# THE PLACE OF THE 'DISHONEST AND FRAUDULENT DESIGN' REQUIREMENT IN ACCESSORIAL LIABILITY FOR ASSISTING IN A BREACH OF TRUST OR FIDUCIARY DUTY

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*Currently in Australia, a plaintiff may sue a third party on the basis that such party has knowingly assisted in a trustee or fiduciary's dishonest and fraudulent design in furtherance of the latter's breach of trust or fiduciary duty. This is known as the equitable claim of accessorial liability. The 'dishonest and fraudulent design' limitation has received considerable criticism. This paper will investigate whether this requirement has any justification in principle and/or legal policy as a component of the test for accessorial liability, by evaluating its strengths and weaknesses. It is suggested that the removal of this limitation is necessary, because it is both incoherent and unfair. Equity should be able to intervene where the third party can be shown to have dishonestly assisted in any breach of trust or fiduciary duty, regardless of whether the defaulting trustee or fiduciary has additionally exhibited any fraudulent behaviour.*

## I INTRODUCTION

It may be impossible or impractical for a beneficiary or principal ('plaintiff') to sue their trustee or fiduciary ('primary wrongdoer') for harm which has resulted from the latter's breach of trust or fiduciary duty.[1] In these circumstances, the plaintiff may cast the net of liability over a third party who has knowingly assisted in a 'dishonest and fraudulent design on the part of the trustee or fiduciary'.[2] This equitable claim is known as 'accessorial liability'[3] or the 'second limb' of the rule in *Barnes v Addy*,[4] the formulation of which prevails in Australia as a result of the High Court of Australia's influential dicta in *Farah*.[5]

* LLB (Hons) (University of South Australia), Grad Dip (Legal Practice) (College of Law). This paper was submitted in partial fulfilment of my Bachelor of Laws (Honours) degree. I thank Professor Charles Rickett for his invaluable support as my supervisor and for providing helpful insights regarding earlier versions of this paper.

1 For example where the trustee or fiduciary is insolvent or has absconded. Alternatively, the plaintiff may wish to preserve a benevolent relationship with the trustee or fiduciary. See, eg, Michael Bryan, 'Cleaning up after Breaches of Fiduciary Duty — The Liability of Banks and Other Financial Institutions as Constructive Trustees' (1995) 7(1) *Bond Law Review* 67, 69.

2 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 [160] ('*Farah*').

3 The claim has also been widely referred to as 'knowing assistance'.

4 *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2.

5 (2007) 230 CLR 89, 159–65 [159]–[185].

As can be seen, the plaintiff must establish two distinct fault requirements. The first relates to the primary wrongdoer's dishonest and fraudulent design, and the second relates to the third party's knowledge.[6] The High Court has failed to give a clear definition as to the first beyond expressing that 'any breach of trust or breach of fiduciary duty relied on [by the plaintiff] must be dishonest and fraudulent'.[7] However, its refusal to adopt the Privy Council decision in *Royal Brunei Airlines Sdn Bhd v Tan*[8] suggests that an inadvertent or honest breach will not suffice.[9] A common definition is 'to take a risk to the prejudice of another's rights',[10] as is impugned conduct attracting a 'degree of opprobrium',[11] and behaviour 'contrary to normally accepted standards of honest conduct'.[12] The requirement that a primary wrongdoer's breach must exhibit a dishonest and fraudulent design goes beyond the usual notion of equitable fraud.[13] Similar to fraud at common law, 'moral reprehensibility' in the form of egregious conduct appears crucial.[14] This gives the concept a limited content. Furthermore, Edelman J has declared the scope of the dishonest and fraudulent design requirement in Australia as uncertain because courts have been unable to agree as to what precisely the concept means.[15] Although moral reprehensibility remains the prevailing, and certainly the better view as to what the concept entails, as mentioned, different words have been used to describe this concept.[16] Therefore, it is apparent that Australian courts can and do inconsistently interpret and apply this requirement, as a consequence of its lacking a fixed definition. Since the dishonest and fraudulent design condition exhibits moral and semantic complexities, frustrating its consistent application in practice, it follows that its value and workability as a requirement of accessorial liability remains questionable.[17]

6 *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250, 267 ('*Belmont*'). The terms 'dishonest' and fraudulent' are in this context synonymous.

7 *Farah* (2007) 230 CLR 89, 164 [179].

8 [1995] 2 AC 378, 392 ('*Royal Brunei*'). In this case, Lord Nicholls refashioned the law concerning accessorial liability so as to remove the requirement of dishonest and fraudulent design.

9 *Farah* (2007) 230 CLR 89, 165 [180].

10 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 574 [245] ('*Baden*').

11 *The Bell Group Ltd (in liq) v Westpac Banking Corporation Ltd [No 9]* (2008) 39 WAR 1, 606 [4727] (Owen J) ('*Bell Group*'); *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 383 [2118] ('*Bell Group Appeal*').

12 *Sewell v Zelden* [2010] NSWSC 1180 (3 September 2010) [71], quoting *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476, 1481 [15] ('*Barlow Clowes*').

13 'Fraud' in equity is not to be equated with deceit, moral fraud or conscious wrongdoing. Rather, any conduct constituting a breach of duty for which there is a remedy in equity will suffice for a finding of equitable fraud, however innocent this breach may be: see *Nocton v Lord Ashburton* [1914] AC 932, 953–4.

14 *BigTinCan Pty Ltd v Ramsay* [2013] NSWSC 1248 (4 September 2013) [84].

15 *Nicholson v Morgan [No 3]* [2013] WASC 110 (2 April 2013) [56].

16 *BigTinCan Pty Ltd v Ramsay* [2013] NSWSC 1248 (4 September 2013) [84]. Drummond AJA in *Bell Group Appeal* (2012) 44 WAR 1, surprisingly, and it is submitted mistakenly, interpreted dishonest and fraudulent design as not requiring morally reprehensible behaviour on the part of the primary wrongdoer in furthering their breach of trust or fiduciary duty: at 383–4 [2119]–[2123]. This is contrary to the ordinary meaning which the term must be given in order for the High Court's rejection of the attempt to abandon the dishonest and fraudulent design 'integer' to make sense.

17 H A Ford and W A Lee, Thomson Reuters, *The Law of Trusts* (at 8 August 2014) [22.10140].

The High Court has yet to provide principled justification for limiting accessorial liability to instances where there has been third party furtherance of trustee or fiduciary fraud. This dishonest and fraudulent design element has been powerfully criticised as being incapable of any principled explanation.[18] The argument is that it is a 'serious shortcoming' for the claim not to include culpable third party assistance in non-fraudulent breaches of trust or fiduciary duties.[19] This paper aims to consider whether the High Court should continue upholding the dishonest and fraudulent design condition of the test for accessorial liability. It will be argued that it is unnecessary and should be removed.

Part II will explore the rationale for this equitable claim. Part III will assess the arguments both in support of and against the dishonest and fraudulent design requirement, demonstrating why its abolition is important. A reappraisal of the doctrine will be made in Part IV, and Part V will offer a way forward.

It should be noted for the sake of completeness that the equitable concept of 'trustee de son tort' and the debate concerning whether 'constructive trusteeship' is appropriate to describe the third party's personal accountability,[20] are beyond the scope of this paper. Also, whether it is appropriate for the third party's liability to be coordinate with that of the defaulting trustee or fiduciary will not be discussed.[21]

## II THE JUSTIFICATION FOR ACCESSORIAL LIABILITY

Lord Selborne's judgment in *Barnes v Addy* reflects the High Court's position on accessorial liability in *Farah*. His Lordship stated:

> strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers … 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. [22]

This statement has been regarded as extending to breaches of fiduciary duties committed by persons other than trustees, and generally to any third party who

18 Paul D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance: "Should Not My Loss Be Your Loss?"' in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 195, 213–14.

19 Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford University Press, 2nd ed, 2010) 892 [30.49].

20 Tom Besanko, 'Refining the Constructive Trust' (2011) 5 *Journal of Equity* 108, 113. The third party's liability is not trusteeship in its conventional sense, because a constructive trust is at the end of the day, a trust. There must be identifiable trust property over which the constructive trust can be declared.

21 Common law mitigating circumstances such as causation, remoteness and foreseeability of damage are not relevant, and therefore the third party becomes exposed to the range of remedies a plaintiff can seek against the primary wrongdoer.

22 *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2.

deals with them.[23] Moreover, Lord Selborne has been recognised in this passage to have categorised third party liability for participation in a breach of trust or fiduciary duty into two distinct claims, being knowing receipt and accessorial liability.[24] Interestingly, such a categorisation had not been made in prior relevant case law.[25] Furthermore, knowing inducement is an additional and related equitable claim which the High Court has accepted as surviving *Barnes v Addy*.[26]

In Australia, fiduciary duties are proscriptive in nature.[27] The fiduciary must not allow a risk or materialisation of a conflict between the interests of the plaintiff and others, nor make an unauthorised profit from their position.[28] It is acknowledged that there exists a debate in the literature on the issue of whether these duties should have, also, a prescriptive dimension.[29] This paper will assume that, until reconsidered by the High Court, accessorial liability requires a breach of trust or a disregard of either the 'no conflict' or 'no profit' fiduciary obligations.[30]

The plaintiff places great reliance and trust in their fiduciary because of the latter's undertaking to act selflessly in the exercise of a power or discretion capable of affecting the plaintiff in a legal or practical sense.[31] The trustee is a prime example of a fiduciary.[32] Since the plaintiff is vulnerable to acts of disloyalty, equity preoccupies itself with protecting them.[33] This is exemplified by the way in which a breach of either obligation triggers the fiduciary's inflexible liability to account.[34] The remedies available in respect of breaches are robust and claimant-friendly in order to deter such socially corrosive behaviour, contrary to the trustee or fiduciary's undertaking.[35] The liability attaches regardless of any good faith

23 *Bell Group* (2008) 39 WAR 1, 585 [4627]. The rule also applies regardless of whether the third party is an agent of the primary wrongdoer.

24 His Lordship had earlier identified 'trustee de son tort' as another circumstance of third party liability for implication in a breach of trust or fiduciary duty: see *Barnes v Addy* (1874) LR 9 Ch App 244, 251.

25 See, eg, *Gray v Johnston* (1868) LR 3 HL 1, 11.

26 *Farah* (2007) 230 CLR 89, 159 [161]. This action will be discussed below in Part III.

27 *Breen v Williams* (1996) 186 CLR 71, 113.

28 *Chan v Zacharia* (1984) 154 CLR 178, 198–9.

29 This issue is beyond the scope of this paper. See, eg, *Bell Group* (2008) 39 WAR 1, 565–7 [4539]–[4545].

30 It is acknowledged that a trustee may be in breach of their trust by acting contrary to the trust deed despite not contravening their proscriptive fiduciary obligations. Accessorial liability attaches where there has been culpable assistance in such a breach. This is why the primary breach is referred to as 'trust or fiduciary duty' in this paper. Equity's focus is always on the protection of the plaintiff beneficiary, no matter whether the trustee has breached their fiduciary or other trustee duty.

31 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7.

32 Ibid 96. A director is also presumed to owe fiduciary duties to their company, as is an agent to their principal.

33 Samantha Hepburn, *Principles of Equity and Trusts* (Routledge-Cavendish, 3rd ed, 2006) 83.

34 *Chan v Zacharia* (1984) 154 CLR 178, 204.

35 Remedies can be personal or proprietary. Equitable compensation and account of profits are common examples.

and irrespective of any demonstrable injury being occasioned to the plaintiff's interests.[36] Equity's treatment of the plaintiff's interests as paramount is evident.[37]

In light of equity's concern to protect the vulnerable plaintiff from exploitation, and to preserve the value and integrity of the trust or fiduciary relationship,[38] the imposition of equitable liability on third parties who assist in a breach of trust or fiduciary duty may fairly easily be justified.[39] While the desire to prevent fraudulent collusions between third persons and fiduciaries is quite clearly rational, a broader justification of deterring third parties from dishonestly assisting in any breach of trust or fiduciary duty is more deserving of support.[40] Successfully discouraging third parties in this way has the secondary and highly beneficial effect of restricting the opportunities for the commission of such breaches.[41]

This simpler rationale for accessorial liability, in contrast to that prevailing in Australia, is both coherent and fair. The dishonest and fraudulent design requirement will be now be critiqued to show why this is so.

## III SHOULD A DISHONEST AND FRAUDULENT DESIGN ON THE PART OF THE TRUSTEE REMAIN AN ELEMENT OF ACCESSORIAL LIABILITY?

Courts have given very little consideration to how the dishonest and fraudulent design requirement may be legitimised. As Bryan recognises, there has been an 'over-absorption with the question of knowledge', perhaps to the detriment of consideration of the dishonest and fraudulent design requirement.[42] This Part will evaluate the various arguments that have been advanced in support of and against the dishonest and fraudulent design requirement.

### A *Arguments in Favour of a Dishonest and Fraudulent Design Requirement*

Two distinct grounds can be identified from the legal literature which attempts to justify this limitation. The first rests upon precedent; the second on legal policy.

36 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408–9; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 145.

37 The fiduciary may only be absolved from liability if he or she can satisfy the court that the plaintiff provided fully informed consent to the breach: *Chan v Zacharia* (1984) 154 CLR 178, 204.

38 I M Jackman, *The Varieties of Restitution* (Federation Press, 1998) 146.

39 See, eg, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 397 ('*Consul*').

40 *Royal Brunei* [1995] 2 AC 378, 387.

41 See, eg, Simon Gardner, 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 *Law Quarterly Review* 56, 79–80.

42 Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 71.

### 1 *The Precedent Argument*

This is the weaker of the two justifications. However, it appears to be the preferred basis upon which most courts have acted.[43] Such courts appear to uncritically apply the dishonest and fraudulent design requirement by following older authorities that have retained this feature since it was first espoused by Lord Selborne. For example, in *Belmont*, Buckley LJ refused to depart from Lord Selborne's formulation of the claim to avoid 'an undesirable degree of uncertainty'[44] from entering the law. Goff LJ noted that such a departure would be 'dangerous and wrong'.[45] Similarly in *Equiticorp Industries Group Ltd v Hawkins*, Wylie J was unprepared to cast the first stone against this safe position.[46] To the same effect, in its dicta in *Farah*, the High Court has stated that it would be wrong for a lower court not to follow its earlier comments in *Consul*, which literally applied *Barnes v Addy*.[47] However, in doing so it failed to indicate whether it approved or disapproved of its prior reasoning in *Consul*.[48] The High Court also failed to adequately address significant judicial developments which had occurred in England since *Consul*,[49] or consider relevant legal opinion arguing against the modern utility of the dishonest and fraudulent design requirement.[50] Notably, Ridge recognises that 1975, the year in which *Consul* was decided, was a time in Australia's judicial history 'when English cases, although not binding upon the High Court, were accorded deference and respect that they would not receive automatically now'.[51] In that year, appeals from the High Court and state courts to the Privy Council were possible. Only four months after the decision in *Consul* were appeals from the High Court abolished.[52] In light of this reason and others, Ridge suggests that the High Court's strict reliance upon *Consul*, and in turn upon *Barnes v Addy*, was misguided.[53]

For final courts of appeal to pursue this mode of decision-based reasoning is undesirable. It avoids an explanation of why the law espoused in the earlier authorities is correct in principle, as well as a consideration of legal policy. This

43 See, eg, *Farah* (2007) 230 CLR 89, 160 [163]; *Consul* (1975) 132 CLR 373, 408 (Stephen J); *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 292–3; *Belmont* [1979] 1 Ch 250, 267; *Baden* [1993] 1 WLR 509, 574 [245]; *Gold v Rosenberg* [1997] 3 SCR 767, 781–2 [30].

44 *Belmont* [1979] Ch 265, 267.

45 Ibid 274.

46 [1991] 3 NZLR 700, 727–8.

47 See *Farah* (2007) 230 CLR 89, 164 [179]–[180].

48 *Quince v Varga* [2008] QSC 61 (3 April 2008) [125].

49 See, eg, *Royal Brunei* [1995] 2 AC 378.

50 Editorial, 'Civil Accessory Liability — Clarity at Last' (1995) 16 *Company Lawyer* 226, 226; Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 89; J K Maxton, 'Equity' [1990] *New Zealand Recent Law Review* 89, 94; Finn, above n 18, 213–14; Gerwyn L H Griffiths, 'A Matter of Principle — The Basis of Secondary Liability for Knowing Assistance' [1996] *Journal of Business Law* 281, 283.

51 Pauline Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 119, 130.

52 *Privy Council (Appeals from the High Court) Act 1975* (Cth) s 3.

53 Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty', above n 51, 130. Ridge argues, for example, that it is difficult to discern a clear ratio decidendi from *Consul* due to the different reasons employed by the members of the High Court in their separate judgments.

formulaic approach has the potential, according to Ridge, 'to mislead lower courts as to why the law is as it is'.[54] It also assumes, at times erroneously, that the prior case law comprising the precedent has set defensible legal rules worth upholding.[55]

In summary, the precedent rationale, as a basis for supporting the dishonest and fraudulent design requirement, treats *Barnes v Addy* as possessing in effect legislative status, locking future courts into a view set by history.[56] This uncritical acceptance of precedent, for example, meant that Austin J, despite recognising that accessorial liability 'is in need of further rationalisation and restatement',[57] reluctantly followed *Consul*, and in turn, *Barnes v Addy.* The precedent rationale also takes the dishonest and fraudulent design requirement for granted. It does this by encouraging courts to be preoccupied with semantic exercises as to what a dishonest and fraudulent design means, at the expense of an understanding as to why it is, if at all, an appropriate prerequisite.[58] Ridge argues that more is required from the High Court by way of reasoning, a point which will be discussed further in the next Part of this paper.[59]

## 2 *The Legal Policy Argument*

The arguments that exhibit a policy-based foundation for the dishonest and fraudulent design requirement are more persuasive.

The tenor of Lord Selborne's comments in *Barnes v Addy*, although by no means explicit, suggest that a dishonest and fraudulent design requirement is necessary to protect susceptible third parties — who might otherwise be held liable — from being unable to discharge their office safely, such as solicitors, accountants or bankers.[60] The notion that a dishonest and fraudulent design requirement ensures that third parties do not become regarded as insurers for fiduciary misconduct has been also recognised by commentators.[61] The argument is that an expansively defined test may render it difficult for trustees or other fiduciaries to exercise their responsibilities, because they greatly rely upon services offered by parties who may be subject to claims of this sort.[62] If the risk of being sued under accessorial

54 Ibid 127.

55 Ibid 127–8.

56 Robert Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 *Sydney Law Review* 187, 189.

57 *NCR Australia Pty Ltd v Credit Connection Pty Ltd (in liq)* [2004] NSWSC 1 (14 January 2004) [164] ('*NCR Australia*').

58 Philip Podzebenko, 'Redefining Accessory Liability: *Royal Brunei Airlines Sdn Bhd v Tan*' (1996) 18 *Sydney Law Review* 234, 236.

59 Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty', above n 51, 127–8. See Part III below.

60 *Barnes v Addy* (1874) LR 9 Ch App 244, 252; Gardner, above n 41, 76–7.

61 Austin Wakeman Scott, 'Participation in a Breach of Trust' (1921) 34 *Harvard Law Review* 454, 481–2; H A Ford and W A Lee, *Principles of the Law of Trusts* (Law Book Company, 2nd ed, 1990) 1029; Robert Fardell and Kerry Fulton, 'Constructive Trusts — A New Era' [1991] *New Zealand Law Journal* 90, 102; William Blair, 'Secondary Liability of Financial Institutions for the Fraud of Third Parties' (2000) 30 *Hong Kong Law Journal* 74, 79.

62 Tom Allen, 'Fraud, Unconscionability and Knowing Assistance' (1995) 74 *Canadian Bar Review* 29, 30.

liability is too real, those third parties would arguably be reluctant to deal with trustees or fiduciaries, or impose higher charges for their services in order to indemnify themselves.[63]

Fardell and Fulton are strong proponents of the dishonest and fraudulent design limitation. They recognise that a third party does not — unlike the primary wrongdoer — voluntarily undertake to sacrifice their self-interest to advance that of the plaintiff.[64] Accordingly, there is no basis for the plaintiff to place any trust and confidence in the third party.[65] Fardell and Fulton also note that an alleged accessory does not beneficially receive any property impressed with a trust or fiduciary duty, arising from their assistance.[66] Furthermore, judgment against a third party imposes a potentially large liability — the extent of their liability duplicates that of the primary wrongdoer.[67] These factors demonstrate how the dishonest and fraudulent design requirement operates as a crucial 'control mechanism' in the accessorial liability claim.[68] The requirement is seen as enabling the law to properly exercise its loss allocation function. Ridge shares this opinion, and argues that the plaintiff should only succeed in this action in 'narrow and exceptional' circumstances.[69]

Sullivan discusses the example of a third party agent of a trustee who is directed by the latter, their principal, to dispose of trust property received by the former in a non-beneficial capacity in breach of trust.[70] If disposal of the property would mean that the agent is participating in trustee fraud, Sullivan accepts that the former should terminate the agency contract rather than follow their principal's directions.[71] However, in her view, the law should not require the agent to terminate the agency contract whenever the agent believes that the trustee's instructions might be contrary to the trust deed in circumstances falling short of fraud.[72] Otherwise, she argues, a burdensome obligation would be placed upon the agent to understand their principal's undertaking to the plaintiff each time they receive, in a ministerial manner, trust property.[73] Since the agent's loyalties lie with their principal, Sullivan argues they should be 'free to follow the latter's instructions short of participating in a fraud'.[74] It is submitted that the agent status of a third party, including their relationship with the primary wrongdoer,[75] can

63 Scott, above n 61, 481–2.

64 Fardell and Fulton, above n 61, 102.

65 Patricia L Loughlan, 'Liability for Assistance in a Breach of Fiduciary Duty' (1989) 9 *Oxford Journal of Legal Studies* 260, 262–3.

66 Fardell and Fulton, above n 61, 102. The plaintiff would otherwise claim under knowing receipt.

67 Joachim Dietrich, 'The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *Melbourne University Law Review* 106, 133.

68 Fardell and Fulton, above n 61, 102.

69 Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty', above n 51, 138.

70 Ruth Sullivan, 'Strangers to the Trust' (1986) 8 *Estates and Trusts Quarterly* 217, 246.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid.

75 Including the third party agent's ability to disobey the primary wrongdoer's instructions.

assist the court in determining whether the third party's assistance has been at fault. This is preferable to relying on the agency of the third party as a rationale for requiring that the trustee or fiduciary's breach of duty must encompass a dishonest or fraudulent design. Part IV of this paper will return to this point.

These arguments, which constitute the policy rationale, together present a strong argument for the careful control of the scope of accessorial liability. They show why the third party should not be subject to an inflexible obligation to account. This was arguably the implicit goal of Lord Selborne.[76] However, the arguments fail to satisfactorily support why, specifically, the mala fides of the primary wrongdoer should be the appropriate qualifying factor, if such a qualifying factor be required at all.[77] For reasons which will be discussed in the next part, such a control mechanism cannot be defended.

## B *Arguments That a Dishonest and Fraudulent Design Produces Inequitable and Unjust Results*

### 1 *The Failure to Achieve Corrective Justice Argument*

The position in Australia — which requires the primary wrongdoer to have exhibited a dishonest and fraudulent design — is inconsistent with fundamental principles of private law, particularly that of corrective justice.

As Weinrib recognises, private law consists of 'our most deeply embedded institutions about justice and personal responsibility',[78] such as the law of fiduciary obligations and the related accessorial liability doctrine. One of its primary objectives is to regulate the injuries people inflict, which requires the judicial administration of corrective justice.

The essence of corrective justice is described by Weinrib as 'correlativity'.[79] That is, a finding of the defendant's liability must reflect a conclusion 'that the parties are situated correlatively to each other as doer and sufferer of the same injustice'.[80] The 'doer' should be held to undo the injustice they have inflicted, revealing the relational nature of this bipolar notion of liability.[81] With these features of corrective justice in mind, it is essential that each factor which conditions the defendant's liability is both 'coherent and fair'.[82] To merit this description, the factors must also be correlatively structured in a framework relating the defendant to the plaintiff.[83] This enables the parties' private law relationship to be regarded as

76 See, eg, Charles Harpum, 'The Stranger as Constructive Trustee: Part I' (1986) 102 *Law Quarterly Review* 114, 145–7.

77 Richard Nolan, 'From Knowing Assistance to Dishonest Facilitation' (1995) 54 *Cambridge Law Journal* 505, 505.

78 Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, revised ed, 2012) 1.

79 Ibid xiv.

80 Ibid.

81 Ibid.

82 Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) 18.

83 Weinrib, *The Idea of Private Law*, above n 78, xiii.

a 'normative unity'[84] and the particular liability regime to function as a 'coherent enterprise'.[85] Any limitation which is relevant to only one party will mean the private law doctrine in question will be unfair from the position of both.[86]

In the context of accessorial liability, the plaintiff has a right in equity to expect that their trustee or fiduciary will perform their undertaking. By way of logical extension, the plaintiff also has a right to assume that any outside party will refrain from intentionally intruding in their trustee or fiduciary's affairs.[87] This creates a correlative and corresponding obligation upon outsiders not to so intrude. An analogy may be drawn to the common law action of procuring a breach of contract, where the existence of a binding contract entitles each party to expect its proper performance; this, in turn, imposes a correlative duty upon the rest of the world not to wrongfully procure its breach.[88] Lord Nicholls has identified the rationale in both cases as the same.[89] The plaintiff's personal entitlement to claim against the third party exists only because of the latter's correlative obligation towards them. They hold what McFarlane refers to as a 'protected personal right'.[90] Where the third party defendant disregards this right by culpably assisting in a primary wrongdoer's breach of trust or fiduciary duty, he or she becomes the 'doer' of the injustice occasioned by this breach.[91] No further causal link need be shown.[92] As Part IV of this paper will suggest, whether a third party is 'culpable' will require a variety of factors to be taken into account. For example, the third party's occupation and level of intelligence will affect whether they had the reasonable opportunity to detect and thus refuse to participate in the anticipated breach of the trustee or fiduciary. If no such reasonable opportunity was available to the third party having regard to those factors, then arguably the plaintiff held no personal right to which the former owed a duty not to infringe. If the opportunity was open and taken advantage of by the third party, then the causal link can be made. This is because it can be said that the trustee or fiduciary's breach would not have occurred but for the third party's actions, or that the primary wrongdoer realised their gains or caused loss to the plaintiff, 'more easily or sooner than would have occurred without the assistance'.[93] Furthermore, the accessorial liability claim in itself presupposes that the third party's actions constitute a form of equitable wrongdoing or harmful event, which creates an injustice for which they should

84 Weinrib, *Corrective Justice*, above n 82, 18.

85 Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 356.

86 Weinrib, *Corrective Justice*, above n 82, 18.

87 *Royal Brunei* [1995] 2 AC 378, 387.

88 *Lumley v Gye* (1853) 2 El & Bl 216, 231–2; 118 ER 749, 755.

89 *Royal Brunei* [1995] 2 AC 378, 387.

90 Ben McFarlane, 'Equity, Obligations and Third Parties' [2008] *Singapore Journal of Legal Studies* 308, 315.

91 Dishonest assistance has been described as 'equitable wrongdoing': *Grupo Torras SA v Al-Sabah [No 5]* [2001] CLC 221, 255 [119], [123] ('*Grupo Torras*'), citing *MacMillan Inc v Bishopsgate Investment Trust plc [No 3]* [1996] 1 WLR 387, 407 (Auld LJ).

92 *Grupo Torras* [2001] CLC 221, 255 [119].

93 Ford and Lee, *The Law of Trusts*, above n 17, [22.10140].

account.[94] This injustice involves the plaintiff suffering an actual loss and/or the integrity of the private law institution of the trust or fiduciary arrangement being threatened.[95] In either form, the plaintiff becomes the 'sufferer' of this injustice because the primary wrongdoer's important undertaking to act loyally is compromised with the third party's assistance.

Now that the correlative nature of the parties' relationship has been set out, it is clear that the presence of the dishonest and fraudulent design condition in the accessorial liability doctrine can impede a court from exercising the 'rectificatory function' of corrective justice when determining claims of this kind.[96] The plaintiff suffers from the injustice just described irrespective of the moral quality of the breach of trust or fiduciary duty in which the third party has participated. This cannot be left without rectification by a third party in circumstances where they have ignored their correlative duty to the plaintiff by culpably assisting in an innocent breach.[97] However, this is a result sanctioned by the High Court in *Farah*. A dishonest and fraudulent design cannot claim to be fair and coherent. It is not representative of the correlativity between the plaintiff and defendant because it operates as an entirely external consideration which relates to neither party.[98] It is also a factor that is unilaterally favourable to the third party defendant, meaning that the test for accessorial liability does not appropriately reconcile the parties' competing bilateral interests. This is why the doctrine cannot presently be said to possess any 'justificatory coherence',[99] nor be accepted to express the parties' relationship as a 'unified whole'.[100]

The primary wrongdoer's liability is capable of enforcement only by way of separate proceedings upon the application of principles peculiar to the law of fiduciary obligations. A dishonest and fraudulent design may only be relevant, coherent and fair to an action as between the plaintiff and the defaulting trustee or fiduciary as defendant, since it respects the correlativity inherent in that separate private law relationship.[101] Therefore, Fardell and Fulton's argument that a dishonest and fraudulent design in accessorial liability reflects the 'desire to restrict liability for breaches of fiduciary duty to the fiduciaries themselves',[102] is weak. It does not appreciate that the third party is liable for their own culpable assistance in the breach, a secondary but different type of equitable wrong to that of the primary wrongdoer.

94 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 105 (Kirby P) ('*Equiticorp*').

95 Allen, above n 62, 32–3. For example, where the third party and/or primary wrongdoer makes an unauthorised gain which the plaintiff would not have been able to make itself.

96 Weinrib, *Corrective Justice*, above n 82, 16.

97 *Royal Brunei* [1995] 2 AC 378, 385.

98 Ibid; Editorial, above n 50, 226.

99 Weinrib, *Corrective Justice*, above n 82, 18.

100 Ibid 3.

101 That is, the plaintiff's right to expect that their trustee or fiduciary will not engage in disloyal conduct contrary to the latter's undertaking, and the trustee or fiduciary's correlative duty not to place their interests before that of the plaintiff or make an unauthorised gain from their position.

102 Fardell and Fulton, above n 61, 102.

In light of these arguments, it is not surprising that the dishonest and fraudulent design requirement has been described as 'responsible for some complex, and arguably unnecessary, analysis of the nature of the breach of fiduciary duty by the principal wrongdoer'.[103] This view has recently been endorsed by Lord Sumption in *Williams v Central Bank of Nigeria* where his Lordship stated that there was no rational reason why a consideration, namely the honesty or dishonesty of the trustee or fiduciary, which has no bearing on the liability of the third party, should limit the scope of the accessorial claim.[104] The incoherence of this limitation thereby represents a hindrance to the realisation of corrective justice. This can be easily redressed by its removal from the accessorial liability claim.

Corrective justice is the appropriate principle to be observed in accessorial liability cases in preference to other principles, such as distributive justice. This is because it recognises that a third party wrongdoer should be accountable for consequences they have themselves contributed to creating and it responds to circumstances where the other wrongdoer, namely the errant trustee or fiduciary, is financially incapable of repairing the damage occasioned by their breach. If the primary wrongdoer *does* have the financial means to account to the plaintiff, then arguably the notion of distributive justice should intrude to the extent of enabling both the third party assistant and the trustee or fiduciary to be held jointly liable.

## 2 *The Disregard of the Defendant's Conscience Argument*

Equity's commitment to corrective justice in relation to accessorial liability can only be shown if the court's inquiry is focused upon whether the defendant's conscience has been affected vis à vis the plaintiff. This seminal principle of equity was first explained in detail in the seventeenth century *Earl of Oxford's Case*.[105] One of the enduring statements from that case is that '[t]he Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions'.[106] In light of this, it is uncontroversial that third party fault has been considered an indispensable ingredient in the test for accessorial liability.[107] This is what necessarily qualifies the third party's correlative duty to the plaintiff,[108] and is a consideration which is fair to each party in this bilateral claim. Birks, for example, correctly describes accessorial liability as 'unintelligible without fault'.[109] As McFarlane states, it would be harsh if the third party were to be held accountable merely for their assistance in the primary wrongdoer's breach.[110] He

103 Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 89.

104 [2014] AC 1189, 1209–10 [35].

105 (1615) 1 Chan Rep 5; 21 ER 485.

106 Ibid 486. The Office of the Chancellor has developed into what is now known as courts exercising equitable jurisdiction. In the context of the law of fiduciary obligations, it is the trustee or fiduciary's compromise of their undertaking to the plaintiff which triggers the intervention of equity to correct the defendant's adverse conscience.

107 *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2; G E Dal Pont, 'Equity's Chameleon — Unmasking the Constructive Trust' (1997) 16 *Australian Bar Review* 47, 56.

108 McFarlane, above n 90, 315.

109 Peter Birks, 'Misdirected Funds' (1989) 105 *Law Quarterly Review* 352, 355.

110 McFarlane, above n 90, 315.

supports this argument by noting the difficulties for outsiders in discovering for themselves whether the party with whom they are dealing is a fiduciary or trustee, and the problems arising from the myriad of actions that can amount to a breach of trust or fiduciary duty.[111] This position formulates accessorial liability so as to conform to the principle as explained in the *Earl of Oxford's Case*. However, the failure to show a dishonest and fraudulent design can lead to a serious violation of this important principle of equity.

This can be illustrated by the following examples. As mentioned, trustees and other fiduciaries frequently rely on services offered by outsiders such as stockbrokers, legal advisers and accountants, often because they lack the professional expertise necessary to perform some aspects of their undertaking to the plaintiff.[112] An adviser may concoct, deliberately, a unilateral and secretive scheme to defraud the plaintiff which does not involve the receipt of any direct material benefit.[113] This scheme may take the form of inaccurate advice, which may facilitate but not *procure* the ignorant primary wrongdoer to unwittingly infringe their fiduciary obligation.[114] Let us take a second example. A trustee may negligently, but not dishonestly and fraudulently, dissipate trust funds entrusted to him or her contrary to the trust deed, constituting a breach of trust and fiduciary obligation on the part of the trustee. This dissipation may have been assisted by a third party who knew full well what they were doing. The third party's assistance may, for example, have involved them acting as a conduit for the dissipation of the funds, or in preparing the necessary documentation to better enable the trustee's breach.[115] In both these examples, it may be that the primary wrongdoer cannot be pursued due to their personal insolvency and the trust property no longer being in existence. The fate of the plaintiff in each instance, in respect of a claim in accessorial liability against the third party, is clear under Australian law. They would not succeed. A critical element — that the primary wrongdoer's breach exhibited a dishonest and fraudulent design — would be lacking in both cases. This shows how the dishonest and fraudulent design limitation can essentially determine the plaintiff's claim, since the third party's knowledge and assistance needs to be connected with such behaviour by the primary wrongdoer.[116] Moreover, the examples demonstrate how Australia's position may lead courts to reach what many describe as unfair, erroneous, illogical, unsatisfactory, and seriously deficient results.[117] The close dealings that the third party may have with the primary wrongdoer and the ease with which they may be able to interfere are seen to be irrelevant.[118] The consequence is that the court must leave the defendant's

111 Ibid.

112 Thomas and Hudson, above n 19, 892 [30.49].

113 Ibid.

114 Griffiths, above n 50, 283.

115 For an example in the case law of a third party acting in this way, see *Barlow Clowes* [2006] 1 WLR 1476.

116 *Baden* [1993] 1 WLR 509, 575 [248].

117 *Royal Brunei* [1995] 2 AC 378, 385; Loughlan, above n 65, 267; Griffiths, above n 50, 284.

118 Loughlan, above n 65, 263; Gardner, above n 41, 81.

tainted conscience uncorrected, contrary to the spirit of the principle explained in the *Earl of Oxford's Case*.

Furthermore, the court in these circumstances cannot observe the equitable maxim that equity will not suffer a wrong without a remedy, which is regarded as having the 'first claim on the loyalty of the law'.[119] This is because the absence of any mala fides on the part of the primary wrongdoer can be used as a self-protective device by the third party to defeat the plaintiff's claim against them, and to accordingly immunise their blatant impropriety from the court. This shows how the normative force of the dishonest and fraudulent design limitation fails to respond to the relational implications of the parties' interaction. That is, the requirement prevents a third party's culpable assistance in an inadvertent breach of trust or fiduciary duty from being linked to the plaintiff's suffering of the injustice resulting from it. This deprives the latter of an entitlement to have the former rectify this injustice.[120] The common law does not provide a remedy against an outsider who has dishonestly violated the plaintiff's personal right to assume that their trustee or fiduciary's responsibilities will be exercised properly without intrusion. Consequently, it is the responsibility of equity to ensure the aggrieved party is able to vindicate its right. This explains why equity is regarded as justified when it intervenes in order to hold 'a fraudster, shyster or wrongdoer'[121] accountable for the consequences of their exploitative actions. Intervening in such a manner protects the underlying right of the plaintiff which has been taken advantage of.[122] As explained, the notion that wrongs should be remedied carries the risk of being ignored by the application of the prevailing test for accessorial liability in Australia. For this reason, and also having regard to the fact that members of the professional community are typical defendants to claims of this kind, Kirby P claimed that the dishonest and fraudulent design requirement insufficiently promotes professional and/or commercial morality.[123] No legal or moral consequences are attached to such persons where their wrongful interference has involved an innocent breach by the primary wrongdoer, the commission of which they may have assisted, for instance, by exploiting the primary wrongdoer's lack of expertise.

Two cases will now be discussed to further accentuate the shortcomings this section has exposed of the dishonest and fraudulent design condition in the accessorial liability claim.

Justice Iacobucci's comments in *Air Canada v M & L Travel Ltd*[124] involve judicial reasoning which elevates the importance of the dishonest and fraudulent design requirement rather than the third party's alleged actions. In that case, it was agreed that travel agency M & L would issue airline tickets on Air Canada's

119 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663.

120 Note the discussion above showing how the causal link between the third party's culpable assistance and the consequences of the breach of trust or fiduciary duty can be established.

121 Alastair Hudson, *Equity and Trusts* (Routledge, 7th ed, 2013) 22.

122 Ibid.

123 *Equiticorp* (1993) 32 NSWLR 50, 105.

124 [1993] 3 SCR 787 ('*Air Canada*').

behalf to the public.[125] The proceeds of these sales, less commission, were to be held on trust for Air Canada until M & L satisfactorily accounted for them twice a month. In breach of its 'no conflict' fiduciary obligation, M & L deposited the proceeds into its general trading account to reduce its indebtedness to the bank.[126] The financial difficulties facing M & L caused the bank to apply the moneys from the trading account to satisfy outstanding repayments on loans it had made to M & L.[127] Air Canada sued two directors of M & L for their alleged assistance in this breach of trust. Like Australia, Canadian authority requires the plaintiff to prove that the primary wrongdoer has engaged in a dishonest and fraudulent design.[128] In interpreting *Barnes v Addy*, Iacobucci J stated that the first and primary issue to consider was whether M & L's breach was fraudulent and dishonest, 'not whether the … [third parties'] actions should be so characterized'.[129] Allen describes this approach as 'curious' because it seems to deny that the defendant's conscience is a significant component of the accessorial liability action.[130] Consequently, once the Supreme Court of Canada found that M & L had breached its duty as trustee, it *additionally* examined the moral nature of this breach. A dishonest and fraudulent design was found to have existed. M & L knew that the proceeds from sold airline tickets were not at its absolute disposal and that the bank would seize any positive balance in its general trading account to cover outstanding repayments on loans.[131] M & L had taken a risk to the prejudice of Air Canada which it knew it had no right to take.[132] This allowed the court *only at this point* to shift its examination to the conduct of the two defendant directors. These defendants were found to have knowingly assisted in the breach of trust through their involvement in removing funds from M & L's general account, triggering the bank to seize the remaining balance which included moneys due to Air Canada.[133]

The undesirability of Iacobucci J's approach to deciding a claim in accessorial liability, which is compliant with Lord Selborne's formulation, is further demonstrated by the decision of the Court of Appeal of Brunei Darussalam in the *Royal Brunei* litigation.[134] The facts closely resemble those of *Air Canada*. Royal Brunei Airlines had appointed Borneo Leisure Travel (BLT) to act 'as its general travel agent for the sale of passenger and cargo transportation'.[135] BLT was required to hold all proceeds, less commission, on trust for Royal Brunei until accounted for. However, it credited these trust moneys into its general trading account. These funds were then misapplied — in violation of BLT's

125 Ibid 796.

126 Ibid 796–7.

127 Ibid 797.

128 Ibid 825.

129 Ibid.

130 Allen, above n 62, 33.

131 *Air Canada* [1993] 3 SCR 787, 826.

132 Ibid.

133 Ibid 827.

134 *Royal Brunei* [1995] 2 AC 378. This was an appeal from the first instance decision of the High Court of Brunei: *Royal Brunei Airlines Sdn Bhd v Tan* [1993] BNHC 18.

135 *Royal Brunei* [1995] 2 AC 378, 382.

'no conflict' fiduciary obligation — to meet ordinary business expenses.[136] BLT had been in arrears in accounting to Royal Brunei due to its dire financial state. Action was thereby instituted by Royal Brunei against BLT's managing director and principal shareholder, Tan. Tan had never beneficially received the misapplied trust money — consequently the issue was whether he could be personally accountable under accessorial liability for knowing assistance. Tan's alleged assistance was in his authorisation of the trust moneys' misappropriation. The Court of Appeal dismissed Royal Brunei's claim. It found that BLT's breach of trust was merely 'a sorry tale of mismanagement and broken promises',[137] but did not reveal any dishonest and fraudulent design. Therefore, a literal application of Lord Selborne's formulation of accessorial liability resulted in Royal Brunei failing to recover the unpaid proceeds from the sale of their airline tickets. This was despite Tan's concession that he had ignored his correlative duty to Royal Brunei by assisting in BLT's breach of trust 'with actual knowledge'.[138] The Privy Council overturned the decision of the Court of Appeal, holding that Tan was liable as for dishonest assistance under a reformulated principle of accessorial liability principle endorsed by Lord Nicholls which, crucially, eliminated the dishonest and fraudulent design requirement.[139] It may be argued that Tan in fact went further and *procured* BLT's breach because the travel agency was in effect his corporate alter ego, and that accordingly a dishonest and fraudulent design did not have to be established. However, since the Privy Council merged the procurement and assistance claims into a single action, the issue of whether the case was one of procurement or assistance becomes irrelevant. Whichever form Tan's conduct took, Lord Nicholls' comments convincingly advocate that a dishonest and fraudulent design should not limit the plaintiff's claim. Since Lord Nicholls' reformulation is yet to be adopted by the High Court, the appeal decision is useful in exposing the flaws in Australia's position on accessorial liability. It is an example of how the dishonest and fraudulent design limitation can compel the court to disregard the fundamental principle stated in the *Earl of Oxford's Case*.

Curbing third party furtherance of trustee or fiduciary fraud is indisputably a desirable aim for equity to pursue, since, as Bryan recognises, fraud is a 'social activity' in which fraudsters generally 'succeed in implicating other parties in their schemes'.[140] However, as this paper contends, equity must go further than this in order to safeguard the right of the vulnerable plaintiff and the integrity of the private legal institution of the trust or fiduciary relationship from the exploitative actions of third parties. The dishonest and fraudulent design requirement fails to ensure that the accessorial liability doctrine is capable of realising this objective. It permits the defendant's adverse conscience to be overshadowed by a complex

136 Ibid 383.

137 Ibid.

138 Ibid. Lord Nicholls quoted from the judgment of Fuad P in the Court of Appeal, where Fuad P indicated that unless the trustee's breach had been dishonest, Mr Tan's knowing assistance was immaterial: at 383–4.

139 Ibid 392.

140 Michael Bryan, 'Equity and the Warped Moral Approach' (2006) 17 *King's College Law Journal* 105, 105.

examination of the moral nature of the primary wrongdoer's misconduct.[141] This is additional to what the law recognises as a breach of trust or fiduciary duty, the finding of which rests on a very low fault threshold. The consequence is that the rationale for equity's intervention is left inexplicably constrained in Australia.[142] The court is being compelled not to recognise and redress impropriety 'where it should'.[143] As Lord Nicholls argues, the case of the honest trustee and dishonest third party ought, if anything, to strengthen the plaintiff's case on the question of the latter's liability.[144] By failing to hold the third party to account in such circumstances, the court, according to Kirby P, 'fails to share risks equitably'.[145] Therefore, it should not matter whether the breach was 'fraudulent or negligent, devious or foolish, heinous or indifferent'.[146]

This reasoning reflects that adopted by the House of Lords in *Gray v Johnston*,[147] a case decided prior to *Barnes v Addy* but which was not acknowledged either in that case or subsequent cases on accessorial liability. In that case, Mr Johnston and his business partner, Mr Mayston, had banked with the appellants, using an account in Mr Johnston's name. The appellants held life insurance policies of Johnston as security for the account's overdraft. Upon Johnston's death, both business partners remained indebted to the appellants. Mrs Johnston was the executrix of her husband's will, and continued the business in partnership with Mr Mayston, using a new bank account in both their names.[148] Part of the proceeds from the insurance policies were applied by the appellants to satisfy the outstanding repayments owed to them by Mr Johnston, with the balance being transferred eventually to executrix, Mrs Johnson. Instead of distributing the balance in accordance with the insurance policies, the appellants honoured a cheque presented by Mrs Johnston for the funds to be credited into the new partnership account.[149] Two issues faced the House of Lords. First, whether Mrs Johnston had breached any trust obligation owed to the beneficiaries of the insurance policies, and second, whether the appellants had participated in the breach by permitting the moneys to be deposited into the business account.

The House of Lords doubted whether a breach actually occurred, but even if it did, it could not affirmatively find that the appellants were privy to or had been dishonestly implicated in Mrs Johnston's supposed breach.[150] In this case the appellants were not influenced by any personal benefit from the transaction that may have arisen by having the funds deposited so as to reduce the overdraft

141 Maureen Ward and Nathan Shaheen, *Third Party Liability for Knowing Assistance* (April 2013) Bennett Jones, 2 <http://acfi.ca/docs/FraudLawUpdate-April2013.pdf>.

142 *Equiticorp* (1993) 32 NSWLR 50, 105.

143 Allen, above n 62, 38.

144 *Royal Brunei* [1995] 2 AC 378, 384. See also Loughlan, above n 65, 267; Griffiths, above n 50, 283; Allen, above n 62, 36.

145 *Equiticorp* (1993) 32 NSWLR 50, 105.

146 *Powell v Thompson* [1991] 1 NZLR 597, 613 ('*Powell*').

147 (1868) LR 3 HL 1.

148 Ibid 9–10.

149 Ibid 10.

150 Ibid 12.

of the partnership's account.[151] The House Lords' analysis focused entirely upon whether the third party bankers had culpably participated in the alleged breach of trust. The Court did not categorise stranger liability into distinct causes of action of knowing receipt, accessorial liability and knowing procurement. This suggests that the House of Lords acknowledged the existence of a single head of participatory liability which did not feature a dishonest and fraudulent design element. Beneficial receipt of property subject to a trust or fiduciary obligation was treated as a circumstance tending to show third party culpability.[152] The House of Lords accordingly left open the possibility of circumstances other than beneficial receipt being sufficient to constitute culpability, such as dishonest assistance in the breach. The focus on the third party's actions should be restored by the High Court, but this can only be achieved through the removal of the dishonest and fraudulent design requirement from the test for accessorial liability. Furthermore, the argument that 'the latitude inherent' in the dishonest and fraudulent design requirement is necessary to ensure no disturbance to the proper functioning of ordinary commerce, is unsatisfactory.[153] So long as third party fault conditions the claim, there is no good reason for the 'commercial community' to be entitled to any further protection by equity.[154] To this extent, Thomas J argues, convincingly, that equity's tolerance should not 'be raised to meet some perceived commercial need'.[155]

This discussion demonstrates that equity cannot be said to display any commitment to the fulfilment of corrective justice so long as dishonest and fraudulent design remains an essential component of the accessorial liability claim. Its non-correlative features means the claim does not possess any internal coherency.

### 3 *The High Evidential Threshold Argument*

The plaintiff's obligation to show the primary wrongdoer's dishonest and fraudulent design makes their accessorial liability claim difficult to prove.[156] Since this is a civil claim, the plaintiff must establish their case on the balance of probabilities. There is a consensus among courts that the dishonest and fraudulent design requirement, because it involves an allegation of fraud, impacts the quality of evidence the plaintiff must tender in order to reach this civil standard.[157] The High Court has explicitly confirmed that the principle stated in *Briginshaw v*

151 Ibid 13.

152 Ibid 11.

153 *Powell* [1991] 1 NZLR 597, 614 (Thomas J).

154 Ibid.

155 Ibid.

156 Paul M Perell, 'Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty' (1998) 21 *Advocates Quarterly* 94, 116–18; Ward and Shaheen, above n 141, 2.

157 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 450; *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd [No 3]* [2013] WASC 183 (17 May 2013) [657]–[658].

*Briginshaw*[158] should be engaged in this regard.[159] In interpreting *Briginshaw* the High Court has recognised that an allegation of fraud is sufficiently serious and grave in character such that the evidence expected to be adduced must be of the clearest as well as the most persuasive and cogent type.[160] An affirmative finding must 'not lightly' be made; the court must scrutinise the evidence to be satisfied it does not suggest the execution of a dishonest and fraudulent design in a mere loose and inexact manner, since dishonest and fraudulent conduct is behaviour in which members of society 'do not ordinarily engage'.[161] This means that it is the plaintiff's responsibility to ensure that their statement of claim properly pleads and particularises this assertion.[162]

This onerous evidential burden has prejudicial consequences. It can be difficult for a plaintiff to prove persuasively a moral deviation by the primary wrongdoer. For example, the defaulting trustee or fiduciary has a special ability 'to conceal or mask' their conduct by virtue of their position of power and control in the trust or fiduciary relationship.[163] Furthermore, the primary wrongdoer may have absconded, or otherwise be unapproachable by the plaintiff.[164] In such circumstances, a lawyer would be ethically bound to advise the client not to pursue an accessorial liability claim despite there being cogent evidence of the third party's wrongful assistance in the primary wrongdoer's breach. This obligation is potentially dissuading plaintiffs from instigating accessorial liability claims. The lack of case law in which courts have dismissed plaintiffs' claims on the basis of inadequate proof of a dishonest and fraudulent design arguably demonstrates this consequence in practice. Another prejudicial consequence is that the plaintiff must expend their own time and financial resources on collecting material to establish the degree of impropriety of a party they have made a conscious decision not to pursue legally. It is undesirable for the dishonest and fraudulent design requirement to remain as a qualification in the test for accessorial liability since the seriousness and gravity of such an allegation is directed towards a party who is not a defendant before the court.[165]

158 (1938) 60 CLR 336, 362 ('*Briginshaw*'). The High Court stated (at 362):

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

159 *Farah* (2007) 230 CLR 89, 162 [170].

160 *Rejfek v McElroy* (1965) 112 CLR 517, 521; *Bell Group* (2008) 39 WAR 1, 607 [4730]–[4731].

161 *Briginshaw* (1983) 60 CLR 336, 386.

162 *Farah* (2007) 230 CLR 89, 162 [170].

163 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375, 381–2.

164 Ford and Lee, *The Law of Trusts*, above n 17, [22.10140].

165 Paul O'Brien and Anthony Di Mento, *The Second Limb of Barnes v Addy* (February 2009) Yeldham Price O'Brien Lusk, 6 <http://www.ypol.com.au/pdfs/secondlimb.pdf>.

### 4 *The Argument That a Dishonest and Fraudulent Design Is Not Required in Other Equitable Claims Related to Accessorial Liability*

In Australia, the related but distinct equitable claim of knowing inducement requires the plaintiff to prove that a third party knowingly induced the primary wrongdoer's breach of trust or fiduciary obligation, irrespective of any dishonest or fraudulent design on the part of the latter.[166] 'Inducement' has been described as something more than assistance.[167] The absence of the dishonest and fraudulent design limitation is justified on the ground that it would be 'absurd' for the instigator to escape liability merely because the breach which they induced was not dishonest and fraudulent in character.[168] The issue which arises here is whether a meaningful distinction can be drawn between accessorial liability and knowing inducement. Ridge and Dietrich recognise that there is no principled reason why such a differentiation is necessary.[169] Lord Nicholls addressed this issue in his groundbreaking judgment in *Royal Brunei*. This resulted in a refashioning of accessorial liability in England, which has also been followed in New Zealand.[170] Irrespective of whether a third party solicitor knowingly induced or dishonestly facilitated an honest trustee to misapply trust property, Lord Nicholls decided that the same finding of personal accountability should ensue.[171] His Lordship could not elicit any clear reason why the dishonest and fraudulent design requirement should differentiate the two claims if in each case the third party has participated with sufficient culpability in the breach.[172] Finn similarly argues this point, noting that such a distinction is arbitrary.[173] Lord Nicholls' reappraisal of this area of law involved bringing accessorial liability and knowing inducement together into a single principle. This principle is that a third party will be held accountable where he or she 'dishonestly procures or assists in a breach of trust or fiduciary obligation'.[174] His Lordship expressly rejected the dishonest and fraudulent design

166 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 357 [245] ('*Grimaldi*'). For example, in *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840, the trustees would have acted within the terms of the trust deed if they had paid over moneys from the trust fund to the legitimate children of Knibb. However, Knibb deceived the trustees by presenting a forged marriage certificate. The trustees, in reliance of this certificate, acted in breach of trust because the children were in fact illegitimate. Knibb was held to have knowingly induced the breach, despite it having been committed honestly: at 842–3.

167 Harpum, 'The Stranger as Constructive Trustee: Part I', above n 76, 116, 144.

168 Ibid 147.

169 Pauline Ridge and Joachim Dietrich, 'Equitable Third Party Liability' (2008) 124 *Law Quarterly Review* 26, 30.

170 *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589, 591 [4] (Tipping J).

171 *Royal Brunei* [1995] 2 AC 378, 384.

172 Ibid 384–5.

173 Finn, above n 18, 205.

174 *Royal Brunei* [1995] 2 AC 378, 392.

limitation.[175] This reappraisal has received wide support.[176] Harpum, previously a proponent of the dishonest and fraudulent design requirement,[177] has since supported Lord Nicholls' persuasive reasoning in *Royal Brunei*. He describes the case as one which should represent the modern position on accessorial liability and which courts should apply in preference to Lord Selborne's outdated comments.[178]

Furthermore, the point at which assistance in a breach becomes instigation can be unclear.[179] This problem is likely to arise where the court is faced with a complex factual matrix.[180] The practical effect of this is that the question for the court as to whether to categorise the third party's actions as 'assistance' or 'inducement' becomes largely discretionary. This is concerning since, in the absence of a dishonest and fraudulent design, the court is weighing, with great consequence, two opposing outcomes for the plaintiff.[181] Therefore, Sales argues 'there is really no difference in principle between knowing inducement and knowing assistance', and 'that the elements of liability should be the same for each'.[182] Allen likewise notes how the two claims should not exist as separate forms of liability since they 'concern the same sort of conduct, with the same sort of remedy'.[183] As Sales recognises, both cases establish a sufficient nexus between the third party's actions and the consequences flowing from the breach of trust or fiduciary obligation.[184] These comments suggest that the dishonest and fraudulent design requirement operates to distinguish, artificially, the two claims. This exposes the limitation as 'superfluous'.[185]

Knowing receipt is another distinct but related claim which does not pre-condition the third party's liability on the primary wrongdoer having engaged in a dishonest and fraudulent design.[186] The claim is premised on the indirect protection of the plaintiff's equitable property rights.[187] This is because the third party has interfered with those rights by knowingly receiving from the primary

175 Ibid 384–5.

176 Nolan, above n 77, 507; Editorial, above n 50, 226; Thomas and Hudson, above n 19, 892 [30.49]; Podzebenko, above n 58, 248; Griffiths, above n 50, 285; Charles Harpum, 'Accessory Liability for Procuring or Assisting a Breach of Trust' (1995) 111 *Law Quarterly Review* 545, 548; Jessica Palmer, 'The Privy Council on Being (Dis)honest about Dishonest Assistance' (2005) 24 *University of Queensland Law Journal* 539, 544.

177 Harpum, 'The Stranger as Constructive Trustee: Part I', above n 76, 144–7.

178 Harpum, 'Accessory Liability for Procuring or Assisting a Breach of Trust', above n 176, 548.

179 Podzebenko, above n 58, 237–8; Harpum, 'The Stranger as Constructive Trustee: Part I', above n 76, 144; Editorial, above n 50, 226; Allen, above n 62, 36, 43; Nolan, above n 77, 505.

180 Editorial, above n 50, 226.

181 If the court characterises the third party's actions as 'assistance', then the plaintiff fails, but if classified as 'inducement', then the claim succeeds.

182 Philip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491, 508 n 58.

183 Allen, above n 62, 36.

184 Sales, above n 182, 508 n 58.

185 Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 91.

186 *Polly Peck International PLC v Nadir [No 2]* [1992] 4 All ER 769, 777 (Scott LJ).

187 *Consul* (1975) 132 CLR 373, 410 (Stephen J). The protection is 'indirect' because the property would typically no longer be traceable at common law or equity. This is why the liability is personal.

wrongdoer, in breach of trust or fiduciary duty, property which is designed and stipulated for their beneficial use.[188] An analogy can be drawn with the common law tort of conversion, which is based upon the safeguarding of the plaintiff's legal property rights.[189] The value and wealth inherent in property, which proprietary rights exist to protect, provides a plausible explanation as to why a dishonest and fraudulent design requirement should not limit the scope of that personal claim in equity. In contrast, the basis of accessorial liability does not lie in the equitable protection of property interests.[190] There need not have been any beneficial receipt of property which was impressed with a trust or fiduciary duty. Rather, the basis of this claim lies in discouraging third party culpable assistance in such breaches, which, as has been argued, is inconsistent with a dishonest and fraudulent design requirement.

If the dishonest and fraudulent design requirement is absent in related and unrelated third party liability regimes in equity[191] and in other similar private law doctrines, such as inducement of a breach of contract, its presence in the test for accessorial liability arguably requires compelling justification. Such justification does not exist.[192]

## 5 *The Argument That the Commercial Nature of the Trust or Fiduciary Arrangement Should Not Dictate Whether a Dishonest and Fraudulent Design is Required to Be Proven*

Tom Allen offers an interesting analysis on accessorial liability, by among other things, distinguishing a 'commercial' plaintiff from a 'non-commercial' plaintiff.[193] He argues that the former is in a stronger position to exert influence over the trustee or fiduciary, and consequently is better able to safeguard their interests from third party exploitation. This renders the 'commercial' plaintiff in 'less need of protection by the court'.[194] Allen states that the only depredation such a plaintiff could not protect himself or herself from would be the primary wrongdoer's dishonest and fraudulent design and any outsider's culpable assistance therein.[195] Therefore, a dishonest and fraudulent design, Allen asserts, should confine the accessorial liability doctrine so far as the 'commercial' plaintiff is concerned.[196] On the other hand, a 'non-commercial' plaintiff is generally incapable or has less ability to protect himself or herself from their trustee or fiduciary's breach, whether dishonest, negligent or innocent in nature.[197] To this extent, he argues

188 *Grimaldi* (2012) 200 FCR 296, 312 [20].

189 *Slaveski v State of Victoria* [2010] VSC 441 (1 October 2010) [304] (Kyrou J), quoting *Fowler v Hollins* (1872) LR 7 QB 616, 639 (Cleasby B).

190 *Royal Brunei* [1995] 2 AC 378, 382.

191 For example, participating in a breach of confidence. See Finn, above n 18, 205, 207.

192 *Williams v Central Bank of Nigeria* [2014] 2 All ER 489, 507 [35] (Lord Sumption SCJ with Lord Hughes SCJ agreeing).

193 Allen, above n 62, 39–40.

194 Ibid 40.

195 Ibid 41.

196 Ibid.

197 Ibid.

that the dishonest and fraudulent design requirement should not be an essential prerequisite to a claim by a 'non-commercial' plaintiff in accessorial liability against a third party.[198]

It is submitted that permitting the criteria of the claim to differ depending upon the plaintiff's status infringes the rule of law.[199] One aspect of the rule is that law must be 'intelligible, clear and predictable'.[200] If Allen's proposition was to represent the position on knowing assistance, then arguably this claim will lack precision and clarity. This is because the distinction between a commercial and non-commercial plaintiff can be tenuous at best. A further aspect of the rule of law, as Lord Bingham states, is that the law 'should apply equally to all'.[201] Allen's suggestion arguably violates this important feature of the rule of law in its discriminatory treatment of the plaintiff, by asserting that their case should be more difficult to prove if their status in the trust or fiduciary arrangement can be regarded as commercial in nature. It is also important to note that the trustee or fiduciary's undertaking to act with utmost loyalty causes the plaintiff, regardless of the nature of the arrangement, to repose trust and confidence in him or her.[202] No obligation thereby falls upon the plaintiff to protect himself or herself against any breach of trust or fiduciary duty, whether dishonest or innocent. Since the accessorial liability doctrine builds upon the fiduciary principle, there is no logical reason why distinctions, bearing in mind the difficulties in making them at all, in the way Allen contends for, should be made.

## 6 *The Argument That Retaining the Dishonest and Fraudulent Design Requirement Will Unnecessarily Turn the Accessorial Liability Principle into a Rigid Rule of Equity*

When a court exercises equitable jurisdiction, it must act as a court of conscience.[203] This no longer equates to the particular judge's personal perceptions as to what fairness and justice require in the case at hand.[204] Rather, the court must rely, before holding a defendant liable, upon its objectively defined judicial conscience, as guided by established principles, maxims and precedents.[205] The Singapore Court of Appeal in *Lau Siew Kim* recognises this shift as reflecting the desire to ensure clear, certain and consistent judicial reasoning.[206] However, it is not in the nature of equity for its doctrines to be strict and immutable such that they become

198 Ibid 42.

199 See, eg, Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69.

200 Ibid.

201 Ibid 73.

202 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).

203 *Fortex Group Ltd (in rec & in liq) v MacIntosh* [1998] 3 NZLR 171, 175 (Tipping J).

204 *Muschinski v Dodds* (1984) 160 CLR 583, 615 (Deane J) ('*Muschinski*'). This is known as the 'Chancellor's foot approach'.

205 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR 108, 121 [25] (Rajah JA) ('*Lau Siew Kim*').

206 Ibid 124 [33].

frozen in time.[207] Rather, they must be 'capable of flexible development'[208] in order to evolve 'to meet the changing conditions of society'.[209] This is what the vitality of equity depends on.[210] Lord Cottenham LC saw it as the duty of a court exercising equitable jurisdiction not to adhere strictly to rules where to so follow would mean it would be refusing to administer justice.[211] Similarly, Megarry J in *Brunner v Greenslade* has argued that it is not in the nature of equity for courts, in developing equitable doctrines, to fetter themselves 'by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable'.[212] In order for it to be progressive and flexible, the doctrine must be capable of being 'altered, improved, and refined from time to time'.[213] To achieve this, precedent, principle, policy and pragmatism are recognised as four key factors which courts should consider.[214] The weight to be placed on each will vary having regard to the implications of the proposed development.[215] Importantly, the desirability to apply precedent should not come at the expense of developing a law which reflects modern opinion.[216]

Contrary to this idea of equity, it is clear that the High Court in its dicta in *Farah* has taken a mechanical approach to the doctrine of accessorial liability. As this paper has shown, it is against sound principle, policy and pragmatism for the High Court to continue its unswerving commitment to precedent-based reasoning by treating *Barnes v Addy* and *Consul* as if those cases had statutory status.[217] Austin J has expressed discomfort with this current commitment.[218] If the High Court does not forego this approach, then the accessorial liability doctrine in Australia will convert, if it has not already, into a rigid rule of equity which is out of touch with persuasive and more contemporary judicial and scholarly viewpoints. Moreover, if the High Court continues in its endorsement of the rationale for third party furtherance of trustee or fiduciary fraud, it would be contravening what Lord Cottenham LC and Megarry J describe as its duty not to be fettered by a test which renders the doctrine unfair.[219] The doctrine will only be transformed into one which is progressive, fair, and principled if prioritisation is given to corrective justice, which entails the need for the defendant's adversely affected conscience to be corrected. The next Part of this paper will suggest how this transformation should be effected.

207 *Re Hallett's Estate* (1880) 13 Ch D 696, 710 ('*Re Hallett*').

208 *Lau Siew Kim* [2008] 2 SLR 108, 123 [29].

209 *Allen v Snyder* [1977] 2 NSWLR 685, 689 (Glass JA).

210 Justice Michael Kirby, 'Overcoming Equity's Australian Isolationism' (2009) 3 *Journal of Equity* 1, 2.

211 *Wallworth v Holt* (1841) 4 My & Cr 635; 41 ER 238, 244 ('*Wallworth*').

212 *Brunner v Greenslade* [1971] Ch 993, 1005–6 ('*Brunner*').

213 *Re Hallett* (1880) 13 Ch D 696, 710 (Jessel MR).

214 *Lau Siew Kim* [2008] 2 SLR 108, 124 [32] (Rajah JA), citing Gary Watt, *Trusts and Equity* (Oxford University Press, 2nd ed, 2006) 47–8.

215 *Lau Siew Kim* [2008] 2 SLR 108, 124 [32].

216 Ibid 124–5 [33].

217 *Powell* [1991] 1 NZLR 597, 611 (Thomas J).

218 *NCR Australia* [2004] NSWSC 1 (14 January 2004) [164].

219 *Wallworth* (1841) 4 My & Cr 635; 41 ER 238, 244; *Brunner* [1971] Ch 993, 1005–6.

## IV THE TOUCHSTONE FOR ACCESSORIAL LIABILITY

This paper has argued that third party fault is the necessary and sufficient touchstone for accessorial liability. An objective value judgment of the defendant's actions is the proper measure by which courts should ascertain whether the defendant's conscience has been adversely affected, because it is capable of universal application.[220] A subjective assessment of the defendant's state of mind, which focuses on their actual knowledge or suspicions, should be avoided, as this inappropriately imports criminal law considerations into the doctrine, considerations which do not commonly feature in equitable claims as they enable the morally obtuse to escape accountability.[221] A subjective test of fault unduly weakens the position of the plaintiff, disregarding the fact that accessorial liability is intended to bolster the protection the plaintiff is entitled to, by increasing their chances of equitable recovery.[222] For example, in *Barlow Clowes*, the Privy Council considered immaterial the fact that the third party defendant did not personally appreciate that his actions would be considered as dishonest by an honest person in the same circumstances.[223] Accordingly, an objective test of conscience ensures the defendant's behaviour will only attract the imposition of personal liability if, having regard to the facts as they knew or suspected them to be, a reasonable and honest person in the same position would not have engaged in that kind of behaviour. The issue for the court should always be whether the third party's assistance in the primary wrongdoer's breach has offended the normal standards of behaviour held by a reasonable and honest person.[224] As Sedley LJ has recognised, such a test enables the court to determine whether the defendant has partaken in conduct which would be regarded as unconscionable or inequitable.[225] This was the standard of fault endorsed by Lord Nicholls in *Royal Brunei*,[226]which was confirmed in *Barlow Clowes*.[227] Although these decisions of the Privy Council are not strictly binding on English courts, it appears from a study of subsequent case law that this test is certainly preferred in England.[228] The rigour of the objective standard of fault applicable to the particular defendant should depend upon their personal qualities such as their experience, intelligence, attributes and awareness of the circumstances existing at the relevant time.[229] The court will be able to assess fault by vesting the reasonable and honest

220 Palmer, above n 176, 542–3.

221 Lord Millett, in his dissent in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, notes that conscious wrongdoing is an important condition to many forms of criminal liability, but cannot be considered as appropriate in civil liability actions, especially equitable ones: at 200 [127].

222 Pauline Ridge, 'Justifying the Remedies for Dishonest Assistance' (2008) 124 *Law Quarterly Review* 445, 446.

223 *Barlow Clowes* [2006] 1 WLR 1476, 1479–80 [10].

224 *Royal Brunei* [1995] 2 AC 378, 389 (Lord Nicholls).

225 *George Wimpey UK Ltd v VI Construction Ltd* (2005) 103 ConLR 67, 84–5 [60].

226 *Royal Brunei* [1995] 2 AC 378, 389.

227 *Barlow Clowes* [2006] 1 WLR 1476, 1479–80 [10] (Lord Hoffman).

228 *Abou-Rahmah v Abacha* [2007] 1 All ER (Comm) 827, 846–7 [64]–[66] (Arden LJ); *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [24]–[30].

229 *Royal Brunei* [1995] 2 AC 378, 391 (Lord Nicholls).

individual with these qualities of the defendant. Whether the third party had great influence upon and/or control over the trustee or fiduciary (for example due to professional expertise) may assist the court in determining whether the third party's actions have fallen short of this objective standard.[230] Other relevant considerations include the ordinary course of business, the seriousness of the consequences flowing from the breach, as well as the nature and importance of the third party's role.[231] To cure the concerns of Sullivan identified in the discussion of policy above,[232] Thomas J asserts that where the third party is an agent of the primary wrongdoer, the court will need to carefully review '[t]heir status, and the circumstances attaching to their role as agent'.[233] The array of factors open for the court to consider when assessing the defendant's conscience ensures that the court is guided towards making an equitable decision. Therefore, this recommended reformulation would not lead a court to indulge in personal, ill-defined and idiosyncratic notions of justice and fairness.[234]

Measuring third party fault in this way means that liability will only attach where the third party has had a real opportunity to refuse or withdraw their assistance.[235] This corresponds with the recognition in *Barnes v Addy* that a plaintiff intends to exonerate from accountability a third party who has acted injudiciously, but without fraud and dishonesty. Imposing some lesser standard of culpability than objective dishonesty in the way described carries the danger of undesirably expanding the scope of the accessorial liability doctrine. Such an expansion would not properly take account of the need to ensure trustees and fiduciaries can readily obtain services central to their management of the plaintiff's interests and of the fact that the claim is not based upon protecting equitable property interests.[236]

## V CONCLUSION

In September 2013, the parties to the Bell Group litigation had their matter removed from the High Court list as a settlement had been reached following extensive negotiations.[237] The case provided an opportunity for the High Court to reconsider its dicta in *Farah*. This is illustrative of the rare occasions the High Court has to consider accessorial liability, contrasted with its frequent application

230 *Powell* [1991] 1 NZLR 597, 614.

231 *Royal Brunei* [1995] 2 AC 378, 390 (Lord Nicholls).

232 Sullivan, above n 70.

233 *Powell* [1991] 1 NZLR 597, 614. The court will have regard to the nature of the agent's contractual relationship with the trustee or fiduciary.

234 Deane J eschewed 'idiosyncratic notions of fairness and justice' in *Muschinski* (1984) 160 CLR 583, 615.

235 Peter Creighton and Elise Bant, 'Recipient Liability in Western Australia' (2000) 29 *Western Australian Law Review* 205, 215.

236 Editorial, above n 50, 226.

237 Richard Gluyas, 'Banks in Bell Group Settlement' *The Australian* (Sydney) 18 September 2013, 3.

by lower courts.[238] Therefore, whether the opportunity arises judicially to examine this claim as part of its ratio or in mere dicta, the High Court should clarify and explain Australia's position for the benefit of lower courts.

Hart states that once we identify the general aim or value of a particular social institution, we must ascertain if any factors should limit its unqualified pursuit.[239] Here, it has been established that the aim of accessorial liability, as a social legal institution, is to discourage third party assistance in breaches of trust or fiduciary duties. The successful pursuit of this aim reduces the ease with which such breaches can be effected at the outset. This beneficially protects the integrity of the trust or fiduciary relationship and the vulnerable plaintiff. This paper has argued that the dishonest and fraudulent design requirement — a term which itself has proven to be confusing — is not a defensible factor which should prevent an unlimited pursuit of this aim. This limitation is undesirable as a matter of principle — in being sympathetic to third parties the limitation operates unfairly to the prejudice of worthy plaintiffs. The result is to render the claim notoriously difficult for the plaintiff to prove by setting an undue bar to equitable recovery.[240] This leaves the knowing assistance claim with little value. *Dishonest* third party assistance, on the other hand, is a justifiable qualification which ought to fetter the unlimited pursuit of this aim. This proposed improvement responds adequately to differences between the culpability of the primary wrongdoer and the third party, by treating accessorial liability as an independent equitable doctrine. That is, it ensures that the significance of the third party's actions is not 'downplayed' by an examination of them through the 'lens' of the defaulting trustee or fiduciary in a restrictive manner. In this way, the court's focus becomes rightfully directed to the minimisation of socially undesirable conduct. The correlative positions of the plaintiff and defendant will be under analysis at all times after a finding of the primary wrongdoer's breach. Equity is being asked to intervene 'only if the defendant's conscience warrants it'.[241] This importantly expresses the criteria of the claim as a 'coherent enterprise'.[242] The need to achieve corrective justice, which includes the application of the *Earl of Oxford's Case* will, beneficially, be restored as the core of this doctrine, reflecting the House of Lord's compelling approach in the foundational case of *Gray v Johnston*.

Therefore, the High Court must not continue its unquestioned deference to *Barnes v Addy*. That case has been widely considered to have 'set the law on the wrong path'[243] and it notably no longer represents the law of the jurisdiction from which

238 See, eg, *NCR Australia* [2004] NSWSC 1 (14 January 2004) [164] (Austin J); *King Network Group Pty Limited v Club of the Clubs Pty Limited* (2008) 69 ACSR 172, 182 [48] (Hodgson JA); *Sewell v Zelden* [2010] NSWSC 1180 (3 September 2010) [71] (Rein J); *Grimaldi* (2012) 200 FCR 296, 358–63 [249]–[270] (Finn, Stone and Perram JJ); *BigTinCan Pty Ltd v Ramsay* [2013] NSWSC 1248 (4 September 2013) [84] (Ball J).

239 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 10.

240 See, eg, *Towercom Pty Ltd v Fahour (No 4)* [2013] VSC 585 (29 October 2013) [19] (Derham AsJ); Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 93–4.

241 Sarah Worthington, *Equity* (Oxford University Press, 2nd ed, 2006) 328.

242 Weinrib, 'Corrective Justice in a Nutshell', above n 85, 355–6.

243 Bryan, 'Cleaning up after Breaches of Fiduciary Duty', above n 1, 93.

it originated.[244] As Jessel MR stated, we must turn to the more modern rather than the more ancient cases to know what the state of the law in regard to an equitable doctrine is.[245] The modern and certainly more preferable position arguably lies with Lord Nicholl's reappraisal of accessorial liability in *Royal Brunei*. Austin J implicitly expressed approval of *Royal Brunei* in *NCR Australia*.[246] This shows that immediate High Court action is imperative.

If this position is adopted, potential exists for accessorial liability and knowing inducement to amalgamate with knowing receipt into an overarching participatory liability doctrine, on the basis that the impugned third party conduct in each category is a mere species of participation in a breach of trust or fiduciary duty.

244 See *Royal Brunei* [1995] 2 AC 378.

245 *Re Hallett* (1880) 13 Ch D 696.

246 [2004] NSWSC 1 (14 January 2004) [164].