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EQUITABLE ACCESSORIAL AND RECIPIENT LIABILITY IN SINGAPORE

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This article considers three possible directions for the development of equitable accessorial and recipient liability in Singapore. These are suggested by leading cases in Singapore, Hong Kong and Australia concerning recipient liability. The first direction is closest to the status quo. It involves a contextual inquiry into dishonesty or unconscionability and exceptionally allows constructive notice to suffice for recipient liability. The second possibility is to treat the two forms of liability as involving the same participatory liability for breach of trust or fiduciary duty. The third possible direction is to maintain a distinction between the two forms of liability and to minimise the operation of recipient liability where there is a concurrent common law claim. The final part of the article considers whether it is possible to achieve autochthony in this area of law, given the various non-legal considerations that may influence the direction taken.

I. INTRODUCTION

There have been calls for the development of an 'autochthonous' legal system in Singapore since the early 1990s; that is, for an indigenous system that is suited to Singapore's circumstances.[1] Yet the Singapore courts readily accept English and Privy Council cases as stating the applicable law with respect to the equitable liability of third parties to breach of trust and breach of fiduciary duty and look to them and their own jurisprudence in equal measure, without much reference to other common law jurisdictions. This is explicable on a number of grounds, not least because full independence from England and the Privy Council in relation to equitable doctrine was achieved comparatively recently.[2] Yet, as Andrew Phang Boon Leong J.A. of

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1 See especially Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990) [Phang, *Development of Singapore Law*].

2 The *Application of English Law Act* (Cap. 7A, 1994 Rev. Ed. Sing.) [*AELA*] came into force on 12 November 1993. See further Andrew Phang, "Cementing the Foundations: The Singapore *Application of English Law Act 1993*" (1994) 28 U.B.C. L. Rev. 205; Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Singapore: Singapore Academy of Law, 2006) at c. 4. Appeals to the Privy Council were formally abolished by the *Judicial Committee (Repeal) Act 1994* (No. 2 of 1994, Sing.). See further, Walter Woon, "The Doctrine of Judicial Precedent" in Kevin Y.L. Tan, ed.,

the Singapore Court of Appeal has noted, this area of law "has been, and continues to be, rife with conceptual as well as practical difficulties".[3]

The Singapore courts do, on occasion, look to other jurisdictions for guidance in relation to the development of equitable doctrine. For example, in relation to fiduciary law itself, rather than its accessorial liability, the High Court of Australia's decision in *Hospital Products Ltd v. United States Surgical Corporation* has been influential,[4] as has the extra-judicial fiduciary scholarship of Professor Paul Finn.[5] Furthermore, the Singapore courts' independent and affirmative answer to the controversial question of whether a fiduciary holds a bribe taken in breach of fiduciary duty, or its proceeds, on constructive trust for his or her principal has been noted with respect around the common law world.[6] On this occasion, at least, Singapore did not follow English law.

Given that the principles in relation to equitable third party liability, specifically accessorial and recipient liability, are unsettled, how should Singapore's jurisprudence in this area develop? The question is particularly topical because of recent decisions on equitable recipient liability in Singapore, Hong Kong and Australia. In this article, I identify in broad terms three directions that the Singapore Court of Appeal could take in relation to accessorial liability and recipient liability in light of these cases and speculate as to what factors might influence the choice of direction.

The first part of the article describes the current law in Singapore on equitable accessorial liability and recipient liability for breach of trust and fiduciary duty. The second part of the article identifies and evaluates three possible directions for the law. These focus upon recipient liability. The article concludes by asking whether legal or non-legal considerations relevant to Singapore specifically, or that apply across the common law world generally, should influence the direction which is taken.

A caveat is necessary before going further. The article is written from the perspective of an Australian lawyer who, until recently, was ignorant as to the local case law of Asian common law jurisdictions.[7] Such parochialism is, perhaps, not uncommon. This is so even though the volume and size of commercial transactions in Singapore and Hong Kong, in particular, generate important legal questions that depend upon a Chancery law heritage that is shared with other common law jurisdictions. Thus, this article's objectives are modest. The first objective is simply to draw attention to a body of case law of which lawyers outside Singapore and Hong Kong may be unaware. Secondly, it uses Singapore as a case study to suggest non-doctrinal considerations that may influence the development of equitable principle within a jurisdiction.

The Singapore Legal System, 2nd ed. (Singapore: Singapore University Press, 1999) 297 at 301 [Tan, *Singapore Legal System*]. See also *Practice Statement (Judicial Precedent)* [1994] 2 S.L.R. 689 (C.A.).

3 *Tan Kiam Peng v. Public Prosecutor* [2008] 1 S.L.R.(R.) 1 at para. 102 (C.A.) [*Tan Kiam Peng*].

4 (1984) 156 C.L.R. 41 (H.C.A.). See *e.g.*, *Friis v. Casetech Trading Pte Ltd* [2000] 2 S.L.R.(R.) 511 at para. 29 (C.A.); *Susilawati v. American Express Bank Ltd* [2009] 2 S.L.R.(R.) 737 at para. 41 (C.A.).

5 See *e.g.*, *Deutsche Bank AG v. Chang Tse Wen* [2013] 1 S.L.R. 1310 at para. 108 (H.C.).

6 *Sumitomo Bank*, *infra* note 38, referred to with approval by the Privy Council in *A.G. for Hong Kong v. Reid* [1994] 1 A.C. 324 at 337, by the Federal Court of Australia in *Grimaldi*, *infra* note 115 at paras. 576, 582, and by Lord Peter Millett in "Bribes and Secret Commissions Again" [2012] Cambridge L.J. 583 at 611.

7 As distinct from Privy Council decisions.

II. Equitable Accessorial and Recipient Liability in Singapore

A. *The Core Scenario: Participation, Assistance, or Procurement in Breach of Trust*

Equitable accessorial liability attaches to a defendant, D, who is involved in an equitable wrong committed against the claimant, C, by the principal wrongdoer, PW. D is liable to provide some redress to C because of D's involvement in, or association with, the principal wrong, although D has not committed the principal wrong itself. The core of the liability, in the sense of the original and most litigated scenario, involves situations where a non-trustee participates in, or assists, or procures, a breach of trust by a trustee and thereby becomes liable to provide redress to the victim of the breach of trust. Such liability was established by the mid-19th century[8] and entered Singapore law by virtue of the application of the *Second Charter of Justice* of 1826.[9]

B. *The Role of* Barnes v. Addy

By the mid-20th century, the attractions of extending such liability to professional agents of fiduciaries in corporate settings became clear.[10] In that context, part of Lord Selborne's 1874 statement of principle in *Barnes v. Addy* in relation to the professional agents of trustees became widely accepted as the template for third party liability in relation to breach of fiduciary duty generally:[11]

> [S]trangers 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.

Although contemporaneous cases encompassed a wider range of participatory conduct and Lord Selborne himself also referred to those "actually participating in any fraudulent conduct of the trustee",[12] the courts' reliance on this passage from *Barnes v. Addy* meant that the focus narrowed to claims for what became known as 'knowing

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8 In relation to procurement of breach of trust, see *Fyler v. Fyler* (1841) 3 Beav. 550, 49 E.R. 216 (Ch.) [*Fyler*]; *Alleyne v. Darcy* (1854), 4 I. Ch. R. 199; *Eaves v. Hickson* (1861) 30 Beav. 136, 54 E.R. 840 (Ch.) [*Eaves*]; and *A.G. v. Corporation of Leicester* (1844) 7 Beav. 176, 49 E.R. 1031 (Ch.) [*Leicester*]. In relation to participation, assistance and receipt of trust property, see *M'Gachen v. Dew* (1851) 15 Beav. 84, 51 E.R. 468 (Ch.); *Lockwood v. Abdy* (1845) 14 Sim. 440 at 441, 60 E.R. 428 at 429 (Ch.); *Barnes v. Addy*, *infra* note 11. The same concepts of procurement, participation and assistance were present in the *Indian Penal Code, 1860* (Central Act 45 of 1860) which came into force in what is now Singapore in 1872. See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2012) at 9, 10.

9 *Second Charter of Justice*, *1825* (U.K.) 6 Geo. IV, c. 85. On the complex question of the application of English common law to Singapore before the *AELA*, *supra* note 2, see Phang, *Development of Singapore Law*, *supra* note 1 at 37-42; Walter Woon, "The Applicability of English Law in Singapore" in Tan, *Singapore Legal System*, *supra* note 2 at 230.

10 See *e.g.*, *Selangor United Rubber Estates Ltd v. Cradock (No. 3)* [1968] 1 W.L.R. 1555 (Ch.).

11 (1874) L.R. 9 Ch. App. 244 at 251, 252 (C.A.) .

12 *Ibid.* at 251.

receipt' and 'knowing assistance'.[13] D's culpability turned on whether D had acted with 'knowledge' of the breach of trust or, now, breach of fiduciary duty.

Actual knowledge clearly sufficed for liability and was taken to include "willfully shutting one's eyes to the obvious and willfully and recklessly failing to make such inquiries as an honest and reasonable man would make".[14] But, also during the 20th century, the question arose whether the equitable concept of notice that was used to determine priority of interests in the context of land transactions, more specifically 'constructive notice' or some variation thereon, could suffice. Constructive notice in the context of priorities rules refers to the notice that the defendant would have obtained had he or she made reasonable and proper enquiries.[15] In the *Barnes v. Addy* context, however, constructive notice acquired a slightly different meaning. The vexed issue was whether D could be liable with "knowledge of circumstances which would indicate [the facts] to an 'honest and reasonable [person]"' (so-called 'constructive knowledge') or "knowledge of circumstances… which would put [an honest and reasonable person] on inquiry" (so-called 'constructive notice').[16] That is, could D be liable if all that could fairly be said was that D had been either obtuse or careless? A further complication was whether the same standard of 'knowledge' applied to both knowing assistance and knowing receipt.

C. *The Current Law in Singapore*

1. *Accessorial Liability:* Royal Brunei Airlines

The leading modern case on accessorial liability for breach of trust and breach of fiduciary duty is the Privy Council decision of *Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming*,[17] decided in 1995 on appeal from the Court of Appeal of Brunei Darussalam. Lord Nicholls' judgment for the Privy Council was widely lauded for bringing certainty and consistency to a confused area of law. The case was followed in Singapore, although it was not binding.[18]

In *Royal Brunei Airlines*, a company conducting business as a travel agency and holding money received for airline tickets on trust for the appellant breached the trust through careless mismanagement of the trust fund. The airline claimed against the company's controlling director for the breach of trust by his corporate alter ego. The case went to the Privy Council on the question of whether the breach of trust must be "dishonest and fraudulent", as per the wording in *Barnes v. Addy*, in order for an assistant to be liable.

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13 On the label of 'knowing receipt', see *Farah Constructions*, *infra* note 112 at 140, 141.

14 The descriptions are taken from the '*Baden* scale' of knowledge: *Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.* [1993] 1 W.L.R. 509 (Ch.). The *Baden* scale has fallen into disfavour in Singapore: see *Public Prosecutor v. Tan Kiam Peng* [2007] 1 S.L.R.(R.) 522 at para. 22 (H.C.) (V.K. Rajah J.).

15 *Macmillan Inc. v. Bishopsgate Investment Trust plc.* (No. 3) [1995] 3 All E.R. 747 at 769 (Ch.) (Millett J.)

16 See *Royal Brunei Airlines*, *infra* note 17 at 387, 388.

17 [1995] 2 A.C. 378 (P.C.) [*Royal Brunei Airlines*].

18 See *e.g.*, *Banque Nationale*, *infra* note 27 at para. 137 (Lai Kew Chai J.); *Caltong*, *infra* note 29 at para. 33; *Bansal Hemant Govindprasad v. Central Bank of India* [2003] 2 S.L.R.(R.) 33 (C.A.) [*Govindprasad*]. See also *Judicial Committee (Repeal) Act 1994*, *supra* note 2.

Lord Nicholls criticised the attention that had been given to the phrasing of Lord Selborne's judgment at the expense of principled reasoning. He drew from 19th century cases,[19] including *Barnes v. Addy*, a general principle that liability attached to "a person who dishonestly procures or assists in a breach of trust or fiduciary obligation".[20]

In so doing, his Lordship switched the focus from the nature of the trustee's breach, which no longer needed to be dishonest and fraudulent, to the accessory's culpability which was now to be measured against a standard of dishonesty.

Dishonesty was preferred to 'unconscionability' here despite 'unconscionability' being the traditional moniker of equitable liability.[21] D's state of knowledge was relevant in determining whether D acted dishonestly, but was not the sole determinant of liability. Furthermore, the so-called '*Baden* scale' of five levels of knowledge ranging from actual knowledge to constructive notice was rejected.[22] Finally, separate conceptual bases were attributed to the two limbs of *Barnes v. Addy*. Recipient liability was differentiated from the reformulated 'knowing assistance' liability, now to be known as 'accessory liability', because "[r]ecipient liability is restitution-based; accessory liability is not."[23] Here, the company director was found to have dishonestly assisted in the breaches of trust by the corporate trustee that he controlled and was thus personally liable to Royal Brunei Airlines.

2. *Questions following* Royal Brunei Airlines

Although widely praised, Lord Nicholls' judgment was not comprehensive.[24] One question concerned whether the reformulated accessory liability principle extended to breach of fiduciary duty generally, or was limited to where there was a misappropriation of property. This may have been because the judgment was framed in terms of the facts which involved an express trust. Although Lord Nicholls referred to 'breach of fiduciary duty' as well as breach of trust in formulating his general principle, subsequent English Court of Appeal decisions queried whether there still had to be a misappropriation of property involved.[25]

The better view is that equitable accessorial liability extends to breach of fiduciary duty generally; that is, there need not be misappropriation of property for liability to arise.[26] But the question is still open in Singapore. In *Banque Nationale De Paris*

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19 *Fyler*, *supra* note 8; *Leicester*, *supra* note 8; *Eaves*, *supra* note 8.

20 *Royal Brunei Airlines, supra* note 17 at 392.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.* at 386.

24 For example, his Lordship did not refer to the situation of a joint participant in a breach of trust, yet clearly such a third party would be liable. See *Barnes v. Addy*, *supra* note 11 at 251.

25 *Cf. Satnam Investments Ltd v. Dunlop Heywood & Co. Ltd* [1999] 3 All E.R. 652 at 671 (C.A.) (Nourse L.J.); *Goose v. Wilson Sandford & Co.* [2001] Lloyd's Rep. P.N. 189 at para. 88 (C.A.) (Morritt L.J.) [*Goose*]. The *dicta* of Nourse L.J. which appears to limit accessorial liability to where there is a misappropriation of property was clarified by the Court of Appeal in the latter case, although the point was left open.

26 See *e.g.*, *Dubai Aluminium Co Ltd v. Salaam* [2003] 2 A.C. 366 at 381 (H.L.). See in Australia, *Consul Development Pty. Ltd. v. D.P.C Estates Pty. Ltd.* (1975) 132 C.L.R. 373 at 396, 397 (H.C.A.) (Gibbs J.) [*Consul Development*] and the facts of *Farah Constructions*, *infra* note 112.

v. Hew Keong Chan Gary,[27] Lai Kew Chai J. concluded that as a matter of principle as well as on the wording of Lord Nicholls' judgment in *Royal Brunei Airlines*, accessory liability was not premised upon the misappropriation of trust property or its proceeds, but upon D's dishonest involvement in a breach of fiduciary duty.[28] Therefore, it was unnecessary for there to be any misappropriation of property. Nonetheless, in *Caltong (Australia) Pty Ltd v. Tong Tien See Construction Pte Ltd (in liquidation)*,[29] on facts involving a breach of fiduciary duty by company directors rather than a breach of an express trust, the Singapore Court of Appeal explicitly stated as a requirement of dishonest assistance that "there has been a disposal of [C's] assets in breach of trust or fiduciary duty".[30]

There was, however, no substantive consideration of the issue and on the facts this requirement did not preclude liability. Subsequent formulations of the liability by the Singapore Court of Appeal have been framed in breach of trust terms, but equally, the particular issue has not been raised.[31] The danger is that a trust will be artificially manufactured in order to meet this unprincipled requirement.[32]

A further difficulty following *Royal Brunei Airlines* was that the apparent clarity of the new test of 'dishonesty' was clouded by its subsequent interpretation in the House of Lords[33] and reinterpretation by the Privy Council.[34] It is now clear that the test of dishonesty in *Royal Brunei Airlines* is objective in the sense that the defendant is to be judged by the standards of 'ordinary honest people' with knowledge of the same facts. The Singapore courts followed the progression of English law on this. The current law is as stated by V.K. Rajah J.A. for the Court of Appeal in *George Raymond Zage III v. Ho Chi Kwong*:[35]

> [F]or a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

Interestingly, his Honour's description of the liability as 'knowing assistance' and the English courts' tendency to refer to 'dishonest assistance' illustrate an ongoing problem with terminology. Both descriptions imply that liability is restricted to those who assist in the breach of trust or fiduciary duty, whereas, as *Royal Brunei Airlines* makes clear, it includes procurement in a breach and, impliedly, joint participation in

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27 [2000] 3 S.L.R.(R.) 686 (H.C.) [*Banque Nationale*].

28 *Ibid.* at paras. 151-157. This went further than the English Court of Appeal, which had left the matter open in *Goose*, *supra* note 25 at para. 88 (Morritt L.J.). See Tan Sook Yee & Tang Hang Wu, "Equity and Trust" (2000) Sing. Ac. L. Ann. Rev. 165 at 166, 167.

29 [2002] 2 S.L.R.(R.) 94 (C.A.) [*Caltong*].

30 *Ibid.* at para. 33.

31 *Zage*, *infra* note 35 at para. 20; *Yong Kheng Leong v. Panweld Trading Pte Ltd* [2013] 1 S.L.R. 173 at para. 79 (C.A.) [*Yong Kheng Leong*].

32 This is similar to what appears to have occurred in *Govindprasad*, *supra* note 18. See further, Tan Sook Yee & Kelvin Low Fatt Kin, "Equity and Trust" (2003) Sing. Ac. L. Ann. Rev. 225 at 233.

33 *Twinsectra Ltd v. Yardley* [2002] 2 A.C. 164 (H.L.) [*Twinsectra*], followed in Singapore in *Malaysian International Trading Corp Sdn Bhd v. Interamerica Asia Pte Ltd* [2002] 2 S.L.R.(R.) 896 (H.C.).

34 *Barlow Clowes International Ltd (in liquidation) v. Eurotrust International Ltd* [2006] 1 W.L.R. 1476 (P.C.), followed in Singapore in *Zage*, *infra* note 35.

35 [2010] 2 S.L.R. 589 at para. 22 (C.A.) [*Zage*].

a breach. On the other hand, the emphasis on assistance reflects the overwhelming majority of the case scenarios.

The remedies for equitable accessorial liability have not been discussed in Singapore. As in *Royal Brunei Airlines,* it is generally assumed that the remedy is loss-based.[36] In Australia, gain-based personal remedies are also available for knowing assistance and this would seem to be the case in England as well, although there are few examples.[37] The possibility of gain-based proprietary relief has, however, been raised in Singapore. In *Sumitomo Bank Ltd v. Thahir Kartika Ratna*,[38] Lai Kew Chai J., at the end of a long judgment, briefly referred to knowing assistance liability pursuant to *Barnes v. Addy* as an alternative route by which the wife of a defaulting fiduciary could be subjected to a constructive trust over assets she held with her husband.[39] His Honour's view that a gain-based proprietary remedy was available on the facts would be considered erroneous in England,[40] but the issue remains open in Singapore.

D. *The Recipient Liability Claim*

When describing equitable accessorial liability, it is also necessary to distinguish it from equity's jurisdiction in relation to the enforcement of equitable proprietary rights. If we assume that C is the beneficiary of a fixed trust and that D participated in a breach of the trust by receiving trust property from the trustee, there are at least three potential equitable claims. First, depending on the nature of D's involvement, C may have a procurement, participation or assistance claim as discussed above. Secondly, C, as the beneficiary of the trust, has an equitable interest in the trust property which can be asserted against anyone who receives the trust property except a *bona fide* purchaser of the legal interest for value without notice, over whom equity has no jurisdiction. C can use the tracing rules if necessary to identify what has happened to C's equitable interest. This has been described as a "persisting property claim"[41] based upon the priorities and tracing rules. It is not accessorial liability as it does not depend on D being at fault except in the negative sense of D not being a *bona fide* purchaser without notice. Rather, it recognises and enforces C's pre-existing property-related rights.[42]

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36 In *Royal Brunei Airlines*, *supra* note 17, Lord Nicholls simply reinstated the order of Roberts C.J. at first instance. Roberts C.J. held that the accessory to the breach of trust was "liable, as constructive trustee, for the debts which [the trustee] owes to [the airline]": *Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming* [1993] BNHC 56.

37 In Australia, see *e.g.*, *Michael Wilson & Partners Ltd v. Robert Colin Nicholls* (2011) 244 C.L.R. 427 (H.C.A.) [*Michael Wilson*]; *Grimaldi*, *infra* note 115 at para. 555. In England, see *e.g.*, *Fyffes Group Ltd v. Templeman* [2000] 2 Lloyd's Rep. 643 (Q.B.) [*Fyffes Group*]; Pauline Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 Law Q. Rev. 445.

38 [1992] 3 S.L.R.(R.) 638 (H.C.) [*Sumitomo Bank*].

39 *Ibid.* at para. 244.

40 *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd* [2011] 3 W.L.R. 1153 (C.A.).

41 Charles Mitchell & Stephen Watterson, "Remedies for Knowing Receipt" in Charles Mitchell, ed., *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010) 115.

42 This claim is also available in relation to property subject to a constructive trust as a result of a breach of fiduciary duty and which is now in the hands of any third party who is not a *bona fide* purchaser for value without notice: *Sumitomo Bank, supra* note 38 at para. 191.

Interposed between these two distinct forms of liability is a fault-based equitable claim against D for receiving, for personal benefit, 'trust property' in consequence of a breach of a trust or fiduciary duty, irrespective of whether D still holds that property or its traceable form. This is the recipient liability claim referred to in *Barnes v. Addy*. Recipient liability extends to C's property that is under the control of a fiduciary, although not held on trust. An example is company assets under the control of a director.[43] That is, 'trust property' for the purposes of recipient liability includes any property that is subject to a fiduciary duty. According to the Singapore Court of Appeal in *Zage*, recipient liability requires:[44]

> (a) a disposal of the plaintiff's assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty…

The courts in Singapore have adopted as the test for recipient liability Nourse L.J.'s formulation in *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele*, namely, that D's "state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."[45]

So far, courts have rejected arguments that recipient liability should either be recast as a strict liability unjust enrichment claim or that a strict liability claim should exist alongside an equitable fault-based claim. The former argument was made by Professor Birks[46] and has been supported extra-judicially by influential judges such as Lord Nicholls,[47] who made the latter argument, and Lord Millett.[48] On this approach, there is a fundamental difference between dishonest accessorial liability, based upon D's fault, and recipient liability, which should be grounded in D's enrichment through the receipt of the trust property at C's expense. Courts in England, Singapore, Hong Kong and Australia have rejected the unjust enrichment explanation of recipient liability as placing too great a burden on recipients of trust property in commercial settings.[49]

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[43] See *e.g.*, *Caltong*, *supra* note 29; *Relfo Ltd (in liquidation) v. Bhimji Velji Jadva Varsani* [2008] 4 S.L.R.(R.) 657 (H.C.) [*Relfo Ltd*].

[44] *Zage*, *supra* note 35 at para. 23, citing *Caltong*, *supra* note 29 at para. 31, and *El Ajou v. Dollar Land Holdings plc* [1994] 2 All E.R. 685 at 700 (C.A.). It seems unclear whether "trust property" includes property subject to a constructive trust in Singapore: see *Sumitomo Bank*, *supra* note 38, where Lai Kew Chai J. found that the widow of a fiduciary who had accepted bribes in breach of duty was subject to a persisting property claim in relation to the bribe proceeds held by her as a volunteer and was liable as a knowing assistant, but did not consider whether she was also liable as a knowing recipient.

[45] [2001] Ch. 437 at 455 (C.A.) [*Akindele*]; *Zage*, *supra* note 35 at para. 23.

[46] See *e.g.*, Peter Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296 (cited with approval by Lai Kew Chai J. in *Banque Nationale*, *supra* note 27 at para. 157); Peter Birks, "Misdirected Funds" (1989) 105 Law Q. Rev. 352; Peter Birks, "Receipt" in Peter Birks & Arianna Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002) 213.

[47] Lord Nicholls of Birkenhead, "Knowing Receipt: The Need for a New Landmark" in W.R. Cornish *et al.*, eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 231; *Criterion Properties plc v. Stratford UK Properties LLC* [2004] 1 W.L.R 1846 at 1849 (H.L.) (Lord Nicholls).

[48] *Twinsectra*, *supra* note 33 at 194 (Lord Millett).

[49] *Akindele*, *supra* note 45 at 455, 456 (Nourse L.J.); *Zage*, *supra* note 35 at para. 27 (the Court of Appeal noted Lord Nicholls' extra-judicial arguments in favour of strict liability, but applied the fault-based test in *Akindele*); *Akai (First Instance)*, *infra* note 67 at paras. 463-468 (Stone J.); *Thanakharn Kasikorn*

Nonetheless, the idea that recipient liability is somehow different in nature from dishonest accessorial liability, being receipt-based rather than fault-based, persists. For example, Lord Nicholls' statement in *Royal Brunei Airlines* has been enormously influential: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not."[50]

This view is also present in the Singapore case law on recipient liability, even though the courts have followed *Akindele* and confirmed that recipient liability is fault-based.[51] Indeed, there are recent indications that the unjust enrichment explanation for recipient liability may yet be accepted by the Singapore Court of Appeal. In *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve*,[52] Andrew Phang Boon Leong J.A., delivering judgment for the Court of Appeal, noted that "for the moment at least, the doctrine of knowing receipt as an *equitable wrong* is clearly part of the legal landscape in the Singapore context."[53] His Honour read the Court of Appeal's decision in *Zage* as only precluding acceptance of the unjust enrichment claim as the sole basis of recipient liability.[54] That is, it could not "displace or subsume the doctrine of knowing receipt".[55] His Honour also noted that "the law in this area is still in a state of *flux*."[56] These comments were *obiter* as recipient liability was not in issue. Nonetheless, the clear implication is that the Court of Appeal is willing to hear arguments on whether to accept a strict unjust enrichment recipient liability claim in addition to fault-based equitable recipient liability. Hence, there continues to be a strong division drawn between accessorial liability and recipient liability even though both continue, for now, to be grounded in D's equitable wrongdoing.[57]

The requisite nature of D's awareness of the breach of trust or fiduciary duty has been the main focus of recipient liability cases in Singapore. Although Nourse L.J. in *Akindele* framed the question in terms of D's unconscionability, as will be discussed below, the courts continue to debate over what level of knowledge suffices and, in particular, whether constructive notice (that is, knowledge of circumstances that would put a reasonable and honest person on inquiry) can ever suffice.

Once recipient liability is shown, D must account for the property received as though he or she were a trustee. Thus, unlike accessorial liability where D is liable for all the consequences flowing from PW's equitable wrong, the focus of the recipient liability remedy is on accounting for the property actually received by D.[58] Generally, D no longer holds the property, so only a personal, loss-based remedy is given. An account of profits is available in principle.[59] In Australia, a remedial constructive

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Thai Chamkat (Mahachon) v. Akai Holdings Limited (in liquidation) [2011] 1 H.K.C 357 at para. 128 (Court of Final Appeal) (Lord Neuberger N.P.J.) [*Akai (Final Appeal)*]; *Farah Constructions*, *infra* note 112 at paras. 148-155.

50 *Supra* note 17 at 386.

51 See *e.g.*, *Banque Nationale*, *supra* note 27 at para. 157.

52 [2013] 3 S.L.R. 801 (C.A.) [*Wee Chiaw Sek Anna*].

53 *Ibid.* at para. 146 [emphasis in original].

54 *Ibid.*

55 *Ibid.* at para. 143.

56 *Ibid.* at para. 144 [emphasis in original].

57 See Part III below.

58 Mitchell & Watterson, *supra* note 41.

59 *Charter plc v. City Index Ltd* [2008] Ch. 313 at 337, 339 (C.A.) (Arden L.J.); *Grimaldi*, *infra* note 115.

trust is possible if D still holds the property or its traceable proceeds.[60] This is not the case in England or, so far, Singapore. As with accessorial liability, the nature and significance of the remedy for recipient liability are contested, but such issues have not yet arisen in Singapore.[61] Other significant questions concerning recipient liability have also yet to be considered in Singapore.[62]

To summarise the discussion so far, the Singapore courts have overwhelmingly followed the Privy Council and the English courts in relation to accessorial and recipient liability. However, perhaps due to the relatively small number of local cases, there has been little or no discussion of the subtleties of the requirements of the two forms of liability and of their remedies.

III. Possible Directions

The Singapore courts have at least the following three options for future development of the law concerning accessorial and recipient liability. These are suggested by recent decisions on recipient liability in Singapore, Hong Kong and Australia.

A. *The Status Quo*

The first and most obvious option is to maintain and refine the status quo by continuing to distinguish accessorial and recipient liability and by fleshing out the elements of each claim as new cases arise. Dishonesty and unconscionability would remain the respective determinants of liability. If this approach is taken then, with respect, Cheung J.A.'s concurring judgment in the Hong Kong Court of Appeal case of *Akai Holdings Ltd (in liquidation) v. Thanakharn Kasikorn Thai Chamkat (Mahachon)*[63] and V.K. Rajah J.A.'s judgment for the Singapore Court of Appeal in *Zage* are textbook examples of how to undertake a contextual inquiry into liability. Both judgments focused upon recipient liability and the question of D's knowledge, but also referred to dishonest accessorial liability. Cheung J.A. did not give the leading judgment in *Akai (Appeal)*, however, it is important for Singapore because six months later it was cited with approval in *Zage*.

The facts of *Akai (Appeal)* in simplified form, are as follows. In 1998, the respondent Bank, which had been badly affected by the Asian Financial Crisis, sought to salvage a losing loan by substituting the appellant, Akai Holdings Ltd. ("Akai"), as the borrower in place of the original borrower, Singer Co. N.V., a company related to Akai. The new loan was secured by a pledge of shares in a subsidiary company of Akai. The effect of this 'switch transaction' was to shore up the Bank's security to

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60 *Grimaldi*, *ibid.*

61 See *e.g.*, Mitchell & Watterson, *supra* note 41, and the discussion of *Akai (Final Appeal)*, *supra* note 49 in Yeo Tiong Min, "Restitution" (2010) Sing. Ac. L. Ann. Rev. at para. 21.31.

62 The most pressing questions concern the interaction of recipient liability with contract. For example, can there be a recipient liability claim in relation to property transferred under a valid contract, but in breach of a fiduciary agent's duty? See Matthew Conaglen & Richard Nolan, "Contracts and Knowing Receipt: Principles and Application" (2013) 129 Law Q. Rev. 359. Secondly, if assets are transferred pursuant to a valid contract, but in breach of fiduciary duty, must the contract be rescinded before a recipient liability claim can be made? The Australian position is unclear: *Grimaldi*, *infra* note 115.

63 [2010] 3 H.K.C 153 (C.A.) [*Akai (Appeal)*].

the manifest detriment of Akai. The switch transaction was enormously important to the Bank as the loan of US$30 million "represented nearly twice its annual profits for the previous year".[64] It "clearly was a gift from heaven".[65]

The relevant transactions were entered into on behalf of Akai by its Chief Executive Officer, James Ting, who also had controlling interests in the original borrower, Singer Co. N.V. The chairman of the Bank was also the chairman of Singer Thailand, in which Singer Co. N.V. had a "substantial interest" and of which Ting was a director.[66] The Bank also had an interest in Singer Thailand. In breach of his fiduciary duty to Akai, Ting fraudulently represented to the Bank that he was authorised to enter the transaction on behalf of Akai. When Akai defaulted on the loan, the Bank sold the pledged shares and sought to recover the outstanding balance of the loan in Akai's insolvency. In response, Akai's liquidators claimed that the Bank was liable at common law for the tort of conversion and in equity for unconscionable (knowing) receipt.

At first instance, Stone J. found in favour of the Bank primarily on the ground that Ting had apparent authority to enter the switch transaction on Akai's behalf. Even if recipient liability was relevant (he found that it was not), actual knowledge of Ting's breach of fiduciary duty was necessary for a finding that the Bank was unconscionable and this was not shown.[67] Akai successfully appealed to the Hong Kong Court of Appeal. Tang V.P. delivered a comprehensive judgment with which Le Pichon and Cheung J.J.A. agreed. In his concurring judgment, Cheung J.A. considered only the knowing receipt claim and, specifically, whether constructive notice could ever amount to unconscionability.

Cheung J.A. reviewed the English case law and also noted the position in Canada, New Zealand and Singapore.[68] He then emphasised the contextual nature of the inquiry into recipient liability and that:[69]

> [I]t is precisely because of the broad approach when unconscionability is adopted as the underlining test of knowledge that one should not confine the examination only to the actual knowledge of the recipient and exclude constructive notice in its wider sense.

His Honour went on to conclude that "[w]hether there should be inquiry [by D] and the extent of the inquiry will depend on the facts of the case. The standard must be what a reasonable person in the circumstances of the case would have done."[70]

Furthermore, in his view, the contextual nature of the inquiry is the same whether one is considering recipient or accessorial liability even though the respective thresholds for liability are different.[71] His Honour accepted counsel for Akai's suggestion

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64 *Akai (Final Appeal)*, *supra* note 49 at para. 95.

65 *Akai (Appeal)*, *supra* note 63 at para. 269 (Cheung J.A.).

66 *Ibid.*

67 *Akai Holdings Limited (in liquidation) v. Thanakharn Kasikorn Thai Chamkat (Mahachon)* [2008] HKCFI 431 at para. 460 [*Akai (First Instance)*].

68 A surprising omission is *Farah Constructions*, *infra* note 112, which was referred to at first instance by Stone J.

69 *Akai (Appeal)*, *supra* note 63 at para. 266.

70 *Ibid.*

71 *Ibid.* at para. 267.

that the factors relevant to dishonest assistance, as described in *Royal Brunei Airlines,* are also relevant to unconscionable receipt.[72] Here, the Bank had not behaved as a reasonable banker and was therefore unconscionable.[73]

The Singapore case of *Zage* concerned the liability of third parties for a breach of trust by a local lawyer, David Rasif, who misappropriated over S$11 million from his firm's client trust account and then absconded.[74] Most of the misappropriated funds belonged to the appellants on whose behalf Rasif was acting in a conveyancing matter. The sole issue[75] in the Court of Appeal was whether a retail jewellery business, Jewels DeFred Pte. Ltd. ("DeFred"), that sold a large quantity of diamonds and jewellery to Rasif in two separate transactions was liable for unconscionably receiving trust property or for dishonest assistance in a breach of trust. Rasif paid for both purchases from his firm's trust account in breach of trust.

On the first purchase, Rasif negotiated a price of S$1,618,000, but then paid S$1,818,000 by way of telegraphic transfer to DeFred's bank account. The telegraphic transfer slip included the words "David Rasif & Partners—Client's Accounts" on it, but was not seen at close hand by the sales assistants to whom it was shown. The jewellery was delivered in a hotel lobby once the funds transfer had been effected. A second purchase of a sapphire was negotiated on this occasion and Rasif paid DeFred's staff by way of a cash cheque. The words "David Rasif & Partners—Client's Accounts" were clearly visible on the cheque. The cheque was handed to DeFred's manager, the second respondent Ho, the following morning. He banked it and authorised delivery of the remaining jewels to Rasif's home. At all times, Rasif dealt with sales assistants; however, Ho, who was also a director and shareholder of DeFred, was fully briefed on the transactions and instrumental behind the scenes in securing suitable merchandise and authorising delivery. The two sales boosted DeFred's annual turnover considerably.[76]

Rajah J.A. framed the question for the court as being whether DeFred had sufficient knowledge for liability under "dishonest assistance or knowing receipt".[77] The former liability was found not to apply because DeFred's participation "was more in the way of passive receipt than active assistance."[78]

In his discussion of recipient liability, Rajah J.A. cited Cheung J.A.'s judgment in *Akai (Appeal)* and agreed that unconscionability for the purposes of knowing receipt

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[72] *Ibid.* at para. 244:

> (1) The nature and importance of the proposed transaction to the parties and the nature and importance of their respective roles. (2) Whether the proposed transaction was within the ordinary course of business and the ordinary course of the parties' business. (3) The position, conduct, knowledge, experience, personal characteristics, understanding and motives of the parties. (4) The benefit to be derived from each of the parties from the transaction. (5) Their ability to investigate and make checks as to the validity and propriety of the transaction. (6) The practicability of proceeding otherwise. (7) The seriousness of the adverse consequences to the beneficiaries. (8) Whether there is a customary practice of making routine inquiries, and (9) Whether and to the extent those inquiries were made.

[73] *Ibid.* at para. 269.

[74] *Zage*, *supra* note 35.

[75] A dishonest assistance finding at first instance in relation to a friend who carried trust funds out of the country for the trustee was not appealed against.

[76] *Zage*, *supra* note 35 at 608.

[77] *Ibid.* at 597.

[78] *Ibid.* at 608.

was not limited to actual knowledge of a breach of trust, stating that "[t]he test of unconscionability should be kept flexible and be fact centred." When considering recipient liability in commercial contexts, it was important to bear in mind customary practices in the particular context.[79]

Consequently, Rajah J.A. found no liability in relation to the first transaction. When one considered the usual practices of jewellers in Singapore,[80] the context of retail jewellery transactions generally, and these particular transactions specifically, there was nothing to alert DeFred's staff to Rasif's wrongdoing and no obligation upon them to have made further inquiries as to the source of Rasif's funds. Importance was attached to the fact that "there was no fixed pattern or manner of conducting this particular type of commercial transaction…"[81]

DeFred was liable in relation to the second transaction. This was because Ho must have seen that the cash cheque was drawn on the clients' trust account and therefore, as a sophisticated businessman with a good command of English, he should have realised that Rasif was apparently acting improperly:[82]

> Whether or not Rasif's withdrawal in fact turned out to be justified, Ho… possessed all the facts necessary for him to conclude that Rasif had *prima facie* made an improper withdrawal of funds belonging to third parties to pay for the particular transaction.

In these circumstances it was unconscionable for Ho to conclude the sale. DeFred's liability was to account as trustee for receipt of the cash cheque.[83]

Thus, for both Cheung J.A. and Rajah J.A. respectively, recipient liability involves a fact-specific, contextual inquiry into unconscionability. Something less than actual knowledge of the principal wrong may suffice depending upon the particular circumstances. Both judges maintain the distinction between dishonest accessory liability and recipient liability, yet the nature of the inquiry into liability is remarkably similar.

It is not clear that this approach will be followed in Singapore and it has been ruled out altogether in Hong Kong. A recent Singapore Court of Appeal decision appears to overlook the considered finding in *Zage* that constructive knowledge may suffice for recipient liability and instead required "actual knowledge or the wilful avoidance of knowledge".[84] Furthermore, Lord Neuberger of Abbotsbury N.P.J., who delivered judgment for the Hong Kong Court of Final Appeal in the *Akai* litigation, required actual knowledge for recipient liability without addressing the contrary view put forward by Cheung J.A.[85] A further 'wildcard' is the Singapore Court of Appeal's recent signalling of interest in the unjust enrichment explanation for recipient liability.[86]

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79 *Ibid.* at 606.

80 It was noted that anti-money laundering regulation did not apply to jewellers in Singapore as opposed to jewellers in the United States and the United Kingdom: *ibid.* at 609.

81 *Ibid.* at 610.

82 *Ibid.* at 611.

83 *Ibid.* at 612.

84 *Yong Kheng Leong*, *supra* note 31 at para. 81.

85 *Akai (Final Appeal)*, *supra* note 49 at paras. 134-137.

86 *Wee Chiaw Sek Anna*, *supra* note 52.

B. *Recipient Liability as a Subset of Accessorial Liability*

The second possible direction for the law in Singapore is to pursue the logical implications of Cheung J.A.'s methodology in *Akai (Appeal)*, as reflected in *Zage*, and accept that receiving trust property is but one manifestation of participation in a breach of trust or fiduciary duty. As will now be argued, D's liability for either receipt or accessorial conduct is informed by the same policy concerns and is determined by the same contextual inquiry and, essentially, the same test for liability. On this approach, receipt *is* accessorial conduct: that is, it is one way in which D might procure, participate in, assist in or, more passively facilitate, a breach of trust or fiduciary duty. It is true that the remedial outcomes are different, but this is because the remedy for recipient liability is better able to be tailored to what has occurred. The challenge, of course, is to settle on a formulation of the test for liability that accurately captures what is required for participatory liability, whatever the form of participation involved.

1. *Same Policy Concerns*

The main policy objectives for accessorial and recipient liability appear to be first, to discourage and forestall breaches of trust and fiduciary duty and, secondly, to increase C's chances of redress by expanding the pool of possible defendants.[87] Regardless of which claim is in play, the weight of these objectives varies according to the relationship between D and PW. For example, with respect to commercial third parties who are 'strangers'[88] to the trust or fiduciary relationship, the first objective predominates. There is an appreciation that commercial and/or professional strangers may be very well-placed to detect and prevent fraudulent activity, such as money-laundering and the like, sometimes without significant transaction costs.[89] That is, this form of civil liability is a useful adjunct to legislative regulation of commercial dealings. On the other hand, courts are concerned not to demand costly, impracticable standards of conduct that would impede commerce.[90]

With respect to third parties who are closely related to the trustee or fiduciary, the second objective of increasing a victim's chance of redress has more weight. Thus, liability is readily imposed upon company controllers and their spouses/families and courts give short shrift to arguments that spouses who were appointed as nominal directors or employees of a company, for example, do not have sufficient knowledge to be either dishonest or unconscionable.[91]

2. *Same Methodology*

Irrespective of differences in nomenclature and formulation, both accessorial liability and recipient liability turn on an assessment of D's conduct in all the circumstances,

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87 See *e.g.*, *Royal Brunei Airlines, supra* note 17 at 386, 387; *Consul Development*, *supra* note 26 at 397 (Gibbs J.).

88 This is the term used by Lord Selborne in *Barnes v. Addy*, *supra* note 11 at 251, 252.

89 See *e.g.*, *UBS AG v. Stand Ford International Enterprises Ltd.* [2002] 3 H.K.C 621 (Court of First Instance).

90 See *e.g.*, *Zage*, *supra* note 35 at 612.

91 See *e.g.*, *Yong Kheng Leong*, *supra* note 31. But see *Banque Nationale*, *supra* note 27.

including what D knew or ought reasonably to have known of the breach of trust or fiduciary duty. That is, the contextual inquiry is the same. Even if one returns to the seminal cases, this is so: Lord Nicholls in *Royal Brunei Airlines* and Nourse L.J. in *Akindele* both emphasised the contextual nature of the inquiry in which D's awareness of PW's wrong was an important, but not sole, factor in determining whether D should be liable. To exaggerate somewhat, the only difference between the two liabilities is that in one instance the standard was set as dishonesty, and in the other it was set as unconscionability, but this seems to be due to a difference of opinion on the utility and specificity of equity's traditional nomenclature of conscience.

3. *Are There Conceptual Differences Between Accessorial Conduct and Receipt?*

Having outlined the argument in favour of a general principle of participatory liability, what objections can be made to it? First and most obviously, the courts in Singapore and elsewhere, except Australia, repeatedly emphasise the conceptual difference between accessorial liability and recipient liability, even in judgments that appear most clearly to combine the liabilities.[92] It is said that accessorial liability is fault-based (and requires dishonesty), whereas recipient liability is receipt-based (and therefore does not require dishonesty). Such statements hark back to the debate over whether recipient liability should be reformulated as an unjust enrichment claim.[93] Given that the current law is that *both* accessorial liability and recipient liability are fault-based, further justification is necessary as to why D's receipt differentiates the two claims.

Leaving aside the strict liability thesis, is there something inherently different in a claim that D received trust property? This is where care must be taken to differentiate the persisting property claim discussed in Part II above from the recipient liability claim. The former claim *is* conceptually different because it is grounded in the assertion of C's proprietary rights and applies regardless of fault. But the recipient liability claim applies irrespective of whether D retains C's property and is grounded in D's equitable wrongdoing. The overlap with the persisting property claim has clouded the fact that recipient liability belongs with accessorial liability in general.[94]

In *Zage*, the two claims of accessorial and recipient liability were distinguished on the basis that dishonesty connotes active conduct, whereas receipt of trust property is passive behaviour for which 'dishonest' is an inappropriate adjective.[95] But receipt can fall at any point on a spectrum of conduct ranging from active involvement to

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92 See *e.g.*, *Akai (Appeal)*, *supra* note 63 at para. 266. See also *Tang Hsiu Lan v. Pua Ai Seok* [2000] SGHC 163 at para. 12 (Lai Kew Chai J.); *Banque Nationale*, *supra* note 27 at para. 157 (Lai Kew Chai J.). I have found only one judicial statement in Singapore to the effect that recipient liability is accessorial, but the comment was brief and *obiter*: *Zim Integrated Shipping Services Ltd v. Dafni Igal* [2010] 2 S.L.R. 426 at 438 (H.C.) (Lai Siu Chiu J.).

93 For arguments against a strict recipient liability claim, see Joachim Dietrich & Pauline Ridge, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment" (2007) 31 Melbourne U.L. Rev. 47.

94 *Ibid.* at 59, 60.

95 *Zage*, *supra* note 35 at 608.

passive facilitation of another's wrongdoing and, in any event, 'dishonesty' applies to D's state of mind as well as D's conduct. Why is it not possible to 'dishonestly', yet passively, receive trust property if one is well aware that it has been misappropriated? The Court in *Zage* cited a case note by Professor Richard Nolan in support of this point, but Nolan's arguments were made as part of his broader thesis that recipient liability should be strict.[96] That is, they rest on the unjust enrichment explanation which does not reflect the current law.

4. *Primary and Secondary Liability*

A second objection to combining accessorial liability with recipient liability relates to the nature of the two liabilities and their remedial outcomes. It is said that accessorial liability is a 'secondary' liability in the sense that once its elements are proved, D is treated as though he or she were the trustee or fiduciary. That is, D takes on PW's liability and is jointly and severally liable with PW.[97] Thus, the argument goes, because no inquiry is undertaken into D's causal responsibility for the consequences of the breach of trust or fiduciary duty, D is not liable for his or her own wrongdoing but for PW's wrongdoing. Conversely, with respect to recipient liability, D is liable only in relation to the trust property D received. In relation to that property, D is treated as if D had been an express trustee of that property. That is, the remedy is quantified with respect to D's primary liability.[98]

The argument that dishonest assistance is a *secondary* liability, whereas recipient liability is a primary liability, is popular in the academic literature.[99] It has received strong support in Singapore,[100] but in my view it is flawed.[101] D's liability is 'secondary' only in the sense that it arises if the primary wrong of a breach of trust or fiduciary duty is committed; once that is shown, D is liable because of his or her own wrongdoing. It is wrong, 'unconscionable' in equitable terms, to interfere with a fiduciary obligation. A primary liability model of dishonest accessorial liability is consistent with Lord Nicholls' opening remarks in *Royal Brunei Airlines*.[102] To similar effect, the High Court of Australia has described knowing assistance liability (the precursor to accessorial liability) as a primary liability:[103]

> The reference to the liability of a knowing assistant as an "accessorial" liability does no more than recognise that the assistant's liability depends upon

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96 Richard Nolan, "How Knowing is Knowing Receipt?" (2000) 59 Cambridge L.J. 447.

97 Yeo Tiong Min, "The Right and Wrong of 'Knowing Receipt' in the Law of Restitution", *Fourth Yong Pung How Professorship of Law Lecture*, Singapore Management University (19 May 2011), online: Singapore Management University <http://www2.law.smu.edu.sg/yphdls/20120516/paper_2011.pdf> [Yeo, "Right and Wrong"].

98 See Mitchell & Watterson, *supra* note 41 at 129.

99 See Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Cambridge L.J. 491; Steven Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 Mod. L. Rev. 16.

100 Yeo, "Right and Wrong", *supra* note 97.

101 Ridge, *supra* note 37. See also Graham Virgo, *The Principles of Equity and Trusts* (Oxford: Oxford University Press, 2012) at 697-699.

102 *Royal Brunei Airlines*, *supra* note 17 at 382:

> Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in the sense that it only arises where there has been a breach of trust.

103 *Michael Wilson*, supra note 37 at para. 106.

> establishing, among other things, that there has been a breach of fiduciary duty by another. It follows… that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum.

This is not to downplay the differences in remedial outcome. Recipient liability clearly is focused upon the direct consequences of D's wrongful conduct in receiving trust property for personal benefit. Nonetheless, in appropriate instances a dishonest accessory may be similarly liable for the direct consequences of his or her wrongful conduct such as where an account of profits is awarded against D.[104] It is only in relation to the more common remedy of equitable compensation that the courts have been reluctant to consider what losses flowed directly from D's participation and this appears to be for good pragmatic reasons.[105]

5. *Can Dishonesty be Equated with Unconscionability or Vice Versa?*

A third objection to recognising a general principle of equitable participatory liability in Singapore is that the courts consistently state that the threshold for liability is higher in relation to accessorial liability than it is for recipient liability.[106] The former is dishonesty which is said to require actual knowledge; the latter is unconscionability, which, according to *Zage* at least, may include constructive notice.[107] Given that recipient liability is fault-based, yet encompasses purely passive conduct, it could be argued that the threshold for liability should be at least as high, if not higher, than that for accessorial liability which requires active involvement in the breach of trust or fiduciary duty.[108] On the latest Court of Appeal formulation of recipient liability, actual knowledge is required, so the differences may not be as great as if the reasoning of *Zage* was pursued.[109] Nonetheless, dishonesty has clearer links to criminal law and common law notions of culpability and connotes a higher threshold than unconscionability.

Lord Nicholls' dishonesty test has been influential in Singapore and is applied beyond accessorial liability.[110] It is highly unlikely that it would be discarded in favour of unconscionability. But does this really matter? Both touchstones have the same function and involve the same methodology. Whether D has received trust property and/or participated in some other way in PW's breach, the question is still whether in all the circumstances D should be fixed with equitable liability. This will depend on the extent to which D is at fault and the outcome will depend on the factual matrix, including whether there is a receipt of property involved. The dishonesty nomenclature is too well-established and popular in Singapore to be easily discarded and it encapsulates policy decisions that have been made to restrict the circumstances

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104 *Fyffes Group, supra* note 37 at 670; *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) at para. 1600.

105 For example, to avoid a complex causation inquiry. See further, Ridge, *supra* note 37 at 458, 459.

106 For a recent illustration, see *Relfo Ltd*, *supra* note 43 at 677.

107 For a different approach, see *Akai (Final Appeal)*, *supra* note 49 at para.134.

108 I am grateful to the anonymous referee for this insight.

109 *Yong Kheng Leong*, *supra* note 31.

110 *Cavenagh Investment Pte Ltd v. Kaushik Rajiv* [2013] 2 S.L.R. 543 at para. 71 (H.C.) (Chan Seng Onn J.).

in which third parties should bear the consequences of another's breach of equitable duty.[111] Dishonesty could be adopted as the threshold for recipient liability so long as it is recognised that this is not necessarily limited to where D has actual knowledge of the misappropriation of trust property. Where D is a purely passive recipient, however, the higher threshold may be more appropriate.

Support by analogy for this argument can be found in the Australian case law. Unlike Singapore, the High Court of Australia has not embraced the *Royal Brunei Airlines* principle of accessorial liability, although it has not ruled out its acceptance yet. In *Farah Constructions Pty Ltd v. Say-Dee Pty Ltd*, the Court retained the *Barnes v. Addy* framework of knowing receipt and knowing assistance in a dishonest and fraudulent design by a trustee or fiduciary.[112] In addition, the Court endorsed a line of authority concerning procurement or inducement of (any) breach of trust. The Court affirmed the *Baden* scale of knowledge and held that levels (i) to (iv) of that scale (actual knowledge to constructive knowledge) suffice for knowing assistance liability.[113] Although the Court did not explicitly state the requisite knowledge for knowing receipt, it appears that the same knowledge standard will apply to knowing receipt and knowing assistance.[114]

Importantly, the Full Federal Court of Australia in *Grimaldi v. Chameleon Mining NL (No 2)* has emphasised the contextual nature of the inquiry:[115]

> [P]articipatory liability as it evolved in equity in cases prior and subsequent to *Barnes v. Addy* was not based on inflexible formulae. Given the variety of circumstances in which, and bases on which, a third party could be characterised as a wrongdoer in equity… varying importance has been given to three matters: (i) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant; (ii) the nature of the third party's role and participation, *e.g.* as alter ago, inducer or procurer, dealer at arm's length, etc.; and (iii) the extent of the participant's knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.

Thus, in Australia, the interplay of (at least) three factors will determine liability and the level of requisite knowledge may vary depending upon the specific facts (with the proviso that anything up to level (iv) on the *Baden* scale may suffice). This reflects, albeit more explicitly, the approach taken in *Akai (Appeal)* by Cheung J.A. and in *Zage*.

C. *Reduce the Attractions of Recipient Liability*

A third possible approach to recipient liability and accessorial liability is implicit in Lord Neuberger's judgment for the Hong Kong Court of Final Appeal in *Akai*

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111 See also Emmanuel Duncan Chua, "Knowing, Dishonest or Plain Unjust?—A Commentary on the Past, Present and Future of Knowing Receipt" (2007) 25 Sing. L. Rev. 53.

112 (2007) 230 C.L.R. 89 (H.C.A.) [*Farah Constructions*].

113 *Ibid.* at 163, 164.

114 See *Grimaldi*, *infra* note 115 at para. 267.

115 *Grimaldi v. Chameleon Mining NL (No 2)* (2012) 200 F.C.R. 296 (F.C.A.) at para. 247 [*Grimaldi*]. See also P.D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Scarborough, Ontario: Carswell, 1993) 195.

(Final Appeal).[116] The effect of this judgment is to remove the attractions and distinctiveness of the recipient liability claim by way of a fusion-style methodology that constrains the requirements and remedy for the equitable claim to those of the common law conversion claim pleaded alongside it. Effectively, Lord Neuberger's approach is to make the equitable liability redundant where there is a concurrent common law liability. There is nothing in Lord Neuberger's reasoning to suggest that this approach could not also be taken for equitable accessorial liability.

Lord Neuberger accepted Akai's common law claim based on its C.E.O.'s lack of authority to enter the loan contract on its behalf. As the contract was void, it followed that the Bank committed conversion by selling the pledged shares and Akai was entitled to common law damages assessed by the value of the shares at the time of sale.[117] Akai, however, also argued that the Bank was subject to recipient liability and that this would yield a greater remedy by way of 'equitable compensation'. The remedy for recipient liability is generally explained in terms of the recipient's liability to account, rather than equitable compensation *per se*, but this point was not pursued.[118]

The issue which is of most interest here was whether, applying the test in *Akindele* which Lord Neuberger was prepared to assume was correct, the Bank had acted unconscionably.[119] Lord Neuberger held that the same test should apply to determine both whether the C.E.O. had authority to bind Akai to the contract and to determine whether the Bank was unconscionable in taking the shares. Equity should "follow the law" in this respect. In his view, the test for liability in knowing receipt is "effectively identical" to that for whether there was reasonable reliance on an agent's apparent authority. This led him to conclude that only actual knowledge is sufficient for knowing receipt liability.[120] Nonetheless, this did not mean that recipient liability could be assimilated with accessorial liability as a whole because unconscionability incorporated "irrationality" as well as dishonesty.[121] Here, the Bank had been irrational in its belief that the C.E.O. had authority.[122]

As for the remedy, Lord Neuberger again assimilated the common law and equitable claims, finding that the measure of equitable compensation should not exceed the measure of common law damages.[123] Presumably, there should be no inducement to plead the equitable claim. Conversely, the Court of Appeal's award of the (equitable) remedy of compound interest calculated on the common law damages award was not overturned, but this was primarily on the basis that the Bank had left

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[116] *Supra* note 49.

[117] *Ibid.* at para. 123. There was no consideration of when title to property might still pass under a void contract. See further Ji Lian Yap, "Knowing Receipt and Apparent Authority" (2011) 127 Law Q. Rev. 350.

[118] But see Yeo, "Restitution", *supra* note 61 at para. 21.35, noting that if compensation is an available remedy for knowing receipt it "will be very difficult to distinguish conceptually between the basis of liability for knowing receipt and that for dishonest assistance."

[119] *Akai (Final Appeal)*, *supra* note 49 at para. 128. A further question was whether there had been a beneficial receipt of property at all. See further Yap, *supra* note 117.

[120] *Akai (Final Appeal), ibid.* at paras. 134-137.

[121] *Ibid.* at para. 134.

[122] *Ibid*.

[123] *Ibid.* at para. 155. This aspect of the judgment is not discussed further here.

it too late to object. Thus, it would appear that in Hong Kong, equitable recipient liability is to be assimilated as far as possible with any overlapping common law claim.

With respect, Lord Neuberger's reasoning is difficult to follow. There is no necessary connection between the principles determining an agent's authority to enter a contract and the test for recipient liability that would require the principles to be the same.[124] Nor does the maxim 'equity follows the law' apply here.[125] His Lordship's finding that only actual notice sufficed for recipient liability is also contrary to Cheung J.A.'s reasoning in *Akai (Appeal)* and, it is suggested, the spirit of Nourse L.J.'s judgment in *Akindele*. Nonetheless, Lord Neuberger's judgment is binding in Hong Kong and is of wider import due to his Lordship's position as President of the Supreme Court of the United Kingdom.

IV. The Way Forward

Andrew Phang Boon Leong, now a member of the Court of Appeal, has argued strongly for the development of an 'autochthonous' Singapore legal system.[126] The calls for autochthony have coincided with the highly successful reform of the judicial system in Singapore[127] and with the achievement of full legal independence from English law.[128] Undoubtedly the Singapore courts are now well-equipped to pursue legal autochthony. But what does this entail with respect to the development of equitable third party liability for breach of trust and fiduciary duty? The following discussion is necessarily speculative.

Singapore is a relatively young jurisdiction. Consequently, it will take time for the local courts to generate a comprehensive local jurisprudence. Pragmatically speaking, it makes sense to 'piggyback' on the case law of larger jurisdictions which share a common equity heritage. England and Wales is the obvious choice in this respect for a number of reasons.[129] For example, Singapore has a strong historical connection to English law which means that the bulk of its jurisprudence is grounded in English case law and which makes it natural to turn to current English cases for guidance.[130] This makes sense as the high volume of commercial litigation in England means that finer points of doctrine are more likely to arise.

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[124] Yap, *supra* note 117.

[125] R.P. Meagher, J.D. Heydon & M.J. Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (Sydney: Butterworths LexisNexis, 2002) at paras. 3-035–3-045.

[126] See *e.g.*, Phang, *Development of Singapore Law*, *supra* note 1; Andrew B.L. Phang, "The Reception of English Law" in Tan, *Singapore Legal System*, *supra* note 2 at 7 [Phang, "Reception of English Law"].

[127] See Mavis Chionh, "The Development of the Court System" in Kevin Y.L. Tan, ed., *Essays in Singapore Legal History* (Singapore: Singapore Academy of Law and Marshall Cavendish Academic, 2005) 93 at 117-120; Waleed Haider Malik, *Judiciary-Led Reforms in Singapore* (Washington, D.C.: World Bank, 2007).

[128] *Tan Kiam Peng*, *supra* note 3.

[129] Subsequent references to 'England' should be taken to refer to the jurisdiction of England and Wales. For suggestions (as at 1999) as to why the courts in Singapore rely heavily on English cases, see Woon, "The Applicability of English Law in Singapore", *supra* note 9 at 240-242. See Phang, *Development of Singapore Law*, *supra* note 1.

[130] Phang, *Development of Singapore Law*, *ibid.* at 37-51.

This natural inclination to rely upon the English law is bolstered by the fact that many, perhaps most, Singaporean lawyers, including academics, receive their postgraduate training at English universities. A significant number also undertake undergraduate legal studies in England.[131] It follows that they become most familiar with the English cases and academic literature. This affects the arguments put to local courts as well as the reading lists of the local university law courses.[132] This may change as other countries seek to increase their intake of Singaporean undergraduate students.

The jurisdiction of England and Wales also has a distinct advantage over common law countries such as Australia and Canada that are organised along federal lines. In Australia, for example, questions concerning equitable third party liability may arise at appellate level in any one of a number of State and Federal courts of equal standing. Although the High Court of Australia has reinforced strict guidelines for the development of the "Australian common law",[133] it may be more difficult for a non-Australian lawyer seeking insights to aid the development of their own jurisprudence to discern the law in Australia, than it is to determine the law in England. The number of relevant courts in Australia also dilutes the development of principle and may delay the progression of unresolved questions of law to the High Court. This helps explain the gap of nearly 30 years between the two leading High Court authorities on equitable third party liability.[134] On the other hand, England is not immune nowadays from European, federal-style constraints which may make its local case law less 'transportable' to other jurisdictions.[135]

The adoption of *Royal Brunei Airlines* in Singapore also makes the Australian law of less relevance, although the High Court of Australia's reasoned rejection of strict unjust enrichment recipient liability in *Farah Constructions* may become more noteworthy following the recent revival of that debate in Singapore.[136] *Farah Constructions* was only cited at first instance in the Hong Kong *Akai* litigation[137] and was not mentioned at all in *Zage*. The Lawnet database shows no 'hits' for *Farah Constructions* in the Singapore cases. Perhaps the Full Federal Court decision in *Grimaldi* will have more influence, particularly as it is being taken note of by the English courts.[138]

It is crucial to Singapore's continued economic success that it be attractive to global investors. This is naturally a concern in all common law jurisdictions, but it may be more pronounced in Singapore which rightly prides itself on its reputation

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[131] As of 2012, there were 729 Singaporean students studying law at U.K. universities. By way of comparison, approximately 360 students graduated in law from National University of Singapore and Singapore Management University combined: Singapore Ministry of Law, *Report of the 4th Committee on the Supply of Lawyers* (Singapore: May 2013) at para. 3.4, online: Ministry of Law <http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/4th%20Committee%20Report.pdf>.

[132] See *e.g.*, Mindy Chen-Wishart, "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62 I.C.L.Q. 1 at 11.

[133] *Farah Constructions*, *supra* note 112 at 152.

[134] *Consul Development*, *supra* note 26; *Farah Constructions*, *ibid.*

[135] Phang, "Reception of English Law", *supra* note 126 at 20.

[136] *Wee Chiaw Sek Anna*, *supra* note 52.

[137] *Akai (First Instance)*, *supra* note 67.

[138] *FHR European Ventures LLP v. Mankarious* [2013] 1 Lloyd's Rep. 416 at para. 80 (C.A.).

as a global commercial hub.[139] Whilst comprehensive legislative schemes[140] and strategic initiatives to attract wealthy individuals are important in this regard, there must also be stability and clarity in the fundamental common law principles that undergird the private law framework.[141] Singapore's important trading links with the United Kingdom further suggests that there should be harmony with English commercial law wherever possible.[142] This militates against anything other than cautious and incremental development of the law.

Professor Chambers has argued that common law jurisdictions must take a united stand on doctrines such as equitable recipient liability in order to combat global-scale fraud and corruption.[143] Unless the law is consistent across jurisdictions, he argues, there is greater scope for money laundering and the loss of trust assets. It has also been suggested that the rapid increase in multi-jurisdictional litigation alone requires that courts strive for consistency.[144] This would suggest that the development of Singapore's equitable third party liability principles should keep in step with mainstream jurisdictions such as England. The force of this argument is weakened somewhat by the fact that much of the world is not regulated by the common law. Nonetheless, it is clear that common law jurisdictions have a responsibility as 'good global citizens' to minimise the opportunities for money laundering and the like in their own jurisdictions as well as to improve the efficacy of legitimate cross-border transactions.[145] Uniformity of equitable principle is therefore desirable, at least where this is not at the expense of conceptually coherent law.

V. Conclusion

There is not one 'correct' response to the questions besetting equitable accessorial and recipient liability. In particular, the law concerning recipient liability is "still in a state of flux" and the option of a concurrent strict unjust enrichment recipient liability claim is yet to be squarely addressed in Singapore.[146] From a purely doctrinal perspective, there is much to be said for the argument that accessorial liability and recipient liability involve the same contextual, fact-specific inquiry into whether D's conduct and state of mind justify equitable liability and should be determined by the same standard, whether that be labelled 'dishonesty' or 'unconscionability'.

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[139] See Sundaresh Menon C.J., "Finance, Property and Business Litigation in a Changing World", Keynote Address to the Singapore Academy of Law and Chancery Bar Conference (25-26 April 2013) at 3, 4, online: Singapore Academy of Law <http://www.sal.org.sg/Lists/Speeches/Attachments/113/CJ%20Menon%27s%20Keynote%20Address%20%28SAL-ChBA%20Conference%29.pdf>.

[140] See *e.g.*, the *Business Trusts Act* (Cap. 31A, 2005 Rev. Ed. Sing.) discussed in Tang Hang Wu, "The Resurgence of 'Uncorporation': The Business Trust in Singapore" [2012] J. Bus. L. 682.

[141] Regarding the importance of trusts law to the promotion of Singapore as a wealth management centre from the early 2000s, see Tang Hang Wu, "Teaching Trust Law in the Twenty-First Century" in Elise Bant & Matthew Harding, eds., *Exploring Private Law* (Cambridge: Cambridge University Press, 2010) 125 at 134, 135. See also, the extra-judicial comments of Yong Pung How C.J. in 1995, as reported in Phang, "Reception of English Law", *supra* note 126 at 21.

[142] See Menon C.J., *supra* note 139.

[143] Robert Chambers, "Knowing Receipt: Frozen in Australia" (2007) 2 Journal of Equity 40.

[144] Menon C.J., *supra* note 139 at 18.

[145] Phang, "Reception of English Law", *supra* note 126 at 22.

[146] *Wee Chiaw Sek Anna*, *supra* note 52 [emphasis omitted].

A unified notion of participatory liability seems to be emerging in Australia, whereas this is less likely in jurisdictions that follow the law in England and Wales. On the other hand, the seeds for a similar development in Singapore are present in the approach taken in *Zage*. Cheung J.A.'s judgment in *Akai (Appeal)* is also relevant in this respect even though it does not represent the law in Hong Kong itself. This would be in line with Australian developments and would assimilate recipient liability into a broader principle of equitable participatory liability. But the development of equitable doctrine in a particular jurisdiction is not determined solely by doctrinal considerations: the interplay of legal and non-legal considerations in Singapore must also be taken into account. This suggests that the courts are unlikely to make radical changes to accessorial and recipient liability for breaches of trust and fiduciary duty: autochthony does not mean discarding functional and reasonably certain commercial law doctrines.[147] Thus, the first option suggested in Part III above, namely that of finessing the status quo, is the most obvious course to take. Nonetheless, the second option, recognising a general principle of participatory liability, is also principled. With respect, the third option of reading down the equitable claims would require radical change to long-standing equitable doctrines and remedies and has little to recommend it. This conclusion is not inconsistent with the pursuit of legal autochthony in Singapore. A contextual inquiry into whether D was at fault in equity, as modelled by Cheung J.A. in *Akai (Appeal)* and Rajah J.A. in *Zage*, is admirably suited to autochthonous outcomes, that is, outcomes that reflect an appropriate balance in the context of Singaporean society between deterring fraud and corruption on the one hand and facilitating efficient commerce on the other.

[147] *Ibid.*