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ACCOUNT OF PROFITS FOR DISHONEST ASSISTANCE

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ABSTRACT. *In* Novoship (UK) Ltd. v Nikitin*, a unanimous Court of Appeal held that an account of profits can be granted against a third party who dishonestly assists a breach of fiduciary duty. This raises fundamental questions as to the status of gain-based relief in relation to secondary wrongs. An account of profits reflects the imperatives of fiduciary duty and it is questionable whether the remedy should be extended to a stranger to that relationship. This article will analyse the spectrum of secondary liability and suggest an appropriate demarcation of compensation and disgorgement.*

KEYWORDS: *account of profits, dishonest assistance, secondary liability, breach of fiduciary duty, procuring or inducing a breach, causation, taxonomy of secondary wrongs.*

I. INTRODUCTION

It is uncontroversial that a delinquent fiduciary may be required to disgorge unauthorised gains. Equity has also long recognised secondary liability in respect of knowing receipt and dishonest assistance.[1] The usual remedy is equitable compensation. A surprisingly neglected question is whether an account of profits can be granted against a third party who dishonestly assists a breach of fiduciary duty.

An account of profits enforces the expectation of fidelity which is central to a fiduciary relationship. The remedy requires a different rationale with respect to strangers to that relationship. It will be argued that the stringent policy which strips a wrongdoer of unauthorised gains should be confined to fiduciaries and knowing recipients. Dishonest assistance should be recast as a common law wrong and relief should be limited to damages.[2] This is subject to the qualification that third parties who procure or induce the fiduciary's breach should not escape the consequences of intermeddling

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1 *Barnes v Addy* (1874) L.R. 9 Ch. App. 244.

2 It is argued below that equitable liability for dishonest assistance in a breach of trust or fiduciary duty should be recast as a common law wrong and governed by existing forms of liability in tort.

in the affairs of the trust. Such persons should be required to disgorge gains in the same manner as a breaching fiduciary and a knowing recipient.

The role of gain-based relief for accessory liability has attracted considerable controversy as a result of the Court of Appeal's judgment in *Novoship (UK) Ltd. v Nikitin*.[3] Before this decision, there was appellate authority in Australia for granting gain-based relief for dishonest assistance.[4] The English position was less clear, although there was support for this approach in a number of decisions at first instance.[5] In a unanimous judgment,[6] the Court of Appeal has endorsed this view in *Novoship (UK) Ltd. v Nikitin*. This decision raises some fundamental issues as to the taxonomy of accessory liability and provides a framework for broader discussion of dishonest assistance within the scheme of equitable wrongs.

II. *Novoship (UK) Ltd. v Nikitin*

Novoship arose from the fraudulent conduct of M, a senior employee of the first claimant, who was responsible for negotiating the charter of the claimants' vessels. In that capacity, he solicited and received bribes. Of particular relevance to the present proceedings was an arrangement whereby five vessels were ostensibly chartered to Petroleos de Venezuela SA (hereinafter "PDVSA"), but were in fact chartered to companies owned and controlled by R. R in turn subchartered the vessels to PDVSA for a substantial gain. As a condition to facilitating this arrangement, M required R to make secret payments not only to himself, but also to Amon International ("Amon"), a company owned and controlled by N. N and M were contemporaneously negotiating the charter of the claimants' vessels to N's company, Henriot Finance Ltd. While M's motive for instigating secret commissions by R to N was unclear, the arrangement was manifestly corrupt and a breach of M's fiduciary duty to his employer.

At first instance,[7] the claimants recovered the proceeds of bribery and other improper gains from M and various parties who participated in his corrupt schemes. With regard to the Henriot charters, Christopher Clarke J. found that N had dishonestly assisted M in the breach of the latter's fiduciary duty by negotiating the Henriot charters when he knew that Amon, his alter ego, had dishonestly received secret commissions at M's direction. Both N and Amon were liable to account for the profits made from the charters (which were informally estimated as exceeding US$100 million).

3 *Novoship (UK) Ltd. v Nikitin* [2014] EWCA Civ 908, permission to appeal to UK Supreme Court refused on 10 November 2014.

4 *Consul Development Pty Ltd. v DPC Estates Pty Ltd.* (1975) 132 C.L.R. 373.

5 *Fyffes Group Ltd. v Templeman* [2000] 2 Lloyd's Rep. 643 (Q.B. Com Ct); *Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638 (Ch); *Tajik Aluminium Plant v Ermatov* [2006] EWHC 7 (Ch); *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm); *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm); *Otkritie International Investment Management Ltd. v Urumov* [2014] EWHC 191 (Comm).

6 Longmore, Moore-Bick, and Lewison L.JJ.

7 *Novoship (UK) Ltd. v Mikhaylyuk* [2012] EWHC 3586 (Comm).

The basic position adopted by the Court of Appeal was that, although not sued as a fiduciary, a stranger can be liable in equity as if he was a trustee.[8] On this broad principle, an accessory can be required to disgorge profits. In line with the primary duty of a fiduciary, there was no requirement that the beneficiary sustained a loss.[9] This is consistent with the orthodox view that damages and an account of profits are mutually inconsistent and that a claimant must ultimately exercise an election between the two.[10] The Court of Appeal added that misuse of trust property was not a prerequisite to liability for dishonest assistance for breach of fiduciary duty.[11] Given the diverse range of fiduciary obligations, both proprietary and non-proprietary, to have ruled otherwise would have constrained secondary liability to a limited class of wrongs irrespective of the nature and gravity of the accessory's conduct.

III. Primary and Secondary Liability

The central premise that a knowing recipient or a dishonest assistant has the same responsibility as an express trustee is not without difficulty. In *Novoship*, the Court of Appeal considered that both forms of liability could be approached in a similar manner, rendering a knowing recipient or a dishonest assistant liable to account for profits.[12] The expansive liability of a trustee, both personal and proprietary, can be readily accepted. He or she has either expressly assumed the onerous office of trusteeship or the obligation has been constructively imposed by the Court. Breach of trust, particularly the unauthorised use of trust assets, is at the apex of equitable wrongs. It is unnecessary to make a case for the surrender of illicit gains through an account of profits. However, the scope of secondary liability requires more caution.

A knowing recipient has, by definition, intermeddled with trust property. The act of knowingly receiving trust property does not render the recipient a trustee.[13] Nevertheless, the recipient is treated as if he was.[14] It is considered that knowing receipt is a distinct equitable liability imposing "trustee-like" custodial duties on the recipient.[15] This conduct correspondingly

8 This language is adopted in preference to the term "constructive trustee". See *Paragon Finance plc v D.B. Thakerar & Co.* [1999] 1 All E.R. 400 (CA), 409; *Dubai Aluminium Co Ltd. v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366, at [141]–[142].

9 *Boardman v Phipps* [1967] 2 A.C. 46 (HL).

10 *Tang Man Sit v Capacious Investments Ltd.* [1996] 1 A.C. 514 (PC).

11 *Novoship (UK) Ltd.* [2014] EWCA Civ 908, at [89] et seq.

12 Ibid., at [82], per Longmore L.J., giving the judgment of the Court.

13 *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189, at [31], [57], [64].

14 *Selangor United Rubber Estates Ltd. v Cradock (No 3)* [1968] 1 W.L.R. 1555 (Ch), 1579; *Paragon Finance plc* [1999] 1 All E.R. 400 (CA), 409.

15 C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London 2011), [8–123]–[8–130]; C. Mitchell and S. Watterson, "Remedies for Knowing Receipt" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford 2010), 115.

attracts remedies associated with a breach of trust.[16] In this regard, disgorgement is consistent with equity's rigorous response to the abuse of trust property by third parties, as reflected in its tracing rules and treatment of property in the hands of transferees.

Turning to dishonest assistance, the case for disgorgement falters. It is questionable whether an accessory can be fully equated with a knowing recipient or a trustee. Unlike a knowing recipient, there is no proprietary link with the subject matter of the wrong. This has drawn the comment that it is harder to characterise dishonest assistants as "trustees" than knowing recipients, not least because the former do not take possession of the disputed assets.[17] The comprehensive personal and proprietary remedies for knowing receipt may also be spurred by the view that "[r]ecipient liability is restitution-based; accessory liability is not".[18] From this perspective, disgorgement serves to reverse an unjust enrichment arising from the receipt of property.

The analogy between an accessory and a fiduciary is even more strained. The assistant has assumed no duty to the principal and it cannot be said that an account of profits is a proxy for enforcing a performance interest. Moreover, a fiduciary has disavowed the opportunity to make a personal gain, whereas an accessory has not. This reinforces – or re-expresses – the argument that an accessory cannot be treated as an express trustee for the purpose of liability or remedy.

In *Novoship*, the Court of Appeal cited *Cook v Deeks*[19] as an example of trusteeship being imposed on a party implicated in a breach of fiduciary duty. In *Cook v Deeks*, the directors of the Toronto Construction Company ("TCC") negotiated a construction contract with the Canadian Pacific Railway Company ("CPR") but entered into the contract personally. The directors incorporated a new company, the Dominion Construction Company ("Dominion"), to carry out and receive payment for the work. Dominion therefore received the profits under the contract. The Privy Council held that the directors were in breach of their duties to TCC and an account of profits was directed against all defendants including Dominion. In *Novoship*, the Court of Appeal opined that the order against Dominion was an instance of an account of profits being granted against a non-fiduciary who had become mixed up in a breach of fiduciary duty.[20] However, it is submitted that *Cook v Deeks* is not entirely convincing in rationalising disgorgement against accessories. The status of Dominion is equivocal. As the entity which generated and

16 *Paragon Finance plc* [1999] 1 All E.R. 400 (CA), 409; *Selangor United Rubber Estates Ltd.* [1968] 1 W.L.R. 1555 (Ch), 1582.
17 C. Mitchell, "Dishonest Assistance, Knowing Receipt and the Law of Limitation" [2008] Conv. 226.
18 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 (PC) at 386. See also *Twinsectra Ltd. v Yardley* [2002] UKHL 12; [2002] 2 A.C. 164 (HL), at [104]–[107], per Lord Millett.
19 *Cook v Deeks* [1916] A.C. 554 (PC).
20 *Novoship (UK) Ltd.* [2014] EWCA Civ 908, at [83].

received the contractual benefits, the company was akin to a principal. Moreover, the company was formed as a vehicle for the personal defendants' breach of duty to TCC. The directors were the guiding minds of Dominion. As the Board recorded, "the Dominion Construction Company acquired the rights of these defendants with full knowledge of all the facts".[21] The affairs of the company were sufficiently connected with its principals that it can be more closely identified as a knowing recipient than an accessory.[22]

IV. Causation and Limiting Principles

If dishonest assistance has the same remedial consequences as the misconduct of an express trustee, this begs the question whether an account of profits fulfils the same function in both cases. This will principally depend on the role of causation and limiting principles such as remoteness, foreseeability, and intervening cause. In the case of a fiduciary, equity imposes a strict duty to disgorge illicit gains. This reflects a prophylactic design to discourage temptation and enforce the highest ethical standards. Accordingly, the role of causation and limiting principles is curtailed in relation to both compensatory and gain-based relief. The test for the former is that a fiduciary is liable if the loss would not have occurred but for the breach. This is assessed with the full benefit of hindsight.[23] With respect to an account of profits, this narrow enquiry is largely irrelevant in determining liability to surrender gains.[24] The Court of Appeal's approach in *Novoship* is consistent with this position to the extent that it recognised that a fiduciary's liability to account for secret profits does not depend on causation and arises if the profits fall within the scope of the duty of loyalty.[25]

In *Novoship*, the defendant, N, was in a contractual relationship with the claimants, but he was not a fiduciary. This raises the pivotal question whether the strict view on causation in respect of fiduciaries is tenable in the case of dishonest assistants. The issue arose in *Fyffes Group Ltd. v Templeman*,[26] a case having factual similarities with *Novoship*. In *Fyffes*, the claimant employed T as its chartering manager. In negotiating shipping

21 *Cook* [1916] A.C. 554 (PC), 565.

22 The Court will only seek an alternative analysis by piercing the corporate veil in strictly limited circumstances and when other remedial options are unavailable. See further *Prest v Petrodel Resources Ltd.* [2013] UKSC 34; [2013] 2 A.C. 415.

23 *Target Holdings Ltd. v Redferns* [1996] 1 A.C. 421 (HL), 434; *Swindle v Harrison* [1997] 4 All E.R. 705 (CA), 717; *Bank of New Zealand v NZ Guardian Trust Co Ltd.* [1999] 1 N.Z.L.R. 664 (CA), 681, 686–88. For recent discussion, see *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58; [2014] 3 W.L.R. 1367.

24 *Bray v Ford* [1896] A.C. 44 (HL), 51–52; *Industrial Development Consultants Ltd. v Cooley* [1972] 1 W.L.R. 443 (HC), 453; *Gwembe Valley Development Co Ltd. v Koshy* [2003] EWCA Civ 1048; [2004] B.C.L.C. 131, at [145]; *Stevens v Premium Real Estate Ltd.* [2009] NZSC 15; [2009] 2 N.Z.L.R 384, at [32].

25 *Novoship (UK) Ltd.* [2014] EWCA Civ 908, at [96]. See also *United Pan-Europe Ltd. v Deutsche Bank AG* [2000] 2 B.C.L.C. 461 (CA), at [47].

26 *Fyffes Group Ltd.* [2000] 2 Lloyd's Rep. 643 (Q.B. Com Ct).

services on behalf of his employer, T received secret commissions from S. Toulson J. (as he then was) held that S was liable for dishonestly assisting T's breach of fiduciary duty to his employer. The question arose as to whether S should be required to account to the claimant for the profit it had made from its service contract with the claimant. Toulson J. accepted that there were cogent grounds for holding that the briber of an agent should account to the principal for benefits obtained from the corruption of the agent. However, on the present facts, he declined to do so. His Lordship found that it was highly probable that the claimant would have entered into the service agreement with S if T had not been dishonest. He further held that the profit was not caused by the bribery of T but was an ordinary profit element arising from the provision of S's services to the claimant, which would have been earned irrespective of the breach of duty.

In *Novoship*, the Court of Appeal considered that *Fyffes* applied a test of causation with respect to dishonest assistance. A distinction was drawn between the status of a fiduciary and an assistant. The fiduciary's undertaking is one of single-minded loyalty, breach of which attracts vigorous sanctions including an account of profits. A dishonest assistant, however, has not entered into direct relations with the principal and does not occupy a fiduciary position. Accordingly, the Court could see "no reason in principle why the common law rules of causation, remoteness and measure of damages should not be applied by analogy".[27] On this basis, the judgment below was reversed. Notwithstanding N's corrupt dealings with M and his arrangements in respect of the claimants' vessels, the subsequent gains were attributed to the prevailing market conditions.[28]

The application of a common law standard has superficial appeal in that an accessory is a stranger to the trust and has not transgressed a fiduciary duty. Even in the case of a fiduciary, it is recognised that liability for a non-fiduciary wrong should be determined by analogy to common law principles.[29] Causation, foreseeability, and remoteness can be seen as a necessary brake on the scope of the remedy outside the strict realm of equitable duty.[30] However, this sidesteps the taxonomy of the wrong, the capacity of the wrongdoer, and the implications of both to the remedy. It is argued below that common law limiting principles can appropriately be applied to accessories and that this form of secondary liability should be governed by the common law.[31] This would remove the anomaly of an equitable duty

27 *Novoship (UK) Ltd.* [2014] EWCA Civ 908, at [106].
28 Ibid., at [114], [115].
29 *Bristol & West Building Society v Mothew* [1998] Ch. 1 (CA).
30 This can potentially produce anomalies. Unlike the fiduciary, an accessory who is complicit in a breach of fiduciary duty may escape a full measure of accountability in respect of gains that are deemed causally remote.
31 There is no single set of common law principles for quantification in tort. The rules for determining common law damages vary significantly, for example, as between negligence and the tort of deceit. See further text at footnotes 49–52.

mediated by common law principles and sever the artificial connection between a fiduciary and a stranger to the trust.[32]

V. Taxonomy of Secondary Wrongs

The analogy between a fiduciary and an accessory is unsound and this is evident when propounded as a rationale for gain-based relief for accessory liability. A fiduciary is usually accountable for gains attributable to the misuse of trust property or a breach of duty, such as the profit rule or the conflict rule. These forms of liability do not apply to an accessory. An accessory is not the custodian of another's property nor has he entered into a relationship with the principal which would engender proscriptive fiduciary duties. It follows that the prophylactic principle which prevents a trustee from asserting a personal interest in unauthorised gains cannot apply to an accessory. This is sometimes explained in terms of a fiduciary being disabled from acquiring rights inconsistent with his duty to the principal. Equity insists on due performance.[33] This finds modern expression in the "good person" fiction which is invoked to reverse the effects of wrongdoing[34] by a fiduciary.[35] As Professor Finn (as he then was) expresses the point: "The fiduciary is not usually permitted to say that the benefit derived was derived other than for his beneficiary, even though this is transparently contrary to his real intentions when deriving it."[36]

The good person fiction and related evidential rules impose what is essentially an irrebutable presumption of probity on conduct that is clearly tainted. In this regard, in the landmark case of *Attorney General for Hong Kong v Reid*, Lord Templeman was emphatic in stating that:

> [E]quity insists on treating him as having acted in accordance with his duty; he will not be allowed to say that he preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself . . . equity insists on treating it as a legitimate payment intended for the benefit of his principal.[37]

32 It can be argued that one anomaly is substituted for another in that common law liability is responding to breach of a wholly equitable duty. However, it is argued below that it is preferable to focus on the nature of the wrong committed by an accessory than the obligations of the primary wrongdoer to the principal. See text below at footnotes 45–48.

33 As exemplified by the well-known maxim "Equity regards as done that which ought to be done".

34 From one perspective, in the eyes of equity, the impugned conduct is not a wrong in that equity refuses to countenance it as a wrongful act or allow the errant fiduciary to cite his own misconduct. To that extent, equity is not reversing a wrong, but refusing to accept its status as a wrong.

35 See D. Hayton, "No Proprietary Liability for Bribes and Other Secret Profits?" (2011) 25 T.L.I. 3. See further Lord Millett, "Bribes and Secret Commissions Again" [2012] C.L.J. 583.

36 P.D. Finn (ed.), *Essays on Restitution* (Sydney 1990), 221.

37 *Attorney General for Hong Kong v Reid* [1994] 1 A.C. 324 (PC), 337, citing Sir Peter Millett, "Bribes and Secret Commissions" [1993] R.L.R. 7. The reasoning in *Attorney General for Hong Kong v Reid* was endorsed by the UK Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2014] 3 W.L.R. 535.

This stringent policy, which strips a wrongdoer of unauthorised gains, is strictly status-driven. It is animated by the unique constraints of trusteeship. It does not extend beyond the immediate fiduciary relationship and, it is submitted, has no application to strangers to that relationship.[38]

An account of profits is a remedy that responds to the breach of a particular duty[39] and reflects the imperatives which underlie that duty. This is not, as *Novoship* implies, a question of degree, where an account of profits may be granted if the wrong is not too remote from the breach.[40] An account of profits reinforces a duty and a more principled position is to confine the remedy to the immediate and obvious context of those who owe direct fiduciary obligations to the principal.[41]

This can be supported from another perspective. Accessory liability, as defined in *Barnes v Addy*, is founded in fraud.[42] Dishonest assistance is constituted by knowledge of, and participation in, a "dishonest and fraudulent design on the part of the trustees".[43] Much scholarly and judicial attention has been directed to the precise level of knowledge, but the general view is that dishonesty or lack of probity is a touchstone of liability.[44]

Although an account of profits applies to an equitable wrong which is premised on dishonesty or fraud, the remedy does not apply to comparable common law wrongs, such as intentional torts. Thus, defendants in common law proceedings are in a more favourable position than a dishonest assistant, even though the latter is not the primary wrongdoer.[45]

38 Subject to limited exceptions, such as knowing receipt and procuring or inducing a breach of trust. See discussion below.

39 An account of profits can be applied in different settings but, for present purposes, discussion of the remedy is confined to trust obligations and fiduciary relationships.

40 This approach is, however, relevant in other areas, most notably in respect of intellectual property infringement. Decisions in this field are not regulated by the more rigid principles governing defaulting fiduciaries. See further P. Devonshire, *Account of Profits* (Wellington 2013), Chapter 6, "Intellectual Property Infringement".

41 As discussed above, knowing receipt is treated as a distinct equitable wrong, and attracts similar remedies, including an account of profits.

42 A view noted in *Novoship (UK) Ltd.* [2014] EWCA Civ 908, at [86].

43 *Barnes* (1874) L.R. 9 Ch. App. 244, 251–52.

44 *Royal Brunei Airlines Sdn Bhd* [1995] 2 A.C. 378 (PC), 392. Following *Royal Brunei*, there was uncertainty as to the extent to which conscious impropriety was a strictly objective test. In *Twinsectra Ltd.* [2002] UKHL 12; [2002] 2 A.C. 164, the majority of the House of Lords asserted a combined subjective–objective test for dishonesty. Lord Millett, dissenting, emphasised the need for an objective standard. Subsequently, in *Barlow Clowes International Ltd. v Eurotrust International Ltd.* [2005] UKPC 37; [2006] 1 W.L.R. 1476, the Privy Council maintained that *Twinsectra* had not departed from *Royal Brunei* and, in line with Lord Millett's dissenting speech in *Twinsectra*, affirmed that, although a dishonest state of mind is a subjective mental state, the law determines dishonesty by reference to an objective standard. New Zealand similarly adopts a test of dishonesty. See *Westpac New Zealand Ltd. v MAP & Associates Ltd.* [2011] NZSC 89; [2011] 3 N.Z.L.R. 751. In Australia, the High Court of Australia has emphasised the strict requirement for knowledge of a dishonest and fraudulent breach of trust or fiduciary duty, as expressed in *Barnes v Addy*. This test is satisfied by actual or constructive knowledge within the first four categories of knowledge postulated in *Baden v Societe Generale* [1993] 1 W.L.R. 509 (Ch). See *Farah Constructions Pty Ltd. v Say-Dee Pty Ltd.* [2007] HCA 22; (2007) 230 C.L.R. 89, at [177]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, at [262].

45 It is not suggested that an account of profits is entirely absent in common law proceedings: (1) in *Attorney General v Blake* [2001] 1 A.C. 268 (HL), the House of Lords held that, in exceptional cases where orthodox remedies are inadequate, a defendant may be required to account to the claimant

It is submitted that an account of profits falls outside the conceptual framework of accessory liability and that this particular wrong should be governed by the common law.[46] In the absence of an equitable duty or abuse of trust property, a third party is not in breach of any positive duty to the principal. At best, he or she is party to harm caused by another. The underlying cause of action should be cast as a common law wrong,[47] which may be variously classed as fraud, deceit, negligence, interference with contractual relations, and so on.[48]

It can be objected that, in this scenario, a claimant may face significant evidential hurdles in establishing a cause of action at law.[49] However, relinquishing an equitable standard for dishonest assistance may be less prejudicial than first appears. Even as an equitable wrong, accessory liability has a high threshold, requiring proof of dishonesty.[50] Moreover, the common law grants concessions for the recovery of damages for intentional wrongs. For example, remoteness of damage for the tort of deceit differs from negligence in that the defendant is liable for all losses flowing directly from the tort, whether foreseeable or not.[51] Liability in this context extends to consequential losses.[52]

VI. Procuring or Inducing a Breach

The argument for treating accessory liability as a common law wrong should be qualified in one respect. There are different forms of fiduciary duty, engendering different intensities of obligation. Secondary liability

for the benefits received from a breach of contract; (2) in proceedings for interference with property, damages may be awarded based in part on the defendant's gain, although the quantum usually falls short of full profit stripping (*Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.* [1974] 1 W.L.R. 798 (Ch)); and (3) by statute, an account of profits is available in respect of intellectual property infringement.

46 Whilst *Novoship* expounds a hybrid form of accessory liability, this contrasts with the established Australian view that dishonest assistance is an equitable wrong in respect of which an account of profits can be granted. See *Consul Development Pty Ltd.* (1975) 132 C.L.R. 373; *Warman International Ltd. v Dwyer* (1995) 182 C.L.R. 544; *Michael Wilson & Partners Ltd. v Nicholls* (2011) 244 C.L.R. 427.

47 Equitable liability for dishonest assistance in a breach of trust or fiduciary duty should be characterised as a common law wrong as opposed to an equitable duty subject to analogous common law rules.

48 It is questionable whether accessory liability in tort is a surrogate for dishonest assistance in equity. The essential elements are that the defendant must have assisted the commission of an act by the primary tortfeasor, the assistance must have been pursuant to a common design, and the act must constitute a tort as against the claimant. In the case of assistance in breach of fiduciary duty, there are conceptual difficulties in characterising the primary wrong as a tort. See further *Sea Shepherd (UK) v Fish & Fish Ltd.* [2015] UKSC 10.

49 In contrast, equity's exacting standards are often conducive to establishing liability. For example, comparing equitable fraud and common law fraud, the former does not require moral turpitude or deception. It is sufficient if the defendant's actions are deemed unconscionable. See *Kitchen v RAF Association* [1958] 1 W.L.R. 563 (CA); *Archer v Moss* [1971] 1 All E.R. 747 (CA).

50 See text at footnotes 42–44.

51 *AIB Group (UK) plc* [2014] UKSC 58; [2014] 3 W.L.R. 1367, at [92]. See also *Doyle v Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158 (CA); *Smith New Court Securities Ltd. v Scrimgeour Vickers (Asset Management) Ltd.* [1996] UKHL 3; [1997] A.C. 254.

52 In the case of fraudulent misrepresentation, damages are not determined by contract principles, but are assessed on the same basis as the tort of deceit.

must be conditioned by that fact. For example, at one extreme, a third party may facilitate the misappropriation of trust property and, at the other, a third party may assist a fiduciary in respect of conduct that marginally infringes the conflict rule. A nuanced response is required. It is submitted that a distinction should be drawn between two forms of participation in the fiduciary's breach: (1) dishonest assistance in furtherance of a fiduciary's breach and (2) procuring or inducing the fiduciary's breach (hereinafter Category 1 and Category 2, respectively).[53]

A third party is liable for dishonest assistance (Category 1) if he or she assists a trustee or fiduciary "with knowledge in a dishonest and fraudulent design on the part of the trustees".[54] By definition, the third party is an accessory to the misconduct of *another*. In contrast, liability for procuring or inducing a breach of duty (Category 2) contemplates that a third party has personally instigated the wrong. Liability is not conditional on dishonesty on the part of the fiduciary.[55] Category 2 is directed to the unilateral conduct of a third party in procuring a breach of fiduciary duty. Arguably, this is considered more venal than Category 1, because it is expressed in more restrictive terms: "... the liability of a person who induces or procures a trustee to commit a breach of trust does not turn on the quality of the breach. There is no requirement that the breach of trust be of sufficient gravity to answer the description of 'dishonest and fraudulent design'."[56]

The English position effectively assimilates the two categories, which are expressed as a general principle of accessory liability. In *Royal Brunei Airlines Sdn Bhd v Tan*,[57] the Privy Council stated: "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly."[58]

The Australian position differs in that procuring or inducing a breach of trust or fiduciary duty is regarded as a distinct head of third-party liability which is independent from the second limb of *Barnes v Addy*.[59] In *Farah*

53 Conceptually, each is a distinct basis of liability. See discussion in text below.

54 *Barnes* (1874) L.R. 9 Ch. App. 244, 251–52, per Lord Selborne L.C. (commonly referred to as "the second limb of *Barnes v Addy*"). Australian law retains this formulation for accessory liability. It also recognises a distinct liability for procuring or inducing a breach of fiduciary duty. This is not dependent on conscious impropriety by a trustee. A third party who has not "assisted" a breach of duty has nevertheless committed an independent wrong: *Hasler v Singtel Optus Pty Ltd.* [2014] NSWCA 266, at [76]–[78]; *Farah Constructions Pty Ltd.* [2007] HCA 22; (2007) 230 C.L.R. 89, at [163]. The English position essentially assimilates the two principles (*Royal Brunei Airlines Sdn Bhd* [1995] 2 A.C. 378 (PC), 392). See further text below at footnotes 56–60.

55 *Royal Brunei Airlines Sdn Bhd* [1995] 2 A.C. 378 (PC), 392.

56 *Hasler* [2014] NSWCA 266, at [77], per Leeming J.A.

57 *Royal Brunei Airlines Sdn Bhd* [1995] 2 A.C. 378 (PC).

58 Ibid., at 392, per Lord Nicholls, delivering the advice of the Board.

59 *Farah Constructions Pty Ltd.* [2007] HCA 22; (2007) 230 C.L.R. 89, at [163].

Constructions Pty Ltd. v Say-Dee Pty Ltd., the High Court of Australia observed that:

> Before *Barnes v Addy*, there was a line of cases in which it was accepted that a third party might be treated as a participant in a breach of trust where the third party had knowingly induced or immediately procured breaches of duty by a trustee where the trustee had acted with no improper purpose; these were not cases of a third party assisting the trustee in any dishonest and fraudulent design on the part of the trustee.[60]

It is submitted that Category 1 and Category 2 provide an appropriate demarcation for the scope of an account of profits. Category 2 contemplates liability for an autonomous wrong. Particularly if a trustee or fiduciary is induced by a third party to commit an "innocent" breach,[61] the case for disgorgement of the third party's gains is compelling. This form of wrongdoing engages the deterrent principle and lends weight to accountability for consequential gains. Unlike Category 1, this is appropriately classified as an equitable wrong for which compensation is awarded on a strict "but for" test of causation and disgorgement is largely unfettered by limiting principles.[62] In contrast, the first category of dishonest assistance should be governed by common law and relief should be confined to damages. In drawing this distinction, it is noted that procuring or inducing a breach of duty has an affinity with intermeddling in the affairs of another, such as a constructive trustee,[63] a trustee de son tort,[64] an executor de son tort,[65] and an unauthorised holding out as an agent.[66] By instigating the breach, the third party is effectively a primary wrongdoer. In these circumstances, it is not anomalous to impose a full gamut of remedies for his or her participation in the substantive wrong.

Finally, to what extent is the accessory's role in the corruption of a fiduciary relationship sufficiently proximate to engage the sanction of an account of profits? It has been argued in this article that the question should only arise in respect of procuring or inducing the fiduciary's breach. Within this category, it is important to put the wrong in perspective. The third party's liability is not entirely parasitic on the fiduciary's conduct. Knowing assistants are liable for their own dishonesty irrespective of the dishonesty of the trustees.[67] It has been pointed out that a third party

60 Ibid., at [161], per curiam.

61 For example, where the third party is a solicitor advising a trustee. See further *Alleyne v Darcy* (1854) 4 I.R. Ch. Rep. 199; *Midgley v Midgley* [1893] 3 Ch. 282 (CA).

62 See text at footnotes 22–24.

63 The term "constructive trust" is an ambulatory concept which is invoked when it is unconscionable for a person to retain property deriving from a particular relationship or course of dealings, or to enjoy the proceeds of its exploitation. For discussion of the terms "constructive trust" and "constructive trustee", see Millett L.J. in *Paragon Finance plc* [1999] 1 All E.R. 400 (CA), 408 et seq.

64 *Mara v Browne* [1896] 1 Ch. 199 (CA), 209.

65 *Peters v Leeder* (1878) 47 L.J.Q.B. 573. See further the Administration of Estates Act 1925, s. 28.

66 *English v Dedham Vale Properties Ltd.* [1978] 1 W.L.R. 93 (Ch). For further discussion of these categories, see C. Harpum, "The Stranger as Constructive Trustee" (1986) 102 L.Q.R. 114.

67 *Royal Brunei Airlines Sdn Bhd* [1995] 2 A.C. 378 (PC); *Williams* [2014] UKSC 10; [2014] A.C. 1189.

would otherwise escape liability altogether if he or she deceived a trustee and caused the latter to innocently commit a breach of duty.[68] A preferable approach is to ask, first, whether the principal has sustained a loss as a result of the third party's conduct. If so, the third party should compensate for that loss on a narrow "but for" test for causation. If the accessory has made a gain without occasioning harm to the principal (or if any gain exceeds the principal's loss), then gains which have an immediate and obvious connection with the wrong should attract disgorgement. For example, if a broker procured a breach of trust by inducing a trustee to purchase unauthorised investments for which the broker received a commission.

Cases such as *Novoship* should fall outside this principle entirely. The facts do not suggest that N procured the breach and his gains were the product of faithful performance of a contract with the principal. Both *Fyffes* and *Novoship* concern the disgorgement of benefits legitimately derived from transactions with the claimant. In both cases, the profits were attributable to the dishonest assistant's services to the claimant. In *Novoship*, there was no finding that N had received any particular advantage in entering into his agreement with the claimants. To this extent, N's gains were causally remote from his participation in the breach of fiduciary duty.

VII. Conclusion

In *Novoship*, the Court of Appeal accepted, in principle, that gain-based relief can be granted against a dishonest assistant as well as a fiduciary. However, this does not give due weight to the fact that an accessory is a stranger to the trust relationship. The status of a fiduciary and an accessory is fundamentally distinct and it is unsafe to equate the two. The Court did, however, recognise that common law rules of causation and remoteness should apply to dishonest assistance. This is anomalous to the extent that it posits a different jurisdictional regime for the same remedy. The anomaly disappears if the cause of action and the remedy are unified as common law constructs. In this regard, it is argued that dishonest assistance should be treated as a common law wrong[69] and that relief should be confined to damages.

An account of profits reflects the imperatives of fiduciary duty. An accessory is a stranger to the relationship which engenders that duty and should not be drawn within its sphere to accommodate gain-based relief. An exception has been suggested where the third party's conduct amounts to procuring or inducing the fiduciary's breach. By instigating the wrong, the third party has intermeddled in a trust relationship and should accordingly be subject to the full vigour of equitable doctrine.

68 P. Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 L.Q.R. 445.
69 As noted above, this conclusion does not apply to knowing receipt.