Trusts & Equity
Fall Term 2023

Lecture Notes – No. 15

XII. TRUSTEE LIABILITY (cont'd)

B. DEFENCES AND OTHER CONSIDERATIONS

(a) The Retired Trustee

A trustee is liable for acts or omissions that fail to fulfill the duty of care owed during his or her tenure as trustee. Early retirement, however, will not render the trustee safe from liability where his or her acts or omissions during administration of the trust would facilitate a breach and where the trustee retires in order to save himself or herself from liability but does nothing to prevent the breach.

Head v Gould
[1898] 2 Ch 250

A retired trustee may be an accessory to his or her successor's breach, but narrowly.

Per Kekewich J:

> What their successors did was to convert the whole remaining trust property and improperly to spend it. They knew that G. D. Gould was reflecting on some possible mode of assisting Mrs. Head, and he had told them, by his letter to Mr. Clapp of November 2, 1894, that he was turning his attention to some means of doing this; but apparently he was as conscious as Messrs. Houlditch & Clapp themselves of the difficulty of doing this, and he certainly never hinted at doing it in the manner ultimately adopted. On reflective study of the evidence and correspondence, and notwithstanding suspicious criticism of some unhappy expressions in Mr. Clapp's letters, I do not believe that Messrs. Houlditch and Clapp contemplated any breach of trust at all, and I am convinced that they never contemplated that actually committed. With the judgment of the Court of Appeal in *Clark v. Hoskins* before us it is easy to understand the Master of the Rolls as meaning what he probably intended to express - that **in order to make a retiring trustee liable for a breach of trust committed by his successor you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place.** That is clearly the doctrine of *Clark v. Hoskins.* It will not suffice to prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated.

(b) Consent, Participation, Acquiescence or Release by the Beneficiary

The beneficiary cannot claim for breach of trust if he or she assented to or concurred in the breach or, after the fact, confirmed the act or released the trustee from liability if the beneficiary is of age, has had full disclosure and knows the consequences of hir or her decision, and there is no undue influence brought to bear in him or her to decide one way or another.

Re Pauling
[1963] Ch 576
[1964] Ch 303

There was a family trust. A father and his children were amongst the beneficiaries. The father tricked the trustee into making advancements to his children for their own needs, but used the money for other purposes. The children were adults but did not object. The children brought an action against the trustee. At trial, Wilberforce J. held that when considering whether it was fair and equitable for a beneficiary who had concurred in such transactions to sue the trustee for breach of trust **the court must consider all the circumstances in which the concurrence was given, and that subject to that, it was not necessary that the beneficiary should know that what he was concurring in was a breach of trust provided that he fully understood what he was concurring in, and that it was not necessary that the beneficiary himself should have benefited by the breach of trust**. In the Court of Appeal, the position was clarified such **that the beneficiary who doesn't consent but who benefits cannot have double recovery – the benefits obtained must be deducted from the compensation due.**

PROTECTIVE DEVICES

(a) Exculpation Clauses

The settlor of the trust may specifically forgive the trustee for breaches of trust based on simple negligence in certain conditions (for example, that the trustee acted honestly, and, that the trustee was insured for liability for negligence). However, what of gross negligence? Here the Courts are generally hostile to enforcing such clauses.

Poche v Pihera
(1983), 16 ETD 68 (Alta. Surr. Ct.)

Executrix of a trust will was found to be grossly negligent in the administration of the estate causing loss to the beneficiary of the trust, who was to receive income from the estate during her life. A second beneficiary, who was to receive the residue outright upon the death of the first beneficiary, was found to have suffered no loss.

Per Hetherington J.

> 63 Mr. Poche's will contains a number of provisions which relieves Mrs. Pihera from liability for a loss resulting from an exercise of discretion by her. Since I am not satisfied on a balance of probabilities that Mrs. Pihera exercised any discretion with respect to the matters complained of in this case, I need not consider these provisions.
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> 64 Mr. Poche's will also contains the following provision:

> 8. I DECLARE that the Trustee of this my Will shall not be liable for any loss not attributable:
>
> (a) To her own dishonesty, or
>
> (b) To a wilful commission by her of any act known by her to be a breach of trust ...

It was not suggested that the loss in question is attributable to Mrs. Pihera's dishonesty. Nor was it suggested that the loss is attributable to the wilful commission by her of any act. The loss is attributable to omissions by Mrs. Pihera, not to any commission. It would appear, therefore, that Mrs. Pihera is relieved from liability for this loss by para. 8 of Mr. Poche's will.

65 However, I am of the view that the conduct of Mrs. Pihera which resulted in the loss to Mrs. Poche was grossly negligent. And I am further of the view that para. 8 of Mr. Poche's will cannot relieve Mrs. Pihera from liability for a loss resulting from her gross negligence.

66 In the case of Seton v. Dawson, (1841), 4 Ct. Sess. Cas. (2d) 310, the Court was required to consider the effect of a clause quoted at p. 311 which provided as follows:

> ... and I declare that the trustees, whether originally added or assumed, shall not be liable for omissions, neglect of diligence, of any kind, nor singuli in solidum, but each only for his own actual intromissions; ...

The Court held that this clause did not relieve the trustees from liability in the circumstances of the case. Lord Cockburn, with whom Lords Justice-General (Boyle,) Mackenzie, Fullerton and Cunninghame concurred, stated at p. 317:

> We hold this total disregard of the trust, after their attention had been called, by their being required to sign the deeds, to the fact that these sums had been received, to amount to culpa lata. Though aware of the indulgence due, under such a clause, to trustees, we think that no trust property would be safe, if such gross negligence were not to make those who are guilty of it liable to the party injured.

Lord Ivory, with whom Lords Gillies and Murray concurred, stated at p. 318:

> But in no view can I hold them excusable, after putting the money into the hands of such third party, for having allowed it, or the greater part of it to remain there for a space of nine years wholly uncared for, and without so much as an account having during all that time been rendered. It is here that the gravamen of the case, as regards the trustees, in my opinion lies. For, could I get over the plea of culpa lata, as applied to this species facti, I should have been disposed, in other respects, to allow them the protection of the clause which the trust-deed contains in their favour; that protection being only to be withheld, when there is a clear case of culpa lata, which, however, I think, there unquestionably is here.

In Knox v. Mackinnon (1888), 13 App. Cas. 753 (H.L.), Lord Watson stated at p. 765:

> By the second of those clauses, it is declared that the trustees 'shall not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each shall be liable for his own actual intromissions only.' I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bona fide abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, and of the persons whom it concerns. But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of culpa lata, or gross negligence on his part, or of any conduct which is inconsistent with bona fides.
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> …
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> **70 I am persuaded by the reasoning in these cases. In my opinion a trustee must be held responsible for any loss resulting from his gross negligence, regardless of any provision in the trust instrument relieving him from such liability.**
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> **71 Since the conduct of Mrs. Pihera which caused Mrs. Poche's loss was grossly negligent, she is not relieved from liability for this loss by para. 8 of Mr. Poche's will.**

Armitage v Nurse
[1997] 2 All E.R. 705 (C.A.)

Here a trust settlement contained a clause that provided that no trustee should be liable for any loss or damage unless it was caused by his own actual fraud. It was held that a clause excluding the liability of a trustee for equitable fraud or unconscionable behaviour was not so repugnant to the trust or contrary to public policy as to be liable to be set aside.

Millet L.J. said:

> **I accept the submission made on behalf of Paula that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.** As Mr. Hill pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.
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> …
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> The submission that it is contrary to public policy to exclude the liability of a trustee for gross negligence is not supported by any English or Scottish authority.
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> …

> At the same time, it must be acknowledged that the view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence should not be able to rely on a trustee exemption clause excluding liability for gross negligence. Jersey introduced a law in 1989 which denies effect to a trustee exemption clause which purports to absolve a trustee from liability for his own "fraud, wilful misconduct or gross negligence." The subject is presently under consideration in this country by the Trust Law Committee under the chairmanship of Sir John Vinelott. If clauses such as clause 15 of the settlement are to be denied effect, then in my opinion this should be done by Parliament, which will have the advantage of wide consultation with interested bodies and the advice of the Trust Law Committee.

(b) The Statutory Defence

The Trustee Act

> Protection from liability
> 28. A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.
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> Assessment of damages
> 29. If a trustee is liable for a loss to the trust arising from the investment of trust property, a court assessing the damages payable by the trustee may take into account the overall performance of the investments. s. 16 (1).
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> Technical Breaches of Trust
> **35. (1) If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.**
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> (2) Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property.

A trustee may be personally liable for breach of trust, unless it appears to the court that she acted (i) honestly; (ii) reasonably; and (iii) ought fairly to be excused for the breach and for not seeking direction of the court before the breach under the Trustee Act.

In ***National Trustee Co of Australia v General Finance Co of Australasia*** **[1905] AC 373, 381** it was held:

> Unless both [honesty and reasonableness] are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances.

These requirement are questions of fact and the onus of proof rests on the trustee; *Re Stuart* [1897] 2 Ch 583. Both honesty and reasonableness must be proven; *Re Rosenthal* [1972] 3 All ER 552 (T was honest but did not reasonably). The statute should be given a broad construction and the standard should be that of an ordinary honest business person. In *Re Grindey* [1898] 2 Ch 593, 601, Chitty LJ said:

> The section is not easy to construe; but in my opinion, a narrow construction ought not to be put upon it, having regard to the language used and the general object in view, which is plain, namely, the relief of honest trustees who have acted reasonably. "Reasonably" must mean reasonably as trustees.

Taking advice is not a "passport to relief":

In *Marsden v Regan* [1954] 1 WLR 423, 435 Evershed MR said:

> In this court it is our unhappy lot sometimes to come across cases in which nothing is more deplorable than the fact that a person inexperienced in matters in which he is involved fails to take advice from solicitors, who could clearly have given advice, and have protected that person from the consequences of his rash conduct. I think that one must pay some regard to the kind of station in life of the people here concerned, the character of the business, and the difficulties with which they were confronted, including the unfortunate fratricidal strife.
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> If this court were to say that the defendant ought to have taken some further advice by way of going to counsel or applying to the judge, I think that it would shock the common sense of many people, and certainly be a most disturbing factor when other persons in like situation found themselves in the position of being personal representatives of their deceased relatives.
>
> I therefore acquit the judge entirely from the view that merely taking advice, without more, is necessarily a passport to relief, but I think with him that, in all the circumstances of the case, and bearing in mind the grave difficulties with which the defendant was confronted, it was reasonable for her, having taken the advice, and paying regard to the advice which was in fact given, to act upon it as she did.

(c) Indemnification

Generally, a trustee is liable for his or her own acts or omissions for breach of trust. If there are two or more trustees held to be liable, contribution proceedings can be instituted by the trustees to apportion liability as between themselves through indemnification (they remain jointly and severally liable to the trust, but one trustee or another may be liable to indemnify the others for his or her greater responsibility for the breach).

THIRD PARTY LIABLITY

In ***Barnes v Addy*** **(1874) L.R. 9 Ch. App. 244**, Lord Selborne L.C. described two distinct equitable actions available against a third party (i.e. someone outside the trust) popularly known as **'knowing receipt'** (available against a third party possessed of trust property in his or her personal capacity; i.e. not as an agent) and **'knowing assistance'** (against a third party who is an accessory to breach of trust of fiduciary duty).

- In both the areas of 'knowing receipt' and 'knowing assistance', the courts and commentators are drawn between two positions: are these forms of liability 'wrongs' (based on some degree of fault) or restitutionary responses based on unjust enrichment (favouring strict liability, subject to a defence of 'change of position')?

- The claim of a bona fide purchaser for fair value without notice of the trust supersedes claims by the trustee or beneficiary; *Nelson* v *Larholt* [1948] 1 KB 339; *Macmillan Inc* v *Bishopsgate Investment Trust (No 3)* [1995] 3 All ER 747.

- The third party in receipt of trust property disposed of in breach of trust by the trustee must be distinguished from the liability of a third party as a 'trustee de son tort'; that is, a third party who is a stranger to the trust and who intermeddles with trust property and does acts characteristic of a trustee and commits a breach of trust. The *trustee de son tort* is personally liable to account to B as well as to hold any trust property on a constructive trust; *Mara* v *Brown* [1896] 1 Ch 199; *Williams-Ashman* v *Price & Williams* [1942] Ch 219; *Re Barney* [1892] 2 Ch 265.

(a) Knowing Receipt: Third Parties in Possession

Traditionally, the liability of a stranger possessed of trust property to hold as a constructive trustee for the rightful beneficiary has been thought to be bound up with considerations of knowledge of the disposition of the trust property in a breach of trust. Thus, cases have concerned themselves with actual, implied and constructive knowledge (whether received at the time of the actual receipt or thereafter) as to the status of the property obtained as being associated with breach of trust or fiduciary duty.

Determination of a sufficient degree of knowledge for equity to consider the conscience of the third party as affected has been highly problematic; in particular, the degree to which suspicion alone would suffice as knowledge has been a source of great uncertainty. Thus it has been well recognised in recent years that the evolution of knowledge-based tests of third party fault have resulted in a complex series of technical considerations that have caused considerable frustration. An influential case has been *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575-576 (Ch) where Peter Gibson J classified knowledge as (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which will put an honest and reasonable man on inquiry; see also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (CA). All of this is very redolent of criminal law.

One judge characterized this area as being one that has become inordinately technical and over-theorized inquiries into knowledge-based personal fault have tended towards 'tortuous

convolutions' along a 'gradually darkening spectrum where the differences [of states of mind constituting sufficient knowledge] are of degree and not kind.' In response, much scholarly work has been done in recent years to rationalize the area to provide for clearer and simpler operation. In particular, the question that has been asked whether the liability of the stranger should be strict.

Citadel General Assurance Co. v. Lloyds Bank Canada
[1997] 3 S.C.R. 805 (S.C.C.).

An insurance agent sold policies underwritten by the plaintiff insurer. The agent collected premiums on behalf of the insurer, and deposited them in a general account with the defendant bank. The bank was aware that insurance premiums were being deposited into the agent's account. The agent's parent company also banked with the bank. The bank received instructions from the parent company's signing officers, who were identical to the agent's signing officers, to transfer all funds in the agent's account to the parent company's account at the end of each business day. The transfer of funds between the accounts reduced the parent company's overdraft. The agent failed to remit to the insurer premiums collected on the insurer's behalf. The agent and the parent company ceased carrying on business. The insurer brought an action against the bank for the outstanding premiums. Liability against the bank was found and a constructive trust in favour of the insurer ordered.

The rule that emerges is that there are three requisite elements in order to obtain a remedy: the property is disposed of in breach of trust or fiduciary obligation; the defendant beneficially receives the property or further property into which the trust property can be traced; the defendant has at least 'knowledge of facts sufficient to put a reasonable person on notice or inquiry.'

Per La Forest J.

> 24 The only basis upon which the Bank may be held liable as a constructive trustee is under the "knowing receipt" or "knowing receipt and dealing" head of liability. **Under this category of constructive trusteeship it is generally recognized that there are two types of cases. First, although inapplicable to the present case, there are strangers to the trust, usually agents of the trustees, who receive trust property lawfully and not for their own benefit but then deal with the property in a manner inconsistent with the trust. These cases may be grouped under the heading "knowing dealing". Secondly, there are strangers to the trust who receive trust property for their own benefit and with knowledge that the property was transferred to them in breach of trust. In all cases it is immaterial whether the breach of trust was fraudulent;** see *Halsbury's Laws of England* (4th ed. 1995), vol. 48, at para. 595; Pettit, *supra,* at p. 168; Underhill and Hayton, *Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 357. The second type of case, which is relevant to the present appeal, raises two main issues: the nature of the receipt of trust property and the degree of knowledge required of the stranger to the trust.
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> 25 Liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit; see *Agip (Africa) Ltd. v. Jackson* (1989), [1990] 1 Ch. 265 (Eng. Ch. Div.), aff'd [1992] 4 All E.R. 451 (Eng. C.A.); *Halsbury's Laws of England, supra,* at paras. 595-96; Pettit, *supra,* at p. 168. As Iacobucci J. wrote in *Air Canada v. M & L Travel Ltd., supra,* at pp. 810-11, the "knowing receipt" category of liability "requires the stranger to the trust to

have received trust property in his or her personal capacity, rather than as an agent of the trustees". In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:

The essential characteristic of a recipient ... is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit.... [Footnotes omitted.]; P.J. Millett, "Tracing the Proceeds of Fraud" (1991), 107 *L.Q.R.* 71, at pp. 82- 83.

...

30 Nonetheless, the respondents' arguments reflect a difficulty with the traditional conception of "receipt" in "knowing receipt" cases. **In my view, the receipt requirement for this type of liability is best characterized in restitutionary terms. In *International Corona Resources Ltd. v. LAC Minerals Ltd.,* [1989] 2 S.C.R. 574 (S.C.C.), at p. 669, I stated that a restitutionary claim, or a claim for unjust enrichment, is concerned with giving back to someone something that has been taken from them (a restitutionary proprietary award) or its equivalent value (a personal restitutionary award).** As well, in *Air Canada v. British Columbia,* [1989] 1 S.C.R. 1161 (S.C.C.), at pp. 1202-3, I stated that **the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense."** ...

48 Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases; see *Air Canada v. M & L Travel Ltd. National Westminster Bank Ltd., supra,* at pp. 811-13. However, **in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability.** Iacobucci J. reaches the same conclusion in *Gold National Westminster Bank Ltd., supra,* where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".

...

50 Some commentators go further and argue that a recipient may be unjustly enriched regardless of either a duty of inquiry or constructive knowledge of a breach of trust. According to Professor Birks, a recipient of misdirected funds should be liable on a strict, restitutionary basis. In his article "Misdirected funds:

> restitution from the recipient", [1989] *L.M.C.L.Q.* 296, he argues that a recipient's enrichment is unjust because the plaintiff did not consent to it, not because the defendant knew that the funds were being misdirected. In particular, he writes, at p. 341, that "[t]he 'unjust' factor can be named 'ignorance', signifying that the plaintiff, at the time of the enrichment, was absolutely unaware of the transfer from himself to the defendant". Birks, however, lessens the strictness of his approach by allowing a defendant to take advantage of special defences, including a defence arising out of a bona fide purchase for value. (See also P. Birks, "Overview: Tracing, Claiming and Defences", in P. Birks, ed., *Laundering and Tracing* (1995), 289, at pp. 322 *et seq.)*
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> 51 In my view, the test formulated by Professor Birks, while not entirely incompatible with my own, may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly *deprived* but, rather, because the defendant has been unjustly *enriched,* at the plaintiff's expense. **To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind not the plaintiff's knowledge, or lack thereof. Indeed, without constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received. In those circumstances, the recipient will not be unjustly enriched and the plaintiff will not be entitled to a restitutionary remedy.**

(b) Third Party Accessories: Knowing Assistance

While the liability of a recipient of property transferred in breach of trust is receipt- based, the liability of a stranger who procures or assists in breach of fiduciary duty is not. Rather, it is conduct-based fault that is at issue here, and the fault of the stranger-accessory is tested without reference to any underlying fault on the part of the trustee who breaches her obligation. It is an independent form of primary liability in its own right which results in an order for the third party to compensate the beneficiary and/or disgorge his or her own profit flowing from the breach.

Air Canada v. M & L Travel Ltd.
[1993] 3 S.C.R. 787 (S.C.C.)

Here a travel agency was obliged to hold the proceeds from its sale of Air Canada tickets in trust for the airline, but the agency breached its trust and used the proceeds to reduce its indebtedness to a bank. There was little question that a trust existed rather than a simple debt given that the travel agency treated the money not as its own (until the breach) but as the beneficial property of the airline.

Per Iacobucci J:

> 34 Second, strangers to the trust can also be personally liable for breach of trust if they knowingly participate in a breach of trust. The starting point for a review of the bases of this kind of personal liability is *Barnes v. Addy,* supra, which involved an estate, for which three trustees had been designated by the testator. The will allowed for the appointment of new trustees without the consent of any other party,

but did not allow for a decrease in the number of trustees. Two of the trustees died and a rift developed between the family and the third trustee, who wished to retire. He instructed his solicitor to prepare an instrument appointing Barnes, who was the husband of one of the beneficiaries, as sole trustee. The solicitor advised him against having only one trustee, but prepared the instrument on the instructions of his client. Barnes' solicitor approved the appointment. Barnes invested the trust funds for his own purposes and [page810] went bankrupt. The beneficiaries sued the previous trustee, his solicitor and Barnes' solicitor for breach of trust. The action against the solicitors was dismissed on the basis that they had no knowledge of, or any reason to suspect, a dishonest design in the transaction, and that they did not receive any trust property.

35 Lord Selborne L.C., at pp. 251-52, set out the ways in which a non- trustee can become responsible for a trust:

> Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

In addition to a trustee de son tort, there were traditionally therefore two ways in which a stranger to the trust could be held personally liable to the beneficiaries as a participant in a breach of trust: as one in receipt and chargeable with trust property and as one who knowingly assisted in a dishonest and fraudulent design on the part of the trustees. The former category of constructive trusteeship has been termed "knowing receipt" or "knowing receipt and dealing", while the latter category has been termed "knowing assistance".

...

58 **It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized. *Barnes v. Addy* clearly states that the stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions which must be examined. The appellant's actions will also be relevant to this examination, given the extent to which M & L was controlled by the defendant directors. The appellant's conduct will be more directly scrutinized when the issue of knowledge is under consideration. It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly.**

59 **Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in *Belmont Finance,* supra, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'." In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in In *re Montagu's Settlement Trusts,* supra, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability.** In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. This approach is consistent with both lines of authority previously discussed.