Advance Copy – Citation

Jamie Glister, 'Diverting Fiduciary Gains to Companies' (2017) 40(1) *University of New South Wales Law Journal* (Advance).

DIVERTING FIDUCIARY GAINS TO COMPANIES

JAMIE GLISTER*

I INTRODUCTION

It is clear that wrongdoing fiduciaries must disgorge profits that they personally make in breach of fiduciary duty. That proposition is 'integral to the formulation of the fiduciary principle itself'.[1] It is also clear that third parties, including companies, can be liable to account on *Barnes v Addy*[2] grounds for profits they make through participating in a fiduciary breach. In cases where third parties receive money or other property, they may be liable in knowing receipt.[3] If a corporate opportunity is misdirected instead,[4] a third party who exploits that opportunity can be liable as a knowing assistant. Where the relevant third parties are companies under the control of the wrongdoing fiduciary, it will be a straightforward task to impute the fiduciary's knowledge of his or her misconduct to the company,[5] and so satisfy the knowledge requirements for *Barnes v Addy* liability.

---

* Associate Professor, Faculty of Law, University of Sydney. I thank Matthew Conaglen, John Stumbles, and the referees for helpful comments on earlier drafts. I remain responsible for errors.

1 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 405 [513] (The Court).

2 (1874) LR 9 Ch App 244.

3 If those misdirected assets were initially held on trust, a property claim may also lie: see *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, 272–3 (Megarry V-C); *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 358 [251] (The Court); Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 205–8.

4 On the 'business opportunity rule' generally, see R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005) ch 9.

5 See *Short v Crawley [No 30]* [2007] NSWSC 1322 (26 November 2007) [765] (White J); *Kation Pty Ltd v Lamru Pty Ltd* (2009) 257 ALR 336, 366 [117] (Basten JA); *Sewell v Zelden* [2010] NSWSC 1180 (3 September 2010) [11] (Rein J); *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (where the fiduciary's knowledge of another's wrongdoing was imputed); *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75, 96–7 [103] (Jackson J); Dietrich and Ridge, above n 3, 378–82; Jamie Glister, 'Equitable Liability of Corporate Accessories' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) (forthcoming).

This is all orthodox, but the important point is that the fiduciaries and third party companies are still treated as discrete actors. In the context of gain-based relief, this means that each is only liable for their own gains. Any gain made by the third party company is only recoverable from the fiduciary to the extent that it reflects loss suffered by the fiduciary's principal, and can therefore be claimed from the fiduciary as equitable compensation. In cases where no loss is suffered, or where the third party's gain is greater than any loss, that gain can only be recovered from the third party itself.

The significance of this can be seen in the English case of *Aerostar Maintenance International Ltd v Wilson*.[6] In breach of fiduciary duty, Mr Wilson diverted business opportunities away from his employer and to a new company, Avman Ltd, of which he was the sole director and shareholder. Morgan J found that Mr Wilson's knowledge could be imputed to Avman, and accordingly held Avman liable to disgorge its profits on the footing of dishonest assistance.[7] The case seems unexceptional, but its importance lies in the fact that Avman then failed between the liability and quantum judgments. This meant that the plaintiff had no choice but to elect for a compensatory remedy against Mr Wilson, even though the plaintiff would have preferred a gain-based remedy calculated by reference to Avman's initial profits.

In situations where the third party is a company controlled by the wrongdoing fiduciary, this leads to a risk of injustice: although the company may be liable for its profits on a *Barnes v Addy* basis, the fiduciary may run it down and effectively deny the plaintiff a remedy. This risk is only partially ameliorated by the possible operation of the insolvent transaction provisions in the *Corporations Act*.[8] The purpose of this article is therefore to explore possible ways in which the fiduciary can be made personally liable for gains that are made by (or appear to be made by) the associated company.

The discussion below is divided into five main parts. Part II explores the width of the general gain-based liability of wrongdoing fiduciaries. Although it will be argued that fiduciaries are not generally liable for gains made by third parties, there is surprisingly little direct authority on the point. Part III considers the application of the corporate alter ego doctrine in this context. On this approach it may be possible for courts to treat wrongdoing fiduciaries and their associated companies as relevantly the same actor, and so to make fiduciaries personally liable for gains that were actually made by the company. However, the status and extent of this analysis are both unclear. Part IV discusses the possible application of agency principles, whereby receipt by the associated company can be treated as receipt by the wrongdoing fiduciary. The fiduciary would be liable for gains that he or she did personally make, although they appeared to be made by the associated company. Such an agency analysis is certainly possible, but it will be argued that it is limited in scope. Part V examines a wider notion of

6 [2010] EWHC 2032 (Ch) (30 July 2010) [201]–[207] (Morgan J) (liability); [2012] EWHC 1353 (Ch) (4 May 2012) (quantum).

7 Avman was also liable in knowing receipt, but probably would not have been so in Australia: see below n 79.

8 *Corporations Act 2001* (Cth) pt 5.7B.

disgorgeable benefit, whereby a profit that is made by a company may still be treated as a disgorgeable benefit enjoyed by its controllers. Part VI discusses a further possible model, where parties to a breach of fiduciary duty who 'act in concert' to secure a mutual gain may be jointly liable to disgorge the whole profit. Part VII concludes that the acting in concert model is illusory, but that the other three analyses do operate to enlarge the personal liability of the wrongdoing fiduciary.

II LIABILITY OF FIDUCIARY FOR GAINS MADE BY THIRD PARTIES

It is worth raising the possibility that wrongdoing fiduciaries may be liable under the general law for gains they do not make personally but that are instead made by third parties. Although the position is almost certainly that fiduciaries are *not* generally liable for such gains, there is little direct authority on the point. The issue is more commonly discussed in the context of whether an accessory is liable for a fiduciary's gain, rather than the other way around.

One case that is directly on point is *Short v Crawley [No 30]*,[9] which concerned the ownership of public houses in Sydney. The pubs were owned by J & J O'Brien Pty Ltd and associated companies. One of the shareholders and directors of those companies, Mr Crawley, was also the managing director and principal shareholder of Vensel Pty Ltd. In breach of fiduciary duty, he caused the J & J O'Brien companies to engage Vensel as management agents of properties owned by the group. Mr Crawley, who was a solicitor, also caused the group to engage his own firm to provide legal services. The question was whether Mr Crawley was personally liable to account for the profits made by Vensel. White J held that he was not:

> Both Mr Crawley and Vensel are liable to account for the profits derived by them. I do not consider that Mr Crawley is liable to account for the profits derived by Vensel. Whilst he controlled Vensel, the case was not conducted on the basis that Vensel was his agent. There is no basis for piercing the corporate veil. The better view is that, where profits are earned by an accessory to the fiduciary's breach of fiduciary duty, it is the accessory who is liable to account for the profits. The liability to account is a personal remedy designed to strip the recipient of profits it is unconscionable for him to retain.[10]

Regal (Hastings) Ltd v Gulliver[11] is also said to stand for the proposition that fiduciaries are only liable for their own gains, although the case is not as clear on the point as might be hoped. Four directors of Regal each bought shares in a subsidiary company, Hastings Amalgamated Cinemas. A fifth director, Mr Gulliver, did not personally buy shares but instead caused three other investors to do so. Two of those other investors were companies in which Mr Gulliver held a shareholding and the third was a personal friend. Soon afterwards, the shares

9 [2007] NSWSC 1322 (26 November 2007).

10 Ibid [763] (citations omitted). This part of the case was not affected by the partially successful appeal: *Crawley v Short* (2009) 262 ALR 654.

11 [1967] 2 AC 134 ('*Regal (Hastings)*').

were sold at a profit. The first four directors were held liable to account for the profits made on their shares,[12] but Mr Gulliver was not liable to account for the profits that had been made by the three other investors. For this reason the case has been treated as authority for the proposition that a wrongdoing fiduciary (here, Mr Gulliver) is not liable to account for profits made by third parties.[13]

Although the case does provide some support for that proposition, it is worth noting that *Regal (Hastings)* was decided purely on an application of the no profit rule. This means that Mr Gulliver was not relevantly a wrongdoing fiduciary at all. It would not have been difficult to find a breach of the no conflict rule,[14] and Mr Gulliver might in fact have benefited indirectly from the profits made by the other investors in which he held shares.[15] But the case was not decided on either basis, so it cannot wholly determine the extent of liability of fiduciaries who *are* wrongdoers.[16]

Warman International Ltd v Dwyer[17] also provides support for the view that fiduciaries are only liable for their own gains, although the parties themselves had overlooked the point. Warman International sought accounts of profits against its former employee and fiduciary, Mr Dwyer, and against two businesses Dwyer controlled, BTA and ETA. The trial judge had made a single order, against all three of Dwyer, BTA and ETA, of the combined amount of the profits made by BTA and ETA. The structure of this order was not challenged in the High Court, where the Court noted:

> It is arguable that any order, such as that made by the trial judge, for payment of a sum determined by an account of BTA's and ETA's profits should be divided into two orders, one against BTA alone for the amount determined by reference to its profits and the other against ETA alone for the amount determined by reference to its profits. … As has been mentioned, however, Dwyer, BTA and ETA did not argue in this Court or in the Court of Appeal that the respective orders made in the courts below should not have been made against the three of them jointly. In the absence of any such argument, it has effectively been common ground that any orders made should be against all three.[18]

Although direct authority on the point is rather limited, oblique authority can more easily be found. In *Michael Wilson & Partners Ltd v Nicholls*,[19] Gummow ACJ, Hayne, Crennan and Bell JJ said:

> the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the

---

12 Ibid 152 (Lord Russell). The claim had been brought in the King's Bench Division against six defendants for damages, alternatively money had and received, in the amount of £8412. Both Mr Gulliver and another defendant were found not liable. The other four were each severally liable for one-sixth of the claimed amount: £1402.

13 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1553]–[1554] (Lewison J); *Short v Crawley [No 30]* [2007] NSWSC 1322 (26 November 2007) [763] (White J).

14 See Richard Nolan, '*Regal (Hastings) Ltd v Gulliver* (1942)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 499, 513–16.

15 See *Regal (Hastings)* [1967] 2 AC 134, 152 (Lord Russell), where this was unsuccessfully argued.

16 Relevantly for the discussion in Part III below, the corporate investors could not properly be described as alter egos of Mr Gulliver.

17 (1995) 182 CLR 544.

18 Ibid 569. See also *Sewell v Zelden [No 2]* [2010] NSWSC 1181 (1 October 2010) [24] (Rein J).

19 (2011) 244 CLR 427.

> claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ.[20]

That case turned on the correct relationship between the liabilities of wrongdoing fiduciaries and knowing assistants, and the specific point was whether or not the compensatory liability of a knowing assistant could only be properly determined once the liability of the fiduciary had been established. If so, and in a situation where the claims could not all be heard together, the defendant knowing assistants argued that it would be an abuse of process to bring suit against them until proceedings against the fiduciary had been finalised. The High Court held that the liabilities of the fiduciary and assistants were not so linked, and so there was no abuse of process. I have suggested elsewhere that the High Court arguably stated the principle in terms wider than necessary to decide the case.[21] Nonetheless, the passage quoted above certainly indicates that fiduciaries and assistants will normally be liable only for their own several profits. In *Grimaldi v Chameleon Mining NL [No 2]*, the passage was taken to support the proposition that fiduciaries and third parties 'will ordinarily be only severally liable for the profits each makes in consequence of the breach of fiduciary duty or breach of trust'.[22]

As mentioned above, the issue of the gain-based liability of fiduciaries and third parties has been more commonly discussed from the other side. That is, the question has been whether or not the accessory is liable for the gains made by the fiduciary. Although there is a line of Canadian authority that supports this position,[23] it has recently been examined and rejected by courts in Australia[24] and England.[25] The reason given for rejecting that position – that such liability would be penal – suggests that fiduciaries too ought to be liable only for their own gains. In an earlier High Court patent infringement case, *Dart Industries Inc v Decor Corporation Pty Ltd*, Mason CJ, Deane, Dawson and Toohey JJ said that

---

20 Ibid 457–8 [106].

21 Jamie Glister, 'Knowing Assistance and Equitable Compensation' (2016) 42 *Australian Bar Review* 152, 168.

22 (2012) 200 FCR 296, 415–16 [557] (The Court) ('*Grimaldi*').

23 *Canada Safety Ltd v Thompson* [1951] 3 DLR 295, 323 (Manson J); *D'Amore v MacDonald* (1973) 32 DLR (3d) 543, 549 (Addy J); *Abbey Glen Property Corp v Stumborg* (1976) 65 DLR (3d) 235, 282 (McDonald J); *MacDonald v Hauer* (1976) 72 DLR (3d) 110, 130 (Bayda JA); *Hanson v Clifford* 1994 CanLII 2982 (BCSC) (12 December 1994). See Steven B Elliott and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *Modern Law Review* 16, 40–1; Mysty S Clapton, 'Gain-Based Remedies for Knowing Assistance: Ensuring Assistants Do Not Profit from Their Wrongs' (2008) 45 *Alberta Law Review* 989.

24 *Glandon Pty Ltd v Tilmunda Pastoral Co Pty Ltd* [2008] NSWSC 218 (25 March 2008) [108] (Gzell J); *Grimaldi* (2012) 200 FCR 296, 415–16 [557] (The Court); cf *Hodgson v Amcor Ltd* (2012) 264 FLR 1, 263–4 [1718]–[1721] (Vickery J). See also *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1, 90 [480] (Edelman J); J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 186–9 [5.270].

25 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1595]–[1601] (Lewison J); *Electrosteel Castings (UK) Ltd v Metalpol Ltd* [2014] EWHC 2017 (Ch) (4 July 2014) [50]–[51] (HHJ Behrens).

'[a]n account of profits is confined to profits actually made, its purpose being not to punish the defendant but to prevent its unjust enrichment'.[26] That comment has been used to support the position that fiduciaries are only liable for their own profits,[27] and that accessories are only liable for theirs.[28]

A final point to note is that a wrongdoing fiduciary will not escape liability by putting gains into a partnership whereby the other partner is entitled (as between the two) to some of the profit.[29] The difference, of course, is that a partnership is not a separate legal person.[30]

For these reasons it seems clear that fiduciaries are not generally liable for profits made by third parties. To the extent that those profits are simply a reflection of losses suffered by the fiduciary's principal, the principal can recover them from the fiduciary as equitable compensation. But to the extent that they do not reflect losses suffered, those third party profits cannot generally be recovered from the wrongdoing fiduciary. The following sections explore situations where this general position does not obtain, and where a fiduciary can indeed be made liable for gains that are actually made by a third party company.

III COMPANY AS FIDUCIARY'S ALTER EGO

In some cases, courts have been prepared to treat the wrongdoing fiduciary and the company that he or she controls as relevantly the same actor. This means that the fiduciary can be made personally liable for gains that were actually made by the company. Enlarging the personal liability of the fiduciary is usually the goal in these cases, but the result can also involve widening the company's liability because the same orders may be made against both the fiduciary and the company. The company can then be made liable for profits made by the fiduciary, as well as vice versa. The effect can be seen in the following passage from *Novoship (UK) Ltd v Mikhaylyuk*,[31] a case where the relevant company, Henriot Finance, was the alter ego of a dishonest assistant rather than a wrongdoing fiduciary. Christopher Clarke J held:

> The account must be against Henriot Finance, who were the immediate earners of the profit, and also against Mr Nikitin, who was the architect of the dishonest assistance effected through him and Henriot Finance, which was both his *alter ego* and the company which he chose as the immediate destination of the profits. It is not necessary to determine where, as between those two, the profits have ended

26 (1993) 179 CLR 101, 111; also McHugh J to the same effect: 123.

27 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 369 [307] (Heydon JA); *Grimaldi* (2012) 200 FCR 296, 410 [533] (The Court).

28 *Glandon Pty Ltd v Tilmunda Pastoral Co Pty Ltd [No 2]* [2008] NSWSC 441 (1 May 2008) [12] (Gzell J).

29 *Imperial Mercantile Credit Association (in liq) v Coleman* (1873) LR 6 HL 189; *National Grid Electricity Transmission Plc v McKenzie* [2009] EWHC 1817 (Ch) (21 July 2009) [118] (Norris J); see below body text preceding n 93.

30 See *Regal (Hastings)* [1967] 2 AC 134, 151 (Lord Russell); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1565]–[1571] (Lewison J).

31 [2012] EWHC 3586 (Comm) (14 December 2012). This decision was later reversed, but the point was not discussed and alter ego liability was assumed to exist: [2015] QB 499, 521 [62] (The Court).

up. That does not mean that the Claimants are entitled to recover twice: only that both are accounting parties.[32]

The foundations and limits of this type of liability are, however, very difficult to identify. Cases refer to the company being the 'alter ego' of its controller, but it is not clear what relationship between the two must exist before that term can apply. The position of this alter ego relationship within the overall model of liability is also uncertain. The fact that an alter ego relationship exists may itself justify making the fiduciary liable for gains made by the company. Alternatively, an alter ego relationship may be necessary but insufficient; something more might be needed to justify that course. To put the point another way: the alter ego model of liability as it applies here may or may not be seen as an instance of piercing the corporate veil. To the extent that the analysis does rely on veil-piercing, there is considerable doubt about its continued application. This is particularly the case in England, but at least one Australian judge has also expressed doubts.

A The Alter Ego Relationship

The first issue, which exists whether or not these cases are to be seen as instances of veil-piercing, involves the necessary relationship between the human defendant and the company that is said to be his or her alter ego. This is said to be a question of fact,[33] and it is obvious that issues of control and ownership are crucial.[34] It will also be difficult to see a company as merely an alter ego if it has a genuine market presence; that is, if it conducts other legitimate activities, or has premises or staff.[35] Beyond these points, it is probably the case that the courts simply know an alter ego when they see one. In the *Trustor v Smallbone* litigation,[36] which will be discussed below, the trial judge found that the relevant company, Introcom, was controlled by a Liechtenstein Trust of which the wrongdoing fiduciary, Mr Smallbone, was a beneficiary. The directors of Introcom were nominees acting on the instructions of Mr Smallbone. The English Court of Appeal still felt able to distil this into the statement that 'Introcom was the creature of Mr Smallbone. He owned and controlled Introcom'.[37]

32 [2012] EWHC 3586 (Comm) (14 December 2012) [529].

33 *Winter v Winter* [2010] FamCA 933 (15 October 2010) [83] (O'Reilly J).

34 See *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337, 343 (Barwick CJ); *ASIC v Hobbs* [2012] NSWSC 1276 (24 October 2012) [1580] (Ward J). On joint control, see *Antonio Gramsci Shipping Corp v Stepanovs* [2011] 1 Lloyd's Rep 647, 651–2 [16]–[17] (Burton J) (case since disapproved but not on this point: *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337, 388 [147] (Lord Neuberger).

35 See *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, 744 [26] (Rimer J); cf *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, 735–6 [103] (Lawrence Collins J).

36 *Trustor AB Ltd (Swedish Company) v Smallbone* [2000] EWCA Civ 150 (9 May 2000); *Trustor AB v Smallbone [No 2]* [2001] 1 WLR 1177 (Morritt V-C).

37 *Trustor AB Ltd (Swedish Company) v Smallbone* [2000] EWCA Civ 150 (9 May 2000) [97] (Scott V-C). Mr Smallbone later conceded that he controlled Introcom: *Trustor AB v Smallbone [No 2]* [2001] 1 WLR 1177, 1183 [16] (Morritt V-C).

B Piercing the Corporate Veil?

The more difficult question is what consequences may flow from the existence of an alter ego relationship. It is arguable that, for these limited purposes of making a fiduciary liable for gains actually made by an associated company, an alter ego relationship alone should be sufficient.[38] However, the matter is complicated because the cases in which a fiduciary has been made liable in this way have been treated as instances of piercing the corporate veil. The unpopularity and uncertainty of veil-piercing generally has meant that those cases have since been explained on other, more orthodox grounds. This in turn has cast doubt on whether an alter ego model of liability is still available in this specific context of calculating the gain-based liability of a wrongdoing fiduciary.

1 English Authorities

The two leading English cases in this area are *Gencor ACP Ltd v Dalby*,[39] and *Trustor AB v Smallbone [No 2]*.[40] In *Gencor v Dalby*, a fiduciary, Mr Dalby, channelled a secret profit to a company that he controlled in the British Virgin Islands, Burnstead Ltd. Orders to disgorge that profit were made against both the fiduciary and the company. Rimer J had no time for the argument that no order could be made against Mr Dalby because he had not actually made any profit, and no order could be made against Burnstead Ltd because it had not breached any fiduciary duty:

> I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability. All that would be required would be for the profiting director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP. If the arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an appropriate case in which to do so. Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby … I hold that Mr Dalby and Burnstead are both accountable for the profit represented by this commission and I will make an order against them accordingly.[41]

---

38 See below body text following n 65.

39 [2000] 2 BCLC 734 ('*Gencor v Dalby*'), cited in *Grimaldi* (2012) 200 FCR 296, 357 [243], 415 [556] (The Court).

40 [2001] 1 WLR 1177 ('*Trustor v Smallbone*').

41 [2000] 2 BCLC 734, 744 [26] (citations omitted). This would not have prevented Rimer J from finding another defendant, Mr Meehan, liable for dishonestly assisting Mr Dalby to divert the relevant opportunities to Burnstead. For other reasons, however, no order was made: 756–8 [83]–[88].

In *Trustor v Smallbone*, Mr Smallbone was managing director of a Swedish company, Trustor, and in breach of fiduciary duty he caused certain payments to be made to another company that he controlled, Introcom. Mr Smallbone then caused Introcom to disburse those funds, including paying some to Mr Smallbone personally. Sir Andrew Morritt V-C allowed Trustor to pierce the corporate veil of Introcom so that receipt of the funds by Introcom was treated as receipt by Mr Smallbone personally. Mr Smallbone was therefore liable to account for all the funds received by Introcom, and not just those that ended up in his own hands. The case is problematic because the outcome involved Mr Smallbone being liable for knowingly receiving property in breach of his own fiduciary duty, which seems at least superfluous if not simply wrong. As Jackson J commented in the Queensland case of *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd*,[42] 'it is difficult to understand why it was considered necessary to identify the receipt by the company as a receipt by the defaulting director, in order to make the defaulting director liable to account. He was personally liable to restore the money dishonestly misapplied or stolen by his breach of fiduciary duty'.[43]

Trustor v Smallbone was decided expressly on the basis that Introcom's corporate veil could be pierced. The reasoning in the *Gencor v Dalby* passage quoted above is not quite so narrow, although Rimer J did say that if the result required a lifting of Burnstead's veil then he thought it appropriate to do so. In any event, both cases were seen as instances of veil-piercing in the UK Supreme Court case of *Prest v Petrodel Resources Ltd*.[44] There, Lord Sumption said that the ability of a court to pierce a corporate veil was limited to situations involving an 'evasion' principle; where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control'.[45] Lord Sumption specifically examined *Gencor v Dalby* and *Trustor v Smallbone* and preferred to see both as involving agency:[46] Burnstead was Mr Dalby's agent in *Gencor v Dalby*, and Introcom was Mr Smallbone's agent in *Trustor v Smallbone*. The orders against the human defendants in those cases could therefore be justified on the basis that the defendants had received the relevant property through their corporate agents. There was then no need to pierce a corporate veil, and 'if it is not necessary to pierce the corporate veil, it is

42 [2015] 1 Qd R 75.

43 Ibid 96 [102]. There were relevantly two directors of Trustor: Mr Smallbone and Lord Moyne. Trustor pursued Smallbone for dishonest assistance and knowing receipt. The trial judge, Rimer J, thought it artificial to see Smallbone as assisting Lord Moyne to breach Lord Moyne's fiduciary duty, rather than as simply breaching his own duty. Yet it seems Mr Smallbone could still be a knowing recipient of property in breach of his own duty.

44 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 ('*Prest v Petrodel*').

45 Ibid 488 [35]; approved 503 [81] (Lord Neuberger). The other Justices were more cautious, but the language of concealment and evasion has been applied in subsequent cases: see, eg, *R v Boyle Transport (Northern Ireland) Ltd* [2016] 4 WLR 63.

46 *Prest v Petrodel* [2013] 2 AC 415, 486–7 [31]–[33]; see also 499–500 [68].

not appropriate to do so, because on that footing there is no public policy imperative which justifies that course'.[47]

Gencor v Dalby and *Trustor v Smallbone* both dealt with the straightforward receipt of misdirected funds, and it is worth considering the application of Lord Sumption's analysis to cases where a fiduciary wrongly diverts a corporate opportunity to an associated company. To the extent that the agency model still works, the fiduciary will be personally accountable for any relevant profits because the company will have made them as the fiduciary's agent. However, it will be argued in the next section that an agency model is difficult to apply outside simple receipt of funds cases.[48] It may also be possible to see the fiduciary as acquiring a personal benefit from the existence of the company's profits, and this benefit would be disgorgeable by the fiduciary.[49] But again, this will not always be the case. It is not hard to imagine an opportunity being diverted to a company controlled by a fiduciary, exploited by that company in a way that does not admit of an agency analysis, and the company's profits then being paid out in such a way that it is difficult to treat that distribution as of benefit to the fiduciary. In such a situation, conventional legal principles will not operate to make the fiduciary liable for the company's profits. The question, therefore, is whether the evasion principle may apply. If it does, a veil-piercing analysis will still be available.

This is a difficult question to answer. Since the fiduciary cannot take up the relevant corporate opportunity personally, it could be said that the fiduciary is under an existing legal restriction – not to make an unauthorised profit – and that he or she is seeking to evade that restriction by interposing a company. This would seem to bring the situation within the evasion principle, which would mean the corporate veil could be lifted and the fiduciary made personally liable for the profits. But the matter is complicated because Lord Sumption appeared to think that the important point in *Gencor v Dalby* and *Trustor v Smallbone* was specifically the impugned receipt, not the underlying obligation. That is, the relevant obligation or liability was the liability that attended the *breach* of the fiduciary obligation; it was not the *owing* of the obligation in the first place. In explaining why the evasion principle was not engaged in either *Gencor v Dalby* or *Trustor v Smallbone*, Lord Sumption said:

> This is because neither Mr Dalby nor Mr Smallbone had used the company's separate legal personality to evade a liability that they would otherwise have had. They were liable to account only if the true facts were that the company had received the money as their agent or nominee. That was proved in both cases. If it had not been, there would have been no receipt, knowing or otherwise, and therefore no claim to be evaded. The situation was not the same as it had been in *Gilford Motor Co v Horne* and *Jones v Lipman*, for in these cases the real actors, Mr Horne and Mr Lipman, had a liability which arose independently of the involvement of the company.[50]

---

47 Ibid 488 [35] (Lord Sumption).

48 See below Part IV.

49 See below Part V.

50 *Prest v Petrodel* [2013] 2 AC 415, 487 [33], referring to *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935; *Jones v Lipman* [1962] 1 WLR 832.

With respect, this can be criticised. The relevant 'liability' in *Gilford Motor Co Ltd v Horne*[51] was simply a contractual non-compete clause whereby Mr Horne promised not to be 'engaged directly or indirectly in any business similar to that of' his former employer. Mr Horne breached the covenant by carrying on business through a new company that was named after his wife. An injunction was issued against Mr Horne on the straightforward grounds that what he was doing was prohibited by the terms of the covenant,[52] but it was also issued against the new company. Lord Sumption said the injunction against the company was based on the evasion principle, and that the 'company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company'.[53] But if Mr Horne's obligation not to compete was the relevant obligation that he sought to evade by interposing a company, why could a fiduciary's obligation not to make an unauthorised profit not be treated similarly?

On Lord Sumption's analysis of the relevant obligations and liabilities, there is a real difficulty with applying the evasion principle to fiduciaries who divert profitable opportunities to associated companies. The fiduciary in such cases is under *some* existing liability in respect of that diversion, because he or she must either compensate for any loss suffered by the principal or disgorge any gain that he or she personally makes. But the fiduciary does not owe any liability in respect of the *company's profits*. It would be question-begging to assert that the evasion principle applies because the fiduciary does owe, and is trying to evade, a liability in respect of those profits.

2 Australia

The area has not received the same level of judicial attention in Australia as it has in England, although Finn, Stone and Perram JJ did refer to the alter ego analysis in *Grimaldi*:

> The fact findings made in this case reveal, potentially, four quite different manifestations of such [third party] participation. Each type warrants present note. The *first*, is where the third party is the corporate creature, vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses by, their breach of fiduciary duty. In these cases the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary's wrong.[54]

51 [1933] 1 Ch 935.

52 Ibid 961: 'a mere device for enabling Mr E B Horne to continue to commit breaches of [the] clause'. See also *ICT Pty Ltd v Sea Containers Ltd* (1995) 39 NSWLR 640, 656–7 (The Court); *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326, 338 [53] (Hodgson JA); J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008) 311.

53 *Prest v Petrodel* [2013] 2 AC 415, 484–5 [29].

54 *Grimaldi* (2012) 200 FCR 296, 357 [243] (The Court) (emphasis in original) (citations omitted). See also 429 [611], distinguishing alter egos from other recipients. The quoted passage has been assumed to be correct in several subsequent decisions: see *Horwood v Davenport* [2014] WASC 436 (26 November 2014) [79] (Acting Master Gething); *Re Waterfront Investments Group Pty Ltd (in liq)* (2015) 105 ACSR 280, 321 [126] (Black J); *Prestige Lifting Services Pty Ltd v Williams* [2015] FCA 1063 (30 September 2015) [245] (Beach J); *Nicholson Street Pty Ltd (rec and mgr apptd) (in liq) v Letten* [2015] VSC 583 (4 November 2015) [16] (Judd J).

It must be emphasised that this passage was part of a discussion of third party liability. Their Honours were not examining the extent of a wrongdoing fiduciary's gain-based liability, but were instead considering ways in which liability may be grounded in an associated company.[55] This was also the context in *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd*,[56] where the plaintiff, Cornerstone, sought to make the defendant company, Suellen Properties, liable on an alter ego basis. Ms Rushbrook, a director of Cornerstone, had diverted a land development opportunity to Suellen Properties. Suellen Properties duly bought the relevant land and became registered as the proprietor. Jackson J held that the diversion of opportunity was not in breach of Ms Rushbrook's fiduciary duty to Cornerstone, but, in case he was wrong, still considered the position of Suellen Properties. There could be no liability in knowing receipt because the opportunity to buy the plot of land did not count as trust property,[57] and no knowing assistance because Ms Rushbrook's actions were not dishonest and fraudulent, even if they had amounted to a breach of fiduciary duty.[58] The final possibility was that Suellen Properties might be treated as Ms Rushbrook's alter ego. Perhaps reluctantly, Jackson J recognised that such a form of liability existed.[59] But the particular problem on the facts was that, while Ms Rushbrook was initially the sole director and shareholder of Suellen Properties, the position had changed by the time the company actually purchased the relevant plot of land. By then, Ms Rushbrook had been bought out by other investors who had taken over the company. This meant Suellen Properties could no longer be considered her alter ego.[60]

Whether or not an alter ego analysis ought to operate to ground liability in an associated company, that is not the same point as whether the analysis can operate to enlarge the gain-based liability of the company's controller. These separate points are admittedly conflated in cases where the same orders are made against the wrongdoing fiduciary and the associated company, such as *Gencor v Dalby* and *Trustor v Smallbone*.[61] Even though the goal in those cases is to enlarge the fiduciary's liability, the effect of those orders is also to ground liability in the company. The company's liability may even be greater than what it would be on a conventional *Barnes v Addy* model, because it may be liable in respect of gains that really were made by the controller.[62] But orders are not

55 See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140 [110], 148 [128] (The Court), where, if the defendant Mr Elias had been liable, Lesmint Pty Ltd would also have been liable as his alter ego.

56 [2015] 1 Qd R 75.

57 Ibid 90–1 [77], referring to *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

58 Ibid 95 [94], referring to *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609.

59 Ibid 95–7 [96]–[106]; see also *Caduceus Enterprises International Pty Ltd v Complete Lending Pty Ltd* [2015] QDC 159 (19 June 2015) [65] (McGill DCJ).

60 If the question had concerned the imputation of knowledge for *Barnes v Addy* liability purposes, Jackson J would have accepted that the knowledge was not lost from Suellen: *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75, 97 [104].

61 The Introcom order had been made earlier but was still in effect when the order against Smallbone was made.

62 See *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) (14 December 2012) [529], quoted above in text accompanying n 32 (Christopher Clarke J).

always made against the companies, and they are not necessary before the fiduciary's liability can be calculated by reference to the company's profits.[63] The desirability or otherwise of an alter ego analysis that operates to make a company liable does not therefore determine whether a similar analysis should operate to enlarge the personal liability of its controller.

3 Discussion

In England at least, it seems clear that cases where a fiduciary is made liable for gains received by an associated company are seen as veil-piercing territory. By that I mean the earlier cases are to be treated as instances where a corporate veil was ostensibly pierced, but where the outcomes should now be explained on different and more orthodox grounds. If a principal in a future case wishes to make a wrongdoing fiduciary personally liable for gains actually made by an associated company, that principal will need to argue for that result on other grounds; most obviously agency. If the result cannot be reached in this way, the principal may argue that veil-piercing is still available by virtue of the 'evasion' principle. For the reasons given above, however, the applicability or otherwise of the evasion principle is difficult.

While that seems to be the position, it is arguably mistaken to see these as veil-piercing cases at all. At least, they concern veil-piercing in only a very particular sense. The cases in this line do not involve creditors of a company seeking access to the personal assets of the shareholders or controllers of that company. Instead, they involve a fiduciary's principal suing the fiduciary. The point is to make the fiduciary liable for the profits made by the associated company. It will usually be easy to make the company itself liable for those profits on conventional *Barnes v Addy* grounds, so it will only be necessary to make the fiduciary liable if the company has failed.[64] In such circumstances, it may well be inappropriate to disturb principles of limited corporate liability as between a company and the outside world that deals with it. But it does not necessarily follow that it is also inappropriate to disregard a company's existence for the purposes of calculating the gain-based liability of a wrongdoing fiduciary.

The same point can be put in a slightly different way: in other veil-piercing contexts, it is not enough to establish that a company can properly be seen as its controller's alter ego.[65] That is a necessary but insufficient element in an attempt to pierce the veil. The required further elements are, of course, hard to identify, and this difficulty was the background to the attempted rationalisation in *Prest v*

---

63 See *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) (10 February 2014) [371], [404] (Eder J), where the relevant company had been dissolved and was not a defendant.

64 Cf *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) (30 July 2010) [205], where Morgan J thought an alter ego relationship alone was insufficient to allow the claimants to pierce the veil and treat receipt by the company as receipt by Mr Wilson personally. But this was in the context of the company being found liable for its own profits on a *Barnes v Addy* basis, and before the company failed: see above body text following n 7.

65 See, eg, *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia [No 2]* [1998] 1 WLR 294, 302, where Toulson J had no trouble describing the relationship between the controller and the companies as one of alter ego, but still did not find a relationship of agency or pierce the corporate veil.

Petrodel.[66] But it may be that these further elements should only be necessary when the task is to pierce the veil from the point of view of external creditors, and they should not be necessary when the task is simply to identify company gains as personally disgorgeable by its controller.

There are, admittedly, at least two difficulties with this argument. The first and most serious is that it appears to cut across the general principle that wrongdoing fiduciaries are only liable for their own gains. This was discussed in Part II and I return to it below.[67] This is clearly a significant objection, and perhaps all that can be said is that the true extent of a fiduciary's gain-based liability has not been the subject of close analysis at appellate level. The principle may be flexible enough to accommodate gains made by very closely connected companies, although not by other third parties. Nonetheless, this objection to the argument is serious and it may be decisive. If it is decisive, then it would seem that any alter ego analysis truly is tied to an ability to pierce the corporate veil. The continued existence of that analysis, as distinct from agency or other models, would therefore be doubtful.

The second difficulty, which could be more easily dealt with, is that the argument would lead to a double recovery problem. The fiduciary could be made liable for an amount calculated by reference to the company's profits, and the company, as a separate legal person undisturbed by any veil-piercing, could also be made liable for that amount on a *Barnes v Addy* basis. A plaintiff can generally recover disgorgeable gains from each participant in a breach of fiduciary duty, and there is not the same prohibition on double recovery as there is with compensatory remedies.[68] This problem does not currently exist under the alter ego model of liability because the fiduciary and company are relevantly treated as one actor, effectively made jointly and severally liable for the total gain.[69] Still, this second difficulty does not seem insurmountable. In the first place, as the High Court said in *Warman International Ltd v Dwyer*, it is 'necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts'.[70] Additionally, and more practically, the companies in these cases have normally

66 [2013] 2 AC 415, 478–88 [16]–[36] (Lord Sumption), 498–503 [59]–[83] (Lord Neuberger, who refers to several academic works on veil-piercing). The literature, both pre- and post-*Prest v Petrodel*, is extensive, but useful examples include: J H Farrar and B Hannigan, *Farrar's Company Law* (Butterworths, 4th ed, 1998) ch 7; Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250; Jason Harris, 'Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-evaluation of Smith, Stone and Knight' (2005) 23 *Company and Securities Law Journal* 7; Len Sealy and Sarah Worthington, *Sealy & Worthington's Cases and Materials in Company Law* (Oxford University Press, 10th ed, 2013) 51–77; William Day, 'Skirting around the Issue: The Corporate Veil after *Prest v Petrodel*' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 269; Tan Cheng-Han, 'Veil Piercing – A Fresh Start' [2015] *Journal of Business Law* 20.

67 See below Part VI.

68 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 457–8 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ); William Gummow, 'Knowing Assistance' (2013) 87 *Australian Law Journal* 311, 315.

69 See *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) (14 December 2012) [529] (Christopher Clarke J), quoted above in body text accompanying n 32.

70 (1995) 182 CLR 544, 559 (The Court).

failed, so any orders against them – whether on an alter ego basis or otherwise – will be somewhat hollow. If the companies have not failed, they can be pursued directly for their gains, and it will not be necessary (although it may still be desirable for the plaintiff) to make the fiduciary liable for those amounts. Again, it is the width of the fiduciary's personal liability that is important.

IV COMPANY AS FIDUCIARY'S AGENT

Another possibility is to treat the associated company as the agent of the wrongdoing fiduciary. On this analysis the fiduciary will be personally liable for gains that appear to have been made by the company, because the company will in fact have made them on behalf of the fiduciary. This possibility was mentioned in *Short v Crawley [No 30]*,[71] where White J noted that the case had not been conducted on that basis. As we have seen, it was also the basis of Lord Sumption's explanation in *Prest v Petrodel* of how the results in *Gencor v Dalby* and *Trustor v Smallbone* could have been achieved without reference to piercing the corporate veil.[72]

In cases where an agency analysis can properly apply, the result will be very similar to an alter ego analysis. This is because the main difference between the two models concerns the position of the company, which on an agency analysis can only be made liable on its own account for knowing assistance or inconsistent dealing, but which in an alter ego case can be made liable based simply on the conduct of its controller and the relationship between the two. The position of the wrongdoing fiduciary on either analysis would be the same, and it is the extent of the fiduciary's liability that is the central concern of this article. An agency analysis would therefore seem preferable, since it can operate to make a fiduciary personally liable for diverted gains and can do so in an orthodox way. However, while an agency analysis is certainly possible, it is also limited in scope.

An agency model can apply without much difficulty to straightforward receipt cases where a fiduciary misdirects money or other property to an associated company instead of pocketing it personally. In *Grimaldi*, for example, it explained why the fiduciary Mr Grimaldi was liable to account for certain shares given to him as a 'spotter's fee' but allocated to a company, Pinnacle, rather than to him directly.[73] But the analysis is harder to apply to situations where a corporate opportunity is diverted and exploited over a period of time. In such cases the company certainly appears to be pursuing the diverted opportunity on its own account. The wrongdoing fiduciary may own and control the company, and to the extent she is a shareholder it can loosely be said that the company is pursuing the opportunity for her benefit. But the company is very unlikely to be acting as *agent* properly so-called for the fiduciary while it exploits

71 [2007] NSWSC 1322 (26 November 2007) [763].

72 [2013] 2 AC 415, 486–7 [31]–[33].

73 *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129 (20 October 2010) [800] (Pinnacle as 'nominee'), [926] (Jacobson J); *Grimaldi* (2012) 200 FCR 296, 429 [610] (The Court).

the opportunity. The company will probably not be binding the fiduciary to contracts as an undisclosed principal, for example.

The case of *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia [No 2]* is instructive here, although it relevantly concerned a breach of contract rather than a breach of fiduciary duty.[74] Rendsburg entered into a shipping charterparty with Yukong. This was done through Rendsburg's brokers, Marcan, and specifically through a director of Marcan, Mr Yamvrias. Rendsburg withdrew from the contract shortly before the vessel was due to be delivered, and Yukong sought damages from Rendsburg for wrongful repudiation. In the course of the litigation it became known that Mr Yamvrias was in fact the beneficial owner and controller of Rendsburg, and that he had since closed Rendsburg's bank account and withdrawn all the funds. Yukong then joined Mr Yamvrias as a defendant, arguing that he was properly seen as Rendsburg's undisclosed principal in the charterparty. Discussing the instant case through the prism of *Salomon's* case,[75] Toulson J said:

> It was nothing to the point that it acted on the direction of Mr Salomon and for his benefit. Something quite different would need to be established in order to show that the company, in law an entity independent of its owner, was acting in some respect as agent for its owner, the necessary requirement being to show that the relationship of agency was intended to be created. Ordinarily, the intention of someone who conducts trading activities through the vehicle of a one-man company will be quite the opposite.[76]

Applying this to the *Yukong* case itself, Toulson J rejected the argument that Mr Yamvrias entered the charterparty as undisclosed principal of Rendsburg. He also rejected an attempt to pierce Rendsburg's corporate veil so as to make Mr Yamvrias personally liable for damages for Rendsburg's breach. The appropriate way to pursue Mr Yamvrias, suggested Toulson J, would be for a liquidator of Rendsburg to proceed against Mr Yamvrias for breach of fiduciary duty for paying away Rendsburg's funds.[77]

A Company As Trustee

Rather than agency, it might be said that the company does not hold the opportunity and its fruits for the company's own benefit because it holds them on trust. However, the cases that have suggested this trust approach see the beneficiary of that trust as being the plaintiff – the wrongdoing

---

74 [1998] 1 WLR 294 ('*Yukong*'). See also *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 556 (Meagher JA, in dissent but not on this point); *Adams v Cape Industries Plc* [1990] 1 Ch 433, 538, 547 (The Court); Harris, above n 66, 9 (noting that agency is often used in a loose sense as justification for lifting the veil, rather than as actual application of the principles of agency); Day, above n 66, 286–8 (also noting the overuse of the term 'agent').

75 *Salomon v A Salomon and Co Ltd* [1897] AC 22.

76 [1998] 1 WLR 294, 304.

77 Ibid 314. Toulson J had found that Mr Yamvrias owed a fiduciary duty as a shadow director: at 311. Toulson J still preserved a freezing order against Mr Yamvrias, the propriety of which was unsuccessfully challenged: *Yukong Line Ltd (S K Shipping Ltd) v Rendsburg Investments Corp* [2000] EWCA Civ 358, [38] (Potter LJ).

fiduciary's principal – not the wrongdoing fiduciary herself.[78] The idea is that the opportunity has been given to the company in breach of fiduciary duty, the company has knowledge of this, and so the opportunity and its fruits are held on trust for the plaintiff. In fact a trust analysis would have limited application, in Australia at least, because it is difficult to conceptualise an opportunity as something that can be received and held on trust.[79] In any event, and regardless of whether or not a trust analysis is available in theory, the analysis does not operate to make the wrongdoing fiduciary personally liable for the company's gains because it is not the fiduciary who is seen as the trust beneficiary. In addition, the current discussion is mainly concerned with cases where the company has failed. If a company has no or few assets, there may be little point in arguing that they are held on trust.

V PROFIT TO COMPANY AS BENEFIT TO FIDUCIARY

Profits that are initially made by companies can later amount to disgorgeable benefits in the hands of others. For example, a fiduciary who wrongly diverts a corporate opportunity to a third party company might be a shareholder in that company, and the profits made from the exploitation of the opportunity might eventually be paid out in dividends.[80] To the extent that profits actually made by the company can properly be seen as benefits enjoyed by the wrongdoing fiduciary, this model will operate to make the fiduciary accountable for those profits.

On certain facts, this analysis can also appear very similar to the alter ego model of liability. This is because the facts that establish an alter ego relationship between the fiduciary and the company can also suggest that the fiduciary has personally benefited from the company's profits. A case that shows this is *Green v Bestobell Industries Pty Ltd*.[81] Mr Green, a regional manager of Bestobell Industries Pty Ltd, formed his own company, Clara Pty Ltd, and caused Clara to

78 See *Queensland Mines Ltd v Hudson* (1976) ACLC 28-658, 28-709 (Wootten J) ('*Queensland Mines*'), although the claim in that case was time barred and the finding of underlying breach of fiduciary duty was overturned: (1978) 18 ALR 1; *Diamond Hill Mining Pty Ltd v Huang Jin Mining Pty Ltd* (2011) 84 ACSR 616, 649–52 [93]–[98] (Croft J) ('*Diamond Hill Mining*'). Also see Lord Sumption's justification for the order against the company in *Gencor v Dalby*: that the company was aware of the plaintiff's equitable interest: *Prest v Petrodel* [2013] 2 AC 415, 486 [31].

79 The benefit of individual contracts can clearly be held on trust, but the extent to which a pure opportunity can be held on trust, or count as property for the purposes of knowing receipt, is very limited in Australia: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 142–5 [116]–[120] (The Court); *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75, 88 [67]–[68] (Jackson J). *Queensland Mines* and *Diamond Hill Mining* can be distinguished because those cases concerned mining licences rather than mere information. The position may be different in England: see *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, 671 (Nourse J); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1491] (Lewison J); *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) (30 July 2010) [193] (Morgan J). See generally Joachim Dietrich and Pauline Ridge, '"The Receipt of What?": Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 *Melbourne University Law Review* 47.

80 See *Regal (Hastings)* [1967] 2 AC 134, 152 (Lord Russell), where this was unsuccessfully argued.

81 [1982] WAR 1 ('*Green v Bestobell*'); *Green v Bestobell Industries Pty Ltd [No 2]* [1984] WAR 32.

tender successfully for a ceiling installation contract. Bestobell was unsuccessful in its tender for the same work. Mr Green was held to have breached a fiduciary duty to Bestobell by allowing his duty and interest to conflict, and he was held liable to account for profits made on the contract. Clara was also held liable to account.

The trial judge, Lavan SPJ, ordered that Green and Clara account severally for the profits that each had made. These orders were not disturbed on appeal to the Full Court: although Burt CJ would have preferred to amend the orders to make Green and Clara jointly liable for the profits made by both, Wickham and Kennedy JJ simply dismissed the appeal. Accounts were then taken and Clara's net profit found to be $163 709. But the Registrar certified the same amount in respect of Mr Green personally, on the basis that he had 'directly or indirectly derived the benefit of the whole of the aforesaid profit'. Mr Green effectively appealed this finding,[82] arguing that he should not be liable for any profit that was actually made by Clara and that could not be traced into his hands. Brinsden J rejected the argument:

> In my view, a fiduciary may not avoid liability to account by the device of setting up a proprietary company to take the benefit of his breach of the relationship. It has never been in doubt that Clara was but the alter ego of Green.[83]

The reference to alter ego deserves comment because it illustrates the elasticity of that term. Lavan SPJ at trial, and Wickham and Kennedy JJ on appeal, had treated Clara Pty Ltd as a discrete third party. Clara's liability was grounded by the imputation to it of Mr Green's knowledge, but Clara was still liable on its *own account* for knowingly participating in *another's* breach.[84] And the basis of Mr Green's liability was not that he was accountable for Clara's profits *because* it was his alter ego; rather, he was liable for $163 709 because that was the Registrar's valuation of the benefit he had personally obtained in breach of fiduciary duty. This means that neither party's liability was grounded in an alter ego analysis in the sense discussed in Part III above. However, that is not to say that the relationship between the two – which may be described as a relationship of alter ego – was not relevant to the correctness of a determination that Mr Green had enjoyed the benefit of all of Clara's profits.

A similar approach was adopted, although *Green v Bestobell* was not cited, in *Andrews Advertising Pty Ltd v Andrews*.[85] There, Mr Andrews breached his fiduciary duty to his employer by diverting opportunities to a new company that was owned and controlled by his wife. By making her company available in this way, Mrs Andrews knowingly assisted in her husband's breach of duty. The company initially made profits on the diverted opportunities, although by the

---

82 In form it was an application to delete the relevant part of the Registrar's certificate.

83 *Green v Bestobell Industries Pty Ltd [No 2]* [1984] WAR 32, 40.

84 See *Green v Bestobell* [1982] WAR 1, 11–12 (Wickham J), 19 (Kennedy J).

85 (2014) 99 ACSR 164. See also *Sewell v Zelden* [2010] NSWSC 1180 (3 September 2010); *Sewell v Zelden [No 2]* [2010] NSWSC 1181 (1 October 2010), where a client bought an apartment from a company owned by the wife of his solicitor. The solicitor personally received a disgorgeable benefit because the proceeds of sale were used to pay off a mortgage on his family home. But the benefit amount was calculated by reference to the profit made by the company on the sale of the property.

time of the litigation it had gone into liquidation. For this reason no order was ultimately made against the company, but Darke J held Mr and Mrs Andrews liable in the same amount as the company's profits, on the basis that they had indirectly received the benefit of those profits.[86] Indeed, the Andrews conceded that the company's profits had been treated as family income.

These two cases certainly show a similarity between an alter ego analysis and what might be called a benefit analysis. However, the two models will not always yield the same results. Rather than enjoying the money themselves, wrongdoing fiduciaries might dissipate the company's profits in other ways. Perhaps the company shareholders were members of the fiduciary's family, and the company profits were paid out as dividends to them. If a wrongdoing fiduciary does not receive any of the money, and if it is not used to discharge some extant liability that he or she owes, then the concept of that fiduciary receiving a disgorgeable benefit becomes rather strained. If any benefit at all is received in such circumstances, it would seem to be valued at a lower amount than the company's profits. Conversely, certain facts could also lead to this approach yielding a greater degree of recovery. This is because the owner and controller of an apparently-profitable company can gain in ways distinct from the value of the shareholding: for example, the owner might be seen as a better credit risk and so able to borrow money at a more advantageous interest rate.

One final point should also be made, which is that the double recovery of gain point discussed above is also relevant here.[87] In *Green v Bestobell*, although not in *Andrews Advertising Pty Ltd v Andrews*, orders were made against both the company and the controller. Both awards required disgorgement of gains, and we have seen that a plaintiff can generally recover disgorgeable gains from all parties to a breach of fiduciary duty. But it would clearly have been inappropriate for the plaintiffs to recover what was effectively the same gain twice over from both Mr Green and Clara Pty Ltd. A similar problem can be seen when a fiduciary pays funds away to a third party, causing loss to his or her principal. In theory it may be possible to make the fiduciary compensate for that loss and also to make the third party accountable for the gain received,[88] but on certain facts that would in substance amount to double recovery for loss. Again, the remedy 'must be fashioned to fit the nature of the case and the particular facts'.[89]

VI FIDUCIARY AND COMPANY 'ACTING IN CONCERT'

It was mentioned above that, in *Grimaldi*, the reason Mr Grimaldi was liable to account in respect of shares that had actually been issued to a company, Pinnacle, was that Pinnacle was found to be his nominee. There was also an additional complication because Pinnacle in fact received the shares on behalf of

86 *Andrews Advertising Pty Ltd v Andrews* (2014) 99 ACSR 164, 189–90 [139]–[142].

87 See above body text accompanying n 68.

88 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 457–8 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ).

89 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (The Court).

two people: Mr Grimaldi and Mr Barnes. Chameleon Mining settled its claim against Mr Barnes but still pursued Mr Grimaldi for the full amount of the profit made on *all* of the shares. This claim was successful at trial and in the Full Court, where Finn, Stone and Perram JJ referred to a further exception to the general rule of several liability for gains:

> there may well be a further exception to the general principle … It is that, if the fiduciary and the third party assistant or recipient *act in concert* to secure a mutual benefit, be this to misappropriate trust property for a particular mutually beneficial purpose or to participate in a breach of fiduciary duty to secure a mutual advantage (eg a business opportunity), they are jointly and severally liable to the wronged beneficiary/principal to restore the trust or to account for the profits made … One can readily understand why, when wrongdoers so entangle their affairs, that the law as a matter of legal policy might wish to make it their responsibility – and not a claimant's – to untangle them for accountability purposes.[90]

Their Honours concluded that 'Mr Grimaldi, as a joint participant in the breaches of fiduciary duty and the derivation of the shares … was liable to account for all of the benefit of the shares and options he and Barnes derived from their breach'.[91]

As the Full Court recognised, finding Mr Grimaldi liable for all the profit involved nothing more than an orthodox application of principles found in partnership cases. The leading case of that type, *Imperial Mercantile Credit Association (in liq) v Coleman*,[92] shows that a wrongdoing fiduciary who puts gains into a partnership remains accountable for the whole profit even if (as between the partners) the fiduciary's partner is entitled to some of it. The only difference in *Grimaldi* was that Mr Grimaldi and Mr Barnes received the gain through the agency of a company rather than directly. But there are other cases that suggest an extension or development of these principles; in particular, they suggest that an initial diversion to a partnership would not be required and that the wrongdoing fiduciary may be liable for profits made by an associated company on the basis of 'joint participation'. This is noteworthy because *Imperial Mercantile Credit* treats fiduciary diversions to partnerships as, in effect, simply fiduciary arrogations to themselves. What the fiduciary then chooses to do with the property or profit is irrelevant.[93] It is not at all clear that the same analysis can work where the opportunity is only ever diverted to and received by a company.

In *CMS Dolphin Ltd v Simonet*,[94] Mr Simonet, a director of CMS Dolphin, diverted corporate opportunities first to a partnership, referred to as Millennium, and then to a new company that he formed, Blue (GB) Ltd. Although it operated for a time, Blue eventually failed and the question was whether Mr Simonet was

---

90 *Grimaldi* (2012) 200 FCR 296, 416 [558] (emphasis in original) (citations omitted). McDougall J did not apply the analysis in the context of liability for loss: *Singtel Optus Pty Ltd v Almad Pty Ltd* [2013] NSWSC 1427 (30 September 2013) [285] (point not discussed on appeal: *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609).

91 *Grimaldi* (2012) 200 FCR 296, 430 [613] (citations omitted).

92 (1873) LR 6 HL 189 ('*Imperial Mercantile Credit*').

93 Ibid 208.

94 [2001] 2 BCLC 704 ('*CMS Dolphin*').

personally liable for the profits that it had initially made. Lawrence Collins J concluded that both Mr Simonet and Blue were equally liable for those profits, although Blue's insolvency meant that no final order was made against it. While recognising that other cases such as *Gencor v Dalby* had come to the same result on veil-piercing grounds, Lawrence Collins J based the outcome on Mr Simonet and Blue having 'jointly participated in the breach of trust'.[95]

Another relevant case is *Cook v Deeks*,[96] where three directors of the Toronto Construction Company acquired a contract for their own benefit in breach of their fiduciary duty to that company. The directors formed a new company, the Dominion Construction Company, which took over the contract and made substantial profits. The Privy Council held that the three directors and the new company were liable to account for those profits.[97]

Both *CMS Dolphin* and *Cook v Deeks* involved opportunities that were initially taken up by partnerships and then taken over by companies. This means the results in those cases are unproblematic because the wrongdoing fiduciaries initially acquired and began exploiting the opportunities themselves. The cases are therefore consistent with *Imperial Mercantile Credit* and *Regal (Hastings)*. But the important question is whether the outcomes would have been the same even if the opportunities had been initially diverted to the relevant companies. In *CMS Dolphin*, Lawrence Collins J did not think this would matter:

> Nor in my judgment does it make a difference whether the business is taken up by the corporate vehicle directly, or is first taken up by the directors and then transferred to a company. *Imperial Mercantile Credit Association v Coleman* and *Cook v Deeks* show that a director who places the benefit of the business opportunities in a partnership or a company will be liable for the whole profit, and also make it clear that a director who is the active agent in a breach of fiduciary duty cannot evade responsibility by transferring the benefit to others. I do not consider that the liability of the directors in *Cook v Deeks* would have been in any way different if they had procured their new company to enter into the contract directly, rather than (as they did) enter into it themselves and then transfer the benefit of the contract to a new company.[98]

As to the consistency with *Regal (Hastings)*, his Lordship said:

> I do not consider that Mr Simonet can derive any assistance from one aspect of *Regal (Hastings) Ltd v Gulliver* on which [his counsel] relied. As I have indicated, in *Regal (Hastings) Ltd v Gulliver* the chairman, Mr Gulliver, who had instigated the whole scheme, was held not to be liable. In particular it was held that he had not profited from the scheme notwithstanding that he held minority interests in

95 Ibid 735–6 [102]–[103]. Blue had a place of business and employed staff, so an alter ego/veil-piercing analysis may not have been available on the facts anyway.

96 [1916] 1 AC 554.

97 Ibid 565. In fact it is not clear whether the directors and the new company were severally liable for their own gains, or jointly liable for the profits made by all of them. It is generally assumed to be the latter: see, eg, John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 33rd ed, 2015) 185–7 [7-055]; *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75, 95 [98] (Jackson J) (noting the lack of explanation of the 'basis in principle for that conclusion'). But cf *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1574] (Lewison J): 'no indication that the order for the account went further than ordering each of them to account for his (or its) own profits'. The answer probably cannot now be known, as the plaintiff had been unsuccessful in both courts below so there were no orders to reinstate.

98 [2001] 2 BCLC 704, 736 [104].

> two companies which had subscribed for shares in Amalgamated. There was no finding at trial that the shares in Amalgamated belonged to him, and there was no evidence that he had made a profit from his shares in the two companies. This is not authority for the proposition that where a director puts the profit into a company in which he has an interest he is not accountable for profits.[99]

If this passage is correct, it recognises a model of liability based on joint participation by a wrongdoing fiduciary and an associated company. Rather than a distinct model of liability, it may be better seen as a caveat or qualification to the general principle that fiduciaries are only liable for their own gains, as discussed above.[100] However, this aspect of *CMS Dolphin* has been seriously doubted in subsequent English cases. In *Ultraframe (UK) Ltd v Fielding*,[101] Lewison J recognised the distinction between cases where the fiduciary initially received property or opportunities and cases where they were only ever received by the relevant company. He found it 'difficult to see how *Regal (Hastings)* can be other than authority for the proposition that a fiduciary is not liable to account for a profit that he has not made'.[102] Later cases have agreed with Lewison J, and disagreed with Lawrence Collins J, on the point.[103]

It is therefore doubtful that an 'acting in concert' or 'joint participation' analysis could operate to make a fiduciary liable for gains actually made by an associated company, unless it could be said that the relevant asset or opportunity was first arrogated to the fiduciary personally or diverted to a partnership of which the fiduciary was a member. In these situations, though, any 'joint participation' aspect of the analysis would be unnecessary: the wrongdoing fiduciary would have acquired the asset or opportunity personally, and would have become accountable at that point. If the opportunity was then taken over by a company, and a business grown, it is true that the fiduciary might not be liable for all of the profits of that business. This is because some of the profits may not be properly attributable to the opportunity that was diverted in breach of fiduciary duty.[104] But it is always open to a defendant to argue that certain profits or acquisitions were not made in breach in fiduciary duty, and the further in time one gets away from the initial breach, the more likely such an argument is to be successful. The interposition of the company does not change the principles at work.

---

99 Ibid 736 [105].

100 See above body text preceding n 67.

101 [2005] EWHC 1638 (Ch) (27 July 2005).

102 Ibid [1575].

103 *National Grid Electricity Transmission Plc v McKenzie* [2009] EWHC 1817 (Ch) (21 July 2009) [117] (Norris J); *VTB Capital Plc v Nutritek International Corp* [2012] 2 BCLC 437, 543–5 [69]–[74] (Lloyd LJ), affirmed [2013] 2 AC 337, although only brief comment was made on this point: at 386 [136] (Lord Neuberger). Note, though, that one criticism of *CMS Dolphin* in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (27 July 2005) [1574] (Lewison J) was the 'echoes of the Australian concept of "knowing participation" which … is not part of English law'.

104 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, where the account was limited to profits made in the first two years.

VII CONCLUSION

The purpose of this article has been to examine ways in which a wrongdoing fiduciary may be personally liable for gains that are made (or appear to be made) by an associated company. The article has identified four ways in which this might be done: an alter ego analysis; agency; profits of the company as benefits for the controller; and a concept of the fiduciary and the company acting in concert. Taking these in turn: the alter ego analysis does seem to exist, at least in Australia, but this has generally been assumed rather than decided. It may be that alter ego cases are in fact instances of agency, or of findings that the company's profits were in fact enjoyed by its controllers and therefore disgorgeable by them. The second model, an agency analysis, is stable but limited in scope. The third model, which sees the company's profits as disgorgeable benefits enjoyed by its controllers, certainly exists but it is somewhat obfuscatory: the true question is *when* profits made by a company will amount to disgorgeable benefits on the part of its controllers. The fourth model, based on joint participation or acting in concert, has been argued to be illusory.

Although the analyses have been discussed in separate sections, the demarcation of the categories is certainly not easy. This is at least partly because of the general flexibility of the terms 'alter ego' and 'agent', which do not have fixed meanings in all contexts. For example, I concluded that an agency approach will rarely work in cases where the company exploits a diverted opportunity over time. In doing so I used a narrow definition of the word 'agency'. But some cases use agency as a shorthand for a set of facts that is thought to justify piercing the corporate veil.[105] Similarly, while I treated *Green v Bestobell* as a 'profit to company is benefit to fiduciary' case, because this was the basis of the Registrar's certificate, the reason that Brinsden J gave for not disturbing the Registrar's assessment was that Clara was the alter ego of Green.

In respect of the fiduciary's personal liability, the models will often yield similar outcomes. The alter ego and agency models both operate to make the fiduciary liable for the whole of the company's gain. The same is not necessarily true of the benefit analysis because the disgorgeable benefit for which a fiduciary is accountable may not be the same amount as the profits that the company made. More marked differences in outcome are seen from the perspective of the company: for example, on an alter ego model the company can be liable for the fiduciary's personal gains, whereas this would not be appropriate on an agency or benefit analysis. There are also potential difficulties surrounding double recovery of gains. But the central concern of this article has been the personal liability of the wrongdoing fiduciary, and each of the three models allows for that liability to be enlarged.

---

105 See, eg, *Smith, Stone & Knight Ltd v City of Birmingham* [1939] 4 All ER 116; *Re FG (Films) Ltd* [1953] 1 WLR 483. For discussion see: Harris, above n 66; R P Austin and I M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015) 148–50.