I. Introduction

Confusion surrounds the equitable liability of a third party to a trust or fiduciary relationship who participates in a breach of the trust or fiduciary duty, but without necessarily receiving trust property.¹ Compounding this confusion is the absence of consensus in courts that share a common Chancery law heritage. Notably, the English courts, including the Privy Council within that term, and the High Court of Australia take quite different approaches to the liability, although drawing upon the same nineteenth century trust law precedents. The Canadian common law is different again, although reliant upon the same cases.²

Until recently, the jurisdictional differences were excused on the basis that the Australian and Canadian courts had not yet had the opportunity to consider the Privy Council’s rationalisation of this form of equitable participatory liability in Royal Brunei Airlines Sdn Bhd v Tan (Royal Brunei) in 1995.³ This still may be so with respect to the Canadian law, which will not be considered further in this chapter, but it seems clear now that the Australian law is set on a different path.⁴

The English approach is one of broad principle. In Royal Brunei, Lord Nicholls gathered together the nineteenth century trust law precedents and reformulated them as a loss based ‘accessory’ liability that attaches to a third party, D, who procures or assists in any breach of trust by the fiduciary, F.⁵ From the twentieth century trust law precedents he identified a requirement of ‘dishonesty’ on the

---

¹ This chapter does not deal directly with recipient liability, that is, liability based upon D’s receipt of trust property in breach of the trust.
⁴ New Zealand law is not considered in this chapter. Royal Brunei’s dishonesty test has been adopted in that country: US International Marketing Ltd v National Bank of New Zealand [2003] NZCA 295, [2004] 1 NZLR 589.
⁵ The liability was formulated in terms of trusts; its application to fiduciaries generally is discussed below.
part of D. The High Court of Australia in 2007 in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (*Farah*) did not endorse *Royal Brunei*, although widely tipped to do so. Instead, the Court adhered more closely to the nineteenth century precedents, as well as to its own 1975 decision in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (*Consul*), by continuing to differentiate between acts of procurement by D and assistance by D on the one hand, and between honest breaches of duty by F, and dishonest and fraudulent breaches of duty by F, on the other hand. In Australia, D’s liability to the claimant beneficiary or principal, C, continues to turn on D’s knowledge of F’s breach of duty, rather than on D’s dishonesty as under the reformulated English model.

Neither the English approach nor the Australian approach is universally endorsed. The optimism generated by *Royal Brunei* dissipated following the interpretation and reinterpretation of its dishonesty test by the House of Lords and the Privy Council respectively. The Australian law remains uncertain as the High Court in *Farah* did not completely rule out the possibility of following *Royal Brunei* in the future.

How is it that two quite different liability schemes have emerged from reliance upon essentially the same equitable precedents? And is either approach defensible? In this chapter I critically evaluate the use of the equity case law by the Privy Council in *Royal Brunei* and the High Court in *Farah* and propose an alternative scheme that more accurately reflects the equitable cases. Of course, the principled use of precedent is not the only consideration in formulating a participatory liability scheme for breach of trust or fiduciary duty. Other relevant matters include policy concerns, the statutory and common law regulatory context for third parties who interact with trustees and fiduciaries, and whether there are jurisdictional idiosyncrasies that might warrant different approaches being taken. Nonetheless, a fundamental step in formulating a defensible participatory liability

---


7 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (HCA).

8 The High Court used the phrase ‘knowingly induced or immediately procured’: ibid [161]. It is difficult to discern any difference in meaning between these terms. Hence, ‘procurement’ will be used to include inducement in this paper. But see P Finn, *The Liability of Third Parties for Knowing Receipt or Assistance* in D Waters (ed), *Equity, Fiduciaries and Trusts* (Toronto, Carswell, 1993) 195, 212 where separate scenarios of inducing a breach of fiduciary duty and procuring a breach of fiduciary duty are described.


10 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476. One judge has referred to the precedential ‘nightmare’ caused by these decisions: *Attorney General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch) [351], [358] (Peter Smith J).

11 I use the term ‘precedent’ to mean cases relevant to the legal issue in question, whether or not binding upon the court.
scheme for breach of trust or fiduciary duty must be to ensure that it is firmly and appropriately founded upon the equitable precedents.

Part II of the chapter outlines the points of doctrinal difference between the English and Australian schemes. Part III describes and evaluates the Privy Council and the High Court’s use of the equity case law in *Royal Brunei* and *Farah*. I argue that there are flaws in both the High Court’s literalist, narrow reading of a selected few cases and the Privy Council’s broad-brush treatment of the case law. Although Lord Nicholls’ methodology is preferable, he did not draw upon a sufficiently wide sample of the relevant precedents and, consequently, his proposed accessory liability scheme in *Royal Brunei* is flawed. Part IV demonstrates how a broader consideration of the equity cases concerning participatory liability suggests an alternative way of organising the case law and formulating a principle. In light of these findings, Part V makes some suggestions as to how the doctrinal differences outlined in Part II might be resolved.

**II. Doctrinal Differences**

Broadly speaking, there are three clear points of doctrinal difference between the English and Australian schemes as presently formulated and one potential point of contention.12

A. How Many Categories of Liability?

The first point of difference concerns whether there is one, all-encompassing, ‘accessory liability’ or two categories of liability, namely,

(i) knowing assistance by D in a dishonest and fraudulent design by F; and,
(ii) knowing procurement by D in any breach of trust by F.

According to *Royal Brunei*, accessory liability, based upon D’s dishonesty, applies to all breaches of trust by F and to all types of involvement by D apart from receipt of trust property by D. Conversely, the High Court in *Farah* adhered to the two distinct forms of liability present in the nineteenth century case law in relation to a D involved in a breach of trust or fiduciary duty without receiving trust property: namely, assisting in a dishonest and fraudulent breach of trust or fiduciary duty by F;13 and procuring any breach of trust by F.14

---


13 *Barnes v Addy* (1874) LR 9 Ch App 244 (CA).

14 *Fyler v Fyler* (1841) 3 Beav 550, 49 ER 216; *Alleyne v Darcy* (1854) 41 Ch R 199; *Eaves v Hickson* (1861) 30 Beav 136, 54 ER 840.
B. Does Liability Turn on D’s Knowledge or D’s Dishonesty?

Traditionally, D’s liability has depended upon whether D ‘knew’ of a dishonest and fraudulent breach of duty by F. This formulation was derived from the so-called ‘second limb’ of Lord Selborne LC’s *ex tempore* judgment in *Barnes v Addy* concerning the equitable liability of agents of trustees:

[S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal power, transactions perhaps of which a court of Equity may disapprove, unless … they assist with knowledge in a dishonest and fraudulent design on the part of the trustees …

Attention focussed upon whether D could be liable for something less than actual knowledge of F’s wrongdoing. The *Baden* scale of knowledge, comprising five levels of possible cognition ranging from actual knowledge to constructive knowledge became ubiquitous in this context. Confusing the issue was that the requirement of knowledge arose both in relation to the first limb of *Barnes v Addy*, that is, where D received trust property in breach of a trust, and in relation to the second limb, where D participated in a breach of trust without necessarily receiving trust property. Minds differed over whether a lower threshold for liability, and hence a lower level of knowledge, might apply under the first limb where D’s liability might be justified in property law terms. That is, in relation to recipient liability, it could be argued that the protection of C’s property rights should over-ride concern with the state of D’s conscience (as indicated by D’s knowledge) and, if this is so, it is easier to say that D should be liable for something less than actual knowledge where D received trust property in breach of the trust.

In *Royal Brunei* Lord Nicholls rejected knowledge as the sole determinant of D’s liability in relation to the second limb of *Barnes v Addy*. Instead, according to Lord Nicholls, the question is whether D acted as an honest and reasonable person in all the circumstances would have acted. D’s knowledge is one (important) factor in a wider factual matrix from which the court decides whether D acted dishonestly. The *Baden* scale was said to be unhelpful in this inquiry because “‘knowingly’ is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not of kind.” After some confusion generated by the House of Lords in *Twinsectra v Yardley*, the Privy Council confirmed in *Barlow*

---

15 *Barnes* (n 13) 251–52.
18 *Consul* (n 7) 410–11 (Stephen J).
19 See generally Gardner, ‘Knowing Assistance and Knowing Receipt’ (n 16) 66–68.
20 *Royal Brunei* (n 3) 391 (Lord Nicholls).
Clowes International Ltd (in liq) v Eurotrust International Ltd (Barlow Clowes) that dishonesty was to be determined according to an objective standard.\(^{21}\)

Conversely, in *Farah* the High Court held that in relation to a D who assists F in a dishonest and fraudulent breach of duty, D’s liability turns upon D’s knowledge, rather than upon a higher-level conclusion of dishonesty. That is, the second limb of the *Barnes v Addy* formulation was retained. According to the High Court, the *Baden* scale is a helpful tool in describing degrees of knowledge and should be used in interpreting the Court’s 1975 decision in *Consul* which continues to bind Australian courts.\(^{22}\) Accordingly, and applying the *Baden* scale to the judgments in *Consul*, level (iv) of that scale, ‘knowledge of circumstances which would indicate the facts to an honest and reasonable man’ suffices for D’s knowing assistance liability in Australia. This will capture the ‘morally obtuse’ D who does not recognise an impropriety that would have been recognised by an ‘ordinary person’.\(^{23}\) It is not stated explicitly in *Farah* whether the same standard of knowledge is required for a D who procures, rather than assists, F’s breach of duty.\(^{24}\)

Thus, the most explicit point of contention between Australia and England at present is whether a single criterion of knowledge suffices for D’s liability or whether instead, the court should determine whether D acted dishonestly by considering a matrix of facts including, but not limited to, the state of D’s knowledge.\(^{25}\)

C. The Ambit of Liability

It is not clear whether the English formulation of accessory liability extends to breaches of fiduciary duty not involving either a trust or property under F’s control.\(^{26}\) Lord Nicholls’ reasoning in *Royal Brunei* focuses upon liability for breach of an express trust and, specifically, the liability of agents acting for trustees, although in his concluding remarks he refers to ‘a breach of trust or fiduciary obligation’.\(^{27}\) Much of his reasoning makes sense only in the context of express trusts. The ambit of liability is considerably widened by the fact that breaches of fiduciary duty by company directors also are treated as instances of breach of trust on the basis that the company property is treated as trust property.\(^{28}\) But it has not

\(^{21}\) *Barlow Clowes* (n 10).
\(^{22}\) *Farah* (n 6) [175].
\(^{23}\) Ibid [177].
\(^{24}\) In *Consul* (n 7) 414 Stephen J rejected the respondent’s argument that D had actively induced F to breach his fiduciary duty and commented, ‘Even were this so I doubt whether, in the absence of knowledge by [D], [C] would be entitled to equitable relief’.
\(^{25}\) The equally important question of the content of D’s knowledge (eg, must D recognise that a breach of trust has occurred?) has not received as much attention. See, eg *Barlow Clowes* (n 10) [28]; cf *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (NSWCA) 253. See generally Mitchell, ‘Assistance’ (n 12) 195–200.
\(^{26}\) See, eg Mitchell (n 12) 160.
\(^{27}\) *Royal Brunei* (n 3) 392.
\(^{28}\) *Soar v Ashwell* [1893] 2 QB 390 (CA). For a recent example, see *Statek Corporation v McNeill Alford* [2008] EWHC 32 (Ch).
been authoritatively spelt out in England whether liability extends to breaches of fiduciary duty not involving property. Conversely, in Australia the two High Court cases in which accessory liability has been considered, *Consul* and *Farah*, involved ‘pure’ alleged breaches of fiduciary duty in which no property, trust or otherwise, was misapplied.29

### D. Remedies

A possible jurisdictional difference between the Australian and English schemes concerns the remedies available for equitable participatory liability. Until very recently, the English courts did not need to consider anything other than loss-based remedies and it seems to have been assumed that the remedy is loss-based only.30 On the other hand, in Australia gain-based remedies seem uncontroversial. So far, the difference can be attributed to the different factual scenarios that have come before the senior courts in each jurisdiction. Thus, for example, the Australian courts have dealt with ‘pure’ fiduciary breaches involving alleged exploitation of business opportunities by D that should have been offered to C,31 or where D appropriated C’s product and product market for his own profit-making purposes.32 The most natural remedy in these scenarios, if the claim were established, is gain-based and certainly none of the courts involved showed any concern with that. On the other hand, the availability of gain-based remedies for accessory liability has been raised less frequently in the United Kingdom and, perhaps as a consequence, it tends to be assumed that the remedy is loss-based.33

### III. Different Approaches to Precedent

The most striking difference between *Royal Brunei* and *Farah* concerns the style of judicial reasoning in each case and, particularly, their different treatment of the

---

29 *Consul* (n 7) 396–97 (Gibbs J).
31 Eg *Consul* (n 7); *Farah* (n 6).
32 *United States Surgical Corporation* (n 25).
same, or similar, precedents. The difference in judicial method is one significant reason why the outcome of Royal Brunei has been preferred to that in Farah.

The facts of Royal Brunei concerned the principal director and shareholder of a travel agency company that held payments received for airline tickets on trust for the airline. The director, through his negligent mismanagement of the company, caused the company to breach this trust. The only question of law before the Privy Council was whether the director could be liable under the second limb of Barnes v Addy despite the breach of trust not being part of a ‘dishonest and fraudulent design’, as per Lord Selborne’s dicta in that case. Yet the litigation was viewed as an opportunity to resolve wider uncertainties besetting the doctrine:

A conclusion cannot be reached on the nature of the breach of trust which may trigger accessory liability without at the same time considering the other ingredients including, in particular, the state of mind of the third party.34

The way was then open to consider all elements of the liability.

In Farah before the High Court, equitable participatory liability was not raised by the facts and had not been the primary focus of the parties’ detailed submissions in a very lengthy case. The question in Farah was whether the wife and daughters of the director of a joint venture company could be liable for participation in the company’s alleged breach of fiduciary duty. The focus in the New South Wales Court of Appeal and the High Court was upon whether they were recipients of trust property (the first limb of Barnes v Addy); however, in the alternative it was argued that they were liable under the second limb of Barnes v Addy. The High Court reinstated the primary judge’s decision that there was no breach of fiduciary duty, yet went on to consider both limbs of Barnes v Addy in light of its strong disagreement with the approach of the Court of Appeal. But the Court declined to consider whether Lord Nicholls’ formulation of accessory liability should be adopted in Australia because this question was not in issue before it.35 ‘For now’, Australian courts should continue to observe the distinction between the second limb in Barnes v Addy, as it was applied in Consul, and the earlier nineteenth century procurement cases.

Thus, the potential of the Royal Brunei litigation to reform equitable participatory liability for breach of trust was fully exploited by Lord Nicholls, whereas the High Court in Farah chose to decline such a task. With respect, it is unfortunate that the High Court did not take up the opportunity presented by Farah. The respondents’ suggested reformulation of the second limb of Barnes v Addy clearly resonated with the momentous changes made in Royal Brunei and, without any stretch of the imagination, raised the question of whether Royal Brunei’s principle of ‘accessory liability’ should be adopted in Australia. Occasions for the High Court to provide guidance on such an important question of commercial law do not come up every day in Australia. The smaller volume of commercial litigation

34 Royal Brunei (n 3).
35 Farah (n 6) [160].
and the diluting effect of Australia’s federal system in which there are multiple appellate courts of equal standing impedes the building of a solid and consistent jurisprudence on these matters at the Court of Appeal level which might then warrant a High Court challenge. Thus, opportunities for doctrinal clarification, however slim, should be grasped.

Bearing in mind then, that the law in Australia may yet be changed by the High Court in a more suitable case, how did the courts in *Royal Brunei* and *Farah* use the equitable precedents in formulating their versions of the liability?

A. The Use of Equitable Precedent in Royal Brunei and Farah

In *Royal Brunei* Lord Nicholls explicitly moved away from a close reading of the case law because, in his view, this approach was responsible for many of the problems besetting this area of law. Specifically, he jettisoned the traditional precedent of *Barnes v Addy*, on the ground that it had been applied as though it were a ‘statute’, and ‘[t]his approach has been inimical to analysis of the underlying concept’.36 He then considered the matter as one of principle, taking into account all case law on third parties and breach of trust, whether binding or not.

The case law was used at two steps in his reasoning. First, the nineteenth century cases involving third parties and breach of trust were referred to in order to highlight an apparently illogical element in the reasoning of Lord Selborne in *Barnes v Addy* that directed attention to the trustee F’s state of mind in order to determine whether D should be liable. Why should a dishonest D assisting a dishonest F be liable, but not a dishonest D assisting an honest F? Lord Nicholls pointed to the handful of trust cases contemporaneous with *Barnes v Addy* in which a dishonest and fraudulent breach was not required where D had procured, rather than assisted, the breach of trust by F. This apparent inconsistency in the precedents presented an opportunity to reconsider the underlying concept of participatory liability in relation to breach of trust. The highlighting of these cases by Lord Nicholls was a significant innovation for they had been overlooked by many judges and scholars.37

Secondly, the twentieth century *Barnes v Addy* case law was discussed in relation to the touchstone for D’s liability. In considering the relevant law, Lord Nicholls drew on the decisions of judges in other jurisdictions (regardless of their level of seniority) as well as academic commentary. He used the twentieth century cases to extract a requirement of ‘dishonesty’ on the part of D, although most of those cases did not use that terminology. Under Lord Nicholls’ approach, the detail of individual cases was given much less prominence in the reasoning process; instead, the precedents were balanced with a normative inquiry as to when

36 *Royal Brunei* (n 3).
third parties dealing with trustees should be subjected to equitable liability. In this context, he considered scenarios that were particularly problematic in the twentieth century *Barnes v Addy* case law such as where D’s conduct had been either careless or reckless.

The judicial methodology in *Royal Brunei* is the antithesis of that employed by the High Court in *Farah*. In *Farah* the High Court rejected the respondents’ suggested reformulation of the second limb of *Barnes v Addy*. Instead, the Court adhered to the literal reading of Lord Selborne’s judgment as it was applied in *Consul* and to a literal reading of the same nineteenth century cases relied upon by Lord Nicholls in *Royal Brunei* concerning procuring and inducing breaches of trust. Consistently with this style of ‘reasoning based on decisional precedent’, the judgment in *Farah* does not expressly indicate whether the Court approved or disapproved of the judgments in *Consul*, nor why it was considered unnecessary to consider the many Australian lower court decisions since then, let alone the international case law and commentary. This may have been due to the Court’s decision to postpone full consideration of *Royal Brunei* for another day or it could be because only *Consul* was a binding precedent for Australian courts. There is also a paucity of normative reasoning in the judgment.

**B. Which Approach Should Be Preferred?**

What should be made of the differences in the use of the equitable precedents in these two leading cases? I will begin by considering *Farah*. The judicial method in *Farah* matches what Finn J has extrajudicially described as a ‘theology of doctrine’ approach to legal reasoning. Under this approach, attention is paid primarily to the detail and presentation of doctrine in earlier cases at the expense of consideration of their context or of the underlying principle contained in those cases. To pursue Justice Finn’s religious metaphor, it is a fundamentalist, literal approach to exegesis. The texts chosen for exegesis in *Farah* were the 1874 decision of *Barnes v Addy* and the 1975 decision of *Consul*.

Focussing on the detail of previous cases, without explaining why that detail is significant, has the potential to mislead lower courts as to why the law is as it is. It also assumes that the earlier courts got it right, which they may well have done, but not necessarily, and not necessarily for reasons that are enduring and which a

---

38 Lord Nicholls rejected the options of no liability or strict liability.
39 *Farah* (n 6) [183]. The respondents’ reformulation replaced the dishonest and fraudulent breach requirement with ‘a significant breach’ and replaced ‘assistance’ with ‘participated in a significant way’.
contextual, principled analysis would elicit. With respect, the lack of explanation in *Farah* as to why the Court was adhering to the formulations in earlier case law, rather than adopting the Privy Council’s changes to that law, is unhelpful to the lower courts, practitioners and legal scholars.

Even if we accept that *Farah* was not an appropriate factual vehicle in which to confront the challenge of *Royal Brunei*, the deference given by the High Court to *Consul* still seems misplaced given that *Consul* is not a strong precedent. The case concerned whether D, the corporate vehicle of a solicitor’s young articled clerk, had knowingly participated in a breach of fiduciary duty by F, a property manager employed by the solicitor. D exploited property development opportunities which should have been offered by F to C, the solicitor’s property development company, but which were instead offered by F to D. The appeal largely turned on how Hope J’s findings of fact at first instance should be construed. These concerned the young clerk’s motivations, his knowledge of F’s conduct and his knowledge of the solicitor’s financial position.

A majority of the NSW Court of Appeal, Jacobs P dissenting, held that D was liable as a third party to F’s breach of fiduciary duty. D appealed to the High Court on the basis that actual knowledge of F’s breach of duty was required and had not been shown. D relied upon the English Court of Appeal’s 1969 decision in *Carl Zeiss Siftung v Herbert Smith & Co [No 2]* (*Carl Zeiss Siftung*). C responded that constructive knowledge sufficed and relied upon two recent English Chancery Division cases that appeared to conflict with *Carl Zeiss* on this point. The majority in the High Court in *Consul* consisted of Gibbs J and Stephen J, who both gave considered judgments, and Barwick CJ who agreed with Stephen J. It has been customary to read Stephen J’s judgment in the High Court in conjunction with Jacobs P’s judgment in the Court of Appeal as Stephen J drew upon Jacobs P’s statement of the law. The dissenting judge in the High Court, McTiernan J, gave a reasoned judgment which turned primarily upon Hope J’s findings of fact.

---

42 Hope J found that although D and F deliberately hid their property dealings from the solicitor (which suggested D knew of F’s wrongdoing), this was because the clerk believed that it was inappropriate for himself as articled clerk and F as an employee of the solicitor to be engaging in dealings similar to C’s own property dealings. Moreover, the clerk wished to forestall awkward questions by the solicitor as to why D did not invest in the solicitor’s own companies. Hope J also found that D believed reasonably that C was not interested in or financially able to pursue the property development opportunities. *Consul* (n 7) 405–07 (Stephen J).

43 *DPC Estates Pty Ltd v Grey and Consul Pty Ltd* [1974] 1 NSWLR 443 (NSWCA). Hardie JA held that the clerk breached a fiduciary duty owed directly to the solicitor’s companies, but he also agreed with Hutley JA who held that the clerk was liable under *Barnes v Addy* because he must have known that he was encouraging F to breach a fiduciary duty.


45 i.e., ‘the sort of knowledge a reasonable and honest man would have had in the circumstances after making due inquiry’: *Consul* (n 7) 400 (Gibbs J).

46 *Karak Rubber Co Ltd v Burden* [1972] 1 WLR 602 (ChD); *Selangor United Rubber Estates Ltd v Cradock [No 3]* [1968] 1 WLR 1555 (ChD).
The High Court in *Farah* applied *Consul* in relation to two questions of law. First, what degree of knowledge sufficed for D’s liability under the second limb of *Barnes v Addy*? This question was directly in issue in *Consul*, although only Stephen J gave a considered judgment on the question of whether recourse could be had ‘to the doctrine of constructive notice’. Gibbs J did not consider it necessary to reach a final view on the correctness of the English cases and assumed, without deciding the point, that they were consistent. According to the Court in *Farah*, because Stephen J rejected level (v) knowledge on the *Baden* scale, and Gibbs J left the point open, therefore level (iv) is the limit for D to be liable. With respect, this is highly mechanistic reasoning on a question which has occupied countless pages of the law reports well beyond 1975 and the decision in *Consul*. Nor is the reasoning particularly persuasive given that one equally could argue that, of the four judges in *Consul*, McTiernan J clearly favoured level (v) and Gibbs J found it unnecessary to express a concluded view. This is not to say at all that Stephen J’s reasoning and that of Jacobs P in the Court of Appeal is not persuasive, but the High Court did not refer expressly to that reasoning, instead relying on what it considered to be the ratio of the case.

The second question of law in *Farah* for which the High Court relied upon *Consul* was whether a dishonest and fraudulent breach of duty by F was required for the knowing assistance liability of D (the very question at issue in *Royal Brunei*). This question was not addressed in *Consul*. The respondents in *Farah* referred to passages in Gibbs J’s judgment in which he describes the dishonest and fraudulent requirement ‘by reference to equitable principles’. The High Court dismissed the respondents’ argument that Gibbs J thereby was referring to any breach of trust or fiduciary duty. Neither the respondents’ argument nor the High Court’s rejection of it is self-evident from Gibbs J’s judgment in *Consul*. The

---

47 Resolution of this question was necessary in his view because it had not been shown that D either had actual knowledge of F’s breach or had calculatedly abstained from enquiry. *Consul* (n 7) 408 (Stephen J).
48 Gibbs J considered that, on the facts as the clerk believed them to be, the fiduciary would not have had a conflict of interest. Therefore D had not knowingly participated in any breach of fiduciary duty and it was unnecessary to decide whether constructive notice sufficed. *Consul* (n 7) 400 (Gibbs J).
49 ie, ‘knowledge of circumstances which would put an honest and reasonable man on inquiry’: *Baden* (n 16).
50 ie, ‘knowledge of circumstances which would indicate the facts to an honest and reasonable man’; ibid.
51 McTiernan J agreed with the Court of Appeal’s overturning of Hope J’s findings. In his view, the clerk had undermined the loyalty of F and therefore D should be liable. *Barnes v Addy* supported this outcome, but if it were necessary he would accept ‘whatever extension of doctrine’ might be involved in the *Selangor* and *Karak* decisions. *Consul* (n 7) 385–86.
52 Ibid 398.
53 Ibid. Gibbs J cited the judgment of Ungoed-Thomas J in *Selangor United Rubber Estate* (n 46) in which Ungoed-Thomas J stressed that ‘dishonest and fraudulent design’ was to be understood by reference to equitable principles rather than criminal law or tort or contract. It is not clear from Ungoed-Thomas J’s judgment whether this meant that the natural meaning of ‘dishonest and fraudulent’ was to be read down, eg, by reference to the concept of equitable fraud.
54 *Farah* (n 6) [181].
focus of Gibbs J’s reasoning in the passages relied upon was on whether Barnes v Addy liability (under both limbs) extended to situations where there is no misapplication of trust property. Gibbs J argued that breaches of fiduciary duty sufficed, as opposed to merely breaches of trust, but it is not clear that he envisaged that any such breach would suffice, whether dishonest and fraudulent or not, first because he was not drawing a distinct line between knowing receipt and knowing assistance and secondly, because he was not considering that question. Thus, Consul is not a strong precedent in relation to either of the two grounds upon which it was relied by the High Court in Farah.

There are two final reasons why the High Court’s reliance in Farah upon its earlier decision in Consul might be misplaced. Consul was decided at a time when English cases, although not binding upon the High Court, were accorded deference and respect that they would not receive automatically now. In 1975 it was still possible to appeal from State courts of appeal directly to the Privy Council. Appeals from the High Court to the Privy Council were abolished in July of 1975, only four months after judgment was given in Consul. It was unlikely that the High Court would have embarked upon a radical reshaping of the English law or that it would have considered itself free to depart from the English law in order to meet local conditions. Secondly, the English cases under consideration in Consul were very early examples of the twentieth century’s resurgence of interest in Barnes v Addy and dealt with an unsettled question of law. At that stage, the two limbs of Barnes v Addy were not so clearly differentiated, nor had the possibly distinct rationales for liability been thought through. For all these reasons, it seems unwise to place too much weight on the sparse ratio decidendi and obiter dicta of Consul. This leaves us with the High Court’s reliance in Farah upon Barnes v Addy as correctly stating the law concerning equitable liability for assistance in a breach of trust and fiduciary duty and the Court’s acknowledgement of a distinction between this form of participatory liability and D’s liability for procuring a breach of trust by F.

Given these criticisms of the use of precedent in Farah, the principled approach taken by Lord Nicholls on behalf of the Privy Council in Royal Brunei must be preferable, whether or not we agree with his conclusion as to the law. Consideration of both precedent and principle is essential in courts of final appeal. This is all the more so when it is universally agreed that the cases are in disarray. But was Lord

---

55 Consul (n 7) 396–97 (Gibbs J).
59 Finn, ‘Internationalization or isolation’ (n 41) 44.
60 Carl Zeiss Stiftung (n 44); Selangor United Rubber Estates (n 46); Karak Rubber Co (n 46).
Nicholls’ principled approach to the precedents correct? He took a helpful step in drawing attention to other nineteenth century case law on third party liability for breach of trust, but did these cases justify collapsing the distinction between assisting and procuring a breach of trust? In the next part of this chapter it will be argued that Lord Nicholls’ collection of the relevant equitable precedents was incomplete and, hence, his formulation of equitable accessory liability is flawed.

IV. Extracting a Defensible Principle

A. Identifying the Relevant Precedents

Royal Brunei and Farah focussed upon five nineteenth century cases concerning participation in breaches of express private trusts. Barnes v Addy and two or three additional cases in which it was held that a third party who procured or induced a breach of trust could be liable were cited.61 These precedents are clearly relevant as they involve participation in breach of trust.62 But it is possible to go much further in identifying relevant equity cases from which a participatory liability principle might be drawn. A flaw in Lord Nicholls’ reasoning is that he only considered cases concerning participation in breach of trust.

Obvious candidates for comparison with participatory liability for breach of trust and fiduciary duty are those equitable doctrines on the fringes of fiduciary law63 where third parties are involved, such as undue influence and breach of confidence. One example is the liability of a third party financial institution that knowingly accepts a guarantee tainted by the debtor’s undue influence over the guarantor.64 Similarly, a third party who receives confidential information in circumstances where he or she knows or ought to know that it is confidential will be subject to equitable liability.65

61 Barnes (n 13); Fyler (n 14); Eaves (n 14). The Privy Council also cited Attorney-General v Corporation of Leicester (1844) 7 Beav 176, 49 ER 1031. The High Court also cited Alleyne (n 14). The two latter cases applied Fyler. See generally Harpum, ‘The Stranger as Constructive Trustee’ (n 37) 141–44.

62 For reasons of space and clarity I will not attempt to comprehensively consider their twentieth or twenty-first century counterparts.

63 Opinion is divided on whether these doctrines form part of fiduciary law. P Finn, Fiduciary Obligations (Sydney, Law Book Co, 1977); M Conaglen, Fiduciary Loyalty (Oxford, Hart Publishing, 2010) 236–44. My arguments do not depend upon which view is correct.

64 Eg, Bank of New South Wales v Rogers (1941) 65 CLR 42 (HCA). See generally R Meagher, D Heydon and M Leeming, Meagher, Gummow & Lehane’s Equity: Doctrine and Remedies, 4th edn (Chatswood, Butterworths LexisNexis, 2002) para [15.150].

65 Prince Albert v Strange (1849) 1 Mac & G 25, 41 ER 1171. See generally Meagher, Heydon and Leeming, Equity (n 64) para [41–110]. Even a D who acquires notice of the confidentiality of information after its receipt will be bound by the confidentiality obligation, although there are unresolved questions concerning whether D’s change of position should be accommodated. Wheatley v Bell [1982] 2 NSWLR 544 (NSWSC); Johns v Australian Securities Commission (1993) 178 CLR 408 (HCA) 459–60 (Gaudron J).
It is possible to go beyond these fiduciary-related doctrines to areas of equity where D’s third party liability has evolved into an independent cause of action. There are two overlapping doctrines that meet the description of an independent cause of action that could equally be conceptualised as third party liability of the same form as that encountered in participatory liability for breach of trust or fiduciary duty:

(i) The liability in England of financial institutions who accept a security in circumstances where the surety is subjected to undue influence or misrepresentation by the debtor and where prescriptive duties of information disclosure have not been met by the financial institution;66

(ii) The liability in Australia of financial institutions who accept a security in circumstances where there is a risk of misunderstanding by the surety arising from a relationship of trust and confidence between the surety and debtor and where the institution has not ensured that the surety is fully informed.67 This liability does not depend upon an equitable wrong having been committed by the debtor; hence, it will not always be possible to conceptualise this as a third party liability.68

If we accept that each of these independent causes of action may be conceptualised alternatively as third party liability, then there is a range of equitable participatory liability which can usefully be considered alongside third party liability for breach of trust or fiduciary duty.69

A seemingly obvious group of participatory liability cases to include when collecting instances of equitable participatory liability concerns D’s personal liability for receipt of trust property (the first limb of Barnes v Addy). But these will be excluded for now. Despite their historical twinning with knowing assistance cases, they raise slightly different considerations due to their proximity to tracing and priorities claims. Rightly or wrongly, the liability sometimes turns on the protection of C’s property interests, rather than on the state of D’s conscience.70 A similar ambivalence between the protection of property interests and a concern with D’s conscience can be seen where a third party without notice receives the benefit of a gift or transaction tainted by an equitable wrong other than breach of trust, although less attention has been paid to these equally problematic instances.

66 Royal Bank of Scotland Plc v Etridge [No 2] [2001] UKHL 44, [2002] 2 AC 773. See also C Rickett, ‘The financier’s duty of care to a surety’ (1998) 114 LQR 17. Rickett argues that the lender’s liability in such cases can be conceptualised as either secondary liability dependent on notice of the primary wrong or primary liability based upon the lender’s own wrongdoing.


68 The Australian doctrine of unconscionable dealings could be included as a category (iii) to the extent that the weaker party’s special disadvantage is the product of another’s equitable wrongdoing, eg, where a financial institution takes a security with notice that the surety is under the undue influence of the debtor. See, eg Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 (HCA) 464 (Mason J).

69 This is not a novel approach: see R Austin, ‘Constructive Trusts’ in P Finn (ed), Essays in Equity (Sydney, LawBook Co, 1985) 196, 200; Finn (n 8) 212–13.

70 Dietrich and Ridge, ‘“The Receipt of What?”’ (n 17) 58–60. See also Harpum (n 37) 126.
of liability. It is possible, and desirable in my view, to reconcile these cases with non property-related instances of equitable participatory liability, but for now it is safest to exclude from consideration cases where a property law analysis might be relevant so that there is no distortion of the analysis.

What becomes clear from considering a broad range of equitable participatory liability cases including, but not limited to, participation in breach of trust and fiduciary duty is that the cases fall into two distinct groups of third party participation, as will now be discussed.

i. Group 1: Participation in an Equitable Wrong for Personal Gain Beyond Remuneration for Services

The first group of equitable participatory liability cases covers a range of types of participation, but whatever the level of involvement in the primary equitable wrong the participants all derive some benefit from the wrong other than simply professional remuneration. This group takes in almost all instances of equitable participatory liability.

At one end of the spectrum of cases in Group 1 are third parties who actively procure the primary wrong. Thus, a solicitor who knowingly induces an unsuspecting trustee client to breach the trust by investing the trust fund with another client of the solicitor who owes money to the solicitor, will be liable to restore the trust fund. Similarly, a company director who procures a breach of trust by a corporate trustee and a creditor who persuades a debtor wrongfully (through undue influence or misrepresentation, for example) to extract security from a relative will be liable. In all these cases the bona fides of the party committing the primary wrong is irrelevant to D’s liability.

Closer to the middle of the spectrum of cases in Group 1 are those third parties who have actively facilitated the primary breach, without necessarily procuring it. An example is the articulated clerk and his corporate vehicle in Consul who allegedly

---

71 Eg a volunteer who receives property tainted by undue influence must rescind the gift regardless of whether he or she had notice of the undue influence: Bridgeman v Green (1757) Wilm 58, 97 ER 22; Tottenham v Green (1863) 32 LJ Ch 201, 206; Addie v Campbell (1841) 4 Beav 401, 49 ER 394. See also Meagher, Heydon and Leeming (n 64) para [15.150]; A Burrows, ‘The Australian law of restitution: has the High Court lost its way?’ in Bant and Harding (eds), Exploring Private Law (n 41) 67, 81.

72 Cases concerning receipt of trust property would be relevant in an extended study: eg Harries v Rees [1867] 37 LJ Ch 102.

73 Eg Syrimi v Hinds (1996) 6 NTLR 1 (NTCA).

74 Fyler (n 14). The principle in Fyler was applied in Alleyne (n 14) and Attorney-General v Corporation of Leicester (n 61).


76 John Owen & JM Gutch v Sarah Homan (1853) 4 HL Cas 997, 1034; 10 ER 752, 767 (Lord Cranworth LC). The House of Lords held strong suspicions as to the lack of probity of the creditor in this case, although no positive finding was made that the creditor procured the debtor’s misrepresentation.

77 Eg Eaves (n 14).

78 Eg Mayor of Salford v Lever [1891] 1 QB 168 (CA). At F’s suggestion, D agreed to pay a bribe to F so that F would ensure that C entered a contract for the supply of coal by D.
participated in breaches of fiduciary duty by F, a senior employee of the solicitor to whom the clerk was articled. The clerk did not procure or induce F’s equitable wrong, but he actively facilitated it by jointly financing the tainted property dealings. Similarly, financial institutions that benefit from securities tainted by an equitable wrong, such as undue influence or misrepresentation, may have facilitated that wrong through not complying with the requisite standard of advice or by taking the benefit with notice of the breach of primary duty. And a publisher who knowingly publishes confidential information may be treated as actively facilitating the primary wrong, rather than simply taking the benefits subsequently.

At the other end of the spectrum in Group 1 are those third parties who passively facilitate the primary equitable wrong. An example comes from the Privy Council’s decision in Cook v Deeks. D, a company controlled by F, took a business opportunity that F, in breach of fiduciary duty, diverted from the principal company, C. Similarly, in relation to the equitable wrong of breach of confidence, a publisher who attempts to publish material knowing that it only could have been obtained in breach of confidence by another, F, will be injunctioned from publishing regardless of whether the publisher actively induced F’s breach of confidence.

One case that sits in Group 1, albeit a little uncomfortably, is Eaves v Hickson which was cited in both Royal Brunei and Farah. A father, D, forged a marriage certificate in order to ensure that his illegitimate children would qualify for distributions under a trust. The trustees, in innocent reliance on the forgery, committed a breach of the trust by distributing to the children. Sir John Romilly MR held that D must pay into court whatever could not be recovered from the children and the trustees must then make up any shortfall to the trust. The problem with fitting this case into Group 1 is that the father did not derive a direct personal benefit; nonetheless, he did receive an indirect financial advantage from his children’s welfare being provided for through the trust. Perhaps this is a case where it is clearer to conceptualise D’s liability as an independent cause of action (fraud) which may also be seen as a third party liability for another equitable wrong (breach of trust). Nowadays, if the trustees acted reasonably, they would be excused from liability and D would be pursued for fraud.

Thus, Group 1 of equity’s participatory liability cases encompasses those Ds who procure an equitable wrong, those who facilitate an equitable wrong, and those who participate in an equitable wrong simply through receiving the benefit of a transaction tainted by the wrong. What unites the third parties in Group 1 is

---

79 Consul (n 7).
80 Royal Bank of Scotland Plc v Etridge [No 2] (n 66); Garcia (n 67).
81 John Owen & JM Gutch (n 76); Bank of New South Wales v Rogers (n 64).
82 Eg Attorney General v Guardian Newspapers (No 2) [1990] 1 AC 109 (HL). Toulson J in Fyffes (n 30) 670 describes the facts thus: ‘The Sunday Times knowingly assisted Mr Peter Wright to breach his duty of confidentiality to the British Government by publishing extracts from his memoirs as an MI5 agent.’
84 Abernethy v Hutchinson (1824) 3 LJ Ch 209; Prince Albert (n 65).
85 Eaves (n 14).
that they derive some advantage, other than professional remuneration, from the relevant transaction or conduct which constitutes the primary equitable wrong. Group 1 cases can be found in relation to many primary equitable wrongs.

ii. Group 2: The Provision of Services by Pure Agents that Facilitate an Equitable Wrong

The second, and remaining, group of third parties who attract equitable participatory liability, but who do not fit the pattern in Group 1, I will call ‘pure agents’. Pure agents are third parties providing agency services to the primary wrongdoer that facilitate the occurrence of an equitable wrong. Unlike Group 1 participants, they receive no direct benefit from the tainted dealings other than, possibly generous, remuneration for their services. Generally, they are related to the primary wrongdoer only by the agency relationship. Solicitors86 and accountants87 predominate in this group.

Significantly, Group 2 cases are found only in relation to breach of trust and breach of fiduciary duty. That is, there appears to be no other equitable wrong in relation to which equity imposes participatory liability upon agents involved in the primary wrong through the provision of professional agency services alone. This is the group described by Lord Selborne in *Barnes v Addy* where he was at pains to restrict their liability.88 This is also the group focussed upon by Lord Nicholls in *Royal Brunei*, when discussing whether a negligent participant in a breach of trust should be liable to C.89

Ironically, the concerns expressed by both Lord Selborne in *Barnes v Addy* and Lord Nicholls in *Royal Brunei* in relation to imposing liability on professional agents who facilitate a breach of trust through careless performance of their duties do not reflect the factual scenario in *Royal Brunei* which did not concern a ‘pure agent’. Mr Tan, the company director of the corporate trustee in *Royal Brunei*, belongs in Group 1: he carelessly facilitated a breach of trust by the trustee company, which he controlled, for his own financial ends. Lord Nicholls implied that Tan made no personal gain from his mismanagement of the trustee company because the trust money was used for the company’s ‘ordinary business purposes’.90 But given that Tan controlled the company and was its principal shareholder, any gain received by the company (through meeting its cash shortfalls by recourse to the trust fund) was Tan’s gain. He was more than a pure agent who received only remuneration for services. He was the company’s alter ego and thus benefited directly from the breach of trust. The facts of *Royal Brunei* therefore fall into Group 1 even though Lord Nicholls’ reasoning was pertinent only to Group 2 instances of participatory liability.

---

86 Eg *Barnes* (n 13); *Carl Zeiss Stiftung* (n 44); *Twinsectra* (n 9).
87 Eg *Barlow Clowes* (n 10).
88 *Barnes* (n 13) 251–52.
89 *Royal Brunei* (n 3) 391.
90 Ibid 383.
An odd case which is difficult to categorise, but which probably falls into Group 2, is *Midgley v Midgley*.\(^{91}\) There, an over-zealous solicitor, who actively encouraged and procured a breach of fiduciary duty by the executor of a deceased estate, was held liable to the estate along with the defaulting executor and the solicitor’s clients who received payment of a statute-barred debt from the estate in breach of trust. The solicitor was said to be ‘the instigator and schemer of the whole thing’.\(^{92}\) On the one hand, the facts seem suited to Group 1, as D actively procured the breach of trust. On the other hand, D received no benefit, other than his professional remuneration, and was retained as an agent providing professional services. It seems likely that D’s liability actually depended upon tracing, for most of the misapplied funds remained in D’s trust account.\(^{93}\) Leaving the possibility of tracing aside, however, the facts seem to be an extreme and unusual example of Group 2 participatory liability.

B. The Rationales for Liability in Group 1 and Group 2

In Group 1 participatory liability cases there is an acknowledged consensus as to the rationale for liability whatever the nature of the primary equitable wrong, namely: the prevention of D’s exploitation for gain of C’s vulnerability arising from the primary wrong. The New South Wales Supreme Court decision in *Khan v Khan* contains a helpful statement of the rationale.\(^{94}\) In that case, the purchasers’ application for specific performance of a contract for the sale of land was refused on the ground that the purchasers had notice of undue influence exercised upon the vendor by her religious leader. Barrett J noted that the liability of a third party to undue influence involves the kind of secondary liability based on knowing participation discussed in *Royal Brunei Airlines Sdn Bhd v Tan*. The third party recipient of benefit [D], who knowingly takes with notice of the undue influence exerted upon the disponer [C] by the person having ascendancy [F], takes unfair or unconscientious advantage of a situation in which a force against which equity will grant relief is known by him or her to be at work.\(^{95}\)

The same rationale is given in cases of breach of confidence,\(^{96}\) unconscionable dealings and related doctrines.\(^{97}\) It is not uncommon for the courts and commentators discussing the rationale for equitable participatory liability in relation

\(^{91}\) *Midgley v Midgley* [1893] 3 Ch 282 (CA). See Harpum (n 37) 142–43.
\(^{92}\) Ibid 301 (Lindley LJ).
\(^{93}\) But see Sales, ‘The Tort of Conspiracy and Secondary Liability’ (n 33) 504, n 38.
\(^{95}\) Ibid 235. Barrett J based his analysis on Meagher, Heydon and Leeming (n 64) para [15.150].
\(^{96}\) In the leading case of *Prince Albert* (n 65) 44–45; 1178–9 it was said that a third party who knowingly took advantage of ‘a breach of trust, confidence or contract by another’ would be liable in equity. See generally Mitchell (n 12) 164–65; R Toulson and C Phipps, *Confidentiality* (London, Sweet & Maxwell, 1996) 92; Meagher, Heydon and Leeming (n 64) para [41–055].
\(^{97}\) *Amadio* (n 68) 462 (Mason J).
to wrongs other than breach of trust or fiduciary duty to refer to that form of liability. There is also some cross-referencing in the case law on participatory liability for breach of trust and fiduciary duty back to other forms of equitable participatory liability.\(^9\) Overwhelmingly then, it appears that the rationale for Group 1 cases is the same whatever the nature of the primary equitable wrong.

The rationale for liability in Group 2, the provision of services by pure agents that facilitate a breach of trust or fiduciary duty, is not as clear-cut. The substantive rationale appears to be that D is so implicated in F’s fraud that he or she should be treated as also committing an equitable wrong even though D received no gain other than remuneration for services.\(^9\) But the substantive rationale does not appear to be the sole, or even primary, rationale for liability in Group 2 cases. It is bolstered by far more pragmatic, policy-driven concerns. The liability in Group 2 is grounded in the ability of pure agents to act as ‘whistle-blowers’ on trustee or fiduciary misconduct. Plus, there is a deterrent function: the threat of such liability may deter pure agents from providing their services in situations of breach of trust or fiduciary duty and thus lessen the opportunities for such breaches. In other words, given that Group 2 consists only of breach of trust and fiduciary duty cases, it would seem that the liability here is bound up with the historically strong prophylactic and protective function of equity’s trust jurisdiction.\(^1\)

V. Implications of a Broader Consideration of the Equitable Precedents

Having identified two distinct groups of participatory liability in the case law, does this cast any light upon whether the English or Australian participatory liability schemes outlined in Part II should be preferred? It will be recalled that the doctrinal differences between the two schemes for breach of trust and fiduciary duty concern:

(i) whether there is one category of liability for breach of trust or fiduciary duty, namely, accessory liability (Royal Brunei) or two categories of liability, namely, knowing assistance by D in a dishonest and fraudulent design by F and knowing procurement by D of any breach of trust (Farah).
(ii) whether D’s liability turns on D’s knowledge (Farah) or D’s dishonesty (Royal Brunei).
(iii) whether accessory liability as expounded in Royal Brunei extends to fiduciary breaches not involving property under F’s control.
(iv) whether the remedies are loss-based only.

---

\(^9\) Eg Fyffes (n 30) 670.
\(^9\) Harries v Rees [1867] 37 LJ Ch 102, 106–07 (Rolt J); Harpum (n 37) 116.
\(^1\) Finn (n 8) 197; Ridge, ‘Justifying the Remedies for Dishonest Assistance’ (n 33) 446–47.
My intention here is simply to make some suggestions as to how these differences may be resolved and to suggest a way forward in developing the law on participatory liability for breach of trust and fiduciary duty.

A. How Many Categories of Liability?

A consideration of equitable participatory liability as a whole demonstrates that both the Privy Council and the High Court’s categorisations are flawed. Lord Nicholls’ collapsing of knowing assistance cases and procurement of breach of trust cases into a uniform accessory liability for breach of trust incorrectly conflates two forms of liability that have different rationales and involve factually different scenarios. On the other hand, the High Court’s signalling in *Farah*, albeit cryptic, of the need to distinguish procurement cases from assistance cases in relation to breach of trust or fiduciary duty better accords with my suggested categorisation of Group 1 and Group 2, although, again, the failure to consider the full range of equitable participatory liability precedents meant that the need to confine the second limb of *Barnes v Addy* to pure agents who receive only remuneration for their services (Group 2) was overlooked.

Furthermore, both the substantive and pragmatic rationales for Group 2 liability strongly support retention of the dishonest and fraudulent breach requirement in the second limb of *Barnes v Addy*. If D is liable because of his or her implication in F’s fraud and failure to prevent F’s fraud through disclosure or refusal of the agency services, then both F’s wrongdoing and D’s knowledge of that wrongdoing must be of a high order. This suggests that the dishonest and fraudulent breach element of liability under the second limb of *Barnes v Addy* is an essential element in justifying D’s liability and furthermore, that D’s state of knowledge of F’s dishonest and fraudulent breach should closely equate to actual knowledge. Agents should only be liable for participation in egregious breaches by F that could be detected and, possibly, prevented.101 This accords with Lord Selborne’s reservations in *Barnes v Addy* itself against too readily imposing liability on the agents of trustees.102

Thus, what is missing from both the English and Australian participatory liability schemes is explicit recognition that liability under the second limb of *Barnes v Addy* is a narrow and exceptional liability that is confined to agents receiving only remuneration for services.103 Once this is appreciated, the obvious question is whether Group 2 liability should wither away altogether on the basis that there is

101 See also Gardner (n 16) 77.
102 *Barnes* (n 13) 251–52. See also *Harries* (n 99) 106–07 (Rolt J): ‘[I]t is well settled that, as a general rule, the solicitor or agent of a personal representative or trustee is accountable only to his principal; that as a general rule the *cestui que trustent* cannot call on the agent to account as trustee, unless fraud can be made out against him personally, or unless he, knowing of the fraud of the trustee, has derived personal benefit therefrom, or unless some other special equity is established against him.’ Rolt LJ cites *Lockwood v Abdy* (1845) 14 Sim 437, 60 ER 428 and *Fyler* (n 14).
103 *Harpum* (n 37) 148.
adequate common law and statutory regulation of agents providing professional services to trustees that facilitate a breach of trust.104

B. Does Liability Turn on D’s Knowledge or D’s Dishonesty?

Although most attention has focussed upon whether the touchstone for liability should turn on D’s knowledge or D’s dishonesty, analysis of a broader range of equitable participatory liability cases suggests that this is a second-order question that is much more easily resolved once the cases are correctly classified and their rationales properly understood. In relation to Group 1, participation in an equitable wrong for personal gain, D’s knowledge or notice of the primary wrong is universally acknowledged to be the appropriate touchstone for liability. This is so even in relation to areas of third party liability which, as yet, are not fully explored.105 The emphasis on D’s knowledge has not been contentious except where Group 1 cases have been wrongly considered as Group 2 cases, that is, as Barnes v Addy knowing assistance liability.106 Outside participatory liability for breach of trust or fiduciary duty, the courts seem far more relaxed about a ‘jury question’ approach to knowledge or notice and there is a rich jurisprudence concerning what is necessary for liability.107 In other words, there is more confidence that the knowledge question can be answered.

Of course, this apparently insouciant attitude towards the requisite knowledge may be because D’s potential liability often is limited to transaction reversal or an account of gains made.108 Thus, it may be helpful to consider an approach to Group 2 liability that balances the degree of wrongdoing with the extent of knowledge of the primary equitable wrong and the potential remedy. If so, a ‘sliding scale’ of knowledge determined by the degree of F’s wrongdoing and the remedy sought, may be appropriate.

On the other hand, in relation to Group 2, pure agents, knowledge as the touchstone of liability has been far more problematic, particularly in relation to whether something less than actual knowledge or actual notice is sufficient. This makes sense when one considers that this is an exceptional liability under which D must bear the potentially onerous and unbounded losses of C, rather than the reversal of a transaction or return of a gain received. As discussed above, both the substantive and pragmatic rationales for Group 2 liability suggest that a very high touchstone of liability should apply, namely, actual knowledge or the equivalent standard of equitable notice.

104 See, eg Finn (n 8) 195.
105 Eg participatory liability for breach of confidence: Johns (n 65) 459–60 (Gaudron J).
106 Eg Royal Brunei (n 3) 386.
107 Eg Amadio (n 68) 467–68 (Mason J), 477 (Deane J). This adds weight to calls for knowledge (or dishonesty) questions to be decided as ‘jury questions’: R Walker, ‘Dishonesty and Unconscionable Conduct in Commercial Life—Some Reflections on Accessory Liability and Knowing Receipt’ (2002) 27 Sydney Law Review 187, 195, 197. See also Twinsectra (n 9) [134] (Lord Millett); Mitchell (n 12) 212.
108 Finn (n 8) 207, n 71.
C. The Ambit of Liability

Recognising that the same principles apply to Group 1 cases regardless of whether a trust or fiduciary relationship is involved means that this form of participatory liability does not depend upon the misapplication of property under the control of the trustee or fiduciary. Group 1 encompasses participation in all types of equitable wrong including breaches of fiduciary duty not involving any misapplication of property. Equally, as suggested above, Group 1 can encompass receipt of property cases. Conversely, the strong historical link between the second limb of *Barnes v Addy* and the protection of trust beneficiaries suggests that Group 2 liability should be reined in accordingly.

D. Remedies

Finally, once Group 2 is confined within appropriate limits, it becomes clear that the liability is loss-based for, by definition, Group 2 agents have made no gain. Agents of a trustee or fiduciary who profit through assistance in a breach of trust or fiduciary duty belong in Group 1 where gain-based remedies are available. The rationale for Group 1 cases, namely, preventing exploitation by D of C’s vulnerability, lends itself most naturally to gain-based or transaction-reversal remedies, however a range of equitable remedies tailored to the particular facts is available. This may explain why there has been little concern about the availability of gain-based remedies even where the cases involved trustees or fiduciaries. Only a loss-based remedy is suited to Group 2 cases and, as noted already, the potentially onerous effect of such remedies helps explain the reluctance to impose liability expressed by Lord Selborne in *Barnes v Addy*.

VI. Conclusion

My objective in this chapter has been to evaluate the use of case law in the formulation of the English and Australian participatory liability schemes for breach of trust and fiduciary duty as epitomised by the judgments in *Royal Brunei* and *Farah*. The methodological differences in the two decisions raise questions about how the law can develop in a way that respects the accumulated wisdom of precedent without becoming stultified by it. So far as judicial method is concerned, Lord Nicholls’ judgment in *Royal Brunei* is a model of senior appellate court reasoning. The strength of the judgment is that it seeks to explain, as well as expound, the relevant law. But the accessory liability principle arrived at by Lord Nicholls in *Royal Brunei* is flawed because his choice of relevant equitable precedents was

---

109 Eg *Consul* (n 7); *United States Surgical* (n 25).
too narrow in that he confined himself to considering cases in which there was a breach of trust.

Looking at equitable participatory liability as a whole, rather than at breach of trust cases only, makes it clearer that there are two distinct forms of liability. The first, and larger, Group 1 is much easier to find a rationale for. Here one principle can be used to encapsulate the liability whether D’s participation is in the form of procurement, assistance, or passive receipt of a benefit. The liability arises because D exploits for gain C’s vulnerability arising from the primary equitable wrong. The second form of liability, that of Group 2 pure agents who facilitate the breach of primary duty through rendering professional services, does not appear in relation to any equitable wrong other than that of breach of trust or fiduciary duty and rests on an historical over-protection of trust beneficiaries that might not be warranted today in light of contemporary common law and statutory regulation of professional agents. This suggests that Lord Nicholls in Royal Brunei incorrectly conflated two distinct forms of liability into ‘accessory liability’ and that his policy discussion, whilst directed to ‘pure agents’, was given in a case that did not involve that scenario. A proper understanding of the relevant equitable precedents opens the way for a more soundly based legal principle to be formulated.

The High Court in Farah offered little by way of explanation for why Australian courts should continue to apply the law as stated in Barnes v Addy and applied in Consul. The judgment founds itself almost exclusively upon precedent, but in this instance the precedent of Consul is not helpful. The ‘theology of doctrine’ approach to legal reasoning taken in Farah is not symptomatic of all contemporary High Court equity decisions, however, and given that the High Court in Farah did not rule out a full consideration of Royal Brunei when the matter is properly before it, there remains an opportunity for the equitable case law to be revisited in Australia.
