Chapter 18: Remedies associated with missing trust property: actions in equity and the basis for liability

1) “It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable ... It is a case of hard-nosed property rights”. (Lord Browne-Wilkinson *Foskett v McKowen* [2000] 3 All E. R. 97, at 102).

Discuss the views that are being expressed in this passage, making an assessment of their significance in current legal thought on remedies available in the aftermath of a breach of trust.

2) ‘Rather than being the central flaw in the restitutionary analysis, the suggestion that tracing is a process of following value rather than property should be accorded greater significance rather than less. The process of identification is genuinely neutral as to any rights attaching to the assets into which the value in question can be traced. The pertinent time to ask what rights if any the claimant can actually assert is once the tracing exercise has been successfully completed’.

Discuss the views which are being expressed in this statement, explaining their significance in current legal thought on remedies available in the aftermath of a breach of trust.

Brief guidance notes:

Both these questions tie closely into the attention paid to actions in the Textbook chapter, and particularly those available to a beneficiary where trust property has been applied in breach of trust, and other claimants who have lost property in circumstances where equity is prepared to treat them as if they were a beneficiary in this situation. They both reflect the need to appreciate why this has been such a fast-moving area of law in recent years, and why being able to point to an understanding of the main parameters which are at play, and are influencing the direction of the law’s development in this difficult area, is still so important a decade on from *Foskett*. These questions both require a ‘core’ understanding of the centrality of principles of proprietary entitlement and also restitution and how each one operates, and the comparative merits of both which are expressed by judges in the leading case law (and by academics in the commentary upon the judicial decisions), and the rationale for the affirmation of proprietary entitlement in preference to principles of restitution evident in the decision in *Foskett* [2000].
3) Provide an overview of the liability which can be incurred by third party ‘strangers’ to a trust where a breach of trust has occurred, ensuring that explanation is given for both:

(a) the similarities and differences between ‘knowing receipt’ and ‘accessory liability’, and

(b) the current ‘tests’ which appear to subsist for both species of liability to arise, indicating whether these standards should be considered to be appropriate.

**Brief guidance notes:**

This question is focused on liability which can be incurred by third party “strangers” to a trust where a breach of trust has occurred, and which (unlike proprietary actions) do not depend upon receipt and retention of wrongly applied trust property. It is a discussion of how constructive trusteeship arises in the context of breach of trust (with some introduction to this including different types of liability which can be incurred by trustees themselves, and also others who are in possession of the property in this context by way of comparison and contrast). A response must then consider the similarities and differences between “knowing receipt” and “dishonest assistance”, notably how the notion of “constructive trusteeship” is approached in each one, and the way in which the latter can only ever be a personal action against an accessory, because this species of liability does not require that trust property ever comes into his hands. Moving on from this, reference must then be made to the lines of case law which have grown up around each species as developed from their ‘shared’ origins in *Baden Delvaux* [1983] to become shaped by *Royal Brunei v Tan* [1995] in the case of accessory liability and by *BCCI (Overseas) Ltd v Akindele* [2000] in relation to knowing receipt. There must then be reference to current thought on their application: *Twinsectra v Yardley* [2002]; *Barlow Clowes v Eurotrust* [2006], *Abou-Rahmah*, and now *Starglade Properties v Nash* [2009-10] in relation to accessory liability; and *Criterion Properties plc v Stratford UK Properties LLC* [2003], *City Index Ltd v Gawler* [2007] and also *Starglade Properties v Nash* [2009] (noting also the significance of *Re Montagu’s ST* [1987] for the judgment in *Akindele* itself). Views must then be formed on the appropriateness of these tests, with an interesting end point being *Twinsectra* [2002], which is already flagged as a key assistance case. Here observations were also made on knowing receipt *obiter* by Lord Millett who suggested an alternative approach which is receipt based rather than fault based. Thus rather than being “knowing receipt” by a third party (through the imposition of a
constructive trust) liability for receipt could be based on restitutionary principles arising from unjust enrichment.

4) ‘It must be the case that a remedy in equity subsists against those who as third parties assist a breach of trust committed by a trustee, or a wrong which equity regards as equivalent with this. From this it follows that the only question is how this liability is defined. Following evolution and revision in earlier authorities, the current formulation of ‘accessorial liability’ now provides the most appropriate formulation of third party assistance liability, and this is precisely where the law should be pitched’.

Discuss the views which are being expressed in this statement, making an assessment of their validity.

**Brief guidance notes:**

This question like question 3 is focused on liability which can be incurred by third party “strangers” to a trust where a breach of trust has occurred, and has as its starting point the concept of breach of trust, and the implications of a breach of trust for a trustee who has committed it, and thus an introduction must reflect this (with some reference to different types of liability which can be incurred by trustees themselves and others in this context by way of comparison and contrast). This is the first step to explaining how those who are third parties can also be liable following a breach even if trust property never actually comes into their possession. This sets the scene for the question’s primary focus on liability arising from assistance given by a third party to a trustee’s breach of trust, which then requires extensive discussion on the law’s current position and how it has evolved. This requires reflection upon on how effective and appropriate the current formulation of accessory liability actually is, in the light of the key development which occurred in *Royal Brunei v Tan* [1995], and indicating the criticism which has been attracted subsequently by key authorities *Twinsectra v Yardley* [2002]; *Barlow Clowes v Eurotrust* [2006] and *Abou Rahmah* [2006], with the most recent position coming from the Court of Appeal decision in *Starglade Properties v Nash* [2010].

5) ‘The current approach to liability for knowing receipt as manifested in the authority of *BCCI (Overseas) Ltd v Akindele* [2000] should be refocused so that it is not dependent upon finding fault on the part of a recipient of wrongfully applied trust property.

Discuss the views which are being expressed in this statement, indicating whether you agree, and providing support for your assessment.
Brief guidance notes:

Like questions 3 and 4, this question is focused on the mechanisms for those who are strangers to a trust to incur ‘personal’ liability for its breach. Thus there must be some introduction made to the concept of breach of trust, and the implications of a breach of trust, and why it is important that a range of personal and proprietary actions are potentially available to a beneficiary following the wrongful application of trust property where a breach of trust has occurred. This sets the scene for the question’s primary focus on liability arising from the receipt of wrongfully applied trust property, which is not dependent upon the continuing possession of the property. This question is specifically focused on liability which arises where receipt is not ‘innocent’ (with some reference to Re Diplock [1948] for the purposes of contrast) currently manifested as “knowing receipt”. This then requires extensive consideration of the current position manifested in Akindele and how it has evolved, commenting on how effective and appropriate the current approach is. This requires an assessment of the background to Akindele as well as subsequent developments, and the significance for Akindele itself of the approach to unconscionability taken in Re Montagu’s ST [1987] described in Akindele as a ‘seminal case’. Part of this assessment must be views expressed obiter by Lord Millett in the key (dishonest assistance) case Twinsectra [2002]. Here Lord Millett suggested an alternative model for wrongful receipt of trust property based on restitutionary principles rather than a basis in fault (currently manifested in ‘knowing’ requirement, and achieved through imposition of a constructive trust). This would be premised on the defendant being unjustly enriched at the beneficiary’s expense, and be subject to a ‘change of position’ defence already evident in the common law action for money had and received. Framing the discussion in such a way will pave the way for the opportunity to express views on the desirability (or otherwise) of such a development.