Justifying the Remedies
for Dishonest Assistance

By
Pauline Ridge

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I. INTRODUCTION

Determining when a third party accessory to a breach of trust or breach of fiduciary duty should be liable in equity has preoccupied judges and commentators since the advantages of such liability in relation to corporate mismanagement and fraud became apparent in the late 1960s. It is now settled that dishonesty is the test for such liability (apart from where the basis of the claim is that the third party has received trust property). The third party’s conduct must breach the standards of an honest person with his or her attributes and in those circumstances. Hence, it is an opportune time to consider a topic that has not received as much attention: the remedy for the “dishonest assistance” claim. If a third party (D) dishonestly assists in a breach of duty by a trustee or other fiduciary (F), what remedies should be available to the claimant beneficiary or claimant principal (C)?

Little attention has been given in the case law to this question, other than to debate whether the liability is appropriately described as being that of a “constructive trustee”. Generally, it is assumed that the remedy is compensatory. Surprisingly, given the volume of case law, the possibility of gain-based remedies has arisen only recently in England, and only at first instance; however, scenarios in which a gain-based remedy for dishonest assistance may be appropriate can readily be envisaged. When, for example, if ever, will D who, at F’s invitation, exploits a business opportunity that should first have been offered to C, be liable to account for a resulting profit? And, if both F and D share the resulting profits, can D be liable for F’s profits as well? And, more controversially, can that

1 See, e.g. Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 W.L.R. 1555. “Accessory” encompasses a third party who procures, participates or assists in the breach of duty. Breach of trust, as well as breach of fiduciary duty, is referred to in order to emphasise that a misapplication of property need not be involved.
gain-based liability ever be proprietary in nature? Nor has much attention been given, until recently, to the relationship between the nature of liability and the appropriate remedy. Yet I argue that the remedy available against a dishonest assistant should depend upon the justification for awarding a remedy at all. Answering the question, why is a remedy warranted, will, in large measure, suggest the appropriate remedy and how it is to be assessed.

II. THE RATIONALES AND NATURE OF DISHONEST ASSISTANCE LIABILITY

(a) The principled and pragmatic rationales

The rationale for dishonest assistance liability has both principled and pragmatic features. The principled basis of the rationale is that Equity intervenes because there is "wrongful conduct". The relevance of this for determining the remedy, including whose wrongful conduct is in issue, that of F or D, will be discussed more fully below. There are also two pragmatic reasons why Equity imposes liability upon dishonest assistants:

(i) to provide C with an alternative means of recourse thereby increasing C’s chances of a successful claim in the event that F is impecunious or has absconded; and

(ii) to deter third party participation in breach of trust or fiduciary duty, thereby restricting the opportunities for wrongdoing by trustees and fiduciaries.

These pragmatic features of the rationale for liability reflect the strongly prophylactic nature of the fiduciary obligation and the high value placed on the rights of principals. In short, this form of third party liability is used to bolster the protection given to the principals of fiduciary relationships.

How, then, might these pragmatic grounds for dishonest assistance liability influence the available remedies? One could argue that they justify the same remedies being available against the dishonest assistant as are available against a defaulting trustee or other fiduciary; that is, both loss-based and gain-based remedies. This would ensure that C is fully protected in the event of breach and would provide a strong deterrence to third parties. Relying on the pragmatic rationale alone to justify a range of remedies, however, requires an expansive view to be taken of the rights of beneficiaries and principals. There is no doubt that, historically, trust beneficiaries and the principals of other fiduciary relationships were very

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7Royal Brunei Airlines [1995] 2 A.C. 378 at 386–387, per Lord Nicholls of Birkenhead; Consol Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 at 397, per Gibbs J.
8Royal Brunei Airlines [1995] 2 A.C. 378 at 386–387, per Lord Nicholls of Birkenhead; Consol Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 at 397, per Gibbs J.
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well protected by Equity.\(^9\) Thus, it is not inconsistent with the doctrinal history of trusts and other fiduciary relationships that the rights of C would be favoured over third parties. But given that there are other checks and balances on both fiduciaries and third parties nowadays (through the evolution of negligence law and through legislative regulation, for example), and that there are clear signs of judicial disquiet with the stringency of some principal-favouring rules in fiduciary law,\(^10\) a sound basis for justifying any remedy for dishonest assistance should address more directly the balance of the rights of C with those of D, and therefore should be found in the principled (wrong-based) aspect of the rationale. The remedy available, in other words, should depend upon the nature of the wrongdoing that Equity intervenes to address.

This is not to say that the pragmatic aspect of the rationale will never be of assistance with respect to remedy. It is of relevance in, first, strengthening any justification given by the principled rationale; and secondly, in settling the bounds of any remedy justified by the principled rationale. So if the principled aspect of the rationale justifies a loss-based remedy (compensation) being available, the pragmatic aspect of the rationale may influence how compensation is to be assessed. For example, the pragmatic rationale would support a generous, claimant-favouring, approach to determining the limits of liability for losses flowing, as a matter of fact, from the dishonest assistance.\(^11\) Thus, it is necessary to consider the principled, wrong-based, aspect of the rationale and this raises the question of the nature of the liability: is it primary or secondary or, in other words, whose wrongdoing grounds the liability?

(b) Primary or secondary liability?

Two models of dishonest assistance liability can be drawn out of the substantial body of recent commentary and case law concerning dishonest assistance. Each model links the nature of the liability to the remedies consequently available. Model A is taken from an influential Modern Law Review article by Steven Elliott and Charles Mitchell.\(^12\) Model B is

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implicit in much of the English case law and commentary on dishonest assistance.

According to Model A, D’s liability is a form of civil secondary liability analogous to common law (and even criminal law) secondary liability, the tort of interference with contract being an example of the same form of liability:\(^13\):

1. D becomes liable for the breach of a duty owed by F by reason of D’s involvement (dishonest assistance) in the breach. The “wrongful conduct” which grounds the principled rationale for equitable intervention is the breach of trust or fiduciary duty itself; D thus assumes the same liability in relation to the same wrong as F.
2. Liability is triggered if D’s conduct was dishonest.\(^14\)
3. Because D’s liability is secondarily linked to F’s wrong it duplicates the liability of F. This suggests that both loss-based and gain-based remedies (including those in proprietary form) are available; however, the remedy can be only whatever is actually available against F.

Conversely, Model B focuses directly upon D’s conduct:\(^15\):

1. D’s liability is a primary liability. The relevant “wrongful conduct”, therefore, is D’s own conduct in procuring or assisting with the breach of trust or fiduciary duty.
2. Liability is triggered if D’s conduct was dishonest.
3. The remedy is loss-based. D must compensate C for losses resulting from the breach of trust or fiduciary duty.

Models A and B are two extremes; there are, of course, permutations of these models and not all commentators necessarily adhere to each element as presented here. For example, one permutation would be secondary liability (Model A, element 1) with equitable compensation as the only remedy (Model B, element 3).\(^16\) Conversely, Lord Nicholls of

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\(^14\)This form of civil secondary liability is to be distinguished from vicarious liability: Sales, fn.12 above, at 502.


\(^16\)This is more consistent with common law forms of secondary liability. It may be that the English case law’s focus upon equitable compensation as the only remedy for dishonest assistance has obscured the full implications of Sales’ thesis; indeed, this is what Elliott and Mitchell argue in “Remedies for Dishonest Assistance” (2004) 67 M.L.R. 16.
Birkenhead, writing extra-judicially, appears to accept primary liability, with the remedy of account of profits being available in appropriate cases. Nonetheless, Models A and B represent two extreme versions of the equitable liability that are clearly presented in the current commentary and/or implicit in the case law.

(c) Model A (secondary liability)

The secondary liability model does not withstand close scrutiny. The problem is in understanding why a dishonest third party’s conduct should not be characterised as wrongful in itself; that is, why is it not a justiciable wrong, and therefore a primary liability, in and of itself, to procure or assist in another’s breach of a legal duty? Primary liability appears to be the most straightforward analysis of the equitable claim; D’s conduct is wrongful and leads to a primary liability which is joint and several with that of F. Patricia Loughlin explains the wrongfulness of D’s conduct as D’s exploitation of C’s vulnerability resulting from the fiduciary relationship; that is, there is “an increased risk of improper advantage-taking by the third person by reason of the initial fiduciary relationship”. Similarly, the High Court of Australia in several cases has referred to the inequitable character of a third party with knowledge of the breach of trust or fiduciary duty retaining a benefit resulting from that breach of duty. Again, the reasoning is that it is wrongful in equity to exploit the vulnerability of C (on the High Court’s formulation, by making a gain from the breach of F’s duty). This can be seen as the expression of a tort theme in equity; equity intervenes here “to protect persons in positions of vulnerability from exploitation or manipulation at the hands of another with whom the former is in a close ‘neighbourhood’ relationship”. On all these approaches, D’s wrongdoing is in his or her exploitation of the fiduciary relationship.

There are other reasons why Model A’s characterisation of the liability as secondary is not compelling. If D’s liability is secondary to F’s liability,
this logically entails that D cannot be liable where F is not liable; but what of a breach of trust by an honest trustee who is able to rely on an exclusion of liability clause in the trust deed; that is, a trustee who never incurs liability? There is no reason why a dishonest D should be able to avoid liability because he or she dealt with an honest trustee yet Model A suggests this outcome. Similar questions arise in relation to fiduciaries. The secondary liability model downplays D’s role in the breach of F’s duty yet D may be the instigator of the breach and F merely D’s innocent tool in that enterprise. Given that the extent of wrongdoing by F and D can vary greatly it is preferable to consider D’s conduct directly rather than through the lens of F’s wrongdoing. A model of liability is needed that can differentiate between the two; and Model A does not do this. Thus, whilst D’s liability is “secondary” in the weak sense that one element of the liability is proof of another’s breach of trust or other fiduciary duty, D’s liability should not depend upon a remedy being available against F: D is liable because of his or her own independently wrongful conduct and, hence, the liability is primary in nature as suggested by Model B. In Lord Nicholls’ words, writing extrajudicially, “breach of trust and dishonest participation in a breach of trust are two species of equitable wrongs”.

(d) Model B (primary liability leading only to compensatory remedy)

Under Model B the remedy for dishonest assistance is limited to equitable compensation on the basis that the equitable claim is analogous to the common law tort of interference with contract. It is assumed that the nature of D’s wrongdoing, exploitation of C’s vulnerability, is adequately addressed by awarding compensation for any resulting harm. It is fallacious, the argument goes, to equate D’s wrongdoing with that of F, and therefore as warranting gain-based remedies, because D has not undertaken the same loyalty obligation as F and does not owe a fiduciary duty. Accordingly, it is said that gain-based remedies are only warranted in relation to a trustee or fiduciary because they have undertaken not to profit from their positions without the informed consent of C. The third party who profits from his or her involvement in the breach of trust or fiduciary duty has not breached any such undertaking. Thus, according to Model B, the primary liability of D is different in kind to the primary liability of F, and warrants less extensive remedies.

23See, e.g. Yeshiva Properties No 1 Pty Ltd v Marshall (2005) 219 A.L.R. 112 (F secured waiver of liability from C who then sued D).
24fn.17 above, at p.244.
27See, e.g. the defendant’s argument in Fofex Group Ltd v Templeman [2000] 2 Lloyd’s Rep. 643 at 669, per Toulson J. See also Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2007] EWHC 915; [2007] 2 All ER (Comm) 993 at [124]–[125], per Rimer J.
Of course, a loss-based remedy for dishonest assistance is easily justified given the principled rationale for liability. At the very least, D should compensate C for loss resulting from D’s wrongful conduct. If any further support is needed for this proposition it can be found in the remedy available for the common law tort of interference with contract. It must be at least as wrongful to interfere with a fiduciary relationship as it is to interfere with a contractual relationship.28 There is a separate issue regarding how that loss should be quantified; as will be discussed below, the current rules for assessing equitable compensation in relation to third parties mean that the loss-based remedy can be onerous. Nonetheless, the availability of a loss-based remedy, in principle, is uncontroversial.

However, if the liability is considered primary in nature, is a gain-based remedy equally justifiable? The proposition that so long as C is compensated for loss then D may keep any additional profits resulting from his or her wrongful conduct is not self-evident.29 It is true that D has not given an undertaking of loyalty; but nonetheless, if he or she has dishonestly interfered with the trust or fiduciary relationship for profit, thereby exploiting C’s vulnerability, this constitutes significant equitable wrongdoing for which a gain-based remedy might be available. Gibbs J. in Consul Development Pty Ltd v DPC Estates Pty Ltd took this approach:

“If . . . the [fiduciary conflict of interest] rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that he had gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom.”30

On this approach, the wrongdoing of F and D, whilst separate and distinct, are equally unmeritorious and exploitative of the vulnerable; and, arguably, both warrant a gain-based remedy when appropriate.

Nonetheless, does the similarity of equitable dishonest assistance liability with the common law tort of interference with contract warrant confining the equitable remedy to compensation as Model B suggests? A problem with Model B is that in seeking consistency with the tort of interference with contract insufficient attention is given to the differences between the equitable liability and the common law liability. Under the equitable liability D exploits a duty of undivided loyalty rather than the duty to perform a contract; there is a qualitative difference between these two duties which justifies a greater range of remedies being available.

29Lord Nicholls fn.17 above, at p.244.
30(1975) 132 C.L.R. 373 at 397. See also Zhu v Treasurer (NSW) (2004) 218 C.L.R. 530 at 571, per Gleeson C.J., Gummow, Kirby, Callinan and Heydon JJ. See also Lord Nicholls fn.17 above.
in relation to interference with the former duty. The duty to perform one’s contractual obligations is qualified in several ways in order to accommodate, for example, the efficient operation of the market and the protection of the contracting parties’ respective autonomies. Therefore, it will not necessarily be regarded as wrongful for a third party to retain an economic benefit resulting from the wrongful interference with another’s contractual obligations, so long as the innocent party is compensated for any loss. Conversely, the liability of a fiduciary is strict; F can only escape liability if C gives fully informed consent to the breach. The function of the fiduciary obligation is to ensure that F is loyal to C in a relationship of inequality; there are no competing economic or autonomy considerations to be balanced with this obligation and which might justify D retaining benefits resulting from dishonest assistance in the breach of fiduciary duty.31

In any event, it is a mistake to assume that the common law necessarily has “got it right” in relation to its remedial scheme. The debate over whether gain-based remedies should be available in relation to breach of some common law duties shows that the need for equitable wrongs to be remedially consistent with common law wrongs has to be carefully thought through.32

(e) Further justifying gain-based remedies

The pragmatic aspects of the rationale for dishonest assistance liability, particularly the second ground of deterrence, add weight to allowing gain-based remedies. If third party liability is effectively to deter breaches of trust and fiduciary obligation then it must be possible to require D to give up profits derived from the dishonest assistance. The pragmatic rationale is especially weighty where F and D are not independent actors; for example, if both are likely to derive benefit from the gain regardless of who receives it. So, for example, if D is closely related to F, or is a company controlled by F, or vice versa, it makes little sense to limit the availability of gain-based remedies to F. An early authority illustrating this point is the Privy Council case of Cook v Deeks.33 D was a company formed by F to take over the contract entered into by F in breach of fiduciary duty to C. Lord Buckmaster L.C., on behalf of the Privy Council, held that as D had full

31A similar argument is made by Worthington, “Reconsidering Disgorgement for Wrongs” (1999) 62 M.L.R. 218 at 236–237. Worthington argues gain-based remedies are justified in relation to breach of fiduciary duty because of the social value attached to the fiduciary relationship; and thus the object of the remedies is to prevent breaches occurring at all, rather than simply to remedy resulting harm. Her arguments apply equally to third parties.


knowledge of the breach of duty (F was D’s controlling mind and will), an account must be directed against it.

It might be argued that such cases are simply instances of piercing the corporate veil; that is, the fiduciary and corporate third party are treated as interchangeable entities where the former is the controlling mind and will of the latter. On this interpretation of the cases, gain-based remedies are not necessarily available for dishonest assistance per se but will be available where D is treated as indistinguishable from F. But such an interpretation does not explain all of the authorities where a gain-based remedy against D has been recognised. For instance, several Australian cases have involved fiduciaries poaching business from their respective employers with the dishonest assistance of their wives or friends as well as, or instead of, companies created to conduct the new businesses; and gain-based remedies have been awarded against the third parties whether or not controlled by F.

There are also Australian authorities where a gain-based remedy was awarded (or would have been available had all the elements of the action been found) against a completely independent third party. In Consul Development Pty Ltd v DPC Estates Pty Ltd, for example, the relationship between F and the controlling mind of D (Clowes) was that of fellow employees of C (Clowes as an articled clerk and F as a real estate adviser and manager). F and D were independent actors and not likely to benefit from each other’s separate and distinct profit; thus there was no implication that they were being treated interchangeably for the purposes of remedy. And in United States Surgical Corp v Hospital Products International Pty Ltd, overturned on appeal on other grounds, a constructive trust was imposed over the assets of D, a public company unrelated to F. Similarly, in the English case of Fyffes Group Ltd v Templeman, D was an independent company, seeking to do business with C, who bribed F in order to secure contracts with C. Toulson J. held that, in principle, a gain-based remedy was available against C. These authorities, from Cook v Deeks onwards, suggest that D’s liability, although separate and distinct from that of F, warrants gain-based remedies.

The strongest case for a gain-based remedy being available is where the gain is one that could have been made by C; for example, where D

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34See, e.g. Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2007] EWHC 915; [2007] 2 All ER (Comm) 993 at [104] and [132]–[133], per Rimer J. Such an argument (made in relation to Cook v Deeks [1916] 1 A.C. 554) was rejected in Fyffes Group Ltd v Templeman [2000] 2 Lloyd’s Rep. 643 at 669–670, per Toulson J.


36(1975) 132 C.L.R. 373.


exploits a business opportunity that should have been offered by F to C. In a very loose sense there is a causal nexus between D’s gain and C’s loss, even if the two are not identical, and even though it is not possible to trace from C to D. C has missed out on the opportunity to exploit the business opportunity which D has exploited; and in that sense, assuming that C would have exploited the opportunity at least as well as D, then C’s loss can be equated with D’s gain. Indeed, it may be that the distinction in such cases between a gain-based, and loss-based, remedy is sometimes overlooked and “compensation” equating with the third party’s gain is awarded.

The New South Wales Supreme Court decision of Colour Control Centre Pty Ltd v Ty explicitly recognised the distinction between the loss-based and gain-based remedy for D’s exploitation of a business opportunity that should have been offered to C; and provides a helpful model for assessing a gain-based remedy in loss of business opportunity cases.39 In that case, Santow J. assessed C’s losses resulting from the breach of fiduciary duty as

> “the profits [C] would have made if [C] had secured and retained the [business opportunity]... multiplied by the chance that the work would have been obtained, which I have estimated at 30%.”40

And he assessed Ds’ profits for which they should account as being the total profit made from the business opportunity discounted by 20 per cent to reflect D’s “time, energy, skill, and financial contribution”.41 He assumed that C would elect the latter, higher, sum.

Is it possible to go further, however, and argue that a gain-based remedy against D is justifiable, given the primary nature of D’s liability, even where C has suffered no loss at all? Clearly, a fiduciary is liable to account for profits resulting from a breach of fiduciary duty, regardless of whether C suffered a loss;42 but does the nature of D’s separate wrongdoing (dishonest exploitation of C’s vulnerability) justify the same approach being taken? Would that be to cast D as a fiduciary even though he or she has undertaken no obligation of loyalty? To some extent this question is obscured by the fact that the rules for assessing equitable compensation are so favourable to principals that it is only in extreme cases that C will be unable to demonstrate any loss; nonetheless, circumstances can be envisaged where D should still account for his or her gains. One example is where D actively encourages F to make certain investments, knowing that this will constitute a breach of the trust or fiduciary duties (due to

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40At 22.
41At 24.
42Boardman v Phipps [1967] 2 A.C. 46.
a conflict of interest, say) and where D’s conduct is motivated by the receipt of generous commissions for securing these investments. Even if, fortuitously, C suffers no loss from the investments, it seems perfectly appropriate that D be made to account for his or her gain (assuming all other conditions for liability are met). Such a result can be justified by the principled aspect of the rationale (D’s wrongdoing) and is further strengthened by the pragmatic aspect: requiring third parties to disgorge wrongfully acquired gains has a deterrent effect on such conduct, thereby preventing potential breaches of the fiduciary obligation by other trustees and fiduciaries.

(f) Limitations on gain-based remedies

To argue that the principled aspect of the rationale for third party liability justifies a gain-based remedy, however, does not mean that D’s liability must be synonymous with that of F; in other words, D need not be treated as though he or she were a trustee or fiduciary. The fact that F has given an undertaking of loyalty whereas D has not is still relevant. Nor is the argument that in all cases where D makes a gain from dishonest assistance in a breach of trust or fiduciary duty, but C suffers no loss, a gain-based remedy should be awarded; simply that this should be an available remedial option where the degree of D’s culpability, or close relationship with F, warrants it. In the example given above, D actively and deliberately encouraged the breach of duty by F in order to secure the investment commission; the remedial scope might be different where D was approached for investment advice and gave it in circumstances that still constituted dishonest conduct but not of the same degree of culpability (for example, if D behaved recklessly rather than fraudulently).

This helps to explain the decision not to award a gain-based remedy in *Fyffes Group Ltd v Templeman*. In that case D bribed F in order to secure contracts with C. Whilst Toulson J. held that the profits made by D on the resulting contracts were recoverable in principle, on the facts of the case, no profit remedy was awarded because it was found that C still would have entered the contracts with D absent any wrongdoing. The profits that D made from the contracts were “not caused by the bribery” but were an “‘ordinary’ profit element” that would have been earned irrespective of the breach of duty. D was liable simply to compensate C for losses resulting from the bribery (including, but not limited to, the amount of the bribes). Thus, compensation was awarded to reflect the extent to which

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the agreed contractual terms were more favourable to D than would have been the case without the breach of duty by F.

Whilst Toulson J. in *Fyffes Group Ltd v Templeman* apparently saw his reasoning as applying equally to fiduciaries,46 the Court of Appeal in *Murad v Al-Saraj* disagreed.47 In that case, a fiduciary was not permitted to argue that because C would have entered the impugned transaction even if there had been no breach of fiduciary duty, and hence, F would have legitimately earned at least some profits, he should only be liable for a proportion of the profits resulting from the transaction. That is, the same argument, used successfully by a dishonest assistant in *Fyffes Group Ltd v Templeman*, failed when used by a fiduciary in *Murad v Al-Saraj*.

The decision in *Murad v Al-Saraj* is consistent with established principles of fiduciary law.48 Arden and Jonathon Parker L.JJ., in the majority, apparently assumed that the liability of a fiduciary and a dishonest assistant are based upon the same principles and on this basis expressed doubt as to the correctness of Toulson J.’s decision in *Fyffes Group Ltd v Templeman*. With respect, the two decisions are consistent if one accepts that the nature of D’s wrongdoing (exploitation of C’s vulnerability) and the nature of F’s wrongdoing (breaching an undertaking of loyalty) are different; F’s duties are of a more absolute, prophylactic, nature and warrant more stringent remedies.

(g) Case law support for “Model C”

There are some cases to support a model of primary liability leading to both loss-based and gain-based remedies and which I will call “Model C”. As well as the early decision of *Cook v Deeks*, and the later Australian cases, most recently in *Fyffes Group Ltd v Templeman*, Toulson J. rejected the defendants’ Model B argument and preferred the approaches of Gibbs J. in *Consul Development Pty Ltd v DPC Estates Pty Ltd* and the Privy Council in *Cook v Deeks*.49 He concluded that a dishonest assistant was personally liable to account due to his or her implication in F’s fraud and if, in fact, extra profits resulting from the bribe alone could be identified (they could not). Toulson J.’s reasoning was confirmed by Lewison J. in *Ultraframe (UK) Ltd v Fielding* as applying wherever a dishonest assistant makes a personal gain resulting from the dishonest assistance or consequent breach of trust or fiduciary duty; that is, the finding in

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46 He cited the leading Australian authority on account of profits for breach of fiduciary duty: *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544 at 561, per Mason C.J., Brennan, Deane, Dawson and Gaudron J.J.


49 [2000] 2 Lloyd’s Rep. 643 at 670. Toulson J. also drew support from the analogous position of a third party procuring or assisting in a breach of confidence.

Fyffes Group Ltd v Templeman did not depend upon special public policy concerns with respect to bribes.50

III. JOINT AND SEVERAL LIABILITY

Having justified, in broad terms, a model of primary liability for the equitable wrong of dishonest assistance that allows both loss-based and gain-based remedies, Model C, does this help in answering two subsidiary questions concerning the remedy; namely:

(i) should D and F be jointly and severally liable for C’s losses; and,

(ii) should D and F be jointly and severally liable for their gains?

(a) Joint and several liability for losses51

If D’s liability is to be characterised as a primary liability, as argued above, it follows in principle that D should be liable only for losses “caused” by D’s own wrongdoing; that is, once D’s dishonest assistance is determined to be a cause-in-fact of C’s losses, the court should consider, as a normative question, the appropriate scope of D’s liability for those losses.52 In fact, however, once D is found to have dishonestly assisted F in the breach of trust or other fiduciary duty, D is held jointly and severally liable with F for all of C’s losses for which F is liable and which result from the breach of duty.53 That is, D takes on F’s liability for C’s losses. Thus, in relation to C’s claim, there is no separate inquiry as to the scope of D’s liability.54 This can result in D being liable to compensate for extensive losses suffered by C even though D’s contribution to the breach of trust or fiduciary duty was relatively minor when compared with that of F (and vice versa).


51 An issue that will not be dealt with here is whether the assessment of equitable compensation for dishonest assistance should be the same for all breaches of trust, whether breach of a fiduciary duty or not. See Bristol & West Building Society v Mothew [1998] Ch. 1; Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 C.L.R. 484. See also Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 L.Q.R. 452 at 479.


The absence of a separate inquiry into the scope of D’s liability for C’s losses appears to favour Model A (secondary liability); indeed, the few authorities that specifically address the question of causation in relation to dishonest assistance are relied upon by Elliott and Mitchell as conclusive evidence that the English courts support a secondary liability model of dishonest assistance.\textsuperscript{55} If the relevant wrongdoing is that of F, D becoming liable for that wrongdoing through accessorrial conduct, then the remedial focus must be on the consequences of that primary wrongdoing. On this analysis, the scope of liability inquiry concerns F’s breach of duty, rather than D’s accessorrial conduct. Indeed, according to Elliott and Mitchell, on the secondary liability, Model A, approach, all that is necessary is that D’s “acts or omissions have at least made the commission of the breach easier than it would otherwise have been . . .”.\textsuperscript{56} D’s dishonest assistance constitutes a “complicity nexus” which substitutes for the scope of liability inquiry.\textsuperscript{57}

There are two alternative justifications for the joint and several liability of F and D which are compatible with a primary liability analysis of dishonest assistance. First, the courts take a generous, claimant-favouring, approach to the scope of F’s liability when assessing compensation for losses caused by a fiduciary.\textsuperscript{58} This is consistent with the prophylactic characteristics of fiduciary law generally. The pragmatic aspects of the rationale for third party liability (particularly that of providing C with an alternative means of recourse) suggest that the same approach be taken when assessing D’s liability for C’s losses. Thus, whilst as a matter of principle, a normative inquiry should be conducted in relation to D’s wrongdoing and the consequent scope of D’s liability, because such issues can be complex, even on equity’s more claimant-favouring rules, all that C needs to establish is that loss was “caused” by F’s breach of trust or fiduciary duty (that is, F’s conduct was a cause-in-fact of C’s losses and the losses were within the scope of his or her liability); and secondly, that D dishonestly assisted in the breach and was also a cause-in-fact of C’s losses. Indeed, it can be argued that the far-reaching consequences of joint and several liability have been a factor in the English courts’ endorsement of a high threshold (dishonesty) for liability; that is, the sort of conduct by a third party that would lead to a finding of dishonesty warrants that party bearing the risk of full liability for the loss caused to C.

A second justification for the apparent anomaly of D being held responsible for F’s liability to C is that it is only in relation to C that


\textsuperscript{56}At 20.


\textsuperscript{58}See, e.g. \textit{Re Dawson} [1966] 2 N.S.W.L.R. 211; \textit{Target Holdings Ltd v Redfern} [1996] A.C. 421.

questions of relative responsibility are ignored; as between D and F such issues are relevant, and go to the question of contribution. The fact that F is liable to pay contribution to D if D meets C’s claim for compensation bears out the argument that the reasons for joint and several liability are pragmatic and prophylactic rather than a logical consequence of D’s liability being secondary to that of F. Thus, even on the model of primary liability argued for in this paper, Model C, D’s joint and several liability C’s losses can be justified.

(b) Joint and several liability for F’s gains

According to my proposed model of primary liability, Model C, the remedy available against D should be directed towards D’s wrongdoing; and therefore it follows that D should not be liable for gains made by F. Nonetheless, it is possible to conceive of circumstances where liability for F’s gains might be justified given the degree of D’s culpability. For example, where F is simply the vehicle for D’s enrichment, and D is the instigator of the breach of duty, such as where F is a company controlled by D, it could be argued that D should account for the gains made by F. Of course, such a claim would only be necessary where F was unable to meet its liabilities and if it were not possible to trace F’s gains into D’s hands (thereby activating either recipient liability or proprietary liability). On the other hand, it may be that such scenarios can be accommodated in other ways; for example in a corporate setting, where F is a company in which D has a substantial interest, removing the gains of F may have the indirect consequence of withholding or removing gains from D. Alternatively, if F’s function is solely to be the vehicle for D’s enrichment then there may be a case for piercing the corporate veil.

Characterising D’s liability as secondary, under Model A, on the other hand, would lead to D being liable for F’s gains because under this model D assumes F’s liability to C. Conversely, if it is D who makes a gain from the breach of trust or fiduciary duty, this gain would not be recoverable, even from D, because it is not a gain for which F is accountable. Elliott and Mitchell do not endorse these aspects of Model A. In particular, they consider that holding D jointly and severally liable for gains made by D’s acts would not be appropriate in these circumstances.


60 See, e.g. Warman International Pty Ltd v Dwyer (1995) 182 C.L.R. 544 at 563–564, per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ. The court noted that an account of profits directed against the third party company would indirectly achieve a similar result to an account of profits, or constructive trust, in relation to F’s shareholding in the company.

61 See Trustor AB v Smallbone (No.2) [2001] 1 W.L.R. 1177; Gencor ACP Ltd v Dalby [2000] 2 B.C.L.C. 734; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638; [2006] F.S.R. 17 at [561]–[576]. The discussion in these cases concerns the opposite scenario; that is, where D is the corporate entity.
F goes beyond what is necessary to fulfil the pragmatic and principled rationales of liability and thus amounts to a punitive measure.

There is a line of Canadian cases supporting joint and several liability on D for F’s gains on the basis that D is to be treated as though he or she were a co-trustee or fiduciary. Those cases, however, contain no discussion of principle and the very difficult questions of law concerning the contribution rules between co-trustees are not elaborated upon; that is, whether or not co-trustees are always jointly and severally liable for each others’ gains.62 Most recently, Lewison J. in *Ultraframe (UK) Ltd v Fielding* adopted the view of Elliott and Mitchell and held that joint and several liability for gains was not justified as a matter of principle and, having penal consequences, it went beyond the court’s jurisdiction as a court of equity.63 For the moment then, the English courts seem unlikely to endorse joint and several liability for gains except where a case can be made for piercing the corporate veil. Such an approach is consistent with a model of primary liability.

IV. PROPRIETARY REMEDIES

If the arguments so far are accepted, then according to Model C, D should be subject to a primary liability to C based upon D’s dishonest exploitation of C’s vulnerability arising from the fiduciary relationship with F. D is potentially liable for both loss-based and gain-based remedies; but can this extend to a proprietary gain-based remedy? The remedies in question are the constructive trust and the equitable lien. Model A and Model B cannot accommodate these remedies; and, since these models have also proved inadequate in relation to the remedies discussed so far, will not be considered further.

(a) When is a proprietary remedy warranted?

A worthwhile exercise is to consider why a proprietary remedy in relation to D’s profits would ever be warranted given that the pragmatic and principled rationales of dishonest assistance liability (namely, deterrence of other dishonest assistants, provision of alternative means of recourse to

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C, and redress of D’s wrongdoing) all appear to be met by the personal remedies of equitable compensation and account of profits. A proprietary remedy clearly bolsters the alternative means of recourse given to C, most obviously by enabling C to secure priority over unsecured creditors of D in the event of D’s insolvency. Prioritising C’s rights over those of D’s unsecured creditors has no deterrent effect upon D, however, nor upon other potential dishonest assistants.64 Furthermore, awarding a proprietary remedy against an insolvent D disrupts the operation of statutory insolvency regimes and disadvantages unsecured creditors not implicated in the dishonest assistance.65 Thus, a proprietary remedy is not warranted where D is unable to meet all of his liabilities. This may be difficult to determine in practice, however, for the ability of D to satisfy his or her unsecured liabilities does not necessarily correlate with D’s insolvency.66

In fact, insolvency protection has not been a relevant factor in Australian dishonest assistance cases that have contemplated or awarded a proprietary remedy.67 In each instance, the remedy was directed towards effectively redressing D’s wrong vis-à-vis C, rather than in ensuring C’s priority in the event of an inadequate pool of assets. These cases demonstrate that there are motivations, other than insolvency protection, as to why a proprietary remedy might be sought and these are consistent with the principled rationale for liability.68

First, a proprietary remedy may be the most straightforward means of ensuring that C is not disadvantaged by D’s wrongdoing. In other words, although an accurate compensatory award will, in principle, achieve the same result, a constructive trust will most effectively redress D’s wrongdoing. An example is where D dishonestly uses non-confidential information, imparted by F in breach of fiduciary duty, to exploit a property redevelopment opportunity that should have been offered to C.69 A court may order D to account for his profits; however, this may not reflect the gain that C could have made if given the opportunity by F to exploit the information, particularly where the opportunity is not yet 

65Re Polly Peck International Plc (No.2) [1998] 3 All E.R. 812.
67Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373; Timber Engineering Co Pty Ltd v Anderson (1980) 2 N.S.W.L.R. 488 (approved by Mason J. in Hospital Products Ltd v United States Surgical Corp (1984) 156 C.L.R. 41 at 115–116); United States Surgical Corp v Hospital Products International Pty Ltd [1983] 2 N.S.W.L.R. 157 (overturned on appeal on other grounds).
69See, e.g. Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373 (proprietary remedy sought but elements of claim not found). See also Say-Dee Pty Ltd v Farah Constructions Pty Ltd [2005] NSWCA 309; where, on similar facts, the NSW Court of Appeal granted a constructive trust for recipient liability. The finding of a breach of fiduciary duty was overturned on appeal: Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 C.L.R. 89.
realised by D. Similarly, C could seek equitable compensation for the loss of profits discounted by the possibility that C would not have taken up the opportunity; however, C may be disadvantaged by the difficulty of accurately assessing such compensation. If a constructive trust is imposed over the property acquired by D, with appropriate allowances for D’s expenditure and efforts to date, C can pursue the property development opportunity. For example, in Consul Development Pty Ltd v DPC Estates Pty Ltd C sought a constructive trust over the real properties acquired through D’s exploitation of an opportunity which F should have disclosed to C.70 The elements of the claim were not made out in the High Court of Australia and so the remedy sought was not in issue; however, none of the judges appeared concerned about the constructive trust order made by the New South Wales Court of Appeal. Thus, if D has usurped C’s commercial opportunity C should be able, by means of a constructive trust, to step into D’s shoes and complete the venture.

Similarly, as in the New South Wales Supreme Court decision of Timber Engineering Co Pty Ltd v Anderson, if company D is created in order dishonestly to assist F (the manager of C) to divert C’s business to D, the most effective remedy from C’s point of view may be a constructive trust over the assets of D to reflect the fact that D’s business is wholly referable to equitable wrongdoing by F and D.71 Just allowances can be made for D’s expenses, efforts and skill.

In Ultraframe (UK) Ltd v Fielding Lewison J. held that Timber Engineering Co Pty Ltd v Anderson was inconsistent with the Australian High Court decision of Warman v Dwyer72; with respect, however, this is not so. A proprietary remedy is not as appropriate when, as in Warman v Dwyer, although a competing business is set up by D and F in breach of F’s fiduciary duties to C, the success of the endeavour substantially reflects the skill and efforts of D and F, and the business opportunity would not have been pursued by C. In Warman v Dwyer a constructive trust was not sought because it was not a proportionate response to the degree of F and D’s wrongdoing, not because it was unavailable as a remedial option. An account of D’s profits for the first two years of operation, with appropriate allowances, better reflected the extent to which D had gained by the breach of fiduciary duty in that a large proportion of the continuing success of

70Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373.
71[1980] 2 N.S.W.L.R. 488 at 496–497, per Kearney J. A second fiduciary was involved as well as the wives of the two fiduciaries. All third parties were found to have knowingly participated in a dishonest and fraudulent scheme. One reading of Kearney J’s decision is that he imposed an equitable lien over the shares in the third party companies: Meagher, Heydon and Leeming, fn.62 above at para.5-250; whereas, in Hospital Products Ltd v United States Surgical Corp (1984) 156 C.L.R. 41 at 115–116 Mason J. construed the remedy to be a constructive trust over the assets of D. Whilst the judgment is not clear, it is suggested that Kearney J. awarded both a constructive trust over the assets of the third party companies and equitable liens over shares held in those companies for the “value injected into such shares” by the breaches of fiduciary duties: at 49.

F and D’s enterprise was referable to F’s own skill and efforts.73 Timber Engineering Co Pty Ltd v Anderson and Warman v Dwyer are perfectly consistent decisions that illustrate when a proprietary remedy is, or is not, appropriate. In fact, the remedies awarded in Warman v Dwyer were equitable charges over the assets of the two third party companies to secure accounts of profits of the respective companies; that is a, lesser proprietary remedy was still given.74

A further situation, again unrelated to D’s insolvency, where it might be desirable for C to seek a constructive trust over property representing D’s gain from dishonest assistance is if the property is no longer identifiable in D’s hands but the value inherent in it can be traced to property held by a third party who is not a bona fides purchaser for value.75 C is limited to a personal gain-based remedy against D, but also may assert his proprietary interest in property held by the third party.

Thus, there are motivations other than insolvency protection for considering a proprietary remedy for dishonest assistance. Such scenarios occur where, as between C and D, C has the better claim to the assets held by D; conversely, where D is insolvent, and the competition is between C and D’s creditors, C does not have a superior claim. The difficulty of determining whether the competition will be between C and D, or C and D’s unsecured creditors, may be a practical obstacle to allowing proprietary remedies; but leaving that to one side for the moment, are there principled reasons for refusing a proprietary remedy even where D is not insolvent or likely to become so? Here, an illuminating contrast can be noted between the law in England and Australia.

(b) Proprietary remedies in England

According to orthodox principles of English law, a proprietary remedy is only available if C can assert a pre-existing proprietary interest in D’s property (if necessary, by tracing the value inherent in C’s original property into substitute property held by D);76 or, alternatively, if C can establish an ‘institutional’ constructive trust over property held by D.77 An institutional constructive trust arises automatically upon the occurrence of specified events and does not involve the ex post facto exercise of

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73Hospital Products Ltd v United States Surgical Corp (1984) 156 C.L.R. 41 at 110, per Mason J., citing Re Jarvis [1958] 1 W.L.R. 815 at 820, per Upjohn J.

74Warman International Ltd v Dwyer (1995) 182 C.L.R. 544 at 570 per Mason C.J., Brennan, Deane, Dawson and Gaudron JJ.

75An analogous example is Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324 (C claimed proprietary rights to constructive trust property traced from F to D).


77The third option of a resulting trust is not relevant in a dishonest assistance scenario. See Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669 at 714, per Lord Browne-Wilkinson.
judicial discretion. The former situation does not depend upon dishonest assistance liability, for C simply asserts pre-existing proprietary rights. The question, then, is whether C can claim proprietary rights to property in D’s hands purely on the basis of D’s dishonest assistance where there is no proprietary “link”, through tracing, between C and D. The debate in England has focused upon constructive trusts rather than equitable liens.

Accepting, for now, the terminology of “institutional” constructive trusts, dishonest assistance is not a recognised category in which such trusts arise in England. The closest analogy is that an institutional constructive trust is said to arise when F acquires property in breach of trust or fiduciary duty. Pursuant to the equitable maxim that Equity looks on that as done which ought to be done, Equity treats the property as having been obtained for C, and thus, as belonging to C from the moment it was received by F. Therefore, it is said, the court recognises a proprietary interest rather than creating one. The same reasoning could be used to justify an institutional constructive trust arising when, as a result of F’s breach of duty, D acquires property that should have been acquired, if at all, for C; however, this has not been the case. Furthermore, the institutional constructive trust arising upon breach of fiduciary duty is controversial; particularly where the subject-matter of the constructive trust would never have been received legitimately by C (for example, where F takes a bribe and converts it to property). Critics of the institutional constructive trust in this context argue, inter alia, that there is no principled justification for prioritising C’s rights over other unsecured creditors of D where the property could never have been legitimately received by C and that, in any event, proprietary relief is not necessary in order to meet the rationale for F’s liability. Given the contested status of the institutional constructive trust for breach of fiduciary duty, it is unlikely to be extended by analogy to dishonest assistants.

78 e.g. the constructive trust which arises upon a contract for the sale of land: Pettit, Equity and the Law of Trusts, 10th edn (2006), at p.163.
80 Keech v Sandford (1726) Sel. Cas. Ch. 61; Boardman v Phipps [1967] 2 A.C. 46; Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324.
81 Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324 at 331, per Lord Templeman.
82 Millett, “Proprietary Restitution” in Degeling and Edelman (eds), Equity in Commercial Law (2005), at p.324.
84 Att-Gen (Hong Kong) v Reid [1994] 1 A.C. 324.
A proprietary remedy for dishonest assistance is said to involve a “remedial” constructive trust and the English courts do not recognise such trusts. A remedial constructive trust is “an order of the court granting, by way of remedy, a proprietary right to someone who, beforehand, had no proprietary right”; that is, it allows the court to vary proprietary rights at the court’s discretion. The primary concerns of those who oppose remedial constructive trusts are that they contravene the principles of insolvency law, they violate the rule of law by allowing courts to create proprietary rights, and they create uncertainty in the law.

(c) Proprietary remedies in Australia

The institutional/remedial dichotomy is puzzling to an Australian lawyer. As was recognised by Deane J. in Muchinski v Dodds, institutional constructive trusts derive that status simply through repeated judicial recognition; that is, all recognised trusts began life as remedial responses to particular instances of equitable wrongdoing and became institutional through repeated usage. There will always be some element of discretion involved in recognising a constructive trust because such trusts, unlike express and resulting trusts, are not referable to the parties’ intentions and depend for their enforcement wholly upon the court’s recognition. Furthermore, although in a developing category of law greater judicial discretion will be necessary to determine whether the remedy is warranted, it is a constrained discretion; that is, the principles for its exercise can be worked out. Whilst some categories of constructive trust are well-established and require very little discretion on the court’s part, others are still evolving. Thus, in Australia the notion that a legitimate constructive trust involves no element of discretion has been rejected; and, furthermore, the institutional/remedial distinction is seen as a connoting a remedial spectrum rather than a remedial dichotomy.

In Australia, proprietary remedies for breach of fiduciary duty are available at the court’s discretion; and, as noted above, the constructive trust and equitable lien have also been awarded for dishonest assistance.

87Re Polly Peck International Plc (No.2) fn.86 above, at 830, per Nourse L.J.
92Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 C.L.R. 373; Timber Engineering Co Pty Ltd v Anderson (1980) 2 N.S.W.L.R. 488 (approved by Mason J. in Hospital Products Ltd v United
On the other hand, in one of its recent references to dishonest assistance liability, the Australian High Court appeared to suggest that the remedy is not proprietary: "Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee." When this passage is read in context, however, it seems that the court was emphasising that the language of constructive trusteeship applies to dishonest assistance liability regardless of whether any trust property is involved. With respect, this obiter dictum was not directed to the separate question of whether later acquired property may be impressed with a trust or lien.

The case for the Australian approach to proprietary remedies, whilst attractive, is not yet overwhelming, however, because there is uncertainty as to how the court’s discretion may be exercised in relation to breach of fiduciary duty and dishonest assistance, albeit that this uncertainty is due to the evolving nature of the jurisdiction, rather than an unwillingness to set boundaries to the remedial discretion. It is possible to glean from the current authorities on discretionary proprietary remedies in Australia the following, possibly overlapping, general principles:

(i) The least intrusive proprietary remedy should be awarded; that is, the first question is "whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust".

(ii) The interests of innocent third parties, including unsecured creditors, must be protected. It is not clear how such exercise is to be undertaken; although, where such interests are affected, two options are to refuse a proprietary remedy altogether or to award only future security.

(iii) The court always has a residual discretion to withhold the proprietary remedy on established grounds such as laches.

98 See, e.g. Chan v Zacharia (1984) 154 C.L.R. 178 at 204-205, per Deane J. referring to “other doctrines of equity such as laches and equitable estoppel”; Warman International Ltd v Dwyer (1995) 182 C.L.R. 544 at 559, per Mason C.J., Brennan, Deane, Dawson and Gaudron J.J.: “estoppel, laches, acquiscence and delay”.

With respect, the careful manner in which the Australian High Court has so far viewed the discretion to award a constructive trust, and the absence of glaring examples of injustice to third parties consequent on such remedies being awarded, casts doubt on the claims of some commentators that a discretionary imposition of proprietary remedies is always and intrinsically “repugnant alike to legal certainty, the sanctity of property and the rule of law”.99 Whilst the lack of certainty, as yet, makes the Australian model less appealing, it has the virtue of explicitly confronting the normative questions involved (particularly with respect to D’s insolvency).

A consideration of the Australian law suggests that a constructive trust may be imposed, and should only be imposed, as a remedy for dishonest assistance where

(i) A proprietary remedy will be the most effective way to redress D’s wrongdoing and would not be otherwise available. This will generally occur where the whole of D’s gain is referable to D’s dishonest assistance, and either a constructive trust is the best means of placing C in the position that C would have been in had F’s breach of duty not occurred; and/or, where a business opportunity can still be pursued to fruition by C.100

(ii) The proprietary remedy can be framed so as to protect the interests of third parties.101 This means that if D is insolvent, or unable to meet his liabilities so that the contest is really between C and D’s unsecured creditors, a constructive trust should not be awarded.

Alternatively, even where an account of profits is deemed more suitable, and so long as condition (ii) can be met, an equitable lien may be imposed to secure the future payment by D of the account of profits.102

V. CONCLUSION

Although early cases awarding gain-based remedies did not explicitly distinguish F and D’s liability, dishonest assistance is best seen as a primary liability based upon D’s exploitation of C’s vulnerability (Model C). The nature of D’s wrongdoing is distinct from that of F who breaches an obligation of loyalty. The rationale for dishonest assistance liability has both pragmatic and principled features; these support the availability of gain-based remedies as well as loss-based remedies. Thus, neither of the models for dishonest assistance liability that are currently predominant in the case law and/or commentaries is satisfactory.

100See also Goode, “Proprietary Restitutionary Claims” in Cornish et al., fn.17 above, at p.74.
101Muschinski v Dodds (1985) C.L.R. 583 at 623, per Deane J.
In most cases the remedy for dishonest assistance will be equitable compensation (breach of fiduciary duty most often resulting in loss rather than gain); however, this does not preclude the court awarding an account of profits when appropriate. D’s joint and several liability for C’s losses resulting from F’s breach of duty is compatible with a model of primary liability if resort is had to the pragmatic rationales for liability; however, joint and several liability for F’s gains generally is not.

A proprietary remedy for dishonest assistance is justifiable only where D’s solvency is not in question. The Australian discretionary approach to awarding proprietary remedies can only be countenanced if it is accepted that, in equity, courts have a controlled remedial discretion. If this is accepted then a proprietary remedy may be awarded where it does not create injustice for innocent third parties and so as to allow C the most effective remedy. The scenario of D’s dishonest assistance in F’s diversion of a business opportunity from C shows that a proprietary remedy is sometimes the most appropriate means of redressing D’s wrongdoing. The Australian cases suggest a way forward in this regard.

PAULINE RIDGE.*

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