CORPORATE ALTER EGO LIABILITY IN EQUITY

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A new form of equitable third party liability is starting to develop in Australian law. Companies used by wrongdoing fiduciaries to further their breaches of duty have always been susceptible to liability on the standard Barnes v Addy grounds of knowing receipt or knowing assistance. Even when a company was owned and controlled by the fiduciary, that company would still be treated as a discrete third party and liable on its own account for its participation in the fiduciary's wrong. But this new type of corporate alter ego liability works differently: here, the company and its human controller are treated as the same actor and their positions are conflated. This has important consequences for when the company can be made liable and for the nature and extent of the remedies available against it.

I INTRODUCTION

This article is concerned with how corporate accessories can be made liable for their controllers' breaches of fiduciary duty. It is very common for a wrongdoing fiduciary to use a company to exploit a business opportunity or to receive funds that the fiduciary has misdirected. In such cases the principal can bring claims against both the wrongdoing fiduciary and the corporate accessory. The question examined here is on what legal bases the corporate accessory can be made liable.

Barnes v Addy is the traditional starting point for discussion of third party liability in equity,[1] even though the case does not provide an exhaustive account of such liability.[2] Under *Barnes v Addy*, any accessory, whether corporate or human, can be made liable for knowingly participating in a fiduciary's breach of duty. However, in recent years a special form of corporate 'alter ego' liability has begun to emerge in Australian law. The idea is that some companies (often 'one person' or family companies) can be seen as merely the corporate vehicles of their controllers

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1 (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC).

2 For example, the case does not mention inducement, which is recognised as a distinct head in Australia: see, eg, *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62.

and not as true third parties. These corporate alter egos are then treated differently, and in some ways more harshly, than they would be under *Barnes v Addy*. This alter ego form of liability was recognised by the Full Federal Court of Australia in the 2012 case of *Grimaldi v Chameleon Mining NL [No 2]* ('*Grimaldi*').[3]

This article starts in Part II by briefly outlining the position in the pre-*Grimaldi* Australian cases. It will be seen that the cases generally did treat even 'alter ego' corporate accessories as liable on their own account on the orthodox *Barnes v Addy* grounds of knowing receipt or knowing assistance. That is, the authorities respected the separate legal personality of the wrongdoing fiduciaries and their associated companies. However, it is also true that the cases often simply assumed that the fiduciary's knowledge could be imputed to the company. Part III introduces the decision in *Grimaldi* and examines whether the distinct form of corporate alter ego liability identified in that case is supported by the authorities cited. Part IV shows how this special form of liability has been applied in subsequent cases: importantly, these include some occasions where conventional knowing receipt or knowing assistance analyses were not available. Part V examines the distinctions between alter ego liability and *Barnes v Addy* liability, showing that they are available in different circumstances and have different remedial consequences. Part VI attempts to identify when this alter ego analysis will be available before Part VII concludes.

II AUSTRALIAN AUTHORITIES BEFORE *GRIMALDI*

Before *Grimaldi*, cases in this area were viewed through a *Barnes v Addy* lens. The corporate accessories were held liable on their own account for their knowing participation in their controller's breach of duty. The following discussion will show that little attention was generally paid to the question of whether knowledge could be imputed to the company: it seems that, the smaller the company, the easier it was simply to assert that knowledge could be imputed. This is intuitively understandable and is particularly unsurprising given that the companies involved invariably did not have separate legal representation. Importantly, though, the companies in these cases were still treated as distinct entities separate from their controllers.

A Imputing Knowledge for *Barnes v Addy* Liability

There are many examples of courts finding little difficulty in attributing knowledge of a controller to a company, but still treating that company as a separate actor and liable on *Barnes v Addy* grounds. These include *Robins v Incentive Dynamics Pty Ltd (in liq)*,[4] where the defendant company held land on constructive trust on the footing of knowing receipt; *Short v Crawley [No 30]*,[5] where the corporate accessory was liable for its profits and was entitled to an

3 (2012) 200 FCR 296 ('*Grimaldi*').
4 (2003) 175 FLR 286 ('*Robins*').
5 [2007] NSWSC 1322 (point not addressed on appeal: *Crawley v Short* (2009) 262 ALR 654).

allowance; *Pedersen v Larcombe*,[6] where Palmer J offered the plaintiff an election between an account of profits against the knowing assistant company and equitable compensation against both the company and the wrongdoing fiduciary; and *Re Cheal Industries Pty Ltd*,[7] where a global order for equitable compensation was made against the wrongdoing fiduciary and his two knowing assistant companies.

The companies in these cases were closely connected to their controllers and this meant knowledge could easily be imputed.[8] Yet the companies were still treated discretely. This is shown by the orders made: with compensatory liability, the same amount was ordered against the human fiduciary and the corporate accessory; with gain-based liability, the company was only liable for its own profits.[9] This reflects the essential *Barnes v Addy* position whereby accessories – whether they be humans, or large or small corporations – are only liable for the profits they have personally made but where their compensatory liability is calculated by reference to the loss suffered from the fiduciary's breach (which means the compensatory awards made against wrongdoing fiduciaries and knowing assistants are normally the same).[10]

B 'Alter Ego' as a Basis for Imputing Knowledge

Other cases are similar to those outlined in the previous section, except that express mention is made of the company being the alter ego of its controller. Describing the company as an alter ego is seen as a justification for imputing knowledge to that company: that is, 'alter ego' is here being used in the same sense as 'directing mind and will'.[11] Importantly, the alter ego concept is being employed to explain why knowledge can be imputed to the company for the purposes of liability in knowing receipt or assistance; it is not being used to identify a special type of liability. The companies in these cases are still liable as third parties, on their own account, on orthodox *Barnes v Addy* grounds.[12]

Three short examples will suffice. In *Mathieson v Booth*,[13] Mr Booth committed a breach of fiduciary duty while acquiring hotel interests. Mr Booth's corporate

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6 [2008] NSWSC 1362 ('*Pedersen*'). See also *H&H Consulting Engineers Pty Ltd v Myers* (2011) 205 IR 363, [44]–[46], [66]–[68] (Gzell J).

7 (2012) 264 FLR 313.

8 See, eg, ibid 320–2 [15] (Ward J); *Robins* (n 4) 298–301 [58]–[69] (Mason P). The corporate accessory's liability was conceded in *Pedersen* (n 6).

9 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 564–5 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman International*'), where the High Court noted that it is preferable to treat the gains of each defendant separately (the trial judge had made a single order against all three defendants of the combined amount of profits made by two of them but this had not been challenged).

10 See below Part V(C). Of course, the ultimate compensatory liability of fiduciaries and accessories can still vary if, for example, the accessory only assists in some breaches of duty.

11 See Edelman J's discussion in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 444–6 [94]–[100]. See generally Eilís Ferran, 'Corporate Attribution and the Directing Mind and Will' (2011) 127 (April) *Law Quarterly Review* 239; Peter Watts, 'The Company's Alter Ego: An Imposter in Private Law' (2000) 116 (October) *Law Quarterly Review* 525; Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) ch 6.

12 A famous English instance of this type of case is *El Ajou v Dollar Land Holdings plc [No 1]* [1994] 2 All ER 685. See also *Bilta (UK) Ltd (in liq) v Nazir [No 2]* [2016] AC 1, 28 [68] (Lord Sumption JSC).

13 [2000] VSC 385.

vehicles were found to be 'knowing participants' because they were his alter egos.[14] This meant a declaration of constructive trust over the property in the hands of those companies would have been available.[15] In *Miorada v Miorada* ('*Miorada*'),[16] Mr Miorada wrongly transferred property from an estate he was administering to a company, Preston Point, of which he was the sole director and shareholder. The company was liable for knowing receipt on the basis that it was Mr Miorada's alter ego, and Miorada and Preston Point were jointly and severally liable to restore the estate.[17] Finally, in *Menkens v Wintour* ('*Menkens*'),[18] Mr Wintour breached his fiduciary duty by causing clients to follow him to his new business, North Coast. The plaintiffs successfully claimed their lost profits from both Mr Wintour and North Coast. As to North Coast's liability, McMurdo J commented that 'any requisite knowledge of the second defendant is proved, Mr Wintour being its sole director and shareholder',[19] and concluded:

> [North Coast] has been joined as an accessory according to the so-called second limb of *Barnes v Addy*. It is and was Mr Wintour's alter ego and there is no submission that its liability does not correspond with that of Mr Wintour. Accordingly upon the plaintiffs' claim, there will be judgment for the plaintiffs against [Mr Wintour] and [North Coast] in the sum of $664,680.[20]

These cases can also be seen as conventional *Barnes v Addy* cases, with the caveat that the alter ego nature of the company obviates, or at least immediately answers, the question of imputation of knowledge. Crucially, the orders made in these cases remain consistent with the wrongdoing fiduciary and the company being treated separately and each being liable on their own account.[21] As we have seen, the compensatory liability of wrongdoing fiduciaries and *Barnes v Addy* third parties is normally the same, whereas individual defendants are generally only liable for their own gains. The important point for the current discussion is this: cases such as *Miorada* and *Menkens*, where the company and its controller are liable for the same amount of equitable compensation, do not prove the existence of a special form of alter ego liability. Such a result is entirely consistent with conventional *Barnes v Addy* liability.

C Exceptions

While the authorities discussed so far can be explained consistently with the companies being liable on orthodox *Barnes v Addy* grounds, there are possible exceptions. For example, in *Southern Cross Mine Management Pty Ltd v Ensham*

14 Ibid [108] (Warren J).
15 Ibid. Warren J did not think it necessary to make such a declaration as she had ordered the relevant property to be retransferred to the plaintiff.
16 [2005] WASC 105.
17 Ibid [38], [171], [206] (Commissioner McKerracher).
18 [2011] QSC 7 ('*Menkens*'), affd [2011] QCA 201.
19 *Menkens* (n 18) [115].
20 Ibid [146]–[147].
21 Other examples of this include *Tavistock Holdings Pty Ltd v Saulsman* (1990) 3 ACSR 502, 509 (Anderson J); *Deeson Heavy Haulage Pty Ltd v Cox* (2009) 82 IPR 521, 548 [155] (McMeekin J).

Resources Pty Ltd,[22] Mr Foots breached a fiduciary duty owed to Ensham Resources. Mr Foots's company, Southern Cross, was found liable as a knowing participant with his knowledge imputed to it.[23] So far this sounds like normal *Barnes v Addy* liability; however, on the point of whether property in the hands of Southern Cross could be held on constructive trust for Ensham Resources, Chesterman J said:

> The claim seems justified by authority … The remedy follows from the principle that as a fiduciary Mr Foots should have obtained the dragline for Ensham. To require Southern Cross to hold it on trust for Ensham is a means by which the erring fiduciary is compelled to account for its forbidden profit.[24]

This justifies a remedy being awarded against the knowing participant, Southern Cross, on the grounds that it is the way to make the fiduciary, Mr Foots, disgorge his profit. This comes rather close to the kind of liability the Full Federal Court later identified in *Grimaldi*, even though Southern Cross was specifically identified as a knowing participant. A more conventional approach would have been simply to hold that a knowing participant is itself amenable to proprietary remedies.[25]

The same point can be seen in the famous *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*') where the High Court said:

> There was no dispute about the fact that … if Farah was in breach of its fiduciary duty to Say-Dee, Mr Elias was liable, being in the same position, and that Lesmint was also liable, since it was Mr Elias's alter ego. Hence the imposition of constructive trusts over the items of property in the names of Mr Elias and Lesmint was an available remedy.[26]

Later in the judgment, the High Court also said: 'Lesmint is liable as the alter ego of Mr Elias: his mind is its mind.'[27] However, while *Farah Constructions* may assume the existence of alter ego liability,[28] the point was evidently not argued. Also, the case cited for the comment that 'his mind is its mind', *Hamilton v Whitehead*,[29] in fact supports the view that a company and its controller ought to be treated distinctly. The whole point of the case was that Mr Whitehead, who caused his company to commit several breaches of the *Companies (Western Australia) Code*, could still be personally liable as an accessory to his company's breaches.

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22 [2005] QSC 233.

23 Ibid [674] (Chesterman J).

24 Ibid [675], citing *Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J), *Boardman v Phipps* [1967] 2 AC 46, 117 (Lord Guest). With respect, it is doubtful that either case supports the principle that Chesterman J applied.

25 See *Robins* (n 4); *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539 ('*Avtex Airservices Trial*'), affd (Federal Court of Australia Full Court, Gummow, French and Heerey JJ, 27 August 1993); *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110. The report does not include Hill J's final orders, dated 16 June 1997, but they are referred to in a later part of the litigation: *Natural Extracts Pty Ltd (in liq) v Stotter* (Federal Court of Australia, Hely J, 18 December 1998).

26 (2007) 230 CLR 89, 140 [110] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*'). See also *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86, 106 [94]–[95] (Macfarlan JA, Giles JA agreeing at 87 [1], Basten JA agreeing at 88 [2]) (appeal allowed but point not discussed: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1).

27 *Farah Constructions* (n 26) 148 [128] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing *Hamilton v Whitehead* (1988) 166 CLR 121, 127 (Mason CJ, Wilson and Toohey JJ) ('*Hamilton*').

28 See *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75, 96 [103] ('*Cornerstone Property & Development*'), where Jackson J thought so.

29 *Hamilton* (n 27).

Finally, it can be noted that one pre-*Grimaldi* case was overturned on appeal for the specific reason that the corporate accessory's separate personality had *not* been adequately respected. In *Exelby v Tuite,*[30] the trial judge had found that a company, Cradex, was the alter ego of a wrongdoing fiduciary, was a 'façade' for him, and that any breach by the fiduciary therefore passed to the company.[31] This was overturned by the Queensland Court of Appeal, where Pincus JA commented that 'Cradex must be treated as an independent entity for all purposes of this action'.[32]

III *GRIMALDI*

The above discussion has shown that, before the decision of the Full Federal Court in *Grimaldi*, corporate accessories were generally dealt with under the standard *Barnes v Addy* model of third party liability. The knowledge element of that liability was very easy to establish in cases where the company was closely linked to the wrongdoing fiduciary, but otherwise the nature of the liability was orthodox. We will now see that the position changed when the Full Federal Court in *Grimaldi* identified a distinct form of corporate alter ego liability.

The facts of *Grimaldi* itself are complicated but at heart involve breaches of fiduciary duty committed by Mr Grimaldi and other directors of the plaintiff company, Chameleon. Those breaches included the misuse of Chameleon's money, which was used to enable other companies linked to the directors to enter a very profitable mining venture, and the acceptance by the directors of secret commissions ('spotters fees'). Much of the appeal to the Full Federal Court was concerned with the basis of liability and relief ordered against the corporate accessories of the wrongdoing directors. In introducing that discussion, Finn, Stone and Perram JJ said the following (it is useful to set out the paragraph in full):

> The fact findings made in this case reveal, potentially, four quite different manifestations of such 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: see eg *Cook v Deeks* [1916] 1 AC 554 at 565 (*Cook*); *Queensland Mines Ltd v Hudson* [1975-1976] ACLC 28-658 at 27,709, revsd on other grounds *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399; 18 ALR 1; *Timber Engineering Company Pty Ltd v Anderson* [1980] 2 NSWLR 488 at [11] (*Timber Engineering*); *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd [No 2]* [1984] WAR 32 (*Green v Bestobell*); *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [26]; *CMS Dolphin Ltd v Simonet* [2002] BCC 600 at [97]-[105] (*CMS Dolphin*). In these cases the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary's wrong. The liability itself is explained commonly on the basis that 'company had full knowledge of all of the facts': *Cook* at 565; it is the alter ego of the fiduciary with

30 *Tuite v Exelby* (1992) 93 ATC 4293 ('*Tuite Trial*'); *Exelby v Tuite* (Queensland Court of Appeal, Macrossan CJ, Pincus JA and Dowsett J, 28 November 1994) ('*Tuite Appeal*').

31 *Tuite Trial* (n 30) 4305–6 (Shepherdson J). In the alternative, the trial judge held that Cradex was liable on its own account for knowing participation on the grounds that Peter's knowledge of Russell's breaches of duty was attributed to Cradex: at 4306.

32 *Tuite Appeal* (n 30). The trial judge's alternative finding of knowing participation failed for practical reasons concerning, inter alia, the timing of the appointment of directors.

> a 'transmitted fiduciary obligation': *Timber Engineering* at [11]; or that it 'jointly participated' in the breach: *CMS Dolphin* at [103]. Liability does not turn on the need to show 'dishonesty', although it often provides the reason for the interposition of the company. Proof of a breach of fiduciary duty will suffice: *Green v Bestobell* at 40. And, as was said in *CMS Dolphin* (at [104]), it is 'rather artificial' to use *Barnes v Addy* to explain this liability.[33]

And later in the judgment:

> [W]here the advantage of a fiduciary's/trustee's wrongdoing accrues to a third party (whether as a knowing recipient or an assistant) and the third party is the alter ego/'nominee' (usually corporate) of the fiduciary, its liabilities will be joint and several with the fiduciary's: *Green v Bestobell* at 40; see *Gencor ACP Ltd v Dalby* (where the action was against the fiduciary for commission payments 'diverted into his own creature company' and for which both the company and the fiduciary were held accountable).[34]

Several subsequent cases have referred to and applied these passages, as will be seen in Part IV below. However, before discussing the influence of the Full Court's analysis in *Grimaldi*, it is first worth examining whether the authorities relied upon truly support that analysis. Do those cases disclose a form of corporate alter ego liability that operates differently from orthodox *Barnes v Addy* liability?

A Cases Relied Upon

In *Cook v Deeks*,[35] three directors of the Toronto Construction Company acquired a contract for their own benefit in breach of their fiduciary duty to the company. The directors formed a new company, the Dominion Construction Company, which took over the contract and made substantial profits. Finding in favour of the plaintiff, a shareholder in the original Toronto Construction Company, Lord Buckmaster LC said:

> Their Lordships have throughout referred to the claim as one against [the three directors]. But it was not, and it could not be, disputed that the Dominion Construction Co acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto company against all the other defendants.[36]

The Full Court in *Grimaldi* interpreted this as meaning that the Dominion Construction Company was liable for all the profits made by itself and by its human directors. This would indeed go further than orthodox *Barnes v Addy* liability, because it would involve a defendant being liable for profits it did not actually make. However, it is not clear that such liability was actually imposed. In the English case of *Ultraframe (UK) Ltd v Fielding*,[37] Lewison J commented that *Cook v Deeks* 'was a case in which the directors and the company were each ordered to account for profits. But there is no indication that the order for the account

33 *Grimaldi* (n 3) 357 [243].
34 Ibid 415 [556].
35 [1916] 1 AC 554.
36 Ibid 565.
37 [2005] EWHC 1638 (Ch).

went further than ordering each of them to account for his (or its) own profits'.[38] Of course, each defendant being liable for their own individual profits would be perfectly consistent with orthodox *Barnes v Addy* liability. Also, *Cook v Deeks* has been seen as authority for the proposition that an account of profits can be awarded against a knowing assistant,[39] which would only be correct if the company in *Cook v Deeks* had been liable on *Barnes v Addy* grounds.

The second case referred to, *Queensland Mines Ltd v Hudson*,[40] can also be explained on orthodox *Barnes v Addy* grounds. Mr Hudson transferred mining exploration licences to companies he controlled. Those licences had been issued in Mr Hudson's name, but he held them on constructive trust for another company, Queensland Mines, of which he was a director. That constructive trust interest still bound the licences when Mr Hudson transferred them to the assignee companies:

> In each case the licence remains impressed with the constructive trust as the company, which is Mr Hudson's company in every sense, took the licences affected by the knowledge which he had, and hence took with his 'transmitted fiduciary obligation'.[41]

Wootten J referred to the assignee companies as 'Mr Hudson's in every sense', but beyond that he did not spell out the exact basis on which those companies were liable (or would have been liable, had the claim not failed on limitation grounds).[42] Wootten J's analysis is entirely consistent with Mr Hudson's companies being knowing recipients in the *Barnes v Addy* sense and with no need for a distinct type of corporate alter ego liability.

The third case, *Timber Engineering Co Pty Ltd v Anderson* ('*Timber Engineering*'),[43] was a straightforward knowing assistance case. Two men breached fiduciary duties to Timber Engineering by diverting business opportunities. They were assisted by their wives and by a company the men and their wives owned and controlled. Kearney J found the wives and the company liable for their own profits on orthodox *Barnes v Addy* grounds. No question of distinct corporate alter ego liability arose: indeed, the passage in *Timber Engineering* that was later cited in *Grimaldi* specifically refers to the accessories being liable under the principle in *Barnes v Addy*.[44]

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38 Ibid [1574]. Note that, if *Cook v Deeks* (n 35) did involve joint liability for profits, then the three human defendants were also liable for profits made by each other.

39 *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, [82]–[83] (Longmore LJ for the Court) ('*Novoship (UK) Appeal*').

40 (1976) ACLC 28,658 (Wootten J).

41 Ibid 28,709, citing *John v Dodwell & Co* [1918] AC 563, 569 (Viscount Haldane for the Board) where it was said: 'Any third person taking … with knowledge of a breach of duty … holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal.' That case did not involve creature companies, and 'transmitted fiduciary obligation' has been applied to human accessories: see, eg, *Avtex Airservices Trial* (n 25) 562 (Hill J). The phrase is rather conclusory: it describes the effect of a finding of knowing participation, but it does not explain when such an analysis will be appropriate.

42 On appeal the underlying finding of breach of fiduciary duty was also overturned: *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1.

43 [1980] 2 NSWLR 488 ('*Timber Engineering*'). Cf *Zibara v Ultra Management (Sports) Pty Ltd* (2021) 283 FCR 18, 88 [263] ('*Zibara*'), where Derrington J treated it as a knowing receipt case.

44 *Timber Engineering* (n 43) 495 [11], cited in *Grimaldi* (n 3) 357 [243] (Finn, Stone and Perram JJ).

The fourth case, *Green v Bestobell Industries Pty Ltd [No 2]* (‘*Green v Bestobell [No 2]*’),[45] requires a little more explanation but was also a knowing assistance case. Mr Green breached fiduciary duties owed to his employer Bestobell Industries by causing his own company, Clara, to bid successfully for a ceiling installation contract. Bestobell failed in its own bid for the same work. At trial, Mr Green as wrongdoing fiduciary and Clara as knowing participant were ordered to account severally for the profits each had made. No changes were made to this order on appeal to the Full Court: Burt CJ would have preferred to make Green and Clara jointly liable for the profits made by both, but Wickham and Kennedy JJ simply dismissed the appeal. When the accounts were taken, Clara’s net profit was assessed at $163,709. 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,[46] arguing that he should not be liable for any profit made by Clara that could not be traced into his hands. Brinsden J rejected this argument in the following terms (and this is the page cited in *Grimaldi*): ‘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.’[47]

This comment must be understood in its proper context: Brinsden J used the language of alter ego specifically to justify a finding that Mr Green had personally enjoyed all of Clara’s profits. Importantly, the comment says nothing about the nature of Clara’s liability. The earlier Full Court judgment had already made clear that Clara was liable on orthodox *Barnes v Addy* grounds.[48]

Stronger support for the proposition advanced in *Grimaldi* can be found in the fifth case, *Gencor ACP Ltd v Dalby*,[49] where Mr Dalby directed a secret profit to his company, Burnstead Ltd. Rimer J ordered both Mr Dalby and Burnstead to account for that profit. Rimer J did not identify the basis of Burnstead’s liability beyond saying that Burnstead was ‘little other than [an] offshore bank account’ and ‘simply a creature company’.[50] Even here, though, the outcome can be seen as consistent with *Barnes v Addy*: knowing receipt would lie because Burnstead received the relevant property while being imputed with Mr Dalby’s knowledge of his own wrong.[51]

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45 [1984] WAR 32 (‘*Green v Bestobell [No 2]*’).

46 Strictly it was an application to delete that part of the Registrar’s certificate.

47 *Green v Bestobell [No 2]* (n 45) 40.

48 *Green v Bestobell Industries Pty Ltd* [1982] WAR 1, 11–12 (Wickham J), 19–20 (Kennedy J).

49 [2000] 2 BCLC 734 (‘*Gencor*’).

50 Ibid [26]. Rimer J went on to say that ‘[i]f 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’.

51 As explained in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, 426 [31] (Lord Sumption) (‘*Prest*’), and noted in *Zibara* (n 43) 88 [262] (Derrington J). See further Jamie Glister, ‘Equitable Liability of Corporate Accessories’ in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 275, 280–1.

The final case cited by the Full Court in *Grimaldi* was *CMS Dolphin Ltd v Simonet* ('*CMS Dolphin*').[52] Mr Simonet, a director of CMS Dolphin, diverted business opportunities first to a partnership, called Millennium, and then to a new company he formed, Blue (GB) Ltd. The question was whether Mr Simonet was liable for the profits Blue made. Lawrence Collins J concluded that Mr Simonet and Blue were equally liable for those profits,[53] although Blue's subsequent insolvency meant no final order was made against it. As the Full Court noted in *Grimaldi*, Lawrence Collins J also commented that it was 'rather artificial' to see an alter ego company as a *Barnes v Addy* knowing recipient.[54] Nonetheless, it must be remembered that the focus in *CMS Dolphin* was on the width of Mr Simonet's personal liability and not on the nature of any liability owed by Blue. In this way, the case is similar to *Green v Bestobell [No 2]*.

This discussion has shown that the cases relied upon in *Grimaldi* do not necessarily provide strong support for a form of liability separate from orthodox *Barnes v Addy*. Nonetheless, and as the next section will demonstrate, the *Grimaldi* analysis has proved influential in later cases.

IV POST-*GRIMALDI*

The *Grimaldi* examination of corporate alter egos – and specifically its identification of a distinct form of corporate alter ego liability – has been considered in many subsequent cases. Sometimes the *Grimaldi* analysis is simply acknowledged in obiter dicta,[55] but on other occasions it plays a more significant role.[56] Crucially for the argument made in this article, several post-*Grimaldi* cases indicate that alter ego is a distinct form of liability that can be pursued alongside more conventional claims of accessorial liability, and perhaps even in the alternative to those claims. However, the treatment of the issue at appellate level indicates that the matter cannot yet be regarded as settled.

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52 [2001] 2 BCLC 704 ('*CMS Dolphin*').

53 Ibid 735–6 [102]–[103].

54 Ibid 736 [104], quoted in *Grimaldi* (n 3) 357 [243] (Finn, Stone and Perram JJ).

55 See, eg, *Australian Securities and Investments Commission v Marco [No 9]* (2021) 399 ALR 735, 746–7 [35]–[37] (McKerracher J); *Harstedt Pty Ltd v Tomanek* (2018) 55 VR 158, 173–5 [67]–[69] (Santamaria, McLeish and Niall JJA); *Blue Visions Management Pty Ltd v Chidiac* [2017] NSWSC 255, [168] (Ball J) ('*Blue Visions*') (and see treatment of the point in the unsuccessful appeal: *Gunasegaram v Blue Visions Management Pty Ltd* (2018) 129 ACSR 265, 278 [48] (Basten JA)); *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016) 340 ALR 580, 614–15 [176]–[178] (Sackville AJA) ('*Australian Careers Institute*'); *Re Waterfront Investments Group Pty Ltd (in liq)* (2015) 105 ACSR 280, 321 [126] (Black J); *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd [No 3]* [2013] WASC 183, [641] (Beech J); *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 626 [74], where Leeming JA commented that alter egos are not 'true' third parties.

56 See, eg, *AHRKalimpa Pty Ltd v Schmidt* [2017] VSC 701, [272] (Elliott J) ('*AHRKalimpa*') (appeal dismissed: *Schmidt v AHRKalimpa* [2020] VSCA 193, but this point not in contention: see at [88], [141] (Kyrou, Hargrave and Emerton JJA)); *Porter v Mulcahy & Co Accounting Services Pty Ltd* [2021] VSC 572, [586]–[587], [603] (Delany J) ('*Porter*'); *OLI 1 Pty Ltd (in liq) v OLG 1 Pty Ltd [No 2]* (2022) 164 ACSR 171, 201 [159] (Chen J).

A Distinct Form of Liability

Alter ego liability has been recognised and applied several times by trial judges, particularly in New South Wales ('NSW'). In *Re Sirrah*,[57] Mr Harris wrongly caused Sirrah to make a series of payments to Harris Health Care, a company of which he and his daughter were directors. In addition to finding Harris Health Care liable as an accessory on *Barnes v Addy* grounds, Black J also applied *Grimaldi* and held the company liable on a separate basis as Mr Harris's alter ego.[58] However, while Black J treated alter ego as a distinct form of liability, it should be noted that knowing assistance was also found.[59] Also, the defendants did not dispute Harris Health Care's liability once that of Mr Harris had been established.

Black J also applied alter ego liability in a second case, *Mudgee Dolomite & Lime Pty Ltd v Murdoch* ('*Mudgee Dolomite & Lime*').[60] This provides stronger authority because alter ego liability was found where knowing receipt and knowing assistance were not (although there was liability under the *Corporations Act 2001* (Cth) ('*Corporations Act*')). The case involved Robert Murdoch and his son Stephen, one of the directors and a senior employee of the plaintiff company Mudgee Dolomite & Lime ('MDL'), breaching fiduciary duties owed to MDL by appropriating a commercial opportunity for the benefit of two other companies, RK Murdoch and Bright Pear. At the relevant time, Robert was a director and the majority shareholder of RK Murdoch while Stephen was a director and shareholder of RK Murdoch and the sole director and shareholder of Bright Pear. Black J held that RK Murdoch and Bright Pear were knowingly involved in Robert and Stephen's breaches of fiduciary duty under the *Corporations Act*. Separately, Black J also found RK Murdoch and Bright Pear liable to account by treating them as the alter egos of Robert and Stephen respectively, relying on the principles in *Grimaldi*.[61] Importantly, and as will be discussed below, the elements of knowing

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57 *Re Sirrah Pty Ltd (in prov liq)* (2021) 152 ACSR 212 ('*Re Sirrah Reasons*') (reasons); *Re Sirrah Pty Ltd (in prov liq)* [2021] NSWSC 492 ('*Re Sirrah Orders*') (final orders and costs), affd *Harris v Harris* [2021] NSWCA 329.

58 *Re Sirrah Reasons* (n 57) 261–2 [153]–[155]. Judgment was entered against Mr Harris and HHC jointly and severally in respect of the amounts the company received, but the company was not liable for some payments made directly to Mr Harris: *Re Sirrah Orders* (n 57) [16]. Cf the approach in *Re Sunnya Pty Ltd* [2023] NSWSC 225 ('*Re Sunnya*'), discussed below, text following n 89.

59 See also *Aucare Dairy (Aust) Pty Ltd v Huang [No 3]* (2019) 135 ACSR 450, 472 [90], 475 [93], 479 [116] (Davies J), where alter ego was said to provide a basis for liability but the final declarations suggest liability as knowing assistants; *Belgravia Nominees Pty Ltd v Lowe Pty Ltd [No 6]* [2019] WASC 5, [389], [394] (Tottle J) (point not discussed on appeal: *Lowe Pty Ltd v Belgravia Nominees Pty Ltd* [2020] WASCA 180), where the plaintiffs alleged liability under both limbs of *Barnes v Addy* (n 1) and under alter ego. Ultimately the company was liable by reason of having jointly participated in the controller's breaches.

60 [2020] NSWSC 1510 ('*Mudgee Dolomite & Lime*'). See also *K & A Laird (NSW) Pty Ltd (in liq) v AIDZAN Pty Ltd (in liq)* [2023] NSWSC 603, [117] ('*K & A Laird*'), where Black J found knowing receipt but said the plaintiffs would also have been entitled to relief on the 'somewhat simpler basis' of alter ego liability; *Re ASP Aluminium Holdings Pty Ltd* [2024] NSWSC 183, [105]–[114], where Black J held that alter ego liability was seriously arguable in the context of granting leave to bring a derivative action. The latter case is particularly significant because the existence of alter ego liability in general was the subject of dispute between the parties.

61 *Mudgee Dolomite & Lime* (n 60) [162]–[164].

receipt were not established on the facts and knowing assistance was not argued.[62] While Black J's approach was not challenged on appeal, Leeming JA (Macfarlan and Gleeson JJA agreeing) did sound a note of caution about the difficulties of an alter ego analysis.[63]

The third case to apply corporate alter ego liability is *Twigg v Twigg*,[64] although it is complicated by issues of tracing in addition to issues of liability. Max Twigg was a director of plaintiff trustee companies that were the trustees of family trusts. Mr Twigg caused the trustee companies to distribute funds in breach of those trusts, with funds paid to Mr Twigg himself and to other companies he controlled. Those funds were then profitably invested and the question was whether the plaintiffs could trace into the fruits of the investments. This meant there were two steps to the analysis. First, were the funds initially received by Twigg or his companies held on trust for the plaintiffs? Secondly, could those initial funds be traced into property currently held by Twigg or his companies?

At trial, Ball J answered both questions in the affirmative.[65] As for the initial funds, Twigg held them on trust because he had acquired the money in breach of fiduciary duty[66] and the companies held the funds on trust because they were his alter egos.[67] In this way, alter ego liability was found. As for tracing, this was most significant in respect of the Byron Bay Beach Hotel, whose sale proceeds had funded the acquisition of several other properties. The hotel had been purchased for $47.2 million by one of Twigg's companies, BBH, using a bank loan of $35 million and a 'loan' from Twigg himself of $12.2 million. It was later sold for $68.2 million, with net proceeds of $32.5 million. Ball J found that the initial 'loan' of $12.2 million was trust money, and that the proceeds of $32.5 million were also trust money. No distinction was therefore drawn for tracing purposes between Mr Twigg himself and the companies he controlled.

The NSW Court of Appeal agreed that Mr Twigg and his companies could be equated for tracing purposes. Brereton JA, with the agreement of Bell CJ and Payne JA on the point, said: 'The conclusion that BBH was Max's alter ego means that the internal arrangements made by Max between himself and his alter ego can be disregarded; in the case of an alter ego, the Court can disregard the form and look to the substance.'[68] However, it is more difficult to say what the Court of Appeal thought about alter ego specifically as a basis of *liability* (as opposed to its effect on tracing). Brereton JA in the main judgment discussed the alter ego liability passage from *Grimaldi* and noted that it was consistent with the High

62 See below Part V(A). Knowing receipt was not established because the defendant companies had not received property but only the benefit of a commercial opportunity.

63 *Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq)* (2022) 398 ALR 658, 664 [27]–[28] ('*Murdoch*').

64 *Twigg v Twigg [No 4]* (2020) 147 ACSR 389 ('*Twigg [No 4]*'); *Twigg v Twigg* (2022) 402 ALR 119 (NSW Court of Appeal) ('*Twigg Appeal*').

65 *Twigg [No 4]* (n 64).

66 In the alternative Ball J held that Max was a trustee *de son tort*. On appeal this was rejected by Brereton JA, but Bell CJ and Payne JA found it unnecessary to decide: *Twigg Appeal* (n 64) 122–3 [4] (Bell CJ and Payne JA), 139–40 [57]–[62] (Brereton JA).

67 *Twigg [No 4]* (n 64) 422 [138], citing *Grimaldi* (n 3) 356–7 [242]–[243] (Finn, Stone and Perram JJ).

68 *Twigg Appeal* (n 64) 200 [225] (Bell CJ and Payne JA agreeing at 123 [5]).

Court's treatment of Mr Elias's company in *Farah Constructions*.[69] But it seems that Bell CJ and Payne JA preferred to reserve their position on the issue.[70]

A fourth case, *Zibara v Ultra Management (Sports) Pty Ltd* ('*Zibara*'),[71] is significant because alter ego liability was found on appeal when it had not been claimed at trial nor mentioned by the trial judge. Indeed, this was the subject of disagreement between members of the Full Federal Court. Mr Zibara and Mr Angeli were former employees of Ultra Management, a company that managed rugby players. After leaving Ultra Management, they formed a new player management company, Genesis, of which they were the sole directors and shareholders. Before leaving Ultra Management, Mr Zibara, assisted by Mr Angeli, put in place contracts with players managed by their former employer which enabled those players to follow Mr Zibara to Genesis. At trial, Greenwood J observed: 'The vehicle they created for the purpose of deriving the gain or benefit arising out of the breaches of fiduciary duty was wholly owned by them. In equity, Genesis is regarded as Mr Zibara and Mr Angeli.'[72]

Despite this language – which is very much the language of alter ego – neither the parties' submissions nor the judgment referred to *Grimaldi* or to alter ego liability. Instead, Greenwood J found Genesis liable as a knowing assistant.[73] The judge made this finding even though Ultra Management had not in terms pleaded that Mr Zibara and Mr Angeli's breach had been of the dishonest and fraudulent nature that is required for liability in knowing assistance.

By majority the Full Federal Court held that Ultra Management had sufficiently pleaded its case, and that the knowing assistance finding against Genesis could stand.[74] Significantly, McKerracher and Anderson JJ also held that liability could alternatively be imposed on the *Grimaldi* alter ego basis.[75] Derrington J disagreed: in his view, the authorities had yet to establish a generally accepted principle for ignoring the separate legal existence of corporate entities.[76] Further, in Derrington J's view, Genesis should not have been held liable on an alter ego basis where it was not pleaded that Genesis was created for the purpose of promoting the interests of its directors in deriving the gain or benefit arising from the breaches of fiduciary duty.

The cases discussed in this section show that, following *Grimaldi*, a distinct form of corporate alter ego liability has been recognised and applied in Australia. At the same time, the position cannot be regarded as wholly settled. The next section discusses why the point is important: it identifies and examines possible

69 Ibid 193–4 [204]–[206].

70 Ibid 123 [5]. This is not completely clear. Bell CJ and Payne JA withheld agreement on 'the tracing issues addressed in [paragraphs] [203]–[223]' of Brereton JA's judgment. Alter ego liability was discussed at [204]–[206] of that judgment, under the heading of 'Tracing', even though – as Ball J recognised – it is a distinct question.

71 *Zibara* (n 43).

72 *Ultra Management (Sports) Pty Ltd v Zibara* [2020] FCA 31, [189] (Greenwood J).

73 Ibid [188]–[189].

74 *Zibara* (n 43) 51 [115] (McKerracher and Anderson JJ).

75 Ibid 62–4 [148]–[157]. Alter ego had not been mentioned below, but McKerracher and Anderson JJ thought it open to Ultra Management to raise it on appeal. Cf *Australian Careers Institute* (n 55) [176]–[182] (Sackville AJA); *Mudgee Dolomite & Lime* (n 60) [164] (Black J).

76 *Zibara* (n 43) 86–9 [260]–[267].

differences between orthodox *Barnes v Addy* liability and this distinct form of corporate alter ego liability.

V WHY IT MATTERS

A New Basis of Liability

The most significant consequence of recognising a form of corporate alter ego liability is that it provides a route to liability separate from the established categories of third party liability. Corporate alter ego liability is not just short-circuited knowing receipt or knowing assistance: it has different elements and applies in different circumstances. This can be seen in *Mudgee Dolomite & Lime*, where two companies were liable to account alongside their controllers for their controllers' breaches of fiduciary duty.[77] The claim in knowing receipt failed because the two companies had not received property misdirected from the plaintiff: instead, they had merely exploited an opportunity that should have been given to the plaintiff. Nonetheless, Black J found the companies liable on 'the alter ego principle'.[78] In this way, the plaintiff was able to obtain judgment against the companies on alter ego grounds that it could not obtain on knowing receipt grounds.[79]

The difference between alter ego and *Barnes v Addy* liability can also be seen in *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd*,[80] where a director of Cornerstone Property diverted a property development opportunity to Suellen Properties, which bought the relevant land. Jackson J held that the diversion of the initial opportunity had not involved a breach of the Cornerstone director's fiduciary duties, but, in case he was wrong on that point, still considered the possible liability of Suellen. Knowing receipt could not lie because there had been no relevant receipt of property and knowing assistance was unavailable because even if the Cornerstone director had committed a breach it was not of a dishonest and fraudulent nature. The final possibility was alter ego liability. This was argued because the Cornerstone director had initially been the sole director and shareholder of Suellen, although by the time Suellen bought the development land the company had changed hands. Jackson J held that the change in control of Suellen by the time of the land purchase meant that alter ego liability could not apply. However, Jackson J also noted that if the question had concerned the imputation of knowledge for *Barnes v Addy* purposes, such

77 *Mudgee Dolomite & Lime* (n 60) (reasons); *Mudgee Dolomite & Lime Pty Ltd v Murdoch* [2020] NSWSC 1675 (costs and final orders) ('*Mudgee Dolomite & Lime Orders*'). The defendant's appeal was allowed in part but not on points relevant here: *Murdoch* (n 63).

78 *Mudgee Dolomite & Lime* (n 60) [164].

79 Knowing assistance was not argued. However, the companies were also knowingly involved in their controllers' breaches under section 79 of the *Corporations Act 2001* (Cth). This means the companies were liable in equity for profits on the ground of being alter egos; separately, they were also liable for their profits as 'compensation' under section 1317H(2) of the Act (where compensation is for 'damage', but damage includes profits made).

80 *Cornerstone Property & Development* (n 28).

knowledge would not have been lost from Suellen on the change of control.[81] Again, it can be seen that alter ego liability has subtle but important differences from *Barnes v Addy* liability.

These examples show that alter ego liability and *Barnes v Addy* liability do not cover precisely the same ground. However, even when liability might be established on both alter ego and *Barnes v Addy* bases, it will be important to identify which is being used. This is because the remedial consequences can vary.

B Gain-Based Relief

Under *Barnes v Addy*, third parties are liable for profits made as a result of their participation in the fiduciary's breach of duty. With knowing receipt the third party is liable for the property wrongly received, subsequent accretions to that property, and, possibly, discrete profits that are not traceable to the original property received but which were made possible by the wrongful receipt of that property.[82] With knowing assistance the third party is liable for profits made by their knowing assistance in the fiduciary's dishonest and fraudulent design.[83] Importantly, however, under *Barnes v Addy* the fiduciary and the accessories are not liable for profits actually made by each other. Neither are accessories liable for profits made by other accessories.[84]

Alter ego liability can change this position. On this approach, the controller and the alter ego can be considered as one accounting party with both liable for the same global amount without regard to which entity – the controller or the company – actually made the relevant gain. It should be emphasised that the point in such cases is normally to enlarge the liability of the human controller rather than the corporate alter ego: that is, the aim is to prevent the human controller from escaping gain-based liability by diverting those gains to a creature company.[85] But the orders can still have the effect of increasing the company's liability. As we have seen, the Full Federal Court in *Grimaldi* said that an alter ego company's gain-based liability would be 'joint and several with the fiduciary's'.[86] In *Novoship (UK) Ltd v Mikhayluk*, Christopher Clarke J held:

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81 Ibid 97 [104].

82 See *Great Investments Ltd v Warner* (2016) 243 FCR 516, 529 [53] (Jagot, Edelman and Moshinsky JJ); *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132 ('*Xiao*') (knowing recipient liable for rental income).

83 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 12–13 [9], 14 [13] (Kiefel CJ, Keane and Edelman JJ). Cf at 36 [85]–[86] (Gageler J), requiring a causal connection between the third party's gain and the fiduciary breach. This analysis is preferred in Pauline Ridge, 'Accounting for Gains from Knowing Participation in Breach of Fiduciary Duty' (2019) 13(1) *Journal of Equity* 69, 74.

84 A further difference in England is that the disgorgeable profit of an accessory is calculated differently from that of a fiduciary: *Novoship (UK) Appeal* (n 39). Lord Briggs has suggested the Supreme Court may want to consider this point: 'Loose Ends in Accounting for Profits' in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years After the Judicature Reforms* (Hart Publishing, 2023) 118.

85 See generally Jamie Glister, 'Diverting Fiduciary Gains to Companies' (2017) 40(1) *University of New South Wales Law Journal* 4 <https://doi.org/10.53637/DSVY5123>.

86 *Grimaldi* (n 3) 415 [556] (Finn, Stone and Perram JJ).

> 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 up. That does not mean that the Claimants are entitled to recover twice: only that both are accounting parties.[87]

Black J took a similar approach in *Mudgee Dolomite & Lime*,[88] and again in interlocutory proceedings in *Re Sunnya Pty Ltd* ('*Re Sunnya*').[89] In *Re Sunnya*, freezing orders had been granted over the assets of Mr He and Ms Lu, who were alleged to have committed breaches of fiduciary duty. Black J extended that order to the assets of two companies they owned and controlled, HLW Investments Pty Ltd and ALL168 Pty Ltd. Importantly, Black J extended the freezing orders against the companies to the same maximum amount as applied to Mr He and Ms Lu's own assets. That is, the freezing orders against the companies were not limited to the amounts that the companies had themselves received:

> [U]nder the principles in *Grimaldi*, there is a seriously arguable case that those entities are the alter ego of Mr He and Ms Lu, with the consequence that all of their assets, and not only the assets recently transferred to them by Mr He and Ms Lu, would arguably be available to meet a judgment against Mr He and Ms Lu.[90]

Black J recognised that the companies could be liable for the amounts they received under knowing receipt, but the important point is that he thought those companies could be liable for a *greater* amount on the alter ego principle.[91] In this way, the wrongdoing fiduciary and the corporate alter ego would be made liable for each other's profits in a way that would not be possible under an orthodox *Barnes v Addy* approach.

C Compensatory Relief

Alter ego liability may also bring differences in compensatory relief. That is, there may be a difference in outcome depending on whether a company is treated as liable on *Barnes v Addy* grounds or on the ground of alter ego liability. However, the position is complicated here because the assessment of compensatory liability under *Barnes v Addy* is not itself completely clear.

The essential question is whether a *Barnes v Addy* third party is liable for the consequences of the fiduciary's breach, or whether the third party is liable only for the consequences of the third party's participation in that breach. If a knowing assistant is only liable for the consequences of their assistance, then their liability may be reduced: the third party might show that the actions of other accessories had a greater causative effect; or the third party might even show that the fiduciary

87 [2012] EWHC 3586 (Comm), [529] ('*Novoship (UK) Trial*'). An appeal was allowed but this particular point was not discussed and alter ego liability was assumed to exist: *Novoship (UK) Appeal* (n 39) 521 [62] (Longmore LJ for the Court). Here the alter ego was of a dishonest assistant and not a wrongdoing fiduciary.

88 *Mudgee Dolomite & Lime* (n 60).

89 *Re Sunnya* (n 58). The plaintiffs then unsuccessfully sought to rely on the alter ego doctrine in the substantive proceedings before Williams J: see *Re Sunnya Pty Ltd* [2024] NSWSC 403, [500]–[511], [965].

90 *Re Sunnya* (n 58) [41].

91 Ibid [39].

would have committed the same breach (and caused the principal the same loss) regardless of the third party's assistance. It must be emphasised that a knowing assistant's liability will not always be lower if third parties are only liable for the consequences of their assistance. This is because that assistance may be so integral to the fiduciary's scheme that it is appropriate to make the third party liable for all the losses flowing from the fiduciary breach. But the question is whether this is *necessarily* the case: are knowing assistants *always* liable for the full consequences of the underlying fiduciary breach; or are they liable for the consequences of their own assistance (which may, depending on the facts, amount to the full consequences of that underlying breach)?

This issue is explored in detail elsewhere[92] and it is enough to note here that the position in Australia is not wholly settled. Dicta in several cases suggest that knowing assistants are liable for losses flowing from the underlying fiduciary breach and not liable merely for the consequences of their own assistance.[93] Against this, the High Court's decision in *Michael Wilson & Partners Ltd v Nicholls* might be read as supporting the opposite view.[94] Also, and although the case dealt with gain-based relief, the High Court in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* held that the relevant causal relationship is between the third party's gain and its acts of knowing assistance, not between the third party's gain and the underlying fiduciary breach.[95]

If the correct position is that a *Barnes v Addy* knowing assistant is liable for the consequences of their assistance, then there will be a remedial distinction between companies accountable under *Barnes v Addy* and companies accountable under the new form of corporate alter ego liability. This is because it seems clear that corporate alter ego liability does bring liability for the controller's fiduciary

92 See Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 299 [8.8.1] <https://doi.org/10.1017/CBO9781107478138>; Jamie Glister, 'Knowing Assistance and Equitable Compensation' (2016) 42(2) *Australian Bar Review* 152. Both use the language of joint and several liability when discussing whether the accessory will be liable for the consequences of the fiduciary breach. That language has now been shown to be inapt: see *Cassaniti v Ball* (2022) 109 NSWLR 348 ('*Cassaniti*'). But the question of whether an assistant is liable for the consequences of the fiduciary breach remains a live one. For the contrary view, that an accessory should only be liable for the consequences of its participation, see Paul S Davies, *Accessory Liability* (Hart Publishing, 2015) 256–8.

93 *New Cap Reinsurance Corporation Ltd v General Cologne Re Australia Ltd* [2004] NSWSC 781, [34] (Young CJ in Eq); *Re-Engine Pty Ltd (in liq) v Fergusson* (2007) 209 FLR 1, 29 [158] (Dodds-Streeton J); *George v Webb* [2011] NSWSC 1608, [262]–[263] (Ward J) (but see *Anderson v Canaccord Genuity Financial Ltd* (2022) 161 ACSR 1, 534 [2802] (Ward CJ in Eq)). Again, the language is of joint and several liability.

94 > [L]iability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an 'accessorial' liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows … that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum.
>
> (2011) 244 CLR 427, 457 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ) ('*Michael Wilson & Partners*').

95 This was a point of difference between the plurality and Gageler J: see above n 83.

breach: the Full Federal Court said in *Grimaldi* that 'the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary's wrong'.[96]

Even assuming that a knowing assistant is liable for the consequences of the underlying fiduciary breach (which, in our view, is the correct position), there may still be remedial differences between knowing assistance and corporate alter ego liability. For example, the NSW Court of Appeal case of *Cassaniti v Ball* establishes that a release given to a wrongdoing fiduciary does not also operate to release third parties who knowingly assisted in the fiduciary breach.[97] The Court held that the 'release rule' as understood at common law never applied to equitable claims,[98] but the Court's reasons for this do not easily apply to corporate alter ego liability. The Court noted that relief in equity is available on terms which may not be the same as between the fiduciary and a third party; that equitable defences may be raised by some but not all defendants; and that a plaintiff can make a split election between defendants as to loss-based and gain-based relief.[99] But these points do not apply with the same force, or even at all, to the context of corporate alter ego liability. It is difficult to imagine terms being different as between a fiduciary and their corporate alter ego, or one but not the other being able to raise equitable defences. It is also doubtful that a different election could be made as between a fiduciary and a corporate alter ego of that fiduciary, as will be discussed in the next section.

D Election

As against individual defendants, plaintiffs must elect between gain-based and compensatory remedies.[100] However, plaintiffs need not elect for the same type of relief from wrongdoing fiduciaries and from *Barnes v Addy* third parties. Instead, plaintiffs can make a split election and recover losses from the fiduciary and any gains made by the accessories. This is shown by the recent case of *Xiao v BCEG International (Australia) Pty Ltd*,[101] where Mr Xiao and Ms Chen breached fiduciary duties owed to BCEG by using some of BCEG's money to fund a property development by a company they controlled, WWM.[102] Xiao and Chen were liable

96 *Grimaldi* (n 3) 357 [243] (Finn, Stone and Perram JJ).

97 *Cassaniti* (n 92).

98 Ibid 378 [120] (Gleeson, Leeming and Mitchelmore JJA). The point was academic because even if the release rule had applied it had been abrogated by legislation: originally section 97 of the *Supreme Court Act 1970* (NSW) and now section 95 of the *Civil Procedure Act 2005* (NSW). But the point will be relevant in areas not covered by that legislation.

99 *Cassaniti* (n 92) 377 [116] (Gleeson, Leeming and Mitchelmore JJA).

100 See *Warman International* (n 9) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521–2 (Lord Nicholls for the Board).

101 *Xiao* (n 82). See also *Club of the Clubs Pty Ltd v King Network Group Pty Ltd [No 2]* [2007] NSWSC 574 (appeal allowed but nothing to undermine analysis of split election: (2008) 69 ACSR 172); *Michael Wilson & Partners* (n 94) 547–8 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ); *Cassaniti* (n 92) 377 [116] (Gleeson, Leeming and Mitchelmore JJA).

102 Mr Xiao and Ms Chen controlled WWM, but the company was treated as a third party on orthodox *Barnes v Addy* (n 1) grounds, with Xiao's knowledge imputed: see *BCEG International (Australia) Pty Ltd v Xiao* (2022) 162 ACSR 601, 694 [430] (Rees J); *Xiao* (n 82) 148 [67] (Gleeson JA, Mitchelmore JA agreeing at 164 [163], Griffiths AJA agreeing at 164 [164]).

for $2.5 million plus interest as equitable compensation for breach of fiduciary duty, while WWM was liable for $2.9 million plus interest as an account of profits for knowing receipt. The NSW Court of Appeal confirmed the plaintiff's ability to make this split election. There was no inconsistency in claiming compensation from the fiduciary and gains from the knowing recipient,[103] and no question of double recovery because the remedies were cumulative rather than inconsistent: 'BCEG is entitled to cumulative remedies because there are two distinct wrongs.'[104]

While plaintiffs can elect differently as between fiduciaries and *Barnes v Addy* third parties, allowing a split election as between a fiduciary and a company liable only on the alter ego basis would be much more problematic.[105] Most obviously, it would appear to go against the whole foundation of the analysis, which is to treat the company as the alter ego of its controller. As we have seen, the point of an alter ego analysis is not to increase the amount of recovery available to the plaintiff but is instead to place the same liability on two parties – the human and the corporate alter ego. As Christopher Clarke J said in *Novoship*, '[t]hat does not mean that the Claimants are entitled to recover twice: only that both are accounting parties'.[106] In this way, the position of a corporate alter ego is different from that of a *Barnes v Addy* third party, who has committed a 'distinct wrong' and is liable for it.

VI WHEN IT MATTERS

A further difficulty is deciding exactly when an alter ego analysis will be available. The first question is what relationship is required between the company and the human controller before an alter ego description will be appropriate. The existing cases do not provide a test or checklist, but it is obvious that ownership and control of the company are critical. The cases do not suggest that exclusive

103 *Xiao* (n 82) 149 [68]–[70] (Gleeson JA). A more difficult question, which will not be discussed here, is whether a plaintiff can elect for an account of profits from the fiduciary and equitable compensation from the accessory. This was doubted by Newey LJ in *Hotel Portfolio II UK Ltd (in liq) v Ruhan* [2023] EWCA Civ 1120, [70]–[71] (permission to appeal to the United Kingdom Supreme Court has been granted). For discussion of this election point see Jamie Glister and Pauline Ridge, 'The Respective Liabilities of Dishonest Fiduciaries and their Knowing Assistants' (2025) 48(2) *Melbourne University Law Review* (forthcoming).

104 *Xiao* (n 82) 150 [74] (Gleeson JA). See also at 151 [83] (Gleeson JA). There must be limits to this analysis: a wrongful transfer of $1,000 from a trustee to a third party should not be characterised as *both* a loss to the trust fund (for recovery of $1,000 equitable compensation from the trustee) *and* a profit made by the third party (for recovery of $1,000 account of profits from that third party).

105 The question was not directly addressed in *Mudgee Dolomite & Lime* (n 60), although Black J's final orders operated to require that the same election be made against the corporate alter egos as was made against the wrongdoing fiduciaries: see *Mudgee Dolomite & Lime Orders* (n 77) [25(6)]–[25(7)].

106 *Novoship (UK) Trial* (n 87) [529] (Christopher Clarke J). Cf *Green v Bestobell [No 2]* (n 45), where separate disgorgement orders were made against Mr Green and Clara Pty Ltd, although for the same amount. It is unlikely that the plaintiff would have been able to recover the same gain twice over, but this is not spelled out in the reports.

ownership or control is required,[107] and, perhaps more controversially, it also appears possible for a single company to be the alter ego of two separate human beings.[108]

The next question is whether fitting an alter ego description is itself enough to ground alter ego liability, or whether 'something more' is required. *Mudgee Dolomite & Lime* suggests that a close relationship between the company and its controller is sufficient. There, it appears counsel for the plaintiff had only argued for alter ego liability in closing submissions. However, Black J thought this did not prejudice the defendants because the already-admitted evidence had sufficiently addressed the relationships between the companies and their controllers.[109] This suggests that alter ego liability only turns on the relationship between a company and its controller. By contrast, in *Zibara*, Derrington J said in dissent that '[i]f it is valid to say of a corporate entity that it is the "alter ego" of an individual or individuals, it necessarily means more than it is wholly owned and controlled by them'.[110]

In cognate areas of law, mere ownership and control of a company is not enough. For example, the bare fact that a company fits the description of alter ego does not, of itself, mean that the company's controller is bound by contracts the company makes with third parties.[111] Something more is needed before the corporate veil will be pierced in this way.[112] The question in that context is when human controllers will be personally liable despite the interposition of a company; in contrast, here we are concerned with when the company will be liable for the activities of its controllers. It would seem at least as important to require something more than a close relationship between a company and its controller if the question is about imposing liability on a company.

If something more than ownership and control is required for alter ego liability, what might that be? Two possibilities emerge in the cases, although neither fits the existing authorities exactly. The first candidate for being 'something more' is the presence of dishonesty on the part of the company controller. This was expressly rejected in *Grimaldi* itself,[113] but other cases have questioned that rejection.[114] The second possibility is whether the company was only formed to exploit the relevant

107 See, eg, *Mudgee Dolomite & Lime* (n 60) (minority shareholding of wives was insignificant); *AHRKalimpa* (n 56) (wife being director was immaterial).

108 See, eg, *Blue Visions* (n 55) [168] (Ball J) (where no fiduciary breach was ultimately found); *Zibara* (n 43) (where the majority saw Genesis as the alter ego of both Mr Zibara and Mr Angeli).

109 *Mudgee Dolomite & Lime* (n 60) [164] (Black J).

110 *Zibara* (n 43) 89 [271].

111 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 556–7 (Meagher JA), 577 (Rogers AJA) (discussing parent companies rather than human controllers). Meagher JA was in dissent, but not on this point. See also *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia [No 2]* [1998] 1 WLR 294, 304 (Toulson J); *Super 1000 v Pacific General Securities* (2008) 221 FLR 427, 468 [197] (White J).

112 See generally Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250.

113 *Grimaldi* (n 3) 357 [243] (Finn, Stone and Perram JJ): 'Liability does not turn on the need to show "dishonesty", although it often provides the reason for the interposition of the company.'

114 See *Australian Careers Institute* (n 55) 615 [178] (Sackville AJA); *Zibara* (n 43) 88–9 [266]–[268] (Derrington J).

fiduciary breach.[115] This was a feature of many of the authorities cited in *Grimaldi*:[116] indeed, in *CMS Dolphin*, the judge expressly distinguished another case, *Regal (Hastings) v Gulliver* ('*Regal*'), partly on the grounds that the relevant company in *Regal* had *not* been formed to take advantage of the fiduciary breach.[117] The company only being formed to exploit the relevant breach is also a characteristic of more recent cases,[118] including *Zibara*, where the Full Court split on whether the point had been sufficiently pleaded but all three judges evidently thought the point was important.[119] On the other hand, there are also cases where the relevant company was not only formed to take advantage of the fiduciary breach. Significantly, these include *Mudgee Dolomite & Lime*,[120] one of the few cases where alter ego liability has been applied. Quite simply, this point is unclear on the present state of the law.

VII CONCLUSION

This article has sought to introduce and examine a developing model of corporate alter ego liability that is still in its infancy but which has considerable potential to reshape the area of equitable third party liability as it applies to companies. We have seen that the foundations of corporate alter ego liability as identified in *Grimaldi* are not strong, but of course this does not automatically mean that any further development of the area should be stopped. Judicial reactions to this new form of liability have so far been mixed: some judges have expressed significant scepticism about the alter ego model,[121] whereas others have clearly found it a useful and efficient tool.[122] It is also interesting to note that, shortly after *Grimaldi* was decided in Australia, the United Kingdom Supreme Court took a different path and chose to maintain a clear focus on the separate legal personality of companies – even those owned and controlled by one person – in *Prest v Petrodel Resources Ltd*.[123]

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115 A similar point is seen in veil-piercing, where a possible ground is that a company was only incorporated to perpetrate a fraud or evade an obligation: *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254, 266–7 (Young J). Cf Jennifer Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56(2) *Cambridge Law Journal* 284 <https://doi.org/10.1017/S0008197300081320>.

116 Including *Cook v Deeks* (n 35); *Timber Engineering* (n 43); *Green v Bestobell [No 2]* (n 45); *Gencor* (n 49); *CMS Dolphin* (n 52).

117 *CMS Dolphin* (n 52) 736 [105] (Lawrence Collins J), distinguishing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (note).

118 See, eg, *Blue Visions* (n 55); *Porter* (n 56) [590]–[591] (Delany J) (where it is wrongly said that the company in *AHRKalimpa* (n 56) was only formed to take advantage of the opportunity).

119 See *Zibara* (n 43) 63 [153], where McKerracher and Anderson JJ adopt the trial judge's finding that Genesis was 'created for the purpose'. Cf at 89–90 [269]–[273] (Derrington J).

120 *Mudgee Dolomite & Lime* (n 60). See also *AHRKalimpa* (n 56) (where Otway Livestock had existed for a long time and even existed before the plaintiff company did); *Western Areas Exploration Pty Ltd v Streeter [No 3]* (2009) 234 FLR 265 (where it seems Jungle Creek already existed). An appeal was allowed on laches: *Streeter v Western Areas Exploration Pty Ltd [No 2]* (2011) 278 ALR 291.

121 See, eg, Derrington J in *Zibara* (n 43); Jackson J in *Cornerstone Property & Development* (n 28).

122 See, eg, Black J in *Mudgee Dolomite & Lime* (n 60); *Re Sunnya* (n 58); *K & A Laird* (n 60).

123 *Prest* (n 51).

Whether or not this new form of alter ego liability becomes firmly established in Australian law remains to be seen. If it does, several points will need to be worked out. First, and probably most importantly, it is not yet clear exactly when the analysis will be available. The difficulty here is not about how closely linked a controller and a company need to be before the alter ego label is appropriate. Judges clearly know an alter ego when they see one. Rather, it is about whether that connection alone is sufficient for alter ego liability to apply. It is arguable that, in addition, the company ought to have been formed with the intention of exploiting the fiduciary breach (although one suspects that, if this is to harden into a requirement, any efficiency gains that would otherwise be made in the litigation process will be much reduced). Another question is whether a corporate alter ego must be pursued on only that basis or whether it is also open to the plaintiff to bring an orthodox *Barnes v Addy* claim. As the cases currently stand there is no difficulty in pursuing both, and the point is significant because each type of liability has its own advantages from the plaintiff's point of view. For example, alter ego liability may appeal on certain facts because it is not constrained by the same 'receipt of trust property' requirement as is knowing receipt. On other facts, the argued inability to elect differently as between a human and their corporate alter ego may make traditional *Barnes v Addy* liability more attractive.