Bennett [1999] BCLC 525, 533. As Morritt LJ said:

> '… if there is no causative effect and therefore no assistance given by the person … on whom it is sought to establish the liability as constructive trustee, for my part I cannot see that the requirements of conscience require any remedy at all.'

1510 Likewise in *Brink's Ltd v Abu-Saleh* Rimer J held that Mrs Elcombe's presence in the car accompanying her husband abroad on money laundering trips did not amount to assistance 'of a nature sufficient to make her an accessory'. She was in the car merely in her capacity as Mr Elcombe's wife …

Remedies against the knowing recipient

1577 In addition to the proprietary remedy (if it is still available) the claimant has a personal remedy for an account against the knowing recipient. Obviously, the personal remedy depends on establishing knowing receipt, but it does not depend on retention. Indeed it is needed precisely where the recipient has not retained the property. In addition, the personal remedy requires the knowing recipient to account for any benefit he has received or acquired as a result of the knowing receipt. However, a knowing recipient is not, in my judgment, liable to account for a benefit received by someone else. [He then went on to explain that the remedy must be fashioned to ensure that there is no double recovery, and continued:]

Fashioning the account

1579 The ordering of an account is an equitable remedy. It is not discretionary in the true sense. It is granted or withheld on the basis of equitable principles. But one of those principles is that of proportionality. In *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 All ER 652 property agents had acquired confidential information about a potential development site in the course of acting for a client. In breach of duty they disclosed that information to a rival (Morbaine). The question arose **(p. 457)** whether Morbaine (which had since purchased the site) could be made liable to account for profits. Nourse LJ said:

> 'What the judge found was that some at least of the information was confidential at the time that it was disclosed, in that its disclosure to a rival developer would or might be detrimental to Satnam. However, even assuming that but for the disclosure Morbaine would not have acquired the Brewery Street site, it does not follow that it would be a proportionate response to hold it liable for an account of profits. All the circumstances must be considered. The information, though confidential, was not of the same degree of confidentiality as the information in the *Spycatcher* case and in *Schering Chemicals Ltd v Falkman Ltd*. All of it was either already available to Morbaine or would have been available to it on reasonable inquiry once, as was inevitable, the news of Satnam's receivership became known. There being no other basis of recovery available, it would in our view be inequitable and contrary to commercial good sense to allow Satnam to recover simply on the basis that there was a degree of confidentiality in the information at the time that it was disclosed to Morbaine.'

[He then considered various cases, including *Warman v Dwyer* (Note 2 following *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd* **[7.29]**, p 394), and *CMS Dolphin v Simonet* **[7.31]**, and continued:]

1588 … The governing principles are, in my judgment, these:

> **i)** The fundamental rule is that a fiduciary must not make an unauthorised profit out of his fiduciary position;
> **ii)** The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant;
> **iii)** The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;

iv) It is important to establish exactly what has been acquired;
v) Subject to that, the fashioning of the account depends on the facts. In some cases it will be appropriate to order an account limited in time; or limited to profits derived from particular assets or particular customers; or to order an account of all the profits of a business subject to all just allowances for the fiduciary's skill, labour and assumption of business risk. In some cases it may be appropriate to order the making of a payment representing the capital value of the advantage in question, either in place of or in addition to an account of profits. …

Remedies against a dishonest assistant

1600 I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any *loss* which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he *himself* has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary. …

[Applying these various principles to the complicated facts, he then settled detailed orders between the parties, with some matters reserved for later.][84]

➢ Questions

1. What is the difference between the liability attaching to third parties who are 'knowing recipients' and those who are 'dishonest accessories'?

(p. 458) 2. Is it possible to claim (i) constructive trusts, (ii) accounts of profits, (iii) equitable compensation against 'knowing recipients' or 'dishonest accessories'?

3. How, if at all, is liability shared between the defaulting director and the offending third party? Can a claimant recover against both of them?

Separately, but in the context of making third parties liable for breaches of directors' duties, note that a substantial shareholder who appoints a nominee director to the company board owes no duty to anyone for the way in which the nominee performs as a director. It makes no difference that the nominee director is an employee of the nominating shareholder.

[7.45] Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1991] 1 AC 187 (Privy Council)

The Kuwait Asia bank owned 40% of the shares in AICS, a New Zealand company which had taken money on deposit from the public. The plaintiff company, NMLN, had acted as trustee for the depositors pursuant to requirements of the New Zealand securities legislation. House and August, employees of the bank, were appointed by the bank to be two of the five directors of AICS; the remaining three were nominees of another large shareholder, Kumutoto. When AICS went into liquidation, NMLN settled claims brought by the depositors for breach of its duties as their trustee, and in these proceedings NMLN sought contribution from, inter alia (i) House and August and (ii) the bank, contending that it (NMLN) had relied on certificates of AICS's financial position which were inaccurate and for which the directors bore collective responsibility. The Judicial Committee held that while a prima facie case existed against House and August, no claim lay against the bank. The bank was not vicariously liable for any breach of duty which might be proved against the two directors whom it had nominated, and this was so even though they were also its employees; and it did not *qua* shareholder owe duties to anybody.

The opinion of the Judicial Committee was delivered by LORD LOWRY: … Their Lordships now proceed to consider the causes of action pleaded by the plaintiff against the bank. Two general principles may first be

stated. (1) A director does not by reason only of his position as director owe any duty to creditors or to trustees for creditors of the company. (2) A shareholder does not by reason only of his position as shareholder owe any duty to anybody …

But although directors are not liable as such to creditors of the company, a director may by agreement or representation assume a special duty to a creditor of the company. A director may accept or assume a duty of care in supplying information to a creditor analogous to the duty described by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [[1964] AC 465, HL].

[His Lordship held that there was an arguable case against House and August personally on this ground, and continued:]

As against the bank, the statement of claim pleaded that the bank was liable to contribute to the loss suffered by the plaintiff in settling the claims of the depositors against the plaintiff for all or any of the following reasons: (1) House and August were appointed to the board of directors of AICS by the bank, were employed by the bank and carried out their duties as directors in the course of their employment by the bank. (2) House and August were, as directors of AICS, the agents of the bank which was the principal. (3) As a substantial shareholder … the bank owed a duty of care to the plaintiff and to the depositors to ensure that the business of AICS was not conducted negligently or recklessly or in such a manner as to materially disadvantage the interests of those unsecured depositors. (4) House and August were persons occupying a position of directors of AICS who were accustomed to act in accordance with the bank's directions, and therefore the bank was a director of AICS within the meaning of section 2 of the Companies Act 1955.

As to (1) the power of appointing a director of a company may be exercised by a shareholder or a person who is not a shareholder by virtue of the articles of association of the company, or by virtue **(p. 459)** of the control of the majority of the voting shares of the company, or by virtue of the agreement or acquiescence of other shareholders. In the present case, the bank and Kumutoto, who together controlled AICS, decided that the bank should nominate two directors. In the absence of fraud or bad faith (which are not alleged here), a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence …

The liability of a shareholder would be unlimited if he were accountable to a creditor for the exercise of his power to appoint a director and for the conduct of the director so appointed. It is in the interests of a shareholder to see that directors are wise and that the actions of the company are not foolish; but this concern of the shareholder stems from self-interest, and not from duty … It does not make any difference if the directors appointed by a shareholder are employed by the shareholder and are allowed to carry out their duties as directors while in the shareholder's employment. House and August owed three separate duties. They owed in the first place to AICS the duty to perform their duties as directors without gross negligence; 9 the liability of a director to his company is set forth in the judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd* **[7.19]**. They owed a duty to the plaintiff to use reasonable care to see that the certificates complied with the requirements of the trust deed. Finally, they owed a duty to their employer, the bank, to exercise reasonable diligence and skill in the performance of their duties as directors of AICS.

If House and August did not exercise reasonable care to see that the quarterly certificates were accurate, they committed a breach of the duty they owed to the plaintiff and may have committed a breach of the duty they owed to the plaintiff and may have committed a breach of the duty they owed to the bank to exercise reasonable diligence and skill. But these duties were separate and distinct and different in scope and nature. The bank was not responsible for a breach of the duties owed by House and August to AICS or to the plaintiff any more than AICS or the plaintiff were responsible for a breach of duty by House and August. If House and August committed a breach of the duty which was imposed on them and other directors of AICS and was owed to the plaintiff under and by virtue of the trust deed they did so as individuals and as directors of AICS and not as employees of the bank; House and August were not parties to the trust deed, nor was the bank. House and August were allowed by the bank to perform their duties to AICS in the bank's time and at the bank's expense. It was in the interest of the bank that House and August should discharge with diligence and skill the duties which they owed to AICS, but these facts do not render the bank liable for

breach by House and August of the duty imposed on them by the trust deed. In the performance of their duties as directors and in the performance of their duties imposed by the trust deed, House and August were bound to ignore the interests and wishes of their employer, the bank. They could not plead any instruction from the bank as an excuse for breach of their duties to AICS and the plaintiff. Of course, if the bank exploited its position as employers of House and August to obtain an improper advantage for the bank or to cause harm to the plaintiff then the bank would be liable for its own misconduct. But there is no suggestion that the bank behaved with impropriety …

(2) Then it is said that House and August were the agents of the bank. But, as directors of AICS, they were the agents of AICS and not of the bank. As directors of AICS, House and August were agents of AICS for the purposes of the trust deed and, by the express terms of the trust deed, responsibility for the accuracy of the quarterly certificates was assumed by the directors of AICS. House and August accepted responsibility for the quarterly certificates as directors of AICS and not as agents or employees of the bank.

(3) Next it was said that the bank owed a personal duty of care to the plaintiff. For the protection of the depositors the plaintiff stipulated for and obtained by the trust deed a duty of care in the preparation of the quarterly certificates by the directors of AICS. The plaintiff may or may not have known that two of the directors of AICS were employed by the bank and that the bank would allow those two directors to carry out their duties as directors while in the employment of the bank. Any of these circumstances, even if known, could change at any time. The plaintiff may or may not have known that the bank was beneficially interested in 40 per cent of the shares of AICS. That circumstance also could change at any time. The plaintiff did not rely on any of these circumstances … **(p. 460)** An employer who is also a shareholder who nominates a director owes no duty to the company unless the employer interferes with the affairs of the company. A duty does not arise because the employee may be dismissed from his employment by the employer or from his directorship by the shareholder or because the employer does not provide sufficient time or facilities to enable the director to carry out his duties. It will be in the interests of the employer to see that the director discharges his duty to the company but this again stems from self-interest and not from duty on the part of the employer.

[His Lordship ruled, finally, that the bank was not in the position of a ‘shadow director’. The proceedings against the bank were accordingly struck out as disclosing no valid cause of action.]

Further Reading

This is the area of corporate law that attracts the most attention from commentators: the volume of literature is enormous, a lot of it very good, but it is clearly necessary to be selective.

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Notes:

[1] There are few if any cases on the directors' obligations to make disclosure in this way, but reformers have certainly seen the importance of disclosure, and CA 2006 makes specific provisions which bear concentrated attention: see CA 2006 Pt 15 on accounts and reports, and especially ss 415ff on the content of the directors' report, including the 'business review' provisions (s 417).

[2] Trustees must conserve property, while directors must take business risks. Trustees must act unanimously, or seek the court's guidance; but directors may act by a quorum, and must accept the principle of majority rule. See further LS Sealy, 'The Director as Trustee' [1967] CLJ 83. accounts).

[3] *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Law Com No 261, 1999), Pt 4.

[4] *Modern Company Law for a Competitive Economy: Final Report* (2001), Vol 1, Annex C.

[5] See S Worthington, 'Reforming Directors' Duties?' (2001) 64 MLR 439, published before the CLR produced its Final Report.

[6] [1988] BCLC 104.

[7] Eg *Re Cape Breton Co* (1885) 29 Ch D 795, CA, affd sub nom *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, HL; and *North-West Transportation Co Ltd v Beatty* **[4.33]**.

[8] Note the difference between showing that a person owes fiduciary duties to a company because he or she is a *de facto* director, or because he or she can be classed as a fiduciary under the normal equitable rules for identifying fiduciary relationships (on the latter, see *Ranson v Customer Systems plc* **[7.04]**). Also see *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 381.

[9] See D Prentice and J Payne, 'Directors' Fiduciary Duties?' (2006) 122 LQR 122.

[10] This is no longer lawful: see CA 2006 s 155(1), which requires a company to have at least one director who is a natural person.

[11] See LS Sealy, 'Directors' "Wider" Responsibilities—Problems Conceptual, Practical and Procedural?' (1987) 13 *Monash University Law Review* 164; also the well-known debate between AA Berle, Jr and E Merrick Dodd, Jr in (1931) 44 *Harvard Law Review* 1049, (1932) 45 *Harvard Law Review* 1145, 1365 and (1942) 9 *University of Chicago Law Review* 538, and JL Weiner, 'The Berle–Dodd Dialogue on the Nature of Corporations?' (1964) 64 *Columbia Law Review* 1458; and, for a detailed exploration of the 'stakeholder', JE Parkinson, *Corporate Power and Responsibility* (1993). On the stakeholder debate generally, see FH Easterbrook and DR Fischel, *Economic Structure of Corporate Law* (1991), ch 1; G Kelly and J Parkinson, 'The Conceptual Foundations of the Company: A Pluralist Approach' [1998] *Company Financial and Insolvency Law Review* 174; A Alcock, 'The Case against the Concept of Stakeholders?' (1996) 17 *Company Lawyer* 177; Lady Justice Arden, 'Regulating the Conduct of Directors?' (2010) 1 *Journal of Corporate Law Studies* 1.

[12] The then Secretary of State for Trade and Industry, Patricia Hewitt, in introducing the *Draft Regulations on the Operating and Financial Review and Directors' Report: A Consultative Document* (2004), expressed her view of the functions and responsibilities of the modern companies, affirming the conclusion reached by the Steering Group:

… What are companies for? The primary goal is to make a profit for their shareholders … [but] we [also] expect companies to generate the wealth that provides good public services and a decent standard of living for everyone

… Good working conditions, good products and services and successful relationships with a wide range of other stakeholders are important assets, crucial to stable, long-term performance and shareholder value …

[13] See the very limited exception illustrated by *Coleman v Myers* **[7.06]**.

[14] Note, however, that shareholders can sometimes pursue 'derivative claims' to enforce wrongs done *to the company*, not to the shareholders personally. And shareholders also have distinctive personal rights, and avenues for pursuing them. See Chapter 13.

[15] As distinct from a derivative claim: see Chapter 13.

[16] Although note that the courts will not imply terms which simply create a parallel set of duties owed by the directors to individual shareholders: *Towcester Racecourse Co Ltd v The Racecourse Association Ltd* [2003] 1 BCLC 260.

[17] (1914) 30 TLR 444, PC.

[18] There is an extensive literature on this topic. See, eg, LS Sealy, 'Directors' "Wider" Responsibilities—Problems

Conceptual, Practical and Procedural?' (1987) 13 *Monash University Law Review* 164; S Worthington, 'Directors' Duties, Creditors' Rights and Shareholder Intervention?' (1991) 18 *Melbourne University Law Review* 121; R Grantham, 'The Judicial Extension of Directors' Duties to Creditors' [1991] JBL 1; A Keay, 'The Duty of Directors to Take Account of Creditors' Interests: Has It Any Role to Play?' [2002] JBL 379; HC Hirt, 'The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance?' (2004) 1 *European Company and Financial Law Review* 71; PL Davies, 'Directors' Creditor-Regarding Duties?' (2006) 7 *European Business Organization Law Review* 301; J Zhao and J Tribe, 'Corporate Social Responsibility in an Insolvent Environment: Directors' Continuing Obligations in English Law?' (2010) 21 (9) *International Company and Commercial Law Review* 305.

[19] *Dicta* to this effect in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 at 249, per Cooke J are, it is submitted, too wide.

[20] Special leave to appeal to the High Court has apparently been filed.

[21] Although the litigation was not, in the end, against the directors for these breaches, but against the banks for 'knowing assistance' in the directors' breaches (in the UK, 'dishonest assistance'). In 2009, Owen J found against the banks, and awarded A$1.56 billion in equitable compensation. The Court of Appeal, by a 2:1 majority (Lee AJA and Drummond AJA, Carr AJA dissenting), upheld this award, increased by additional interest, damages and costs.

[22] See Lord Wedderburn, 'Employees, Partnership and Company Law?' (2002) 31 ILJ 99.

[23] These parts draw on contributions made earlier to *Palmer's Company Law Annotated Guide to the Companies Act 2006* (2007).

[24] See LS Sealy, '"Bona Fides" and "Proper Purposes" in Corporate Decisions?' (1989) 15 *Monash University Law Review* 265; S Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches?' (2000) 116 LQR 638.

[25] [1920] 1 Ch 77.

[26] (1968) 121 CLR 483, Aust HCt.

[27] (1972) 33 DLR (3d) 288.

[28] More accurately, voidable: see *Bamford v Bamford* **[4.32]**.

[29] (1953) 90 CLR 425 at 445, Aust HCt.

[30] But see P Finn, *Fiduciary Obligations* (1977), p 73, who contends that members' decisions should be subject to a similar test to those of the directors; also S Worthington, who advocates a proper purposes test (but not fiduciary duties) for all members' decisions: 'Corporate Governance: Remedying and Ratifying Directors' Breaches' (2000) 116 LQR 638.

[31] See the White Paper, *Company Law Reform* (Cm 6456, 2005), para 3.3; CLR, *Modern Company Law for a Competitive Economy: A Strategic Framework* (1999), para 5.

[32] Committee on Corporate Governance, *Final Report*, para 1.17.

[33] On this, see the 2012 Kay Review, noted at 'General issues', p 261.

[34] In the context of s 172(1)(b), also see the power to make provision for employees on cessation or transfer of business (s 247): s 247(2) states that this latter power 'is exercisable notwithstanding the general duty imposed by s 172'.

[35] [1896] 2 Ch 743.

[36] On nominee directors, see E Boros, 'The Duties of Nominee and Multiple Directors?' (1989) 10 *Company*