INTERMEDDLERS OR STRANGERS TO THE BREACH OF TRUST OR FIDUCIARY DUTY

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1. Introduction

A trustee breaches the terms of a trust or a fiduciary breaches his duty and the trust or the beneficiary of the fiduciary duty suffers a loss or misses the opportunity to make a gain. The beneficiary sues, but the defendant trustee or fiduciary is without assets. Is there anybody else who is liable to compensate or restore to the beneficiary? Are the lawyers, agents, bankers, employees, purchasers, and other third parties who may have aided the trustee or fiduciary or who may have gained something from the breach of trust or breach of fiduciary duty liable to the trust or to the beneficiary? Does it make any difference whether these third parties knew or ought to have known about the misconduct? Does the quality of the trustee's or fiduciary's misconduct make a difference? Does it make any difference whether the third parties did or did not receive a personal benefit from that misconduct? What are the rationales for the third party's liability? The recent Supreme Court of Canada decisions in *Air Canada v. M&L Travel Ltd.*;[1] *Gold v. Rosenberg*,[2] and *Citadel General Assurance Co. v. Lloyds Bank Canada*[3] and several recent lower court decisions from across the country have addressed these questions and drawn attention to equity's remedial power against third parties who are connected to a breach of trust or fiduciary duty.[4]

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1. (1993), 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 68 O.A.C. 1.
2. (1997), 152 D.L.R. (4th) 385, [1997] 3 S.C.R. 767, 104 O.A.C. 1.
3. (1997), 152 D.L.R. (4th) 411, [1997] 3 S.C.R. 805, 206 A.R. 321.
4. The equitable doctrines that make third parties liable apply to both breaches of trust and also to breaches of fiduciary duty: see P.D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in *Equity, Fiduciaries and Trusts*, D.W.M. Waters, ed. (Toronto: Carswell, 1993), p. 195 at pp. 200-1, 204-5; C. Harpum in "The Stranger as a Constructive Trustee" (1986), 102 L.Q. Rev. 114 at p. 114;

In *Air Canada,* a travel agency was obliged to hold in trust the proceeds from its sale of Air Canada tickets but the travel agency breached the trust and the airline was owed $25,079.67 for ticket sales. The issue in the case was whether the defendant directors and owners of the travel agency were liable for the travel agency's misconduct and, indeed, the directors were found liable. In *Citadel,* an insurance agency was obliged to hold in trust the proceeds from its sale of the plaintiff's insurance policies, but the funds were transferred into the bank account of the agency's parent company. The transfer reduced the parent company's overdraft, and the issue was whether the defendant bank was liable to pay the plaintiff $633,622.84, the outstanding amount payable to it for the premiums. The defendant bank was found liable. In *Gold,* an executor arranged to have a corporation owned by the estate sign a guarantee to repay his own corporation's indebtedness to a bank. The guarantee was secured by a mortgage of estate property. The plaintiff, who was a co-executor, authorized the guarantee but later said he had been misled. The issue was whether the defendant bank could enforce the guarantee obtained by a breach of trust. This time, the defendant was successful in resisting the claim.

The law's remedies against third parties to a breach of equitable duty, who, in case-law are usually referred to as intermeddlers or strangers to the breach, are associated with some doctrines that have strange-sounding or unwieldy names such as trustee *de son tort,* the doctrine of knowing assistance, the doctrine of knowing receipt, tracing, and unjust enrichment. In *Air Canada,* the plaintiff claimed that the directors of the travel agency were liable as a trustee *de son tort* or under the doctrine of knowing assistance or the doctrine of knowing receipt. The directors were found liable for knowing assistance. In *Citadel,* the defendant bank was held liable under the doctrine of knowing receipt. In *Gold,* the bank successfully fended off claims made against it under the doctrines of knowing assistance and knowing receipt. From the perspective of recognition, classification, terminology, and theory, these doctrines have had a problematic history, with various scholars and judges suggesting different schemes and theories and the case-law frequently confusing one doctrine with another.[5] The recent cases, however, go some

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D.W.M. Waters, *Law of Trusts in Canada,* 2nd ed. (Toronto: Carswell, 1984), p. 381.

5. See: R.B. Grantham, C.E.F. Rickett, "Liability for Interfering in a Breach of Trust"

distance in settling the nomenclature, in resolving some of the problems, in more clearly articulating the scope and differences amongst the doctrines, and in revealing the underlying policies that explain why the doctrines are different.

The purpose of this article is to take stock of the recent cases and developments and, in general, to describe from a practical perspective the nature of the remedies available to a victim of a breach of trust or fiduciary duty against intermeddlers or strangers who are connected to a breach of trust or fiduciary duty. The article presupposes that a trustee or fiduciary has neglected or breached his or her duties and describes the free-standing or auxiliary liability of the stranger. In terms of structure, the article begins with the equitable doctrine where the stranger's liability is not dependent upon the quality of the misconduct of the trustee or fiduciary. Thus, the discussion begins with the stranger's liability as a trustee *de son tort*.[6] Then the discussion will turn to describe property law remedies

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(1998), 114 L.Q.Rev. 357; L. Smith, "Whither Knowing Receipt" (1998), 114 L.Q.Rev. 394; S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996), 112 L.Q.Rev. 56; Tom Allen, "Fraud, Unconscionability and Knowing Assistance" (1995), 74 Can. Bar Rev. 29; D.J. Hayton, *Underhill and Hayton Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995), (the *Stolp* case) pp. 408-32; M.H. Ogilvie, "Case Comment—*Arthur Anderson Inc. v. Toronto Dominion Bank*" (1994), 73 Can. Bar Rev. 592; E.P. Ellinger, "The Bank as Fiduciary and Constructive Trustee" (1994), 9 B.F.L.R. 111; P.D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance", in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts, ibid.*, p. 195; K. Kalinowsky, "The Constructive Trustee: A Stranger's Knowing Participation in the Breach of Trust" (1991), 7 B.F.L.R. 383; P.J. Millett, "Tracing the Proceeds of Fraud" (1991), 107 L.Q.Rev. 71; R. Sullivan, "Strangers to the Trust" (1986), 8 E.&T.J. 217; P.L. Loughlan, "Liability for Assistance in a Breach of Fiduciary Duty" (1989), 9 Oxford J. Leg. Stud. 260; C. Harpum in "The Stranger as a Constructive Trustee" (1986), 102 L.Q.Rev. 114 and p. 267; R.P. Austin, "Constructive Trusts" in P.D. Finn, ed., *Essays in Equity* (Agincourt: Carswell, 1985); Waters, *Law of Trusts in Canada, ibid.*, p. 381.

6. There may be other direct claims against strangers. Some commentators identify a group of old cases under the label of "knowing inducement". In these cases, the stranger induces a trustee or fiduciary to breach his or her equitable duties: *Fyler v. Fyler* (1841), 3 Beav. 550, 49 E.R. 216; *Alleyne v. Darcy* (1854), 4 Ir. Ch. 199; *Eaves v. Hickson* (1861), 30 Beav. 136, 54 E.R. 840; *Midgley v. Midgley*, [1893] 3 Ch. 282 (C.A.); *Chillingworth v. Chambers*, [1896] 1 Ch. 685 (C.A.); *Trusts & Guarantee Co. Ltd. v. Miller and Brenner*, [1933] 4 D.L.R. 273, [1933] S.C.R. 656, 15 C.B.R. 112. Strangers might also be liable under the emergent tort of interference with economic relations. These claims, which are not discussed in this article, save to the extent that they are covered by the doctrines of knowing assistance or knowing receipt, are like the doctrine of trustee *de son tort* in the sense that the stranger's liability is not auxiliary. However, these cases go beyond the doctrine of

against the stranger and the proprietary or compensatory remedies available for unjust enrichment. Here, the discussion, which will include a few comments about the role of the common law and equitable rules of tracing, will reveal that, while the stranger's liability under the law of property, if any, is factually connected to the trustee's or fiduciary's misconduct, the stranger's liability is based upon the beneficiary's proprietary entitlement to claim the property. Next, the discussion will consider the doctrines of knowing assistance and knowing receipt. For these doctrines, the connection between the trustee's or fiduciary's misconduct and the stranger's conduct, including his or her knowledge of the misconduct, is pivotal. The article will conclude with some practical observations about the similarities and differences amongst the doctrines and remedies against strangers to a breach of trust or fiduciary duty and with a methodology to simplify the analysis of whether there is a viable claim against the stranger.

2. Liability as a Trustee de Son Tort

A beneficiary of a trust or fiduciary duty may have a claim against a stranger as a trustee *de son tort*. When a person, although not appointed a trustee or a fiduciary, goes ahead to control and administer trust property and to act as a trustee, the person will be liable as a trustee *de son tort* if he commits a breach of trust.[7] Having volunteered to act as a trustee, the stranger becomes directly accountable to the beneficiary. The rationale for the stranger's liability is his or her voluntary assumption of responsibility.[8] The trustee *de son tort* is subject to the same liabilities as an expressly appointed trustee.

For Canadian cases about the doctrine, in *Citadel General Assurance Co. v. Lloyds Bank Canada*,[9] the bare facts of which were noted in the introduction, La Forest J. explained that the bank was not liable as a trustee *de son tort* for the breach of the insurance agency because it never assumed the office of trustee. In *Maguire v.*

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trustee *de son tort* because the stranger is the instigator or primarily responsible for the trustee's or fiduciary's misconduct.

7. *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073 (Ch. D.); *Williams-Ashman v. Price and Williams*, [1942] Ch. 219; *Mara v. Browne*, [1896] 1 Ch. 199 at p. 209; *Soar v. Ashwell*, [1893] 2 Q.B. 390; *Blyth v. Fladgate*, [1891] 1 Ch. 337; *Lyell v. Kennedy* (1889), 14 App. Cas. 437 (H.L.).
8. R. Sullivan, "Strangers to the Trust", *supra*, footnote 6, at p. 223.
9. *Supra*, footnote 4.

Maguire,[10] the infant plaintiff, Maguire, who was the beneficiary of a trust, wished to lend $800 from the trust to one Barrett. Maguire's trustee advanced the money to Maguire's older brother, who arranged the loan, which was subsequently not repaid. The younger Maguire then sued the senior. The court held that the elder Maguire would have been liable as a trustee *de son tort* but for the fact that the younger Maguire had adopted the transaction when he came of age. In *Royal Bank of Canada v. Fogler, Rubinoff*,[11] a law firm received $180,000 from a client who had borrowed the money from the Royal Bank. The funds were to be used to buy out the client's co-shareholders in a restaurant business. The Ontario Court of Appeal held that the law firm had knowledge that the funds were being held in trust for the bank on the condition that they be repaid to the bank if they were not used for the planned buy-out. Unfortunately, there was a falling-out between the law firm and the client and the law firm used $100,000 of the funds to satisfy its account for fees and then remitted the balance directly to the client. The Court of Appeal held that since the law firm had possession and control of the trust property, knew of the trust, and had acted inconsistently with the terms of it, the firm was liable to the bank as a trustee *de son tort*. The law firm was liable to pay the bank $180,000 for the breach of trust.

As Professor Sullivan points out in her valuable article about the liability of strangers,[12] a major concern associated with the liability of a trustee *de son tort* is the problem of differentiating between a person who has taken on a trustee's responsibilities and a person who is merely acting as the agent for the genuine trustee. This concern reflects a practical problem and focuses attention on the major policy issue of determining when a stranger ought to be liable for a trustee's or fiduciary's misconduct. The policy concern emerges from the situation where the trustee or fiduciary, who is directly liable to the beneficiary, retains an agent, who will be directly liable to the trustee or fiduciary but who is not directly liable to the beneficiary. To use an example to illustrate the issues, a trustee instructs his agent to purchase a property using trust funds. Unknown to the agent, the instructions amount to a breach of trust but the agent obeys his principal. The purchase turns out to be imperfect or

10. (1921), 64 D.L.R. 204, 50 O.L.R. 162, 20 O.W.N. 125 (S.C.).
11. (1991), 84 D.L.R. (4th) 724, 5 O.R. (3d) 734, 43 E.T.R. 131 (C.A.).
12. R. Sullivan, "Strangers to the Trust", *supra*, footnote 6, at pp. 227-9.

improvident. These last circumstances may expose the agent to a claim of professional negligence by the trustee. The trustee's claim against the agent is not controversial since it can be grounded in contract, tort, or fiduciary duty. The controversial questions of legal policy are whether the agent should also be directly liable to the beneficiary for the various breaches, including the trustee's breach of trust. On the one hand, if the agent's liability were coincident with the trustee's, then the agent would, practically speaking, have become a sentry, insurer, and guarantor of the trustee's conduct and responsible for knowing the trustee's proper mandate under the trust. If this is the law's standard, then a prudent agent should make inquiries and refuse to follow instructions inconsistent with the client's equitable duties. However, imposing this burden may be neither fair nor in trade and commerce interests of providing professional goods and services. Further, such exposure is difficult to justify in terms of the theory of contract, tort, or fiduciary duty. On the other hand, the imposition of the burden may be just and fair, especially if the agent is not acting as a mere agent but personally profits from the trustee's misconduct and, in these circumstances, liability may be salutary to professional commerce. If, as is the case, the law adopts the middle position that mere agency is not enough but that agents and other strangers will be liable to the beneficiary in some circumstances when they are acting for the trustee or fiduciary, then there is the practical problem of determining in any given case whether the stranger is a mere agent or whether there is something more upon which to ground liability.

The cardinal case adopting the middle position, that there must be something more than participation, that is, something beyond mere agency, for a stranger to be liable is the old English case of *Barnes v. Addy*.[13] In this case, an executor of an estate found it unpleasant to deal with his cousin who was a beneficiary of the estate and he transferred her share of the estate to the trusteeship of her husband. This transfer was a breach of trust. Unfortunately, the husband misappropriated the trust property for his business and then became a bankrupt. Next, the cousin's children, who were ultimately beneficiaries of the estate, sued the lawyers who had acted for the executor and for the husband. The action against the lawyers, the strangers to the executor's breach of trust and who had simply followed their

13. (1874), 9 Ch. App. 244.

respective client's instructions, was dismissed. Lord Selbourne L.C. stated in a much-quoted passage:[14]

> But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

As will emerge from the discussion below, the doctrines of knowing receipt and knowing assistance are, in a sense, extrapolations or interpretations of what Lord Selbourne L.C. meant by the two "unless phrases" found in this passage, which describe circumstances where it would be appropriate to make a stranger liable to the beneficiary. This struggle to determine when participation crosses the line into culpability also manifests itself in the context of the trustee *de son tort.* Here the concern is between distinguishing between the stranger who is acting merely as an agent and the stranger who has gone further to usurp the role of the trustee, who may have disappeared or surrendered control and responsibility. Professor Sullivan states:[15]

> . . . where a stranger in possession of trust property ceases to act as agent for the trustee and begins instead to act as trustee for the beneficiaries, he is said to "intermeddle" in the trust and to thus render himself chargeable as trustee *de son tort* for the property he has received. This is well-established law, but a difficulty arises because the courts are vague in their statement of what constitutes intermeddling for this purpose.

Unfortunately, there is no easy answer to these concerns because everything will depend upon the facts of the particular case as to whether a stranger has intermeddled and become liable as a trustee *de son tort.*

3. Property Law, Unjust Enrichment, and the Rules of Tracing

A beneficiary of a trust or of a fiduciary duty may have property law rights that will support a claim against a stranger. The beneficiary may also have proprietary or compensatory remedies against

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14. *Ibid.*, at pp. 251-2. See also *Carl Zeiss Stiftung v. Herbert Smith & Co. (a firm) (No. 2)*, [1969] 2 Ch. 276 at pp. 303-4, *per* Edmund-Davies L.J., and *Lee v. Sankey* (1873), L.R. 15 Eq. 204.
15. R. Sullivan, "Strangers to the Trust", *supra*, footnote 6, at p. 227.

the stranger under the doctrine of unjust enrichment. The relationship between property law rights and unjust enrichment remedies is complicated. By way of overview, the law of property or the doctrine of unjust enrichment may establish that a beneficiary has a proprietary interest in property and a stranger may be obliged to recognize the beneficiary's ownership interest and restore the property to the beneficiary after a breach of trust of fiduciary duty. Where the original property has been mixed with other property or where it has been converted into another form of property, then certain rules, known as the rules of tracing, may allow the beneficiary's property law claim or the proprietary remedy under the doctrine of unjust enrichment to survive the mixing or transformation of the property. When property cannot, or cannot fairly, be restored to the beneficiary, the doctrine of unjust enrichment may substitute a compensatory remedy against the stranger where money rather than property is used to restore the beneficiary. More particularly, where there is a breach of an equitable duty, including a breach of trust or fiduciary duty,[16] or where the beneficiary is granted a proprietary remedy for unjust enrichment[17] and the beneficiary's property, in its original or some converted form, comes into the possession of a stranger who is not a *bona fide* purchaser for value or who has no other defence to the unjust enrichment claim, the stranger may be obliged to restore the property in its original or converted form to the beneficiary. As an alternative, the stranger may be obliged to recognize that the beneficiary has a lien or charge on the stranger's property that was derived from the breach of trust or fiduciary duty. It should be noted that the stranger's liability to restore property does not depend upon the nature of the trustee's or fiduciary's misconduct. Rather, the stranger's liability depends upon the beneficiary having an ownership interest in an identifiable and traceable item of property that is recognized by the law of property or by the doctrine of unjust enrichment.

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16. *Diplock's Estate (Re)*, [1948] Ch. 468; *Hallet's Estate (Re)* (1880), 13 Ch. D. 696 (C.A.); *Nuforest Watson Bancorp Ltd. v. Prenor Trust Co. of Canada* (1994), 21 O.R. (3d) 328 (Gen. Div.).
17. *Goodbody v. Bank of Montreal* (1974), 7 D.L.R. (3d) 335, 4 O.R. (3d) 335 (H.C.J.); *Simpsons-Sears Ltd. v. Fraser* (1974), 54 D.L.R. (3d) 225, 7 O.R. (2d) 61 (H.C.J.); *Phoenix Assur. Co. of Canada v. Toronto (City)* (1981), 129 D.L.R. (3d) 351 (H.C.J.), 35 O.R. (2d) 16 (H.C.J.), supp. reasons 124 D.L.R. (3d) 738, 33 O.R. (2d) 457, 38 C.B.R. (N.S.) 299, affd. 39 O.R. (2d) 680 (C.A.), leave to appeal to S.C.C. refused 142 D.L.R. (3d) 767*n*, 46 C.B.R. (N.S.) 80*n*.

Conceptually, the situation under the law of property of the beneficiary of a trust or fiduciary duty that has suffered the misappropriation or loss of identifiable property is perhaps the easier to explain. There is a breach of trust or fiduciary duty when property gained from the misconduct comes into the possession of a stranger. The beneficiary's claim to ownership of that property is an equitable interest and it is a fundamental rule of the law of property that an equitable title is good against all the world except a *bona fide* purchaser of the legal title for value without actual or constructive notice of the equitable interest.[18] Unless the stranger is a *bona fide* purchaser for value or unless the beneficiary's ownership interest is overridden by statute, equity will assist the beneficiary in pursuing and reclaiming the identifiable property and, subject to what are known as the rules of tracing,[19] equity, and to a more limited extent, the common law, will assist the beneficiary in pursuing and retaking any property that had been acquired by conversion or substitution for the property being pursued. Thus, by way of illustration, a trustee wrongfully takes money from the trust estate and purchases a diamond ring that he gives to his beloved. She is unaware of the source of the gift but she must, nevertheless, restore it to the beneficiary. She must return the ring because her claim to ownership under the law of property gives way to the prior equitable ownership of the beneficiary in property that can be traced.[20] (Again, it may be noted that her liability to return the ring is based on the law of property and is independent of the nature of the trustee's breach of trust.) If, however, the guilty trustee had purchased the ring using the trust funds and then sold it to his beloved who acquired it without actual or constructive notice of the source of the property, then she keeps the ring, even if she bought it at a bargain price, but the beneficiary has compensatory redress against the guilty trustee. If, however, the beloved had purchased the ring with actual or constructive notice of the breach of trust, then she must return it or recognize the beneficiary's interest as a lien or charge because she cannot claim the sta-

18. *Pilcher v. Rawlins* (1872), 7 Ch. App. 259; *Gray v. Lewis* (1869), L.R. 8 Eq. 526 at p. 543; *Le Neve v. Le Neve* (1747), Amb. 436, 27 E.R. 291.

19. R. Maudsley, "Proprietary Remedies for the Recovery of Money" (1959), 75 L.Q.Rev. 234; R. Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976), 92 L.Q.Rev. 360.

20. Thus, in *Diplock, supra*, footnote 17, the charities who had mistakenly received a bequest of funds from the testator's residuary estate were subject to a tracing order.

tus of a *bona fide* purchaser and the beneficiary has the superior claim to ownership.[21]

Conceptually, the doctrine of unjust enrichment sometimes provides an alternative to the property law explanation for why a stranger should restore property to the beneficiary after a breach of trust or fiduciary duty. The doctrine of unjust enrichment, if its constituent elements are satisfied, will also support a compensatory award against the stranger. The elements of a claim for unjust enrichment are:[22] (1) an enrichment of the defendant; (2) a corresponding deprivation experienced by the plaintiff, and (3) the absence of any juristic reason for the enrichment. Defendants to a claim for unjust enrichment have the defence that they detrimentally changed their position before they had knowledge of the plaintiff's claim to the property and thus it would be unfair to oblige them to make restitution.[23] As a remedy for unjust enrichment, the courts have the power to order the defendant to pay compensation or to declare that the defendant holds specific property in trust for the plaintiff and this constructive trust is a way of creating a proprietary interest. The proprietary remedy for unjust enrichment, however, is discretionary and not automatic and the plaintiff must justify the grant of the proprietary remedy for a specific property.[24] Factors relevant to whether a proprietary remedy is justified include: the ap-

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21. That she purchased the ring at a bargain price might be circumstantial evidence that she was not a *bona fide* purchaser for value without notice. As the discussion below of the doctrines of knowing assistance and knowing receipt will make clearer, if she took the ring as a gift or purchased it with actual notice that the trustee had committed a fraudulent or dishonest act, then, in addition to a proprietary remedy, she would be exposed to liability to pay compensation for knowing assistance. If she received the ring as a gift or purchased it with actual or constructive knowledge of the breach of trust, then, in addition to exposure to a proprietary remedy, she would be exposed to liability to pay compensation for knowing receipt.
22. *Hunter Engineering Co. v. Syncrude Canada* Ltd. (1989), 57 D.L.R. (4th) 321, [1989] 1 S.C.R. 646, [1989] 3 W.W.R. 385; *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289; *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165.
23. *Lipman Gorman v. Karpnale plc*, [1991] 2 A.C. 548 (H.L.); *Rural Municipality of Shorthoaks v. Mobil Oil Can. Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591.
24. *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 397; *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 981, 77 B.C.L.R. (2d) 1; *Nuforest Watson Bancorp Ltd. v. Prenor Trust Co. of Canada*, *supra*, footnote 17; *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477*n*, 37 C.B.R. (3d) 73, 10 E.T.R. (2d) 78 (C.A.).

propriateness of the plaintiff having a protected claim in the defendant's bankruptcy; the appreciation or diminishment in value of the property; the moral quality of the defendant's acts; whether the defendant intercepted the plaintiff's opportunity to make a profit or gain; the adequacy of other remedies, including difficulties in assessment; and the uniqueness of the property. Applying the principles of unjust enrichment to the circumstances of a stranger who receives property misappropriated from a trust or fiduciary relationship, the stranger may have been enriched, the beneficiary will have been deprived, and there may be no juristic reason for the enrichment, unless, for example, the stranger was a *bona fide* purchaser for value without notice, which would provide a juristic reason for the enrichment. And, depending on the circumstances, the stranger may be able to rely on the change of position defence. If the stranger has been unjustly enriched, then the court has the remedies of a compensatory award or a declaration that the stranger holds the property in trust for the beneficiary, which is, of course, a proprietary remedy that would allow the beneficiary to claim the property.

The rules of tracing supplement the property law or unjust enrichment claims of the beneficiary against the stranger. Save for two comments, it is not necessary for the purposes of this article to explore the details of these complicated rules. First, it may be noted that the rules of tracing are more generous under equity than at common law. The common law would not trace an asset that had become part of a mixed fund.[25] Thus, if in breach of trust, gold were converted into cash and the proceeds were deposited in a stranger's bank account with other funds, the common law would not trace. Equity, however, developed some rules that allowed property to be traced into a mixed fund and thus the exposure of strangers to proprietary claims is greater because of the equitable rules of tracing. Second, the rules of tracing apply differently depending upon the moral quality of the conduct and the state of knowledge of the person holding the beneficiary's property. If the stranger holding the property is a *bona fide* purchaser for value, then tracing is not possible at all because the stranger has perfected his title to the property and there is a defence to the unjust enrichment claim. If, however, the stranger cannot claim this status, then his guilt or innocence in terms of knowledge of the trustee's misconduct makes a difference in how the rules of tracing are applied. To illustrate, it is a rule of

25. *Taylor v. Plumer* (1815), 3 M. & S. 562, 105 E.R. 721.

equitable tracing that where the beneficiary's property is mixed with the property of a stranger who had notice of the beneficiary's claim, then the stranger has the burden of proving what proportion of the property is free of the beneficiary's claim;[26] however, where the beneficiary's property is mixed with the property of a volunteer, that is, a stranger who, although not a purchaser for value, had no notice of the beneficiary's claim, then the beneficiary has the burden of proving what proportion of the mixed property is derived from the trust or breach of fiduciary duty, failing which, generally speaking, there will be an equal sharing between the beneficiary and the stranger.[27]

If the proprietary nature of the beneficiary's claim under property law or under the doctrine of unjust enrichment is kept in mind, then the limits of the proprietary remedies and tracing against the stranger who takes the beneficiary's property become apparent. First, property must be existing and identifiable. Tracing is remedial in the sense that it aids the pursuit of proprietary claims, but the right to trace presupposes something tangible to pursue. Tracing is tied to identifiable assets, that is, the original asset or its converted form. If the asset is dissipated, unidentifiable, or not locatable, then there can be no tracing.[28] Second, and this is the more important point, the beneficiary must have a proprietary claim in the sense that the court must recognize that the beneficiary is the equitable owner of the property. A proprietary remedy presupposes a proprietary entitlement. Thus, a proprietary remedy and the rules of tracing are available for breach of trust, for breaches of fiduciary duty, and for claims for unjust enrichment, where the court recognizes the beneficiary's claim to property.[29]

This is all quite complicated but, before moving on to describe the doctrines of knowing assistance and knowing receipt, it is possible to regroup and to simplify by looking at the two situations where the beneficiary's claim against the stranger does not involve any of the difficulties of tracing property. The first situation is

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26. *Lupton v. White* (1808), 15 Ves. Jun 432, 33 E.R. 817; *Cook v. Addison* (1869), L.R. 7 Eq. 466; *Norman Estate (Re)*, [1952] 1 D.L.R. 174, [1951] O.R. 752; *McTaggart v. Boffo* (1975), 64 D.L.R. (3d) 441, 10 O.R. (2d) 733 (H.C.J.).
27. D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), pp. 1051-52.
28. *McTaggart v. Boffo*, *supra*, footnote 27.
29. *Hallet's Estate (Re)*, *supra*, footnote 17; *Kolari (Re)* (1981), 36 O.R. (2d) 473, 39 C.B.R. (N.S.) 129 (Dist. Ct.); *McTaggart v. Boffo*, *ibid.*

where it is clear that tracing of property is possible and the second situation is where it is just as clear that tracing is not possible. Visualize, in the first situation, a trustee or fiduciary breaches his or her duty and the property that is the spoils of the breach comes into the possession of and is retained by a stranger. As a matter of property law, the stranger must return the property, unless he or she is a *bona fide* purchaser for value without notice. As a matter of the doctrine of unjust enrichment, the stranger must return the property if the plaintiff succeeds in both establishing the constituent elements of an unjust enrichment claim and also persuading the court to grant a proprietary remedy. If the plaintiff proves an unjust enrichment but not a proprietary entitlement, then the beneficiary's remedy will be compensation. In the second situation, a trustee or fiduciary breaches his duty and the property that is the spoils of the breach comes into the possession of but is not retained by a stranger or it is dissipated. In this situation, because tracing the property is not possible, property law is remedially sterile, but the doctrine of unjust enrichment can provide a compensatory remedy to the beneficiary against the stranger.

4. The Doctrine of Knowing Assistance

A stranger to a trust or fiduciary relationship may be liable under the equitable doctrine of knowing assistance if he, with actual knowledge, assists the trustee or fiduciary in a dishonest and fraudulent scheme. The personal liability of the stranger is justified because he or she has acted in a way that equity considers unconscionable. *Air Canada v. M&L Travel Ltd.*,[30] the bare facts of which were noted in the introduction, is an example of a successful knowing assistance claim. The rationale for equity's intervention under the doctrine of knowing assistance is that the stranger's conscience is sufficiently connected to the trustee's or fiduciary's dishonest and fraudulent scheme so as to justify the imposition of personal liabil-

30. (1993), 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1. In this case, La Forest, Sopinka, Gonthier, Cory and Major, JJ. concurred with Iacobucci J. McLachlin J. concurred with the result but felt that the case could be decided narrowly without venturing to decide some of the difficult legal and policy issues raised in Iacobucci J.'s judgment.

31. *Air Canada v. M&L Travel Ltd., ibid., per* Iacobucci J. at p. 618 D.L.R. On this point, Iacobucci J. relied upon *Montagu's Settlement Trusts (Re)*, [1987] Ch. 264.

ity on the stranger.[31] If the stranger's conduct attracts equity's disapproval, then the stranger will be liable to compensate the beneficiary for his or her losses, including losses of opportunity. The four essential elements of a claim for knowing assistance against a stranger are: (1) a trust or fiduciary relationship; (2) the trustee or fiduciary fraudulently or dishonestly breaching his or her equitable duty; (3) the stranger having actual knowledge of the misconduct, and (4) the stranger assisting in the fraudulent or dishonest design.

It is to be observed that for a knowing assistance claim, the stranger need not have secured any personal benefit or received any property from his participation in the misconduct and that it is the trustee's or fiduciary's conduct that must be fraudulent or dishonest. Whether or not the stranger receives a benefit and regardless of whether his conduct is fraudulent, the conduct in assisting the guilty trustee or fiduciary is against conscience and makes the stranger liable.[32] There are subtle points here. To be liable for knowing assistance, the stranger must have actual knowledge of the trustee's or fiduciary's dishonest or fraudulent act but, beyond being shown to have participated in that design, the third party himself need not necessarily be shown to have acted in a fraudulent or dishonest fashion. And the stranger need not have taken or held any property. Thus, the stranger's liability for knowing assistance is conceptually independent of any property law or unjust enrichment proprietary law remedies, although it is possible that a stranger could be concurrently liable for knowing assistance and liable under property law or unjust enrichment principles.

The key ingredient under the doctrine of knowing assistance is the knowledge requirement. In *Air Canada v. M&L Travel Ltd.*, Iacobucci J. stated:[33] "The knowledge requirement for this type of liability is actual knowledge, recklessness or wilful blindness will also suffice."[34] Iacobucci J. explained that for liability, the stranger had to have actual knowledge or wilful blindness about both the

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32. *Air Canada v. M&L Travel Ltd.*, *ibid.*, at pp. 606, 617-8 D.L.R.

33. *Ibid.*, at p. 608 D.L.R. Iacobucci J. relied upon: *Belmont Finance Corp. Ltd. v. Williams Furniture Ltd. (No.1)*, [1979] 1 All E.R. 118 (C.A.) at pp. 130, 136; *Montagu's Settlement Trusts (Re)*, *supra*, footnote 31, at pp. 271-2 and 285; and *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 All E.R. 367 (C.A.) at p. 379.

34. Wilful blindness is sometimes referred to as "Nelsonian knowledge", the allusion being to the story of Admiral Nelson intentionally putting his telescope to his blind eye and thus being unable to see the signals from the flagship ordering the English fleet to withdraw.

existence of the trust and the dishonest and fraudulent scheme. Where the trust was imposed by statute, then the stranger would be deemed to have actual knowledge of the existence of the trust. If the stranger received a benefit, then this might ground an inference that the stranger had actual knowledge of the trust. As for the requirement of knowledge of a dishonest and fraudulent scheme, which was a point of controversy and divergence in the case-law, Iacobucci J. held that under the doctrine of knowing assistance, the quality of the breach of equitable duty made a difference and equity's imposition of liability upon the stranger was justified only if the predicate conduct was dishonest and fraudulent in the sense of being morally reprehensible.[35] Iacobucci J. stated that a trustee would be acting dishonestly or fraudulently if he took on a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take. Applying Iacobucci J.'s resolution of these points to the facts of the *Air Canada* case leads to the conclusions that: the travel agency had committed a dishonest and fraudulent breach of trust; the directors actually knew about the breach, and, therefore, the directors were liable under the doctrine of knowing assistance.[36]

As a corollary to the standard of actual knowledge, Iacobucci J. held that constructive knowledge, that is, knowledge of circumstances that would put an honest person on inquiry, was insufficient for liability under the doctrine of knowing assistance. This degree of knowledge was insufficient because constructive notice did not amount to the want of probity that would attract equity's interest as a court of conscience. A consequence of the knowledge requirements under the doctrine of knowing assistance is that employees, agents, solicitors, and banks that act as agents for trustees and fiduciaries are not unduly exposed to liability for the misconduct of others, who may have been assisted by their services. This approach is consistent with the *Barnes v. Addy* policy, noted above, that there

35. *Belmont Finance Corp. Ltd. v. Williams Furniture Ltd.*, [1979] Ch. 250 (C.A.); *Transamerica Life Insurance Co. v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), affd 74 A.C.W.S. (3d) 207 (C.A.).

36. In *St. Mary's Cement Corp. v. Construc Ltd.* (1997), 32 O.R. (3d) 595, 35 C.L.R. (2d) 234 (Gen. Div.), the court applied *Air Canada v. M&L Travel Ltd., supra*, footnote 30. A director of a corporation was deemed to have knowledge of the trust provisions of the Ontario *Construction Lien Act*, and he was found liable for knowing assistance in respect to a breach of trust that was characterized as dishonest and fraudulent.

should be something more than participation to make an agent liable for another's breach of trust or fiduciary duty. In *Air Canada v. M&L Travel Ltd.*, Iacobucci J. adopted the observation of Professor Sullivan about the liability of the stranger that acts for the guilty trustee that 'so long as he chooses to remain an agent, his loyalties are to his principal, the trustee, and he should be free to follow the latter's instructions short of participating in a fraud."[37] In *Citadel General Assurance Co. v. Lloyds Bank Canada*,[38] the bare facts of which were noted in the introduction, the defendant bank was not liable for knowing assistance because it did not have actual knowledge that the transfer of funds into the parent corporation's account was a breach of trust. In *Canson Enterprises Ltd. v. Boughton*,[39] the British Columbia Court of Appeal followed the *Air Canada* case and rejected a knowing assistance claim against a law firm. The firm's clients, who were joint venturers in a land purchase, had a breach of fiduciary duty claim against certain other defendants who had earned a secret profit on the clients' purchase. The clients joined a claim against their lawyers for knowing assistance in facilitating the closing of the purchase. The claim, however, was dismissed because the lawyers did not have actual knowledge of the secret profit, that is, they did not have actual knowledge of the guilty fiduciaries' fraudulent and dishonest act.

5. The Doctrine of Knowing Receipt

A stranger to a trust or fiduciary relationship may be liable under the doctrine of knowing receipt if the stranger receives trust property in his or her own personal capacity, that is, beneficially and not merely as agent of the guilty trustee or fiduciary, with actual knowledge or constructive knowledge of a breach of trust or fiduciary duty.[40] The three major elements of a claim for knowing receipt

37. *Supra*, footnote 30, at p. 617 D.L.R.
38. (1997), 152 D.L.R. (4th) 411 (S.C.C.).
39. [1996] 1 W.W.R. 412, 11 B.C.L.R. (2d) 1, 42 C.P.C. (3d) 337 (C.A.), leave to appeal to the Supreme Court of Canada refused March 26, 1996. To avoid confusion, it is helpful to note that this was the second judgment of the British Columbia Court of Appeal in this litigation. The earlier proceedings are reported (1988), 52 D.L.R. (4th) 323, [1989] 2 W.W.R. 30, 31 B.C.L.R. (2d) 46 (S.C.), affd 61 D.L.R. (4th) 732, [1990] 1 W.W.R., 39 B.C.L.R. (2d) 177 (C.A.), affd 85 D.L.R. (4th) 129, [1991] 3 S.C.R. 534, 39 C.P.R. (3d) 449. These proceedings yielded an important decision of the Supreme Court of Canada about the limits and measure of equitable compensation for breach of fiduciary duty.
40. *Canadian Pacific Airlines Ltd. v. Canadian Imperial Bank of Commerce* (1987),

against a stranger are: (1) a trust or fiduciary relationship; (2) the stranger receiving property from the trust or fiduciary relationship in his or her own personal capacity, and (3) the stranger having actual or constructive knowledge that the property was transferred to the stranger in breach of trust or fiduciary duty.

It is notable that, for the doctrine of knowing receipt, actual knowledge is sufficient but not necessary for the stranger's liability. The doctrine of knowing receipt actually sets a lower standard for its knowledge component than does the doctrine of knowing assistance, and it is also notable that, for knowing receipt, it is not necessary that the predicate breach of duty be fraudulent or dishonest.[41] The standard of constructive knowledge is lower than a standard of actual knowledge because it is easier to prove objectively what a person ought to know in the circumstances of a particular case than it is to prove what a person actually knew in the circumstances.

In *Citadel General Assurance Co. v. Lloyds Bank Canada*,[42] La Forest J.[43] explained that the bank was liable under the doctrine of knowing receipt because it had received funds for its own benefit with constructive knowledge that the transfer to it was in breach of trust. In so holding, La Forest J. rejected the conclusion of the Alberta Court of Appeal that actual knowledge was required for liability for knowing receipt.[44] Rather, in circumstances where a stranger to the breach of trust is enriched, constructive notice, that

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42 D.L.R. (4th) 375, 61 O.R. (2d) 233, 71 C.B.R. (N.S.) 40 (H.C.J.), affd 71 O.R. (3d) 63*n*, 4 C.B.R. (3d) 196, 37 E.T.R. 1 (C.A.).

41. *Citadel General Assurance Co. v. Lloyds Bank Canada*, *supra*, footnote 4.
42. *Ibid.*
43. La Forest J. wrote the main judgment for himself and Gonthier, Cory, McLachlin, Iacobucci and Major JJ., concurred. Sopinka J. also concurred but subject to his reasons in the companion case of *Gold v. Rosenberg*, *supra*, footnote 3.
44. The cases supporting constructive knowledge for knowing receipt are: *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, *supra*, footnote 8; *Nelson v. Larholt*, [1948] 1 K.B. 339; *Cartwright v. Lyster*, [1934] 2 D.L.R. 166, [1934] O.R. 161, [1934] O.W.N. 117 (C.A.); *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78, [1976] 2 W.W.R. 673 (B.C.C.A.); *B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 112 D.L.R. (3d) 88, [1980] 2 S.C.R. 343, 41 N.S.R. (2d) 573; *Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce*, *supra*, footnote 41; *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, 14 B.L.R. (2d) 1, 13 C.L.R. (2d) 225 (C.A.), leave to appeal refused [1994] 3 S.C.R. v., 16 B.L.R. (2d) 254*n*; *Glenko Enterprises Ltd. v. Ernie Keller Construction Ltd.* (1996), 134 D.L.R. (4th) 161, [1996] 5 W.W.R. 135, 110 Man. R. (2d) 27 (C.A.). The *Citadel* decision overturns the Court of Appeal for Ontario's decision in *Bullock v. Key Property Management Inc.* (1997), 33 O.R. (3d) 1, 17 E.T.R. (2d) 151, 90 O.A.C. 116 (C.A.), where the

is, knowledge of facts sufficient to put a reasonable person on notice or on inquiry of the possibility of a breach of trust or fiduciary duty, is sufficient to ground liability. The rationale for liability at the lower standard is that if the stranger seeks to obtain a personal advantage in circumstances that a reasonable person would be alert to the possible claims of a beneficiary, then it is fair to require the stranger to ensure himself of the propriety of the transaction. One very important consequence is that a stranger receiving a personal benefit is under a duty to make inquiries regarding a possible breach of trust. In *Citadel,* La Forest J. stated:[45]

> In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

The defendant bank in *Citadel* obviously would have preferred to have the knowledge requirement for knowing receipt set at the higher level of actual knowledge of a breach of trust or at the still higher level of actual knowledge of a breach involving fraud or dishonesty. The lowering of the standard for knowing receipt claims to constructive knowledge exposes banks and other classes of lenders or creditors to a greater risk of liability. Of particular concern to banks will be accounts with customers in the construction industry because of the statutory trusts imposed by construction lien legislation. This, however, is not to say that liability is in any way automatic simply because a bank will undoubtedly know that its customer is subject to statutorily imposed trust obligations. Knowledge of the trust is not enough. For the bank to be liable, it must have at least constructive knowledge that there has been a breach of the statutory trust. For example, in *Glenko Enterprises Ltd. v. Ernie Keller Contractors Ltd.*,[46] the Manitoba Court of Appeal upheld a judgment where the trial judge had concluded that the defendant bank did not have either actual knowledge or constructive knowledge of a breach of the trust obligations under the Manitoba *Builders' Liens Act.* In *Arthur Andersen Inc. v. Toronto-*

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court had held that constructive knowledge was insufficient to impose liability for breach of trust on a stranger to the trust.

45. *Supra*, footnote 4, at p. 434 D.L.R.

46. *Supra*, footnote 45.

Dominion Bank,[47] the Ontario Court of Appeal stated that the assessment of the reasonableness of the conduct of the lender had to be made in context and would depend upon the length and nature of the relationship between the lender and its customer. In this case, a claim against the bank was dismissed because it did not have the requisite degree of knowledge to ground liability and, in the circumstances of the case, there was no duty to inquire.

As already noted in the introduction to this article, in *Gold v. Rosenberg*,[48] the defendant, Rosenberg, who was an executor and a beneficiary of his father's estate arranged to have a corporation owned by the estate sign a guarantee to repay his own corporation's indebtedness to the Toronto-Dominion Bank. The guarantee was secured by a mortgage of estate property. The plaintiff Gold, who was a co-executor and beneficiary, authorized the transaction but later said he had been misled and he sued the bank for a declaration that the guarantee was invalid. In a 4:3 split judgment, which affirmed the judgment of the Ontario Court of Appeal, the Supreme Court dismissed Gold's action. In the main judgment, Sopinka J. for a majority[49] agreed with that portion of Iacobucci J.'s dissenting judgment[50] that dismissed Gold's claim under the doctrine of knowing assistance. This claim failed because there was no proof that the bank had actual knowledge of Rosenberg's dishonest and fraudulent breach of trust. In Sopinka J.'s majority opinion, Gold's claim under the doctrine of knowing receipt also failed because, in the circumstances of the case, the bank had acted reasonably and did not have either actual or constructive notice of any breach of trust. In the *Gold* case, Sopinka J. felt that an honest person would not have acted any differently than the bank.[51] Thus, there was no constructive knowledge.

On the question of knowledge, Sopinka J. adopted the typology of Gibson J. in the English case of *Baden v. Société Générale pour*

47. *Supra*, footnote 45.
48. *Supra*, footnote 3.
49. McLachlin and Major, JJ. concurring. Gonthier J. concurring in short separate reasons.
50. La Forest and Cory, JJ. concurred in the dissent.
51. Sopinka, McLachlin and Major, JJ. also felt that the claim for knowing receipt failed because, in their view, the receipt of a guarantee backed by a mortgage was not a beneficial receipt of property. On this point, however, Gonthier J. agreed with Iacobucci, La Forest and Cory, JJ. Thus, Gonthier J. decided that it was a knowing receipt case but the constituent element of at least constructive knowledge had not been satisfied.

Favoriser le Développement du Commerce et de l'Industrie en France SA.[52] Gibson J. described five types of knowledge: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; (4) knowledge of circumstances that would indicate the facts to an honest and reasonable person, and (5) knowledge of circumstances that would put an honest and reasonable person on inquiry. The first three types form the class of actual knowledge and the last two types form the class of constructive knowledge.

La Forest J.'s judgment in *Citadel* makes it clear that the doctrinal rationale and remedy for liability for knowing receipt is different from the rationale for liability for knowing assistance. The rationale and remedy for knowing receipt are restitutionary. The knowing recipient must disgorge or return his benefit and restore to the plaintiff on the grounds of unjust enrichment, that is, the defendant has been unjustly enriched at the plaintiff's expense.[53] In contrast, as already noted above, the doctrinal basis for recovery under the doctrine of knowing assistance does not depend on the defendant being enriched. Rather, the rationale is fault-based and equity intervenes to protect the plaintiff's proprietary interest where the defendant actually knew that he was an accessory to reprehensible conduct by the trustee. One very significant difference arising from the different rationales is that the beneficiary's recovery from knowing receipt may be less than the recovery from knowing assistance. This follows because, under the doctrine of knowing receipt, the defendant's liability is measured by his unjust enrichment while, under the doctrine of knowing assistance, the defendant's liability is measured by the plaintiff's injury consequent to the trustee's misconduct. The plaintiff's injury may exceed the defendant's benefit. *Air Canada v. M&L Travel Ltd.* is an example of this phenomenon.

It should also be observed that while the doctrine of knowing receipt may be rationalized by notions of unjust enrichment, it does not perfectly align itself with the constituent elements of a claim for unjust enrichment. The discrepancy is that a claim for unjust enrichment does not depend upon the plaintiff proving that the defendant

52. [1992] 4 All E.R. 161 (Ch. D.).

53. *Citadel General Assurance Co. v. Lloyds Bank of Canada, supra,* footnote 4, at pp. 435-6 D.L.R. See also Iacobucci J.'s dissenting judgment in *Gold v. Rosenberg, supra,* footnote 3, at pp. 395-9 D.L.R., where he develops the point that unjust enrichment is the essence of a claim for knowing receipt.

had either actual knowledge or constructive notice of the circumstances yielding the unjust enrichment. In the context of litigation against strangers, however, the discrepancy is substantially diminished because, while the plaintiff beneficiary with an unjust enrichment claim need not prove that the defendant stranger had some degree of culpable knowledge, the stranger can introduce the issue of knowledge through the defence of being a *bona fide* purchaser for value without notice or through the defence of change of position, for which defence the question of the stranger's state of knowledge would be a pertinent consideration. Moreover, practically speaking, if a beneficiary were to advance an unjust enrichment claim instead of a knowing receipt claim, the stranger would likely respond that there was a juristic reason for the defendant's enrichment, for example, a bank would respond that it was a creditor of the fiduciary or trustee and was not being unjustly enriched in settling the debt. The plaintiff's counterargument would be that the bank was being unjustly enriched precisely because it had constructive knowledge of the plaintiff's entitlement when it received the funds from the trustee or fiduciary, and thus the plaintiff's unjust enrichment claim would translate into a knowing receipt claim.

6. Conclusion: Some Practical Observations

By way of a conclusion and a summary, seven practical observations about the similarities and differences between the various doctrines and remedies are offered, along with a methodology to simplify the analysis of whether there is a viable claim under one or more of the doctrines against the stranger.

The first observation is that the significance of the stranger's state of knowledge to his exposure to liability varies from doctrine to doctrine. To be liable for knowing assistance, the stranger must have actual knowledge or what is regarded as its equivalent. For knowing receipt, the stranger will be liable with actual or with constructive knowledge, which is a lower standard. For property law remedies and for unjust enrichment, the stranger's state of knowledge is not a constituent element of the claim, but is still significant because the stranger will have a defence to the claim if he was a *bona fide* purchaser for value without actual or constructive knowledge of the beneficiary's claim and the stranger's ignorance of the true situation may be a factor in a change of position defence to the claim for unjust enrichment. For the reasons expressed above, unjust enrich-

ment claims, therefore, translate into knowing receipt claims. The stranger's state of knowledge is not a factor in determining liability as a trustee *de son tort* although, presumably, the stranger will know that he has voluntarily assumed responsibility and control of the trust assets.

The second observation is that the significance of the nature of the trustee's or fiduciary's misconduct to the liability of the stranger varies from doctrine to doctrine. For the stranger to be liable for knowing assistance, the trustee or fiduciary must have acted fraudulently or dishonestly. In contrast, the stranger can be liable for knowing receipt under the law of property or under the doctrine of unjust enrichment when the trustee or fiduciary has simply breached his equitable duty without any fraud or dishonesty. The stranger can be liable as a trustee *de son tort* without any actionable misconduct by the genuine trustee. Indeed, one possibility is that the genuine trustee no longer exists, and the stranger voluntarily assumed responsibility for the trust with the attendant responsibilities.

The third observation is that the significance of control or receipt of property derived from the trust or fiduciary relationship differs from doctrine to doctrine. The stranger's receipt of property is not a necessary factor for liability for knowing assistance, although the receipt of the property may ground an inference that the stranger had actual knowledge of the trustee's or fiduciary's fraudulent and dishonest conduct. In contrast, the receipt of property is necessary for liability under property law, for knowing receipt, for unjust enrichment, and as a trustee *de son tort*. In the case of liability for knowing assistance and for unjust enrichment, the stranger must have received the property beneficially.

The fourth observation is that the rationale for the stranger's liability differs under the various doctrines. Knowing assistance is fault based. Knowing assistance and unjust enrichment are restitutionary. The stranger's liability under property law is explained by notions of the strength of ownership claims against rival claims. Liability as a trustee *de son tort* is explained by the stranger's voluntary assumption of a trustee's responsibilities despite the absence of an official appointment.

The fifth observation is that the measure of the stranger's liability differs from doctrine to doctrine. The stranger who is liable for knowing receipt or unjust enrichment is liable to the extent of his unjust enrichment. The stranger who is liable under property law is liable to restore the property in his or her possession. In contrast, the

stranger who is liable for knowing assistance or as a trustee *de son tort* is exposed to the same liability as a trustee or fiduciary who breaches his or her equitable obligations. This liability may extend beyond the disgorgement of any property and, indeed, a trustee *de son tort* or a stranger under the doctrine of knowing assistance may not have received any personal benefit or property.

The sixth observation is that the differences between the various doctrines may or may not be significant in a particular case. If, for example, a stranger receives the benefit of funds impressed with a trust or fiduciary duty with constructive notice of the equitable claim, then liability for knowing receipt or unjust enrichment would be established, and if that receipt of funds was the measure of the beneficiary's losses, it would be redundant for the beneficiary to prove that the stranger had actual notice of a fraudulent or dishonest design and that the stranger had assisted in that design and was, therefore, liable for knowing assistance. Alternatively or conversely, in this example, if it could be shown that the stranger had actual knowledge and participated in fraudulent or dishonest conduct by the trustee or fiduciary, then it would not be necessary to prove that the stranger personally benefited from the misconduct and, in this case, the proof of liability for knowing receipt or unjust enrichment would be redundant. For another example of the possible redundancy of claims, take the case of a stranger who receives trust property as a gift from a guilty trustee or fiduciary. If the gift is traceable, then property law will restore the property to the beneficiary, who would then not need to prove the more difficult elements of knowing assistance or knowing receipt. However, in this last example, the other claims would not be redundant if the gift were no longer traceable.

The seventh observation is a corollary of the other observations. It follows from the above observations that the most difficult case for the beneficiary is the situation where the stranger did not receive a personal benefit and participated only to the extent of assisting the guilty trustee or fiduciary who retained control of the property. Such a stranger would not be exposed to liability unless he had actual knowledge of the trustee's or fiduciary's fraudulent or dishonest design.[54]

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54. Although the case involves the misappropriation of property as a result of fraud as opposed to a breach of fiduciary duty, *Royal Bank of Canada v. Horowitz* (1994), 17 O.R. (3d) 671 (Gen. Div.) illustrates how a claim against a stranger may fail. In

From these observations and from the discussion in the earlier part of this article, it is possible to construct a methodology of a series of questions that may simplify the analysis of whether the beneficiary of a trust or fiduciary duty has a viable claim against a stranger. The first question is whether the stranger is a *bona fide* purchaser for value without notice. If the answer to this question is yes, then it follows that all the possible claims fail. By definition, such a stranger would not have actual or constructive knowledge, would have a defence to property law or unjust enrichment claims, and would have taken control of the property for his own benefit and not as a trustee *de son tort.*

If the answer to the first question is no, then the second question is whether the stranger received property for his own benefit. If the answer here is no, then there is no unjust enrichment claim, no knowing receipt claim, and no claim under property law, but the stranger may be liable as a trustee *de son tort* or for knowing assistance.

If the answer to the second question is yes (that is, the situation is that the stranger has personally benefited from the receipt of property but cannot claim the status of a *bona fide* purchaser for value without notice), then this eliminates the claim based on liability as a trustee *de son tort* but exposes the stranger to potential liability for knowing receipt, for unjust enrichment, and under property law. The stranger could also be exposed to liability for knowing assistance but, practically speaking, it would not be necessary to pursue this most difficult claim unless the beneficiary's losses exceeded the stranger's unjust enrichment.

If the answers to the questions yield the possibility of a property law claim, then, practically speaking, this is the easiest claim to pursue because it does not depend upon proving any constituent element of knowledge (and the first question has already eliminated the defence of *bona fide* purchaser for value.) The next question then is

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this case, as a result of frauds and forgeries, the plaintiff bank granted a credit facility to a lawyer. He used moneys from the credit facility to repay a loan to the defendant Horowitz, who was a stranger to the misconduct. Horowitz had no actual or constructive notice of the fraudulent source of the funds. The absence of knowledge of any type precluded any claim under the doctrines of knowing assistance and knowing receipt. The claim for unjust enrichment also failed because there was a juristic reason for the enrichment at the expense of the bank, that is, the defendant was genuinely owed the money by the person who paid it. Finally there was no tracing or proprietary claim because she was a *bona fide* purchaser for value.

whether there is traceable property to make the property law claim worthwhile.

If the answer to either line of questions yields the possibility of a claim for knowing assistance and there is a practical reason to pursue this difficult claim, then its viability will depend upon establishing whether the stranger had actual knowledge of the trustee's or fiduciary's fraudulent or dishonest conduct.