Comment and Analysis

Remedies against an alter ego knowing recipient: *Akita Holdings Ltd v Attorney-General (Turks and Caicos Islands)*[*]

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Citizens of the Turks and Caicos Islands could apply for 'Conditional Purchase Leases' of Crown Land. Under this scheme, the citizen would promise to develop land in a certain way. Assuming that development happened, the citizen would then be entitled to purchase the freehold. The purchase price would be the value of the unimproved land prior to development, less a discount of 50 per cent.

Mr Hanchell took advantage of this scheme. In 2004 he successfully applied for a lease of certain land in Providenciales, one of the Caicos Islands, and over the next two years he developed that land in accordance with the conditions of the lease. Mr Hanchell transferred his right to buy the freehold to Akita Holdings Ltd ('Akita'). Akita was owned by Mr Hanchell and his brother, and Mr Hanchell was also a director. In 2006 Akita exercised that right to buy by paying $75 200 for the land. Further development of the land took place, and the value of the land duly increased.

The purchase price was set at $75 200 because the government relied on a 1998 valuation that gave the land value prior to development as $150 400. The true value of the unimproved land in 2004, according to a private valuation commissioned by Mr Hanchell, was actually $500 000. However, Mr Hanchell did not tell the government about this private valuation. This failure to disclose was legally significant because Mr Hanchell was not merely a private citizen but was a government minister who owed fiduciary obligations to the Crown.

Case history

The Attorney-General brought proceedings against Akita on the grounds of unjust enrichment or, in the alternative, knowing receipt.[1] The claim in unjust enrichment was limited to the difference between what Akita ought to have paid for the land and what it actually paid.[2] The more valuable claim was for knowing receipt, since that could involve requiring Akita to account for its profits.

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* [2017] UKPC 7.

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1 There was also a minor question of interest on unpaid rent, which will not be discussed.

2 The precise amount was $174 800 (being $250 000, the price payable on a value of $500 000, less $75 200).

The case initially got off to a false start. At trial, Ramsay-Hale J found for Akita on the grounds that there was insufficient evidence Mr Hanchell knew the land was being sold at an undervalue.[3] Although he had employed the $500 000 figure when discussing financing with banks, Mr Hanchell said he thought it referred to the land's potential future value rather than its current value. Ramsay-Hale J accepted this. On appeal, the Court of Appeal remitted the case for a rehearing.[4] This was ostensibly on the grounds that Ramsay-Hale J had failed properly to analyse the contents of the private valuation report, but it seems likely that the Court of Appeal simply did not believe that Mr Hanchell had been unaware of the true value of the land.

At the second trial, Goldsbrough CJ rejected the claim in unjust enrichment but found for the Attorney-General on the ground of knowing receipt.[5] The Chief Justice found that Mr Hanchell had known the true value of the land at the relevant time and in breach of fiduciary duty he had failed to disclose it. There was no difficulty in imputing knowledge of Mr Hanchell's breach to Akita: 'for all relevant purposes he and the defendant company had the same knowledge'.[6] Akita was therefore liable in knowing receipt. It is worth extracting Goldsbrough CJ's reasons on the appropriate remedy at some length:

> I am of the view that the remedy available to the Plaintiff is to trace the value of the benefit obtained by the defendant company. The starting point is to determine the nature of the asset held by the defendant. That asset, the land, remains in the ownership of the defendant. It has not been sold on and so the question of a bona fide purchaser for value does not arise. It might therefore be the case that the Plaintiff may choose, at his instance, to seek a return of the land or seek an alternative remedy.
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> I regard this land as a mixed asset as described in *Foskett v McKeown* [2001] 1 AC 102. The value in money which the defendant put into the purchase of this asset represents but a proportion of its value. The balance of the value of the asset came from property of the Plaintiff. The proportions can be ascertained by mathematical calculation after one ascertains the value of the asset compared with the price paid. On the present evidence that is a value of $500,000 minus a 50% discount i.e. $250,000 as opposed to the actual purchase price which was $75,200. In percentage terms it is 69.92% as opposed to 30.02%
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> [...]
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> I arrive at the conclusion that the defendant holds the freehold title on a constructive trust for payment of the value of the benefit to the Plaintiff. The Plaintiff is entitled to recover the value of that proportion of the land for which it has not received value (referred to earlier on the present evidence as being 69.92%) that being the value of the unimproved land and the same percentage of the current value of the improved land insofar as the improvements are attributable to the Defendant's use of the land.

3 *A-G (Turks and Caicos Islands) v Akita Holdings Ltd* (SC, 19 July 2013).

4 *A-G (Turks and Caicos Islands) v Akita Holdings Ltd* (CA, 11 September 2014). The order for rehearing was made in January 2014, but the reasons were not published until September 2014 (after the judgment in the rehearing itself).

5 *A-G (Turks and Caicos Islands) v Akita Holdings Ltd* (SC, 5 September 2014). The claim in unjust enrichment was rejected on the grounds that there was no mutual mistake.

6 ibid [8].

> To that end I order that the Defendant account to the Plaintiff for the benefit of its use of the land for which it has not received value.[7]

Goldsbrough CJ made formal orders reflecting these reasons a few days later. Those formal orders can be summarised as follows. The Chief Justice declared that Akita held the purchased land on constructive trust 'for payment of the value of the benefit' that Akita had derived. As to the calculation of that disgorgeable benefit, the plaintiff was entitled to (a) 69.92 per cent of the current value of the unimproved land; (b) 69.92 per cent of the current value of the improved land 'insofar as the improvements are attributable to the defendant's use of the land'; and (c) 69.92 per cent of 'the benefit received by the defendant by reason of its use of the land for the purposes of raising finance'.

An appeal to the Court of Appeal was rejected,[8] and Akita made a further appeal to the Privy Council. The Privy Council delivered judgment on 27 March 2017.[9]

Privy Council

Before the Privy Council, counsel for Akita argued that the company should only be liable in respect of the amount of the original underpayment. The appropriate result would be an order to pay $174 800 with interest. Any other profits made by Akita ought not to be disgorgeable because of a lack of causation between the breach and the profit: 'The breach of duty in this case was not the sale of the land but the failure to disclose the private valuation. The profit earned from that breach was the amount of the undervalue, and no more.'[10] In contrast, counsel for the Attorney-General argued that an account of profits was an available remedy for knowing receipt, and so the original orders of Goldsbrough CJ should stand.

In a relatively short advice, the Privy Council dismissed Akita's appeal. Lord Carnwath, giving the advice of the Board, said:

> In the Board's view, [counsel for Akita's] submission is based on a misunderstanding of the nature of the liability to account. As was made clear in the leading case *Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134, 144–5, the liability of a fiduciary to account for a profit made from his position does not depend on whether the principal has in fact been damaged or benefited, but 'from the mere fact of a profit having, in the stated circumstances, been made' ... It is true that in *Novoship*[11] itself it was held that the same strict principles did not necessarily apply to a mere dishonest assistant who is not himself in a position of trust. However, in the circumstances of the case [counsel for Akita] realistically has not sought to argue that Akita can be better off in this respect than Mr Hanchell himself.[12]

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7 ibid [40]–[45].
8 *Akita Holdings Ltd v A-G (Turks and Caicos Islands)* (CA, 4 February 2016).
9 *Akita Holdings* [2017] UKPC 7.
10 ibid [10].
11 *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, discussed below.
12 *Akita Holdings* (n 9) [17].

Three aspects of the case are particularly worthy of comment: the fact that the claim was based on knowing receipt at all,[13] the nature and extent of the relief awarded, and the treatment of Akita as the alter ego of Mr Hanchell. It can also be noted in passing that Mr Hanchell's underlying fiduciary breach was characterised as the breach of a positive 'duty to disclose', rather than as the failure to avoid a conflict or as the making of an unauthorised profit.

Knowing receipt and rescission

There was no pre-existing trust in relation to the land before Mr Hanchell wrongly arranged its sale to Akita. It was simply owned by the Crown. According to the analysis in *Criterion Properties plc v Stratford UK Properties LLC*,[14] the first question in such circumstances ought to be whether the sale is binding on the transferor or can be set aside. If rescission is available then, pending rescission, the recipient has a full title subject only to the transferor's mere equity. Once rescinded, the beneficial interest in the transferred property revests in the transferor.[15] That interest vests retrospectively for some purposes, including tracing, but it does not retrospectively impose duties on the recipient to, for example, not make a profit out of the property in the meantime.[16]

Criterion Properties was apparently not cited to the Privy Council and the claim proceeded as one based on knowing receipt rather than on rescission. In a strict sense this is problematic: the analysis in *Criterion Properties* is intended to identify occasions when a knowing receipt analysis cannot apply because there is no relevant receipt of property; it is not intended to provide an alternative to a knowing receipt analysis. Having said that, it is understandable why in practice the Attorney General sought to base the claim on knowing receipt.

The facts were very similar indeed to an earlier case, *Arthur v Attorney-General (Turks and Caicos Islands)*,[17] which had also been treated as a knowing receipt case. *Arthur* chiefly concerned the interaction of knowing receipt liability and the Turks and Caicos version of the Torrens system.[18] The Turks and Caicos Registered Land Ordinance provides that, while a registered proprietor generally takes free of other interests, this is subject to a provision that 'nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee'.[19] In *Arthur*, the Privy Council held that these words included liability as constructive trustee for knowing

13 I am grateful to the referee for raising this point.

14 [2004] UKHL 28, [2004] 1 WLR 1846. See generally Matthew Conaglen and Richard Nolan, 'Contracts and Knowing Receipt: Principles and Application' (2013) 129 LQR 359.

15 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 (HC); *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch 520 [49].

16 See *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) 23; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [125]–[127]; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [53]; Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 416.

17 [2012] UKPC 30, [2012] All ER (D) 164 (Aug).

18 The position is not the same as in Australia: see Lyria Bennett Moses, 'Knowing Receipt of Torrens Land in the Turks and Caicos Islands: *Arthur v Attorney General of the Turks & Caicos Islands*' (2013) 7 J Eq 74.

19 Registered Land Ordinance, s 23.

receipt.[20] It was therefore clear in *Akita* that a claim based on knowing receipt would not run into problems with the Torrens system, whereas the same could not be said of a claim based on rescission. Rectification of the register would probably have been available,[21] but that would not have yielded the remedies the claimant sought. First, the Attorney General did not want to seek the return of the land. Second, there was a claim for profits made *by use of* the land. Even putting Torrens questions aside, a separate basis of liability would be needed to recover these profits on a rescission analysis: undoing the underlying transaction itself would not be enough. A separate basis of liability may well have existed on the facts, but for these reasons it is still understandable why the claim was brought on the familiar terrain of knowing receipt.

Nature and extent of the relief

The fact that the claim was based on knowing receipt and not rescission meant the Attorney-General could have sought an order that Akita retransfer the land but did not need to do so. In the event, the Attorney-General did not seek such an order. Akita argued that this election not to pursue recovery of the land meant that, as a matter of knowing receipt, the Attorney-General was precluded from seeking an account of profits based on the development and use of that land. Instead, so it was argued, the only disgorgeable profits related to the difference between the price that was paid and the price that ought to have been paid. Akita also argued that the orders of the Chief Justice failed to distinguish between personal and proprietary remedies.

The first of these points was quickly rejected. In the earlier case of *Arthur*, Sir Terence Etherton had commented that a personal claim in knowing receipt 'will usually only be necessary where following or tracing is not possible'.[22] But the Privy Council confirmed that this observation should not be read as limiting the right to seek an account of profits to only those cases where retransfer of the property itself is impossible.[23] That is, it is not inconsistent to seek an account of profits while not seeking a retransfer of the relevant property.

There is a little more to be said about whether or not Goldsbrough CJ failed to distinguish between personal and proprietary remedies. We have seen that the Chief Justice decided the plaintiff could 'trace the value of the benefit' received by Akita, and he concluded that Akita held 'the freehold title on a constructive trust for payment of the value of the benefit'. As to what was meant by 'benefit', Akita was liable to account in relation to three things: the current value of the unimproved land, the current value of the improved land 'insofar as the improvements are attributable to the defendant's use of the land', and the benefit received by reason of Akita's use of the land for the purposes of raising finance. In each, Akita was liable to disgorge 69.92 per cent of the benefit received.

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20 *Arthur* (n 17) [39]–[45].

21 Under Registered Land Ordinance, s 140, following the reasoning in *Arthur* as to the meaning of 'fraud' in the legislation: see *Arthur* (n 17) [42]–[45], but the point not fully argued.

22 ibid [34].

23 *Akita Holdings* (n 9) [14].

The first two bases of liability probably just mean that the increase in the value of the land was to be shared between plaintiff and defendant according to the proportions of their original 'contributions'. This reflects Goldsbrough CJ's view that the land should be treated as a mixed asset, with both the government and Akita seen as contributing purchase funds, even though strictly speaking the government did not contribute anything. But there was also another type of disgorgeable benefit — that received by reason of Akita's use of the land for the purpose of raising finance — and the liability to disgorge these profits was included in the award of the constructive trust. It therefore seems that a proprietary remedy was granted in respect of what might be called discrete profits.[24] By 'discrete' I mean profits that are not the traceable products of the originally-received property.

One answer to this point is to say that the language of constructive trusteeship relates to personal and not proprietary remedies. If this is correct then only personal remedies were ever awarded. But Goldsbrough CJ did not merely say that Akita was liable to account as a constructive trustee; he said that the land was held on constructive trust. Indeed, the Chief Justice's final order simply said 'on trust' without even the addition of the word 'constructive'. Another point is that examples can be found of constructive trusts being awarded in ways that suggest they are intended to operate more as equitable charges.[25] The language of Goldsbrough CJ's orders is consistent with such an approach: 'on constructive trust for payment of the value'. On this analysis it could be said that the relevant remedy was personal, albeit secured with a proprietary interest. Finally, not all jurisdictions maintain in this area the same sharp distinction between personal and proprietary as exists in England and Wales. For example, in Australia it can be said without caveat that a declaration that property is held on constructive trust is an available remedy for knowing receipt. There is no necessary tracing link between the property initially received and the property subject to the declaration.[26] In England it might also be said that a knowing recipient holds certain property on constructive trust, but the trust here would not be a remedy *for* the knowing receipt. Any trust would depend on tracing or following. It would depend on the recipient's state of mind only in so far as to prevent reliance on the bona fide purchase defence. The trust would not depend on the knowledge of the recipient, and so would not strictly be a remedy for knowing receipt, even though it may be awarded against a knowing recipient.

A final point concerns the extent of the relief granted. It seems that the Attorney General was content to seek only accounts of *proportionate* profits; that is, the government did not seek disgorgement of all of Akita's profits

24 I have argued that knowing recipients should not necessarily be liable to disgorge discrete profits at all, in that such liability ought to depend on a higher level of fault than is necessary to ground mere liability to repay the value of the property received: Jamie Glister, 'Accounts of Profits and Third Parties' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing 2017) ch 9.

25 Eg, *Muschinski v Dodds* (1985) 160 CLR 583 (HC).

26 For an excellent discussion see Pauline Ridge, 'Constructive Trusts, Accessorial Liability and Judicial Discretion' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook 2013) 73, 84–88.

while giving credit only for Akita's expenses.[27] This is interesting because there is a hint to the effect that the Privy Council may have been receptive to such a claim.[28]

It is, however, easy to understand why the Attorney-General did not seek disgorgement of all of Akita's profits. The reason also provides an appropriate introduction to the next section of the discussion, on the relationship between Mr Hanchell and Akita. The important point to remember is that Akita was being sued as a third party, not as a breaching fiduciary itself. It is abundantly clear that wrongdoing fiduciaries themselves are liable to disgorge all of their profits, subject to expenses and possible allowances.[29] A wrongdoing fiduciary cannot retain some of the profits on the grounds that he or she could legitimately have made them.[30] But it is not clear that the same is true of people who are liable to disgorge profits on the footing of knowing receipt. Some Australian cases do suggest that the nature of the liability placed on the third party is the same as that placed on a fiduciary,[31] but other cases suggest a difference. In particular, the recent English Court of Appeal decision in *Novoship (UK) Ltd v Mikhaylyuk* held that the calculation of an account of profits would differ between third parties and fiduciaries.[32] The case involved ship charterers paying bribes to Mr Mikhaylyuk, who was responsible for negotiating charters on behalf of ship owners. The charterers made huge profits on those charters when the market moved in their favour and they sub-chartered the ships. The Court of Appeal concluded:

> Mr Nikitin [one of the charterers] was not a fiduciary either as regards NOUK or the ship owning companies. He is not sued for a breach of fiduciary duty. He is sued because he has committed an equitable wrong. Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy. We recognise that these rules do not apply to the case of a fiduciary sued for breach of a fiduciary duty; but that is because the two cases are different.
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> We would therefore hold that there was an insufficient direct causal connection between entry into the Henriot charters and the resulting profits. We must stress, however, that had Mr Nikitin been a true fiduciary, and had entry into the Henriot charters been a breach of fiduciary duty, then the causation test we have adopted would not have applied.[33]

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27 At least, the government did not seek a wider account in the Court of Appeal or the Privy Council, where it sought only to uphold the orders of Goldsbrough CJ.

28 *Akita Holdings* (n 9) [12].

29 *Boardman v Phipps* [1967] 2 AC 46 (HL).

30 *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] All ER (D) 503 (Jul).

31 See *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (HC) 397; *Zhu v Treasurer (NSW)* [2004] HCA 56, (2004) 218 CLR 530 [121]; but cf *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2014] QSC 265, [2015] 1 Qd R 75 [79].

32 *Novoship* (n 11). See also *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 (QB).

33 *Novoship* (n 11) [107], [115].

This reasoning has been strongly criticised and it appears unlikely to gain a foothold in Australia.[34] It also remains to be seen how the English law will develop in future cases. Nonetheless, given *Novoship* it is understandable why the government apparently did not seek disgorgement against Akita to the same extent that it may have sought it against Mr Hanchell himself, had Mr Hanchell taken the land personally. But the point is interesting, because the reason that the Privy Council ultimately gave for upholding the decision of Goldsbrough CJ was that Akita was subject to the same type of liability to account as was its controller Mr Hanchell.

Akita as an alter ego

The above discussion leads to perhaps the most striking aspect of the case, which is the way Akita's position was equated with that of Mr Hanchell. The very first paragraph in the Privy Council judgment reads 'This appeal concerns the remedies available against a knowing recipient of property acquired at an undervalue from the government by a minister acting in breach of his fiduciary duty.'[35] Yet the reason given for rejecting Akita's argument that its only disgorgeable profit was the gain made through buying at an undervalue was that Akita ought to be treated in the same way as Mr Hanchell would have been. That is, it was appropriate to apply to the third party Akita the rules concerning profit disgorgement that would have applied to Mr Hanchell personally.[36] Despite the reference to knowing receipt, the Privy Council treated the company as the alter ego of Mr Hanchell and liable on that basis. It did not treat Akita as a 'true' third party, liable on its own account.

Several examples of companies being treated as the alter egos of their controllers can be found in the cases.[37] In *Gencor ACP Ltd v Dalby*,[38] for example, a wrongdoing fiduciary channelled a secret profit to a company that he owned and controlled. Rimer J made orders to disgorge the profit against both the fiduciary and the company, referring to the latter as 'little other than [an] offshore bank account' and 'simply a creature company'.[39] In the famous *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[40] the High Court of Australia noted that if Mr Elias had been liable for breach of fiduciary duty then his company Lesmint Pty Ltd would also have been liable as his alter ego. In

34 See *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74 [68], referring to William Gummow, 'Dishonest Assistance and Account of Profits' (2015) 74 CLJ 405, 408.

35 *Akita Holdings* (n 9) [1].

36 With the caveat again that the government only sought disgorgement of a *proportion* of Akita's profits: see above nn 27–28.

37 In addition to those discussed below, see: *Cook v Deeks* [1916] 1 AC 554 (PC); *Trustor AB v Smallbone (No 2)* [2001] EWHC 703 (Ch) [2001] 1 WLR 1177; *CMS Dolphin Ltd v Simonet* [2001] EWHC 415 (Ch), [2001] All ER (D) 294 (May); *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) [371], [404]. The analysis was used at trial in *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), [2012] All ER (D) 158 (Dec) [429] and the point was not questioned on appeal. See generally Jamie Glister, 'Equitable Liability of Corporate Accessories' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) ch 12.

38 [2000] EWHC 1560 (Ch), [2000] 2 BCLC 734.

39 ibid [26].

40 [2007] HCA 22, (2007) 230 CLR 89 [110], [128].

Grimaldi v Chameleon Mining NL (No 2),[41] the Full Court of the Federal Court of Australia commented:

> The fact findings made in this case reveal, potentially, four quite different manifestations of such [third party] participation. Each type warrants present note. The *first*, is where the third party is the corporate creature, vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses by, their breach of fiduciary duty. In these cases the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary's wrong.[42]

One problem with an alter ego analysis is that the proper role and limits of the analysis are unclear. An alter ego argument can be used (i) to ground liability in a company; (ii) to expand the personal liability of the controller of a company; and (iii) to justify a finding that the controller of a company has enjoyed the benefit of a company's profits.[43] These are all slightly different situations and in each the alter ego concept is being used to accomplish slightly different things.

In cases like *Akita*, where the point is to ground liability in a company, it is not clear that an alter ego analysis pays due regard to the company's separate legal personality and to the principles concerning the attribution of corporate knowledge. For these reasons the UK Supreme Court had appeared to limit the availability of an alter ego analysis in English law in the 2013 case of *Prest v Petrodel Resources Ltd*.[44] Lord Neuberger and Lord Sumption (who were both members of the Board in *Akita*) discussed several authorities where companies had been treated as alter egos of their controllers and sought to explain the results in those cases on more orthodox grounds.[45]

This point is significant because liability for gains is an area where a real difference can be seen between treating a company as the alter ego of its controller and treating it as a separate third party (albeit with its controller's knowledge imputed so as to ground liability). Generally speaking, liability for gains in this field is several and not joint. The particular point did not arise in *Akita* because Mr Hanchell was not a party to the action and there was no evidence as to any gains he may personally have made. But the issue goes deeper than the several nature of the liability: as discussed in the previous section, it also concerns the *extent* of the gain-based liability. *Novoship* indicates that, despite the same name being used, the liability to account for unauthorised profits that attends a fiduciary is not the same thing as the remedy of an account of profits that may be awarded against a knowing recipient.

Perhaps too much should not be made of this. The accounts ordered against wrongdoing fiduciaries and third party companies may not *necessarily* be calculated on the same basis, but it must also be the case that equity will not allow a fiduciary to, in effect, limit the scope of the obligations owed to his or

41 [2012] FCAFC 6, (2012) 200 FCR 296.
42 ibid [243] (emphasis in original, citations omitted).
43 *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32.
44 [2013] UKSC 34, [2013] 2 AC 415. See also the criticisms of Jackson J in *Cornerstone* (n 31) [97]–[103].
45 *Prest* (n 44) [31]–[33] (Lord Sumption), [68] (Lord Neuberger).

her principal simply by operating through a corporate vehicle.[46] In this way the closeness of the relationship between a wrongdoing fiduciary and a corporate accessory continues to be relevant, even if labels such as alter ego become less fashionable. Also, the initial litigation in *Akita* began before *Prest* was decided, and counsel for Akita never sought to distinguish the positions of the company and Mr Hanchell in this regard.[47] Nonetheless, it is still interesting that Akita's distinct legal personality was essentially ignored. It would have been possible for the Privy Council to have reached the same result while still respecting that distinct personality. The Privy Council could have treated Akita as a distinct third party, liable on its own account for knowing receipt, but *on the facts* liable to account in the same way as its wrongdoing fiduciary controller.

46 See *Cook* (n 37), discussed in *Akita Holdings* (n 9) [15]–[16].
47 The choice not to take this point was even described as 'realistic': *Akita Holdings* (n 9) [17].