,000 and the FIM 70.45 million (the whole totalling some £20 million in value). In respect of £426,439, the Trustor money received by Mr Smallbone from Introcom, Mr Smallbone, as well as Introcom is accountable. But what of the balance? Introcom was the creature of Mr Smallbone. He owned and controlled Introcom. The payments out by Introcom of Trustor money were payments made with the knowing assistance of Mr Smallbone. Rimer J, on several occasions in his judgment, characterised Mr Smallbone's participation in the steps taken to extract Trustor's money and pay it out to various recipients without the authority of Trustor's board as being dishonest . . . *It would follow, it seems to me, from the judge's finding of dishonesty on Mr Smallbone's part in respect of the payments out made by Introcom of Trustor's money, that Mr Smallbone would be liable jointly and severally with Introcom for the repayment of that money with interest thereon. Mr Smallbone's joint and several liability would not be confined to the part that he personally received.* In my judgment, the judge's order for an interim payment by Mr Smallbone of £1 million was not justified as an interim payment on account of damages or compensation for loss caused by breach of duty as a director. The amount of that loss is still too uncertain. But Mr Smallbone is, in my view, clearly liable, jointly and severally with Introcom, for the whole of the sums for which Introcom is accountable.[24]

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21 *Al-Sabah v Grupo Torras SA* [2001] CLC 221 at 255 (an appeal by another defendant was successful).

22 [2000] EWCA Civ 150.

23 Another director of Trustor, Lord Moyne, was also implicated although he was not a defendant. Rimer J thought it artificial to see each as assisting the other to breach their fiduciary duties, although this meant he apparently accepted that Mr Smallbone could be a knowing recipient of property in breach of his own duty.

24 *Trustor AB Ltd v Smallbone* [2000] EWCA Civ 150 at [97]–[98] (emphasis added).

The precise question before the Court of Appeal was whether or not an interim payment directed by Rimer J could be justified. The basis of Rimer J's order was that Mr Smallbone would clearly be liable in damages for breach of his directors' duties in an amount of at least £1 million. Importantly, the interim payment order was made on the basis of damages for breach of those directors' duties; it was not made in respect of liability for dishonest assistance. The Court of Appeal noted that the order to pay £1 million could be justified on a dishonest assistance basis, following the reasoning in the paragraph just quoted. But the Court ultimately decided that the order should not stand because Mr Smallbone had not been given the opportunity to argue against that reasoning.

One point that Mr Smallbone could have raised is that the paragraph refers to his assistance in Introcom's dispersal of the Trustor moneys, yet it is arguable that that stage of the fraud did not involve a relevant breach of fiduciary duty in which Mr Smallbone could assist: Introcom was never Trustor's fiduciary, unlike Mr Smallbone himself. Helping or causing a primary recipient to squirrel the funds still further away from the plaintiff can amount to assistance in the initial breach, but here the initial breach was Mr Smallbone's.

Putting that to one side, the paragraph does assume joint and several liability on the part of a dishonest assistant for the whole loss suffered. But even then, the essence of the point was to show that Mr Smallbone's liability was not limited to the amount that he personally received (that is, was not limited to the amount that could have been subject to a knowing receipt claim). The fact that a third party has not received something is not the same as saying that they did not assist in causing its loss, and, since Mr Smallbone controlled Introcom, he certainly did relevantly assist. In short, even putting the other problems to one side, this would clearly have been a case where the assistant's actions did justify an award in respect of the whole amount of loss.

The matter was eventually tidied up by Morritt VC, who decided that Trustor could pierce the corporate veil of Introcom so as to make receipt by Introcom treated as receipt by Mr Smallbone.[25] The whole amount of Introcom's receipts could then be claimed from both Introcom and Mr Smallbone on the footing of knowing receipt. The oddity of knowingly receiving property in breach of your own fiduciary duty was apparently skipped over.

Casio Computer Co Ltd v Sayo

The analysis in *Grupo Torras* was applied by the Court of Appeal in *Casio Computer Co Ltd v Sayo*,[26] the only other English case where the point has been important. The case concerned the issue of whether, in an action for dishonest assistance, the act of assistance constitutes a harmful event 'relating to tort, delict or quasi delict' for the purposes of the Brussels Convention. The

25 *Trustor AB v Smallbone (No 2)* [2001] All ER (D) 206 (Mar); [2001] 3 All ER 987; [2001] 1 WLR 1177; [2001] 2 BCLC 436. See the criticisms of this approach in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415; [2013] 4 All ER 673; [2013] 3 WLR 1; [2013] UKSC 34 at [32]–[33], [68].

26 [2001] All Er (D) 147 (Apr); [2001] EWCA Civ 661.

Court of Appeal held that it does. A further question then arose relating to causation, because liability in tort, delict or quasi delict 'can only arise provided that a causal connection can be established between the damage and the event in which that damage originates'.[27] Tuckey LJ referred to *Grupo Torras*:

> *Grupo Torras* also establishes that in a claim for dishonest assistance it is not necessary to show a precise causal link between the assistance and the loss. Loss caused by the breach of fiduciary duty is recoverable from the accessory. This is the relevant causal connection for this purpose. In the absence of such a connection the accessory would be under no liability. So this type of claim does depend on there being 'a causal connection between damage and the event in which the damage originates'.[28]

Again, the point was not the subject of argument and it seems fair to say that its correctness was assumed rather than decided. Having said that, in some ways *Casio v Sayo* is the strongest authority in favour of the point because it was necessary for the decision in the case and there was no alternative reason also suggested for that decision (as there was in *Grupo Torras*). It can also be noted that, although those two cases agree on the legal position in respect of the extent of an assistant's liability, they are not entirely consistent in their rationales. At least, there is a difference of emphasis. In *Grupo Torras*, Mance LJ employed a legal policy argument: 'it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance'.[29] In *Casio v Sayo*, on the other hand, it was treated as a causation point: as a matter of legal causation, assistance of more than a de minimis level *causes the whole loss* suffered as a result of the breach.[30]

Other cases

The point has been mentioned in a few other English cases, but very little seems to have turned on it and it has certainly not been explored. In *Ultraframe (UK) Ltd v Fielding*, Lewison J said that he could 'see that it makes sense for a dishonest assistant to be jointly and severally liable for any *loss* which the beneficiary suffers as a result of a breach of trust'.[31] But the two claims for dishonest assistance made in that case both failed; one for a lack of dishonesty, the other for a lack of relevant assistance. In *Madoff Securities International Ltd v Raven*, Popplewell J said that the 'liability of the assistant is for such loss as the party in breach of fiduciary duty would be liable for. It is not necessary to show that the assistance itself is causative of any loss'.[32]

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27 *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735 at 1746; [1987] QB 708 at 730.

28 *Casio Computer Co Ltd v Sayo* [2001] All Er (D) 147 (Apr); [2001] EWCA Civ 661 at [15]. See also at [52]–[53] per Pill LJ.

29 *Grupo Torras SA v Al-Sabah (No 5)* [1999] CLC 1469 at 1667.

30 Of course, on this approach it would be wrong to distinguish liability 'for the breach' and liability 'for the assistance'.

31 *Ultraframe (UK) Ltd v Fielding* [2005] All ER (D) 397 (Jul); [2005] EWHC 1638 (Ch) at [1600]. The emphasis on 'loss' exists because Lewison J was really addressing the point about whether an assistant is liable for gains made by the trustee.

32 *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) at [339], cited in L Tucker et al, *Lewin on Trusts*, 19th ed, Sweet and Maxwell, 2015, at [40–053].

Again the point was not truly in issue, however: Popplewell J found no relevant breach of fiduciary duty, no dishonesty on the part of the third party, and said that in any case no loss was suffered. The point was also mentioned in *Novoship* at first instance and on appeal,[33] but that case was really about the calculation of accounts of profits.

In *Otkritie International Investment Management Ltd v Urumov*, Eder J said that 'liability is not limited to the loss caused by [the] assistance but extends to the loss resulting from the relevant breaches of fiduciary duty'.[34] The point might have had some weight in that case because the relevant defendant, Mr Jemai, was clearly not one of the ringleaders in the fraud and he might otherwise have sought to reduce his liability. Having said that, Mr Jemai was found liable for the full loss anyway on the alternative grounds of deceit and conspiracy.[35]

Australian authorities

It is possible to find Australian authority for liability between trustees and knowing assistants being joint and several. However, the cases rarely speak directly to the point of whether the measure of liability is necessarily the same between trustees and assistants.

Some cases support the view that an assistant is liable for loss caused by the breach, but the point has not been central. In *New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd*, Young CJ in Eq noted that 'the accessory is jointly and severally liable with the principal malefactor to pay the amount of equitable compensation required to restore the trust fund',[36] but nothing apparently turned on it. In *Re-Engine Pty Ltd (in liq) v Fergusson*, Dodds-Streeton J would have found a third party jointly and severally liable with the fiduciary for the 'total loss and damage to the plaintiffs sustained by reason of his breaches of fiduciary duty',[37] but the claim for knowing assistance failed due to a lack of relevant assistance.

In *George v Webb*, Ward J referred to *Grupo Torras* in saying that:

> The third party's conduct must have had more than a minimal causative effect on the breach, though it appears that it is not necessary to determine the exact causal significance of the assistance on the breach to the loss sustained.[38]

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33 *Novoship (UK) Ltd v Mikhaylyuk* [2012] All ER (D) 158 (Dec); [2012] EWHC 3586 (Comm) at [90]; *Novoship (UK) Ltd v Mikhaylyuk* [2014] All ER (D) 63 (Jul); [2015] 1 QB 499; [2015] 2 WLR 526; [2014] EWCA Civ 908 at [103].

34 *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) at [79], citing *Grupo Torras SA v Al-Sabah (No 5)* [1999] CLC 1469.

35 *Otkritie International Investment Management Ltd v Urumov*, ibid, at [519]. Mr Jemai's sister, Ms Jemai, was also found liable for certain amounts on perhaps problematic bases (eg, she was found liable for dishonest assistance, or in the alternative knowing receipt, in respect of money that she had not received and when the company could not easily be said to be her alter ego: see ibid, at [549]). Gloster LJ gave permission to appeal in [2015] EWCA Civ 766, not directly on the quantification point, but it may still be useful to observe any full appeal. Mr Jemai's application was refused: [2015] EWCA Civ 916.

36 *New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd* [2004] NSWSC 781; BC200405527 at [34].

37 *Re-Engine Pty Ltd (in liq) v Fergusson* (2007) 209 FLR 1; [2007] VSC 57; BC200701426 at [131], [158]. Dodds-Streeton J had liability for the breach, not the assistance, in mind.

38 *George v Webb* [2011] NSWSC 1608; BC201110449 at [262], referring to Mance LJ in

The first two defendants were partners in a law firm that paid out money in breach of trust, while the third was a third party accessory who was liable for both knowing receipt and knowing assistance. All were liable for the same loss, although the orders relevant to this liability were structured as (i) an order for joint and several liability among the first two defendants; and (ii) a separate order against the third defendant. The reason for these separate orders was that the accessory was actually the moving force behind the whole scheme, and by a third order he was made to indemnify the first and second defendants. As far as the plaintiff was concerned, there was joint and several liability among all three defendants for the whole loss suffered and she could recover from any of them.[39] But, as far as the defendants were concerned inter se, the first two were to be indemnified by the third. It is therefore clear that the actions of the knowing assistant were so instrumental that the nature of his liability — for the consequences of breach or assistance — was not truly in issue. Certainly it was not necessary to *rely* on the principle that exact causal significance need not be determined.

Other cases support, or appear to support, the alternative position that assistants may not be liable for the consequences of the underlying breach. In the famous *Warman International Ltd v Dwyer*,[40] two companies that Dwyer created and controlled (BTA and ETA) were held liable for knowingly participating in Dwyer's breach of fiduciary duty. Those companies made profits through exploiting a business opportunity that Dwyer had secured in breach of his fiduciary duty to Warman International. The trial judge made a single order, against all three of Dwyer, BTA and ETA, of the combined amount of the profits made by BTA and ETA. The structure of this order was not challenged in the High Court, although the court did make the following comment:

> It is arguable that any order, such as that made by the trial judge, for payment of a sum determined by an account of BTA's and ETA's profits should be divided into two orders, one against BTA alone for the amount determined by reference to its profits and the other against ETA alone for the amount determined by reference to its profits. *It is also arguable that any order for an account of equitable compensation for the loss sustained by Warman should have been made against Dwyer only*. As has been mentioned, however, Dwyer, BTA and ETA did not argue in this Court or in the Court of Appeal that the respective orders made in the courts below should not have been made against the three of them jointly. In the absence of any such argument, it has effectively been common ground that any orders made should be against all three.[41]

Does this passage say anything about the liability of BTA and ETA in respect of loss, in the event that Warman International elected for a loss-based remedy? The comment does appear to suggest that only Dwyer would be

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Grupo Torras SA v Al-Sabah (No 5) [1999] CLC 1469. Ward J's analysis was adopted by Hallen J in *Craigcare Group Pty Ltd v Superkite Pty Ltd* [2014] NSWSC 326; BC201402072 at [224]. Hallen J did not find knowing assistance proved, but would have found the assistant liable for the whole loss if he had (see [267]).

39 The claim against the trustees was not apportionable: see above n 6.

40 (1995) 182 CLR 544; 128 ALR 201; 69 ALJR 362; BC9506414.

41 Ibid, at CLR 569; ALR 217 (emphasis added).

liable for loss suffered. However, that can be easily explained because Warman International only ever claimed damages against Dwyer, and not against BTA and ETA.[42]

More recently, *Singtel Optus Pty Ltd v Almad Pty Ltd* involved a senior employee of Singtel Optus, Mr Curtis, who breached his fiduciary duties by placing Optus's business with third-party companies he controlled. An account of profits was sought from one of those companies, Sumo, while equitable compensation was sought from another, Electrosales. Optus tried to make Electrosales liable for the same amount of equitable compensation as was sought from Mr Curtis himself. But McDougall J held, relying on *Michael Wilson & Partners Ltd v Nicholls*:

> There is no principle that, where it has been shown that an 'assistant' has been knowingly involved in a breach of duty by a fiduciary, the liabilities of the fiduciary and the assistant must necessarily be the same. It is clear, for example, that one may be called upon to make compensation, and the other to account for profits. *And it is equally clear that the measure of loss recoverable from each may differ*.[43]

Once again the point was not central to the case, however, and McDougall J did not even have the benefit of submissions on it. His Honour further noted that 'it cannot be suggested that Electrosales was knowingly involved in the whole of Mr Curtis' breaches of fiduciary duty. In those circumstances, I have some difficulty in understanding how it can be held liable to pay compensation, jointly and severally, with Mr Curtis, for the consequences of all those breaches'.[44] McDougall J could therefore have reached the same result on the basis that the assistant did not actually assist in many of the breaches in respect of which compensation was sought.

Although *Singtel Optus v Almad* can be explained on the grounds just mentioned, it remains true that McDougall J thought *Michael Wilson & Partners v Nicholls* stood as authority for the proposition that the measure of loss recoverable from a trustee and an assistant could differ. The authors of the latest edition of Meagher Gummow and Lehane agree. According to them, the Australian position was formerly that 'a knowing participant was joint and severally liable with the defaulting fiduciary for losses suffered by the principal as a result of the fiduciary's breach of duty'.[45] But the authors think that the law has now changed, and they cite *Michael Wilson & Partners Ltd v Nicholls* in support of that position. It is therefore necessary to examine

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42 This is not clear from the High Court report, but is clear from the decision below: *Warman International Ltd v Dwyer* [1994] QCA 12; BC9404566.

43 *Singtel Optus Pty Ltd v Almad Pty Ltd* [2013] NSWSC 1427; BC201313439 at [280] (emphasis added) (appeal dismissed *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; 311 ALR 494; [2014] NSWCA 266; BC201406650, where the point was not considered, but note [118]).

44 *Singtel Optus Pty Ltd v Almad Pty Ltd*, ibid, at [284].

45 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies*, 5th ed, LexisNexis Butterworths, 2015 at [23–555]; cf H Ford et al, *The Law of Trusts (Online)*, Thomson Reuters, 2001, at [22.10160]. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [553], decided after *Michael Wilson*, the court noted the 'subsisting uncertainties as to whether and/or when the liabilities of the knowing assistant or recipient are only several, or are joint and several, with those of the delinquent fiduciary or trustee'. That case was about gains, so the point was not examined.

exactly what that case decided, and so the case must be considered in some detail.

The *Michael Wilson & Partners* case

This case involved the plaintiff, Michael Wilson & Partners (MWP); Mr Emmott, a former director and shareholder of MWP; and the defendants Mr Nicholls and Mr Slater who were both former employees of MWP. The facts were relatively straightforward: Emmott, Nicholls and Slater left MWP to form their own company and took some of MWP's clients with them. MWP pursued Mr Emmott in London, under an arbitration agreement contained in his contract, and pursued Mr Nicholls and Mr Slater in the Supreme Court of New South Wales. Relevantly, MWP claimed that Nicholls and Slater had knowingly assisted Emmott in the breach of his fiduciary duties to MWP. But, in addition to knowingly assisting in Emmott's breaches, MWP also claimed that Nicholls and Slater had breached personal fiduciary duties they owed directly to MWP.

At trial before Einstein J, Nicholls and Slater argued that MWP's actions in bringing proceedings in New South Wales were an abuse of process. The judge rejected this submission,[46] and an allegation of apprehended bias, and awarded equitable compensation against Nicholls and Slater in the amounts of US$3.5 million, €0.55 million, and A$4.0 million. However, Einstein J did not attach that liability directly to the knowing assistance claims or to the claims based on breaches of direct fiduciary duties.[47]

On appeal,[48] the Court of Appeal ordered a new trial on the bias ground, but also ordered that it be stayed until the outcomes of the London proceedings against Emmott were known.

The practical difficulty in the case was that the proceedings against Mr Emmott for breach of fiduciary duty were being conducted in London at the same time as the proceedings against Mr Nicholls and Mr Slater for knowingly assisting in that same breach were being conducted in Sydney. Between Einstein J's decision in December 2009 and the subsequent Court of Appeal hearing in July 2010, the London arbitrators had in February 2010 released a report that found breaches of fiduciary duty on Mr Emmott's part, but also found that the losses caused to MWP by those breaches had been substantially less than the amount Einstein J had ordered Mr Nicholls and Mr Slater to pay.[49] And, while Nicholls and Slater had been sued for breaches of their own fiduciary duties as well as for knowingly assisting in Emmott's breaches, we have seen that Einstein J had not treated those claims as distinct.[50] That is, Einstein J had found Mr Nicholls and Mr Slater liable to

46 *Michael Wilson & Partners Ltd v Nicholls* [2009] NSWSC 1033; BC200909087 at [628]–[644].

47 *Michael Wilson & Partners Ltd v Nicholls* [2009] NSWSC 1377; BC200911187 at [95].

48 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222; BC201006780.

49 The London tribunal found that many of the clients would not have stayed with MWP once Mr Emmott had left, so the loss of their business was not compensable: see ibid, at [306].

50 See *Michael Wilson & Partners Ltd v Nicholls* [2009] NSWSC 1033; BC200909087 at [278]; *Michael Wilson & Partners Ltd v Nicholls* [2009] NSWSC 1377; BC200911187 at [95].

MWP for certain losses without identifying the basis of that liability as breach of their own fiduciary duties or as knowing assistance in Mr Emmott's breach.

In the Court of Appeal, Lindgren A-JA viewed it as primarily a knowing assistance case. He said:

> [Einstein J] decided, inter alia, that Messrs Nicholls and Slater were liable to pay compensation to MWP for having knowingly participated in a breach by Mr Emmott of his fiduciary duty in relation to clients, including clients other than Kangamiut and Lancaster. The Arbitrators decided, however, that MWP suffered no loss as a result of his breaches in relation to 'his' clients, and that MWP was not entitled to equitable compensation and damages in respect of the loss of those clients . . . In the light of the Award, it would be an abuse of process for MWP to seek to sustain and rely upon his Honour's findings and declarations of accessorial liability on the part of Messrs Nicholls and Slater and his orders based on them, in so far as they relate to 'Mr Emmott's clients', that is to say the clients other than Kangamiut and Lancaster.[51]

It is not clear whether or not MWP tried to uphold Einstein J's award on the grounds that it was properly made in relation to the breach of direct fiduciary duties, and so was not only based on knowing assistance. Although the Court of Appeal clearly recognised the distinct nature of those claims,[52] it seems that the case was simply seen as really being about knowing assistance. Given that a new trial was being ordered anyway, the point may not have been seen as particularly important.

The case was certainly treated as a knowing assistance case on further appeal to the High Court of Australia. In the High Court, MWP conceded an 'inconsistency' between Mr Emmott being found not liable for certain losses in London and Mr Nicholls and Mr Slater being found liable for those losses in Sydney on the footing of knowing assistance. However, MWP argued that this inconsistency did not amount to an abuse of process. It arose because Emmott did not consent to being joined to the New South Wales action and Nicholls and Slater could not be parties to the London arbitration. The separate actions were then a regrettable necessity, not an abuse of process. Gummow ACJ, Hayne, Crennan and Bell JJ dealt with the point globally:

> All of the arguments that asserted there was an abuse of process proceeded, explicitly or implicitly, from a common starting point — that any liability of the respondents to MWP for knowingly assisting Mr Emmott in the breach of his fiduciary duties was limited by the nature and extent of the relief MWP sought and obtained in the arbitration of its claims against Mr Emmott. That is, as Lindgren A-JA put the point, the liability of the respondents was no more than 'ancillary, or coordinate with', the liability of Mr Emmott. This understanding of the relationship between the liabilities of a defaulting fiduciary and a knowing assistant of the fiduciary's breach should not be accepted.[53]

Their Honours continued:

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51 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222; BC201006780 at [398]. See also Basten JA at [99] (but cf [108]).

52 See, eg, ibid, at [99].

53 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; 282 ALR 685; [2011] HCA 48; BC201109206 at [100].

> No matter how the allegation of abuse of process was formulated, the allegation depended upon treating the liability of the respondents as necessarily confined by the extent of Mr Emmott's liability to MWP. This was said to be because the respondents' liability to MWP was no more than accessorial to the principal wrongdoing of Mr Emmott. That is not so. The claims against the respondents, as knowing assistants, were not dependent upon the claims made against Mr Emmott in the fashion asserted by the respondents.
>
> As MWP rightly pointed out, this Court has held that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an 'accessorial' liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows, as MWP submitted, that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ. It follows that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott.[54]

The High Court therefore allowed MWP's appeal. However, rather than simply reinstating Einstein J's award, the High Court remitted the matter to the Court of Appeal for further consideration. This was because the Court of Appeal had allowed further evidence to be admitted (including, relevantly, evidence of the London arbitrator's award), before it decided to order a new trial. The effect of the High Court's decision was that Einstein J's initial decision stood, but that it remained subject to an appeal in the Court of Appeal that would be affected by evidence of the London arbitrator's award.

On remittal,[55] the Court of Appeal was only concerned with the quantum of relief to be ordered against Mr Nicholls and Mr Slater, bearing in mind that the London arbitrator's decision was now available and had been admitted into evidence. For evidential reasons MWP did not seek accounts of profits against the defendants and instead sought equitable compensation. Given the earlier treatment of the case, one would expect the question before the court squarely to concern the amount of equitable compensation payable by knowing assistants and its relationship (if any) to the amount payable by the defaulting fiduciary himself. However, Mr Nicholls and Mr Slater conceded breaches of fiduciary duties shortly before the remittal hearing, and so the case stopped being about knowing assistance and became about breach of direct fiduciary duties again. Sackville A-JA, with whom Meagher and Barrett JJA agreed, analysed the question of how equitable compensation is assessed against a

54 Ibid, at [105]–[106] (references omitted). At [100]–[104] the High Court referred to three 'important but nonetheless subsidiary' reasons why, on the facts, there would not be an abuse of process. One of these was that the claims against Mr Nicholls and Mr Slater in New South Wales were not confined to actions for knowing assistance in respect of Mr Emmott's breaches.

55 *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383; BC201209453.

defaulting fiduciary. This is a notoriously difficult question,[56] but it is not obviously the same question as how one assesses equitable compensation against a knowing assistant. Ultimately, the Court of Appeal drastically reduced the amount of compensation payable by Nicholls and Slater.[57]

It seems that the defendants intended to concede liability in equity in a general sense, without distinguishing between direct fiduciary liability and liability based on knowing assistance. Instead, they would just argue about quantum. The interesting point about that, given the history of the case, is that it would certainly not have been an abuse of process to maintain actions against Mr Nicholls and Mr Slater in New South Wales in respect of liability that was not affected by Mr Emmott's breach. The abuse argument, at least as understood in the Court of Appeal and High Court, relied on there being a necessary link between the findings of liability and quantum made against Emmott in London and the proper award to be made against Nicholls and Slater in New South Wales. The High Court held that there was no such necessary link in the way the defendants had argued. But there would clearly have been no necessary link, and no abuse, if the claims were wholly separate (and, it must be remembered, made in a context where the actions could not be joined).

Quantum of relief against a knowing assistant

Returning to the issue addressed in this article, the question is whether the decision of the High Court in *Michael Wilson & Partners v Nicholls* necessarily ousts or forbids a rule which provides that a knowing assistant is liable for the total loss suffered as a result of breach in which he or she assists. To put it consistently with the question posed at the start of the article: does the case determine that a knowing assistant is liable only for the consequences of the assistance, and not for the consequences of the underlying breach?

The point arose in the case because Mr Nicholls and Mr Slater had argued before the High Court that liability for knowing assistance was necessarily related to the liability of the defaulting fiduciary. However, they were arguing for this in a very particular sense. In essence, Nicholls and Slater were trying to take advantage of Emmott's position as a part-owner of MWP. As a part-owner, Emmott could on the final taking of accounts set off the value of his stake against any liability he was found to owe MWP. The value of his shareholding would then reduce or even eliminate his net liability. Messrs Nicholls and Slater argued that the amount ordered against knowing assistants could not be greater than the amount ordered against the fiduciary, and that Mr Emmott's liability could not be determined until that accounting process had been completed. If any liability remained, Nicholls and Slater accepted that they would be jointly and severally liable with Emmott in that amount.

56 Particularly on the point of what hypotheticals may be employed: see *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222; BC201006780 at [187]; M Conaglen, 'Brickenden' in *Equitable Compensation and Disgorgement of Profit*, S Degeling and J Varuhas (Eds) (forthcoming).

57 The US dollar award was reduced from $3.5 million to $0.68 million, the euro award was reduced from €0.55 million to €0.38 million, and the Australian dollar award of $4 million was abandoned.

The High Court rightly rejected this argument, but in doing so perhaps went further than was necessary. It is quite possible to recognise that the quantum of equitable compensation owed by a fiduciary and two knowing assistants is the same, and even owed by them jointly and severally to the plaintiff, while acknowledging that no defendant can take advantage of a right of set-off held by another defendant. In the event that a plaintiff 'recovers' the loss from the fiduciary through including the figure in an accounting exercise, the fiduciary may seek contribution from the assistants.[58] Alternatively, the plaintiff may proceed against the assistants first, recover, and then the equity to prevent double satisfaction would mean that the liability could no longer be included in the account taken with the fiduciary. The assistants could then claim contribution from the fiduciary. It follows that it was not necessary, in rejecting the model of liability proposed by Mr Nicholls and Mr Slater, to decide that there was *no* link between the liability of a defaulting fiduciary and the liability of his knowing assistants.

In any event, the High Court's stated reason was that knowing assistance is a discrete wrong.[59] An underlying fiduciary breach is a necessary element of that wrong, but the fiduciary's liability is not by nature linked to that of the assistant. Such an understanding of third party liability does seem to mark a change from the old law of constructive trusteeship as discussed earlier in this article. The point is no longer to establish facts that justify the imposition of a deemed trusteeship; instead it is simply to respond to an equitable wrong. However, the same change has occurred in England and the rule is (or appears to be) still that the assistant is liable for the consequences of the breach and not the assistance.

Conclusion

The rule that assistants are liable for the consequences of the breach is not as deep-seated in England as may be thought. There are also academic arguments against it.[60] For the reasons given, its position in Australia is unclear. On one hand it may be thought that the High Court's view of the nature of knowing assistance means that the assistant's liability should only be for the consequences of the assistance. We have seen that this was the view of McDougall J in *Singtel Optus v Almad*, and is the view expressed in Meagher, Gummow and Lehane. On the other hand, we can recognise the discrete nature of the knowing assistance wrong while still fixing a defendant with liability for the consequences of the fiduciary's breach.

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58 Nicholls and Slater actually conceded this in further litigation concerning bankruptcy petitions made against them: *Michael Wilson & Partners Ltd v Slater* [2014] FCCA 2871; BC201411344 at [68], [75]. They argued that the decision of the London arbitrators, by which Emmott's liability was set off against his share in MWP through an accounting exercise, had effectively satisfied the liability owed by Nicholls and Slater (or, which is similar, that it allowed them to raise the point of the equity against double recovery). Judge Lloyd-Jones rejected this for reasons of insufficient evidence of finality in London, rather than for reasons of principle: at [81], [87], [92]. See also W M C Gummow, 'Knowing assistance' (2013) 87 *ALJ* 311 at 315.

59 See also Gummow, ibid, at 319.

60 See G Virgo, *The Principles of Equity & Trusts*, Oxford University Press, 2012, pp 709–11; P Davies, *Accessory Liability*, Hart, Oxford, 2015, 257; M Campbell, 'The honest truth about dishonest assistance' (2015) *Conv* 159 at 166–7.

The reasons for fixing an assistant with this liability can be stated slightly differently: that it is inappropriate to consider such evidential questions as between the claimant and the third party (although they might be relevant to the question of contribution between the fiduciary and the third party);[61] that, as a matter of legal causation, only a baseline level of assistance is needed before the law views the whole loss as being caused by the assistance; that a sufficient participation link exists between the assistance and the loss.[62] In truth, these are all manifestations of the same policy question. Rather than suggesting a particular answer to that question, the point of this article has been to show that the question exists and to argue that *Michael Wilson & Partners v Nicholls* should not be interpreted as mandating a particular response. It would be consistent with the reasoning in that case to make a knowing assistant liable for the consequences of the trustee's breach.

61 The detail of how contribution would work is complicated, in particular the possible application of trustee contribution rules to assistants and the question of unequal contribution. In *George v Webb* [2011] NSWSC 1608; BC201110449 at [341]–[354], Ward J would have applied equal contribution in equity between the trustees and the assistant even though the third party was the main wrongdoer; cf *McNally v Harris* (2008) 1 ASTLR 549; [2008] NSWSC 659; BC200805099 at [150]-[154]. In Victoria, note Wrongs Act 1958 (Vic) s 23B. See further C Mitchell, 'Apportioning Liability for Trust Losses' in *Restitution and Equity Volume: Resulting Trusts and Equitable Compensation*, P Birks and F Rose (Eds), LLP, 2001, p 211; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed, LexisNexis Butterworths, 2006, at [2117]–[2120]; A Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34 *MULR* 481 at 488–9; J Dietrich and P Ridge, *Accessories in Private Law*, Cambridge University Press, 2016, pp 301–3.

62 See P Ridge, 'Monetary Remedies for Equitable Participatory Liability: General Principles and Current Questions' in *Equitable Compensation and Disgorgement of Profit*, S Degeling and J Varuhas (Eds) (forthcoming). Ridge continues: 'The purposes of equitable participatory liability are also relevant here. The pragmatic objectives of deterrence, increasing C's chance of recourse, encouraging de facto regulation of trustee and fiduciary behaviour by third parties and vindication of relationships of trust and confidence, all support the imposition upon a culpable accessory of joint and several liability for losses resulting from the primary wrong'.