on estoppel or change of circumstances or position to defeat a claim founded on unjust enrichment or restitution. That outcome of this decision commentators will probably accept and approve. The proposition relating to restitution on constitutional principles may be more debatable. There is justification for treating the recovery of improperly imposed taxes as a distinct kind of claim. Whether that leads to the recognition of a ''new'' category of restitution is more questionable. As a Canadian judge once remarked, ''the categories of restitution, like those of negligence, are never closed'': *James More & Sons* v. *University of Ottawa* (1974) 49 D.L.R. (3d) 666 at 676. The Supreme Court of Canada has now recognised one extension of previously known and applied categories. Their attitude in this respect is consistent with how that Court, in *Garland*, significantly altered the criteria for recovery on the basis of unjust enrichment. Little by little the law of restitution in Canada continues to evolve. The question is: where will it end?

G.H.L. FRIDMAN

RECIPIENT LIABILITY IN EQUITY

THE first defendant, Farah, sought planning permission for a redevelopment project as part of a joint venture between itself and the claimant, Say-Dee. As a result, Farah learned in a fiduciary capacity that such permission would be more likely if the application included two adjoining properties. Farah and the other defendants bought those two properties. Say-Dee claimed that the defendants held the two properties on constructive trust as they had knowingly received the properties following a breach of fiduciary duty by Farah. Say-Dee's success in the New South Wales Court of Appeal (noted [2007] C.L.J. 19) has now been reversed by the High Court of Australia: *Farah Constructions Pty. Ltd.* v. *Say-Dee Pty. Ltd.* [2007] HCA 22.

The High Court, giving a single judgment, accepted that if Farah proposed to purchase the properties itself, it had to disclose to Say-Dee the information it had learnt during the planning application process: otherwise it would be acting with a conflict between its duty to Say-Dee and its own interest (at [103]). The trial judge, Palmer J., had found as a matter of fact that Say-Dee had given its fully informed consent to the conflict, so as to render it unobjectionable. Surprisingly the Court of Appeal then reversed Palmer J.'s finding of fact. In an excoriating repudiation of this decision of the Court of Appeal, the High Court re-instated Palmer J.'s finding, accepting that Farah had revealed to Say-Dee why the joint venture's planning application had

been rejected, and that it had invited Say-Dee's participation in acquiring the adjoining properties (at [37]–[38], [87]–[89] and [99]). Say-Dee had thus given informed consent to Farah acquiring the properties on its own account (at [107]–[109]), and so there was no breach of fiduciary duty when Farah (and the other defendants) acquired them.

Technically, therefore, the High Court's discussion of the other legal issues in the case is *obiter*. That discussion is important, nonetheless, as the considered opinion, following full argument, of a highly respected Commonwealth court of final appeal. Three points are particularly noteworthy.

First, the Court of Appeal's decision to adopt strict liability as the relevant standard for personal liability in equity where X receives property transferred in breach of trust was considered "a grave error" (at [131]): no compelling reason had been identified for departing from the traditional fault-based form of recipient liability in equity. The High Court said that equity has devised protections for equitable interest holders which would be "cut down" by the restitutionary approach (at [153]). This is somewhat unconvincing, because the strict liability approach would *increase* protection for beneficiaries under trusts; it would only reduce that protection if one takes the (extreme) view that there is no relevant difference between legal and equitable property rights, so that equitable interests can be completely ignored, which has not (yet) been argued by restitution scholars. However, the High Court's conclusion is correct because equitable property interests have always been protected differently, and generally to a lesser extent (*viz*. their vulnerability to *bona fide* purchasers), from legal property interests (see [2007] C.L.J. 19, 21–22), and the respondents failed to explain what injustice lay in continuing to apply that system, and refusing to make liable someone who received trust property without any inkling that it was such (at [155]).

Secondly, even assuming Farah had acted in breach of fiduciary duty, the High Court held that the defendants had not received any relevant property, and so could not be liable in equity as knowing recipients. The adjoining properties had not themselves been held on trust by Farah prior to their acquisition by the defendants, and the information which Farah acquired was not itself property (at [118]–[119]; see also *OBG Ltd.* v. *Allan* [2007] UKHL 21, [2007] 2 W.L.R. 920 at [275]). Consequently, there was no trust property to be traced into the properties bought by the defendants. This conclusion is contestable, but has much to commend it.

There is clearly a relevant receipt by X where a trustee transfers trust property to X in breach of trust. Similarly, there is a receipt where a company transfers its property to X pursuant to a director's

breach of fiduciary duty, even though the director did not hold the company's property on trust: the property is treated *as if* it were held on trust: *Ultraframe (UK) Ltd.* v. *Fielding* [2005] EWHC 1638 (Ch) at [1487]–[1488]. Also, receipt will occur where a fiduciary takes property from a third party in breach of trust (*e.g.*, a bribe) and then transfers it to X.

The question that arises is whether recipient liability should attach where a fiduciary acts in breach of fiduciary duty and diverts the property in question to X without ever taking title to it at some intermediate stage. Morritt J. considered this arguable in *Carlton* v. *Halestrap* (1988) 4 B.C.C. 538 at p.540, although only in interlocutory proceedings regarding the removal of cautions from a registered title. The difficulty with extrapolating from the previous situations to this one is that here X has received property as a result of a breach of fiduciary duty, but X did not receive property impressed with a trust: no such trust ever arose. The policy concern is that this reasoning would allow fiduciaries to engineer situations that avoid the imposition of recipient liability on X. However, to extend recipient liability to this situation would blur the distinction between it and accessory liability: *Ultraframe*, at [1599]. The High Court's view is more doctrinally sound and, it bears repeating, X remains vulnerable to a claim for assistance in the breach of fiduciary duty. (In this regard, it is noteworthy that, in Australia, the assistant need not be dishonest but must assist in a dishonest transaction, whereas, in England, the assistance must be dishonest but the transaction need not be: compare *Farah* v. *Say-Dee* at [163] with *Twinsectra Ltd.* v. *Yardley* [2002] 2 A.C. 164.)

Thirdly, the High Court held that even if the defendants had received property following a breach of fiduciary duty, that property was protected from any proprietary claim by the defendants' indefeasible registered title: at [197]–[198]. The slight differences between the English and the Australasian (Torrens) systems of registration should not affect the applicability of this conclusion in England. The implication is that indefeasible title would also protect the defendants from any *personal* liability for receipt, so as to ensure that the indefeasibility conferred by registration is not undermined surreptitiously.

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PROVING A TRUST OF A SHARED HOME

THE trust that commonly arises when cohabiting couples buy a house together sits uneasily between different legal regimes and their

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