Suing Third Parties Involved in Fraud: Some key Issues

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The Funds and Fraudsters' Conference

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Remarks

By

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Extensive liabilities in equity under English law

English equitable principles – as opposed to common law principles – can provide extensive remedies against a third party involved in fraud. Where the third party has received property the best remedy is a proprietary remedy so that the claimant prevails over unsecured creditors of the third party and reaps the benefit of any increase in the value of any property obtained by the party's involvement in the fraud. Otherwise, a claimant may have a personal money claim against a defendant either dishonestly assisting in a breach of an equitable or a fiduciary duty or dealing dishonestly or unconscionably with property beneficially received from someone acting in breach of an equitable or a fiduciary duty. By a 'fiduciary' duty I mean the core 'no profit, no conflict' duty of a fiduciary not (without due authorisation) to make a personal profit nor to be in a position of conflict between personal interest and altruistic duty to persons whose interests are to be preferred to those of the fiduciary or between two such altruistic duties[1].

[1] In *Bristol & West BS v Mothew* [1998] Ch 1 Millett LJ made it clear that a lawyer's negligent breach of contract could not amount to a breach of fiduciary duty even if the lawyer-client relationship gave rise to the 'no profit, no conflict' duty. The latter duty was a separate independent duty.

I will first outline the proprietary remedy, highlighting the problems raised by the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[2] which has implications for the ambit of the personal claims. *Sinclair* determines that where a person takes a bribe or secret commission in breach of his fiduciary duty only a personal money claim lies: the bribe or secret commission and any subsequent traceable product is not held on constructive trust for the claimant. It is to be noted that the views that I will be expressing are, of course, provisional as I have not had the benefit of tough forensic argument on the complex case law and competing policies in the areas I am about to discuss. Thus, I am in the position of a ship's captain in uncharted waters without the benefit of skilled and experienced local pilots.

Constructive trusts of property obtained in breach of trust or fiduciary duty

After 1993 when the British Privy Council in *Reid v Attorney General for Hong Kong*[3] had expressly considered and rejected the 1890 Court of Appeal decision, *Lister v Stubbs*[4], it was considered that a fiduciary automatically held a secret profit such as a bribe and the traceable product thereof on constructive trust for his principal. Thus, whenever a fiduciary, F, took advantage of his fiduciary position to obtain a secret profit, whether from property owned or controlled by him in such position or from other opportunities inherent in his position, his principal, P, had a direct proprietary right to that profit and the traceable product thereof, as where a bribe was profitably invested. After all, as Lawrence Collins J has pointed out[5], there is no injustice to creditors in their not sharing in an asset for which the fiduciary has not given value and which the fiduciary should not have had.

[2] [2011] EWCA Civ 347,[2012] Ch 453, [2011] 4 All ER 335.
[3] [1993] 3 WLR 1143, [1994] 1 AC 324.
[4] (1890) 45 Ch D 1.
[5] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 2286 (Ch), [2005] Ch 119 at [86].

The justification for F holding the bribe forthwith on constructive trust for P was that if P claimed that F had been a good fiduciary acting exclusively in P's best interests in accordance with the 'no profit, no conflict' core obligation so as to acquire the bribe for P as an authorised profit, F could not be allowed to deny this[6]. Equity looked on F as having done what he ought to have done as claimed by P, so the actual profit is recovered as substitutive performance of F's obligations.

In 2011, however, the Court of Appeal in *Sinclair* considered that F was simply a wrongdoer and as such only entitled to make a money claim for breach of fiduciary duty and so followed *Lister*. It was not as if F had derived his profit directly from P's property so that the traceable product of such property could be recovered as P's property. Lord Neuberger MR on behalf of the Court of Appeal stated[7], "A claimant cannot claim proprietary ownership of an asset purchased by a defaulting fiduciary with funds which, although they could not have been obtained if he had not enjoyed his fiduciary status, were not beneficially owned by the claimant or derived from opportunities beneficially owned by the claimant." He thus considered that there is a clear distinction between misuse of fiduciary *property* owned or controlled by F as a result of his position and mere misuse of F's *position.* Is there not, however, much uncertainty as to when an opportunity that a fiduciary diverts from P to himself or his alter ego can be regarded as sufficiently mature to be regarded as belonging to P as P's traceable property[8].

Anyhow, Lord Neuberger MR held that misuse of fiduciary property by F gives rise automatically to a constructive trust of the profit arising therefrom but misuse of F's fiduciary position only gives rise to a money claim. Although the Privy Council had interpreted the House of Lords decision in

[6] Further see D J Hayton 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems', [2012] Conv 263 and Lord Millett, 'Bribes and Secret Commissions Again', (2012) 71 CLJ 583.
[7] [2011] EWCA Civ 347, [2012] Ch 453, [2011] 4 All ER 335 at [89].
[8] See the review in *Ultraframe Ltd v Fielding* [2005] EWHC 1638 (Ch), [2007] WTLR 835 at [1332]-[1356].

Boardman v Phipps[9] as having revealed that no such distinction existed, he rejected such interpretation and upheld the distinction. Is such a distinction, however, a workable one? Not only is there the problem as to when an opportunity of F can be regarded as belonging to P as P's traceable property[10]: consider the following scenario.

Consider a defendant who is a senior policeman or customs official who takes a bribe to be present as driver or passenger in a car with bags of cocaine or stolen gold bars in the trunk, so that they can safely pass through a checkpoint or border. Should it make a difference as to whether he wore his uniform and was in the official car provided for him or, instead, wore his own clothes and was in his private car relying upon being well-known to the officers at the checkpoint or border? In the latter case would it make all the difference if he was not recognised and so needed to show his official identity badge belonging to his employer?

The purpose of having the distinction is a perceived general need to limit the exposure of unsecured creditors of F and a perceived specific need to limit the exposure of persons who lend money to F upon the security of an equitable charge over property that is the traceable product of a bribe, by ensuring that priority is not accorded to any prior equitable interest of P. The fact that any enhanced value in the traceable product of the bribe would otherwise exclusively benefit P rather than being made available to assist equitable chargees or unsecured creditors is another justification.

If one accepts that the distinction between misuse of property and misuse of position is not satisfactory how can the perceived under-protection of creditors be dealt with? One bold way ahead for the UK Supreme Court would be to accept that the amount of a bribe or secret commission has

[9] [1967] 2 AC 46.

[10] Currently, this is an objective issue though it can be argued that it should it be subjective, so that if P claims the opportunity and the profit to be his and not F's, F should not be permitted to deny this because any denial would negate F's duty not to profit himself but his principal that is at the very heart of their fiduciary relationship.

to be taken to represent the amount by which P receives less exchange value for his input in goods or services and so should give rise to an equitable lien in his favour for such amount with interest, but that any surplus should be available to assist equitable chargees or unsecured creditors. Alternatively, the strict proprietary liability under *Att-Gen for Hong Kong v Reid* based upon a *trustee* not being able to deny his beneficiary's claim that he acted as a good trustee authorised to collect the bribe, should only apply to persons who are trustees of expressly created trusts, with a personal money liability under *Sinclair* for all other fiduciaries. The other possibility is for the UK Supreme Court to prefer the traditional Chancery approach in *Reid* that favours vulnerable beneficiaries to the commercial approach in *Sinclair*.

High Court cases[11] have, of course, followed *Sinclair*. This English position that only money claims may be made in respect of secret profits obtained by a fiduciary's misuse of his position, like bribes, is contrary to decisions in the USA[12], Canada[13], Australia[14] and Singapore[15]. Under English private international law, however, if by virtue of the foreign law applicable to the original taking of the secret profit, such as the law of Singapore or of Caribbean States whose final appellate court is the Privy Council, such profit would as soon as received be held on constructive trust for the claimant, it seems that this equitable proprietary right to the profit and its traceable product would be recognised and enforced by the English courts if having jurisdiction[16]. Where, however, the fiduciary's misconduct does not forthwith automatically give rise to a constructive trust, but the court, as in Australia, has discretion as to whether to grant a proprietary remedy or only a personal remedy, it seems that the English courts would not recognise any proprietary interest as

[11] *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch); *Michael Wilson & Partners Ltd v Sinclair* [2012] EWHC 2560 (Comm)
[12] *USA v Carter* [1910] USSC 115.
[13] *Insurance Corporation of British Columbia v Lo* [2006] BCCA 585, (2006) 278 DLR 4 148.
[14] *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [569]-[584].
[15] *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 Sing LR 735.
[16] Just as in *Re Fitzgerald* [1904] 1 Ch 573, the Court of Appeal gave effect to the non- assignability of a life interest under a trust governed by Scots law (so the English mortgagee had no security), though life interests under English law could not be non-assignable.

having arisen. Exceptionally, it seems that it could if, after the foreign court's judgment had created a proprietary interest in particular property, the property or its traceable product became located in England.

Where the secret profit arose under applicable English domestic law, it may be that in foreign countries where the constructive trust is not a substantive institution automatically arising in response to certain situations but is a possible remedy for consideration in a wide variety of wrongdoing circumstances[17], that more than a money remedy may be provided if the foreign court has jurisdiction e.g. because the profit or its traceable product or the defendant is located in such a jurisdiction.

Dishonest assistance in a breach of trust or fiduciary duty

Liability

Some English cases[18] suggest that a dishonest assistant, D, can only be liable where F's breach relates to misapplication of property held on trust or to property, like a company's property, in respect of which F as a director owes fiduciary duties. In principle, however, there seems no good reason why D should not be liable where he dishonestly assists any breach of Fs 'no profit, no conflict' fiduciary duty, such as where F in breach of fiduciary duty diverts to himself or another

[17] E.g. in Canada and Australia.
[18] *Cowan be Groot Properties Ltd v Eagle Trust plc* [1991] BCLC 1045 at 1103, *Satnam Investments ltd v Dunlop Heywood & Co* [1999] 1 BCLC 385 at 404.

profitable opportunity[19] or where F takes a bribe or secret commission. Indeed, more recently this has been held to be the case by some High Court judges[20].

D may well be a lawyer or accountant or banker or investment manager. For D to be dishonest he needs to have some 'knowledge' that his conduct is assisting in something "dodgy" viz something likely to be illegal like the evasion of tax or exchange control or anti-money-laundering laws, or the furtherance of theft or fraud. He is then taking the risk of it turning out to be a breach of trust or fiduciary duty[21]. His conduct must have some causative input into the breach of duty but it is no help to the assister that he was a small cog in a big chain of events or that the breach would probably have occurred without his assistance[22]. If F committed several breaches, however, D can only be liable for dishonest assistance in respect of those breaches to the commission of which his own conduct had contributed[23].

'Knowledge' covers (i) actual knowledge and (ii) "blind-eye" knowledge. The latter is the knowledge that D would have had but for turning a blind eye, whether by ignoring the obvious or by deliberately or recklessly failing to make the inquiries an honest reasonable person would make when suspecting that it was more likely than not that something "dodgy" was going on. It matters not that by D's morally obtuse standards he saw nothing wrong in turning such a blind eye[24] even though at one stage Lords Hoffmann and Hutton[25] appeared to indicate that dishonesty required a defendant himself to be aware that what he was doing would be regarded as dishonest by ordinary

[19] Indeed, in some cases this may be regarded as property properly belonging beneficially to F's beneficiaries or principal: *Sinclair Investments (UK) Ltd v Versailles Trade Finance* [2011] EWCA Civ 347, [2011] 4 All ER 335 at [50] and [89].
[20] So held by Peter Smith J in *JD Wetherspoon plc v Van de Berg & Co* [2009] EWHC 639 (Ch) at[518] and [552], followed in *Fiona Trust & Holding Corp v Primalov* [2010] EWHC 3199 (Comm) at [61].
[21] *Abou- Rahmah v Abacha* [2006] EWCA Civ 1492 at [39].
[22] *Balfron Trustees Ltd v Petersen* [2001] IRLR 758 at 761.
[23] *Grupo Torras SA v Al Sabah (No 5)* [1999] CLC 1469.
[24] Also see *Consul Developments Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8, (1975) 132 CLR 373 at 398 and 412413 endorsed by *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 81 ALJR 1107 at [178].
[25] In *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

standards of honest people. Lord Hoffmann, however, in giving the judgment in *Barlow Clowes International Ltd v Eurotrust International Ltd* [26] rejected such an interpretation of their remarks. Thus the requisite knowledge for personal liability was established where a director providing offshore financial facilities had "an exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important" and so decided not to make inquiries lest he discover, as he suspected, that the money passing through his hands was the proceeds of a breach of trust or fiduciary duty. There is thus an objective ordinary standard of honest behaviour that the defendant must not transgress[27].

The measure of a *dishonest assister's liability*

F and D are jointly and severally liable for the loss[28]. D is attributed with a liability that derives from and duplicates F's liability. The starting point is to determine what loss or damage flowed from a breach of duty by F, and if D dishonestly assisted this breach then he is liable for the same measure of compensation as F[29].

Where F is liable for breach of his primary obligations in respect of property over which he has a trustee or trustee-like stewardship (as directors have in respect of corporate property[30]) e.g. the duty to disburse money only for authorised investments and to authorised beneficiaries, these duties must be absolutely observed. Equity allows a claimant to insist upon being restored to the position equivalent to that in which he would have been had F specifically performed his role in

[26] [2005] UKPC 37, [2006] 1 WLR 1476.
[27] As emphasised in *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 at [31] –[32] where it was held irrelevant that there might be a body of opinion of "sharp" businessman, including the defendant, which regarded the ordinary standard of honest behaviour as set too high.
[28] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1600].
[29] *Casio Computer Ltd v Sayo* [2001] EWCA Civ 661 at [15]; *Re Bell's Indenture* [1980] 1 WLR 1217 at `1236.
[30] *Bairstow v Queen's Moat Houses plc* [2001] EWCA Civ 712, [2001] BCLC 531 where directors were strictly liable for paying unlawful dividends without any deduction for that amount that could have lawfully been declared if they had properly operated available mechanisms involving subsidiaries.

accordance with those obligations. By way of substitutive performance of F's primary obligations F's accounts as to his stewardship of the fiduciary property are falsified by disallowing unauthorised items.

Take the case where F transferred Gogo Inc shares worth $50,000 to a stranger, R, not entitled to receive them, but who innocently received them, sold them and dissipated the proceeds of sale. Thus no proprietary tracing claim and no personal money claim can be made against R. Tackling F's accounts, the transfer of Gogo shares would be struck out leaving F as still having the shares. If these had trebled in value when F was called to account, F would either have to buy back for the trust fund the equivalent number of the shares for $150,000 or augment the fund by $150,000. If the shares had halved in value, then F would remain liable for $50,000 as if he had bought the shares for himself at their $50,000 market value so that he could have legitimately transferred the shares to R. F cannot deny his beneficiaries' claim that F acted as a good man properly performing his obligations and so had replaced the shares with $50,000.

In the above exercise common law questions concerning remoteness of damages do not arise and loss is assessed at the date of the trial using the full benefit of hindsight[31]. This strict liability is mitigated by English statutes[32] that provide protection for trustees or directors who acted honestly and reasonably and ought fairly to be excused for their breaches of duty and, in the case of trustees, for not earlier having sought guidance from the court.

[31] See *Target Holdings Ltd v Redferns* [1996] AC 421, *Bairstow v Queens Moat Houses plc* (above), *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, *Lloyds TSB Bank v Markandan* [2012] EWCA Civ 65, [2012] 2 All ER 884.
[32] Trustee Act 1925 s 61, Companies Act 2006 s 1157 (no relief granted under Companies Act 1985 s 727 in *Bairstow* (fn 30 above) due to deliberate or dishonest conduct of the directors.

As to profits made by F from a breach of trust or fiduciary duty, one might have expected that D would have the same duplicative liability as F as in the case of losses. Lewison J, however, in *Ultraframe (UK) Ltd v Fielding*[33] stated

"I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as result of a breach of trust. I can see also that it makes sense for a dishonest assistant to disgorge any profit which he himself has made as result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay the beneficiary an amount equal to a profit he did not make and which has produced no corresponding loss to the beneficiary." Such a step he considered would be punitive and thus inappropriate.

Is it not, however, possible to take the view that there can be a corresponding loss when F obtained a traceable profit derived from exploiting *property* covered by his fiduciary duty, even if no traceable profit from exploitation of his fiduciary *position* can now arise due to *Sinclair?* Thus if the traceable property from exploitation of property cannot be recovered in specie or in value from F, because dissipated by an insolvent F, the claimant would have suffered a loss of property for which no compensation would be received unless recovery of compensation could be obtained from D. This could justify duplicative liability for a loss of property beneficially owned by the claimant.

Since, however, a proprietary interest cannot subsist in respect of profits made merely from F exploiting a fiduciary position such as bribes and secret commissions, a claimant will not have lost any proprietary interest in bribes or secret commissions, only a right to make a personal claim for

[33] [2005] EWHC 1638 (Ch), [2007] WTLR 835 at 1600.

compensation from F. This can, perhaps, justify excluding any duplicative liability of D for such payments, it being regarded as too punitive for such a liability to be imposed, loss of a beneficial interest in property only justifying an extensive duplicative remedy.

More recently, in *Fiona Trust and Holdings Corp v Primalov*[34] Andrew Smith J rejected the strict approach in *Ultraframe* that a defendant is only liable to disgorge the profit he himself had received. He thus ordered the dishonest assistant, D, to account for using his de facto control that ensured the fiduciary, F, made secret commission payments, that otherwise would have gone to D, to three companies associated with D. The judge did not seek to justify D's accountability by treating the payments as having been made to companies that could be regarded as alter egos of the dishonest assistant as has been held in some cases[35].

Dishonest dealing with property beneficially received from breach of equitable or fiduciary duty

Liability

Once a person has knowledge that he has beneficially received property as a result of a breach of an equitable or a fiduciary duty he comes under a duty immediately to restore the property to its rightful owner (s) and not use it for his own benefit[36], so that he is personally liable if he deals with the property in any other way. While "unconscionable" dealing was held to be the appropriate qualifier rather than "dishonest" in 2000 by the English Court of Appeal in *Bank of Credit and*

[34] [2010] EWHC 3199 (Comm) at [1538]-[1540]. See also *Pulvers v Chan* [2006] EWHC 2406 (Ch), [2008] PNLR 9 at [383].

[35] *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; and see *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [69]-[73] and *Petrodel Resources Limited v Prest* [2012] EWCA Civ 1395 at [126], [156] and [159]

[36] *Arthur v Att-Gen of Turks and Caicos Islands* [2012] UKPC 30 at [37] and [43];*Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 All ER 210 at [81]; *Target Holdings Ltd v Redferns* [1996] AC 421 at 437. Failure to do so can amount to theft: *Holmes v Governor of Brixton Prison* [2004] EWHC 2020 (Admin) at [22]

Commerce International (Overseas) Ltd v Akindele[37], "dishonest" dealing in the same sense as in "dishonest" assistance is, to my mind, more apt . Back in 2000, however, there was some uncertainty as to how much subjectivity or objectivity was required in establishing whether or not a defendant's conduct had been "dishonest" in "dishonest" assistance cases, and the courts considered that there ought to be liability for a recipient of property who had dealt with it in circumstances where he had no subjective dishonesty but he had been guilty of commercially unacceptable or unconscionable conduct. As already seen, it is now established that a defendant will be "dishonest" whenever his conduct transgresses the ordinary standard of honest behaviour, whether or not he was aware of this and whatever his motive[38]. Thus one can fall back to "dishonest" dealing as a less opaque identifier than "unconscionable"[39].

For a dealing to be "dishonest" there will need to be the same actual or blind-eye knowledge as to the dubious provenance of the received property as for liability for dishonest assistance. Once such knowledge has been obtained the duty of the recipient is forthwith as trustee of the property to restore the property or its traceable product to its rightful owner. This will be a trustee or a replacement trustee or the absolutely entitled beneficiary or beneficiaries or the principal(s) to whom a fiduciary owes this duty[40]. This rightful owner can normally be expected to assert his equitable proprietary rights so long as the property has not become dissipated and so untraceable. Once the recipient no longer has the property or its traceable product he cannot be subject to any proprietary claim, nor can he be subject to any personal claim for dishonest dealing if he innocently

[37] [2000] 4 All ER 221, [2001] Ch 437.

[38] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

[39] Indeed, in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392 the Privy Council expressly rejected relying on 'unconscionable' assistance rather than 'dishonest' assistance.

[40] See *Soar v Ashwell* [1893] 2 QB 390 at 395; *Target holdings Ltd v Redferns* [1996] AC 421 at 435;*Montrose Investments v Orion Nominees Ltd* [2004] EWCA Civ 1032, [2004] WTLR 1133; *Pulvers v Chgan* [2006] EWHC 2506 (Ch), [2008] PNLR 9 at [380] and [385].

dealt with the property eg by way of gift, before he had acquired the requisite knowledge of its provenance[41].

There must, however, be a receipt of property in breach of an equitable or fiduciary duty, so that there is a dishonest misapplication of property contrary to the recipient's strict obligation to restore the property to its rightful owner. Remember, however, that in England, due to *Sinclair,* a secret profit obtained by misuse of fiduciary position, as opposed to misuse of fiduciary property, cannot rank as if it were property received from the claimant's trustee or fiduciary that has been dealt with dishonestly.

Receipt must be beneficial receipt and not merely ministerial receipt as an agent immediately accountable to a principal[42] – though this agent could be liable for dishonest assistance if dealing with the property in accordance with his principal's instructions with knowledge that this was wrongful.

The measure of liability of R who beneficially received property from the trustee or fiduciary, F

The rightful owner is entitled to be restored to the position equivalent to that in which he would have been at the time of his claim being heard but for F and R not having specifically performed their respective duties as trustee of the property to restore the property to him immediately their restorative duty arose. R as constructive trustee has the same restorative duty as an express trustee once he has knowledge that he had received the property in breach of F's equitable or fiduciary

[41] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 All ER 210 at [76]-[78].
[42] *Trustor AB v Smallbone (No 2)* [2001] 3 All ER 987 at 994 at [18]. Where cheques in favour of R are paid into his bank account it seems his bank receives the money as ministerial agent immediately liable to account for it to R. The bank then borrows the money from R or if R's account is overdrawn it applies the money on R's behalf to reduce his debt .See Underhill & Hayton, *Law of Trusts and Trustees* 18th ed 2010 (eds D Hayton, P Matthews, C Mitchell), LexisNexis, paras 98.19 et seq.

duty[43]. Thus the rightful owner's claim is a substitutive performance claim with the effects explained above in ascertaining the liability of a defaulting trustee or fiduciary.

While the same rules apply to measure liability of R and F, the extent of their liability may well differ because the actual value of the property at the date of F's duty to restore it will usually differ from the actual value of the property when R came under a duty to restore it unless at the outset R knew of F's breach of duty.

Thus, as seen in the example concerning Gogo shares transferred by F to R when the shares were worth $50,000, F's minimum liability was for that $50,000. In contrast if the shares were worth $100,000 when R first had knowledge of the misapplication of the shares R's minimum liability would be for $100,000, the value he ought then to have restored. If, however, R retained the shares and sold them a year later for $150,000 so as to pay for his daughter's wedding reception, his liability would be for $150,000. If, instead, such sale had only realised $75,000 his liability to restore $100,000 would remain.

It is noteworthy that if R still has the received property or its traceable product then a proprietary claim will be available, though if the claimed property is worth less than the amount due to the rightful owner, the latter will claim an equitable lien over the property to obtain partial satisfaction of his personal money claim[44].

Unjust enrichment claims?

To obviate the need for a defendant recipient to be "dishonest" in the sense discussed above, can a defendant, who has been unjustly enriched at the expense of a claimant's equitable proprietary

[43] *Charter plc v City Index Ltd* [2008] Ch 313, [2007] EWCA Civ 1382 at [74] per Arden LJ.
[44] *Foskett v McKeown* [2001] 1 AC 102 at 130 per Lord Millett.

interest be strictly liable under principles of unjust enrichment if the defence of change of position is not available to diminish or negative the enrichment? No, is the current orthodox answer in in England[45] (and in Australia[46]), liability in equity historically depending upon the defendant being at fault in some way, his affected conscience alone justifying his liability.

It is, however, worth noting two exceptional cases. Inherited from the ecclesiastical courts' jurisdiction there is a strict personal liability of third party recipients of property from a deceased person's executor or administrator to the extent that recovery cannot be obtained from the latter[47]. Second, there is strict liability on unjust enrichment principles where benefits have been conferred on a person by a company in circumstances dealt with by dicta of Lord Nicholls in the House of Lords in *Criterion Properties plc v Stratford UK Properties LLC*[48]. He made it clear that where a benefit has been conferred on B by Company A as a result of its directors acting for an improper purpose and without authority then, "irrespective of whether B still has the assets in question, [Company] A will have a personal claim against B for unjust enrichment subject always to a defence of change of position."

Recently, Sales J considered these dicta in *Relfo Ltd v Varsani*[49]. He held that the defendant was personally liable for a payment traceably received by him from the claimant company when he was aware that he was not entitled to it. As it happened, there could be no proprietary liability in

[45] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 446, CA.
[46] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 at [148]-[158]
[47] *Ministry of Health v Simpson* [1951] AC 251, HL.
[48] [2004] UKHL 28, [2004] 1 WLR 1846 at [4].
[49] [2012] EWHC 2168 (Ch) at [86]-[90]. See also *Federal Republic of Brazil and Municipality of Sao Paulo v Durant International Corporation and Kildare Finance Ltd* [2012 JRC 311 where the Jersey Royal Court would have applied unjust enrichment principles but for a more liberal view of tracing principles than current in *rationes* of English cases, which enabled recovery of Brazilian monies fraudulently extracted from the Municipality in breach of fiduciary duty and passed on via unidentified black market currency dealers to New York as US dollars and then to a Jersey bank.

the absence of the claimant proving what had happened to the money after it had left the defendant's bank account. Having heard full argument on Lord Nicholls' dicta, Sales J stated that he would have applied them if he had found that the payment received by the defendant was not traceably Relfo Ltd's money.

He would have held that the payment would not have been paid to the defendant by X Co but for being triggered by a payment of Relfo's money to persons associated with X Co: this would have sufficed for the defendant to have been unjustly enriched at Relfo's expense.

Much has been written for or against extending strict liability for unjust enrichment except to the extent that a change of position negatives the enrichment. My sympathies currently lie with the orthodox equitable view but now is not the time for me to add my contribution to the debate.