Fiduciary Accessories

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There is a substantive distinction between accessories who do, and those who do not, undertake to serve the beneficiaries of a fiduciary function. Where the access of accessories to beneficiary assets is limited, they are directly accountable as fiduciaries to the beneficiaries. Today that distinction is not widely understood. Many seem to assume that the accountability of accessories is defined exclusively by the law of knowing (dishonest) assistance. Understanding the distinction should clarify the nature of both forms of accountability.

I Introduction

Fiduciaries often contract with others (eg employees, directors, solicitors) in order to acquire assistance in performing aspects of their undertakings to their beneficiaries.[1] Those assistants may participate in the breaches of their fiduciary employers, or they may independently exploit the value of assets linked to the function of their employer.[2] The liability principles that apply when that happens are not clearly understood. Specifically, not everyone understands that assistants engaged in serving particular beneficiaries for their employers are themselves accountable *as fiduciaries* directly to the *beneficiaries*[3] (rather than only for

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1 It is common today for judges and lawyers to describe a 'fiduciary' as one who undertakes to act in the interest of another. While that is proper, it does not specify the attendant duty. By itself it may lead to the misconception that the 'fiduciary' *duty* of a fiduciary is to act in the interest of the beneficiary. That would be to confuse the initiation of the duty with its content. The only fiduciary duty is to avoid compromising an other-regarding function with unauthorised conflicts or benefits. See R Flannigan, 'Compound Fiduciary Duty' (2017) 23 *Trusts & Trustees* 794.

2 For linguistic economy I will regularly refer to 'beneficiary assets' rather than to 'the value of assets linked to the function of their employer'. The latter phrase, however, is the more accurate one. It is not necessary that beneficiaries have a formal alienable ownership right in the assets that are exploited. Beneficiaries may, for example, have only a discretionary, contingent or defeasible interest in assets. For fiduciary accountability, one needs only a limited access to beneficiary assets (through authority, proximity, influence, etc).

3 In the past I have myself wrongly assumed the opposed view. For example, I assumed that only universities, and not their instructor employees, were directly accountable as fiduciaries to students for the limited access they have to student assets (primarily confidential information). See R Flannigan, 'Fiduciary Mechanics' (2008) 14 *Candian Labour & Employment Law Journal* 25, 37 n 27. I made that assumption without first critically examining the case law. As will appear, having now completed my own assessment of the jurisprudence, I have adjusted my understanding.

knowing (dishonest) assistance).[4] I provide the explanation for that conclusion. I first examine the matter in terms of principle. I show that the accountability arises because assistants acquire only a limited access to beneficiary assets. Assistants are to be distinguished from other actors who interact with fiduciary employers but who do not undertake to serve the beneficiaries.[5] I then investigate the development of the English jurisprudence. The English cases, being the original authorities, are sufficient to elucidate the distinction, and there is no need to assess the case law of other jurisdictions. The relevance for all jurisdictions of the initial explanation of principle will be obvious. The subsequent discussion of the English cases will illuminate the nature of the distinction and suggest that the frequent failure to comprehend the distinction has hobbled the development of both the law of fiduciary accountability and the law of knowing assistance.

I will describe the parties to the initial fiduciary relation as the fiduciary and the beneficiary (the latter being the beneficiary of the undertaking, and the

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4 There are historical and jurisdictional differences as to whether the assistance must be knowing or dishonest. I shall use ‘knowing assistance’ throughout without intending to address that controversy.

5 Other commentators do not see the distinction. They suppose other lines of demarcation. Paul Finn, for example, discussed the matter at two points in his 1977 book. See P Finn, *Fiduciary Obligations* (Law Book Company, 1977) [411]–[414], [469]. He did not think the cases gave real guidance, and concluded that the ‘only working hypothesis which can be advanced’ was that an assistant (agent, employee or a person in a ‘chain relationship’) must knowingly be employed in ‘substantial performance’ of the undertaking of the fiduciary. It should be or will become apparent that substantial performance is a narrower basis for accountability than limited access. In a subsequent essay on ‘The Liability of Third Parties for Knowing Receipt or Assistance’ (in Donovan W M Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) ch 10) Finn did not develop, or mention, his working hypothesis. Compare Sarah Worthington, who would classify as a fiduciary *anyone* who assisted a fiduciary breach. See S Worthington, ‘Exposing Third Party Liability in Equity: Lessons from the Limitation Rules’ in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) ch 14. She disagrees (at 342) with what she perceives to be the ‘overwhelming view of the courts’ that dishonest assistants are not fiduciaries. In her view (at 342–3) there ‘seems to be nothing material dividing [dishonest assistants from fiduciaries] and the parallels between them are powerful’. Consider her first ‘parallel’, that both are required to disgorge gains. That does not tell us *why* either class of actor must disgorge. She introduces the point by saying that: ‘The distinguishing characteristic of fiduciaries is the legal insistence on self-denial.’ But the legal insistence on self-denial is the *content* of the duty that is *imposed only once* the ‘distinguishing characteristic’ is present (that characteristic being a physical undertaking to serve another for a defined purpose). It may be noted parenthetically that the same observation applies to the incoherent statement in David Hayton et al, *Law Relating to Trusts and Trustees* (LexisNexis, 19th ed, 2016) [1.52] that ‘[i]t is the existence of the proscriptive fiduciary obligations that creates the fiduciary relationship leading to the obligee being termed a fiduciary’. Consider lastly Jamie Glister, who exclusively addressed the position of corporate accessories, and asserted that courts impose fiduciary accountability on corporate accessories where the corporate veil may be pierced. See Jamie Glister, ‘Equitable Liability of Corporate Trustees’ in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) ch 12.

fiduciary duty, of the fiduciary). I will describe assistants as assistants, or as may be convenient, by their nominate characterisation (eg agent, solicitor).

II Accountability In Principle

It appears to be assumed by some judges and commentators that anyone who participates in some manner in a breach of duty by a fiduciary will not themselves be liable as a fiduciary *to the beneficiary* of the fiduciary undertaking, but instead may be liable *to the beneficiary* for knowing assistance. Consider for example a corporation serving as a trustee. While the corporation itself clearly is accountable as a fiduciary to the beneficiary, it may be thought that the directors of the corporation and the solicitors advising the corporation are not. That assumption usually may be attributed to the 1874 decision of the English Court of Appeal in *Barnes v Addy*.[6] The case, however, is problematic because the court failed to identify a critical distinction. Some persons are engaged by fiduciaries as assistants to perform (or support) aspects of the fiduciary undertaking (eg employees, solicitors). Other persons interact with fiduciaries as parties to transactions that occur as part of performance. Such persons include third parties who purchase beneficiary assets from fiduciaries desiring to sell and bankers who accept beneficiary assets on deposit from fiduciaries. Those other classes of persons figured prominently in the jurisprudence prior to *Barnes*. The distinction that *Barnes* failed to make between assistants and those others is that the latter do not normally, for the main purpose of their interaction, undertake to act in the interest of either the fiduciary or the beneficiary. The distinction matters because when *assistants* do give that undertaking to the fiduciary *and* the beneficiary, they become accountable as fiduciaries to *both* and, unlike liability for knowing assistance, they are *strictly* liable.[7] For them, the doctrine of knowing assistance would be a weaker redundant form of accountability.

I shall first explain the distinction and then how it was masked by the abstract statement of principle in *Barnes*. My initial task is to explain why assistants to fiduciaries are themselves properly characterised as fiduciaries to the beneficiaries.

Consider initially the conventional basis for fiduciary accountability.[8] Courts have always been concerned with the opportunistic impulses of those who undertake to serve others. They therefore crafted the form of regulation that

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6 (1874) LR 9 Ch App 244 ('*Barnes*').

7 See the description of aspects of the strict nature of fiduciary accountability in *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [96]–[119].

8 See generally R Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375.

today we describe as *fiduciary* accountability. Having recognised the opportunism mischief, they identified arrangements where that mischief was latent. Over time they concluded that certain actors were subject to fiduciary accountability on a status basis. Those actors included trustees, agents, employees, solicitors and partners. All of those arrangements or relations, in their usual form, were understood to involve one actor expressly or implicitly physically undertaking to act in service to another for a limited or other-regarding purpose.[9] In the course of such service an actor invariably acquires access to the value of the assets intended to benefit the beneficiary of the undertaking. That limited access alone creates the latent risk or vulnerability that the actor might take unauthorised personal advantage of the assets. The risk does not exist without the access. The courts addressed that risk by formally attaching legal accountability to the physical undertaking. They held the actor to the actual and incidental purposes of the undertaking, and denied any scope for other purposes (which would be unauthorised, and therefore self-regarding, purposes). The undertaking potentially would be compromised by any prospect of unauthorised self-regard.[10] The limited access of the actor therefore became the trigger or basis for the imposition of a duty to forgo unauthorised conflicts or benefits.[11] Accordingly, undertaking a status fiduciary function activates fiduciary accountability. That accountability then only crystallises into liability upon the fiduciary entertaining an unauthorised conflict or benefit.[12] The courts simultaneously recognised that

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9 See the discussion of the undertaking requirement in Flannigan (n 8) and R Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (2010) 36 *Advocates' Quarterly* 431, 439–46. The requirement of a physical undertaking (the assumption of a limited access) is express or implicit throughout the record of the conventional jurisprudence. Of the cases discussed herein, see, eg, *Morgan v Stephens* (1861) 3 Giff 226, 236; 66 ER 392, 397 ('get into his hands the assets of a testator, either through the authority, negligence or confidence of [the fiduciary]'); *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, 643 ('the proposition that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it').

10 For a more detailed description of the justification for limited access accountability, see Flannigan (n 8) 376–85.

11 Personal conflicts and benefits represent the full range of potential opportunistic exploitation. Personal *conflicts* include conflicts of duty and duty. Elevating one duty over another is to act on a personal preference. Personal *benefits* include benefits arranged for third parties that the fiduciary wishes to favour.

12 In a 2018 presentation published in this journal, Lionel Smith sought to convert an Australian audience to the view that fiduciary accountability extends beyond the proscription on unauthorised conflicts and benefits. See L Smith, 'Prescriptive Fiduciary Duties' (2018) 37 *University of Queensland Law Journal* 261. I have elsewhere critiqued Smith's arguments respecting fiduciary accountability. See Flannigan (n 8) 411–15 and R Flannigan, 'Contesting Public Service Fiduciary Accountability' (2016) 36 *University of Queensland Law Journal* 7, 8–9 n 8. In my view his understanding of the conventional jurisprudence is thin and his reasoning porous, and that was again illustrated in his presentation. The deficiencies I find with his new analysis include his failure to address his previous commitment to a 'motive' theory, his denial that fiduciary accountability is created and shaped by the undertaking of the fiduciary, his conflation of nominate and fiduciary

the status categories did not exhaust the circumstances where objectionable opportunism was latent, and they therefore generalised their regulation to apply to all situational or fact-based limited access arrangements. Initially they spoke of relations of 'trust and confidence', but that terminology (though still used in some courts) has generally been replaced by 'fiduciary' terminology.[13] Today courts most often say that a fact-based fiduciary relation arises where one actor undertakes to act in the interest of another, which is to say that the assumption of a limited access is the test for fiduciary accountability.

An undertaking to serve (the assumption of a limited access) is the sole necessary condition for fiduciary accountability. Strict fiduciary accountability is not imposed on actors indifferently simply to produce 'equitable' outcomes.

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accountability (asserting that the duty to disclose and the best interest duty are fiduciary duties), his denial that public policy is the source of fiduciary accountability (though he qualifies himself in a footnote), his assertion that there is a justified *fiduciary* duty of *care* distinct from the general tort law duty of care, his use of the notion that there are 'fiduciary powers', his inapt examples, his rhetorical questions parading as analysis, and his narrowly shaped effort to dissociate undue influence and breach of confidence from fiduciary accountability. To understand many of the above objections to his analysis, see R Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 35–61 ('Boundaries'). Ultimately Smith's analysis fails because he does not accept the established principle that fiduciary accountability regulates only the mischief of opportunism. Once one understands that distinct mischiefs afflict undertakings of service (eg want of authority, want of care, want of loyalty), it becomes apparent that the regulation of each of those distinct mischiefs requires distinct regulation. Identifying all of the regulation that addresses those distinct mischiefs as 'fiduciary' regulation is a misleading revision of the conventional taxonomy, where the function of fiduciary accountability is understood to be to control the opportunism of those who act for others (and not to control *every* kind of failure by those actors).

I pause here to anticipate the complaint that my assessment of the work of Smith (and others) is rather too blunt or aggressive. A first observation is that often the sensation of aggressive tone is due more to the weakness of the critiqued material than to an indelicate hand. In other cases the complaint is but an elliptical means to seek to diminish the substance or weight of critical analysis. Beyond that it should be understood that commentators often influence the development of the law. That influence has over time contributed to the fogging of principle in various respects in different jurisdictions. It is part of my professional function to challenge suppositions, research, logic and sometimes agenda, and to do so in the clearest terms. My objective is to arrest influence that potentially will maintain or add to the distortion of sound principle. I expect that others will contribute to that function by openly identifying any ostensible deficiencies in my own work (rather than doing so anonymously, and thereby avoiding rebuttal, when serving as referees for journals).

13 The use of the 'trust and confidence' formulation as the test for fiduciary accountability ought to be discarded. Apart from the seemingly pointless redundancy of the 'trust' and 'confidence' terms, the formulation is seriously misleading to lay actors who, while intuitively conversant with the regulation, generally are formally under-informed or misinformed about their own fiduciary accountability and that of persons with whom they deal regularly. Members of the public likely will take the phrase to mean actual subjective trust, and thereby will underestimate their exposure to liability and their potential claims against others. Recognise that fiduciary accountability does not depend on the perceptions or suppositions (expectations) of beneficiaries. It depends on the actions of those alleged to be fiduciaries.

Rather, the accountability formalises the autonomous physical assumption of a limited access.

The necessary undertaking, it must be understood, is not to explicitly 'be loyal'.[14] Nor is it an undertaking to explicitly undertake any sort of duty.[15] The relevant undertaking, again, is merely to physically undertake an other-

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[14] The requisite undertaking sometimes is described inconsistently by judges, even within individual judgments. For example, in *Galambos v Perez*, 2009 SCC 48, Cromwell J stated (at [66]) that it was 'fundamental' that there be an undertaking 'to act in the best interests of the other party'. A few paragraphs later (at [69]) he characterised the undertaking as one of loyalty: 'The critical aspect ... is an undertaking of loyalty: the fiduciary undertakes to act in the best interests of the other party.' A number of paragraphs after that (at [75]) he stated that 'what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her'. There here seems to be a progression from requiring a physical undertaking (of an other-regarding task) to a legal undertaking (of a *duty* of loyalty). Conventional authority requires only proof that an actor undertook to serve another. Establishing that physical undertaking then prompts the default imposition of fiduciary accountability (the duty to forgo unauthorised conflicts or benefits). Recognise that the duty of loyalty is not 'reposed on him or her' *until* the undertaking is proved. Commentators are also inconsistent. See J Penner, *The Law of Trusts* (Oxford University Press, 10th ed, 2016). Penner initially states (at [2.18]) that a trustee '*agrees* to undertake the trust, so his obligations are voluntarily undertaken'. That shorthand (linking agreement directly to obligation) appears to contemplate an initial physical undertaking to serve (as a trustee). A few paragraphs later, however, Penner states (at [2.21]) that a fiduciary relation exists where a person agrees 'to undertake *legal* powers to affect the *legal* position — ie *the legal right, duties, or powers* — of another'. That wrongly suggests that the person must explicitly undertake the *duty* of a fiduciary in order to be found to be a fiduciary.

[15] James (now Justice) Edelman took the view in a 2010 article that an undertaking of 'responsibility' (which he did not clearly define) is necessary for fiduciary accountability. See J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302. Apart from several other concerns with his analysis (eg he denies that parent status per se attracts fiduciary accountability, he appears to accept the 'reasonable expectation' notion of fiduciary accountability, and he assumes that duties of best interest and 'good faith' are independent 'fiduciary' duties), Edelman rejects the conventional view that fiduciary accountability is imposed by law. He does not appear to accept that the undertaking requirement is for a physical or factual undertaking that triggers a consequential imposition (by law) of a duty to forgo unauthorised conflicts or benefits. Edelman returned to his undertaking element in a subsequent article. See J Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7 *Journal of Equity* 128. He again generally speaks of an undertaking without specifying the nature of that undertaking, although he refers to others who describe the undertaking as being one to act in the interest of another (ie undertaking an other-regarding access). Significantly, he actually denied (at 129) that it was necessary 'for the purposes of [his] article to consider the issue of when an undertaking becomes a fiduciary undertaking'. Apart from that, he appears to misconceive the meaning of the various judicial statements that he references (at 131–2). He seems not to appreciate that the statements only express the view that, while conventional fiduciary accountability is implied by law, it may be varied or shaped *ex ante* or *ex post* by the fully informed agreement of the appropriate party. That is, one initially determines whether the actions of an actor constitute an undertaking to serve another. If so, fiduciary accountability becomes applicable on a default basis. At that point, one must assess whether that default content effectively has been varied through consent. Edelman sought to buttress his thesis in various ways in a third article, but his reasoning is elusive. See J Edelman, 'The Role of Status in the Law of Obligations' in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) ch 1.

regarding task or function. The law then deems that assumption or creation of a limited access arrangement to be an assumption of (or a submission to) the generic default fiduciary regulation fashioned by the community. There need not be an explicit expression of service. Assuming a status that is recognised as a fiduciary status constitutes an implicit undertaking of service, whether or not the actor actually understands or acknowledges the fact. The implicit undertaking of service to another attracts the proscription on personal advantage. We may then say in shorthand (as I sometimes do) that a physical undertaking to serve another becomes legally an undertaking to not exploit beneficiary assets (because of the communal imposition of default fiduciary accountability).[16]

The point that the undertaking is implicit in the assumption of a recognised fiduciary status perhaps requires emphasis. The law has fashioned idiosyncratic arrays of rules (usually default rules) for various kinds of nominate relations. Those discrete arrays include for example the law of agency, employment and partnership. The law has similarly attached generic fiduciary accountability to those nominate relations.[17] Thus, where an actor physically chooses (undertakes) to perform tasks or functions pursuant to the direction of another, the idiosyncratic law of employment or agency will apply (depending on whether the task is internal or involves interaction with third parties). And actors who physically choose to carry on business in common with a view to profit will attract the idiosyncratic rule array defined by the law of partnership. At the same time, those physical undertakings attract the generic law of fiduciary accountability because each is a limited access arrangement. Accordingly, physically undertaking certain arrangements is to implicitly agree to the idiosyncratic nominate regulation and the generic fiduciary regulation that the law previously has crafted to govern those arrangements. In these cases the undertaking and the attendant fiduciary accountability is proved by proving the status of the actor.

Outside of the status fiduciary relations, the absence of status accountability means that proof will be required of an actual (express or implied) undertaking of service, rather than merely proof of a recognised status. For example, in the case of the spouse–spouse relation (apparently currently not regarded as a mutual status fiduciary relation), there frequently will be instances where one spouse expressly or implicitly acquires only a limited access to the assets of the other (eg property, information). Rather than proving spouse status, it will be necessary to

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[16] See the shorthand of Lord Eldon in *Ex parte Lacey* (1802) 6 Ves Jun 625, 626; 31 ER 1228, 1228: 'A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.' The triggering undertaking is the undertaking 'to sell and manage for others,' which causes the imposition of the duty 'not to manage for the benefit and advantage of himself.'

[17] On the distinction between nominate and fiduciary accountability, see Flannigan, 'Boundaries' (n 12) 40–2.

prove an actual undertaking (express or implied) to act in service to the other. Another example is the basic corporation–shareholder relation. Corporations (and their directors) are not fiduciaries to shareholders as a matter of status (because their access to the share capital provided by shareholders is open rather than limited),[18] but corporations (or their directors) may separately undertake to serve individual shareholders on a limited access basis. To make the case for accountability, the shareholder will have to prove an actual undertaking. Without an actual other-regarding undertaking, there is no evident foundation for the communal imposition of the accountability.[19]

Assistants of fiduciaries fit into that framework in the conventional way. Assistants employed to perform other-regarding services are, in terms of their ability to exploit their particular access to beneficiary assets, in generally the same position as their fiduciary employers.[20] Both fiduciaries and assistants have a de facto ability to divert the value of beneficiary assets to themselves or their associates. For example, a fiduciary might, through an access to an authority granted for the purposes of the undertaking, cause a beneficiary to enter into a contract with another party in which the fiduciary is economically interested. An employee of the fiduciary might independently use confidential information to

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[18] See R Flannigan, 'Shareholder Fiduciary Accountability' [2014] *Journal of Business Law* 1.

[19] Sarah Worthington has argued that the undertaking requirement 'must be flawed' because Paul Finn would not give effect to blanket denials of fiduciary responsibility. See S Worthington, 'Fiduciaries: Following Finn' in T Bonyhady (ed), *Finn's Law: An Australian Judge* (Federation Press, 2016) ch 2, 63. However, as I have explained, blanket exclusions of fiduciary accountability can be justified. See Flannigan (n 8) 390–4. Further, it must be evident that the undertaking is necessary to create the accountability before that accountability is then dismissed by an ad hoc supervening limitation on the autonomy of the parties involved to exclude what would otherwise be fiduciary accountability. Worthington elsewhere has asserted that an undertaking 'to act in a loyal manner' has 'never been' the test for fiduciary accountability. See Worthington (n 5) 341. That is correct in the sense that one need not explicitly undertake to *be loyal*. Loyalty (forgoing personal conflicts and benefits) is the duty imposed only once there has been the relevant physical undertaking, which is to undertake (expressly or implicitly) to serve another for a defined purpose. Worthington seems partially to agree with that limited access accountability on her view (at 341) that actors become fiduciaries when they 'assume the care or management of property known to belong to others'. Beyond that, there are multiple separate concerns with her analysis in the above two essays. In her 2016 chapter (above), for example, she lauds (but mostly rejects) the analysis in Finn's 1977 book. Her laudation itself is misinformed. She wrongly asserts (at 35) that prior to Finn's book judges had 'provided little guidance on the relevant rules' and that 'there was neither detail nor distinction in the law on fiduciaries'. In fact the prior jurisprudence was relatively clear, as will become apparent if one critically reviews its historical development and understands the missteps. Finn's book, with its 16 duties that 'individually define their own' fiduciary (Finn (n 5) [3]), actually contributed confusion that, along with the linguistic and substantive confusions introduced by others, dimmed the modern clarity of the regulation. In the corporate context, for example, see R Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449. See also Flannigan (n 8) 399–429.

[20] Their ability to exploit may be less capacious where their access is asset specific, or more capacious where they have a wider operational access than their fiduciary employer.

make personal trades on the stock exchange. Those are separate breaches that result in distinct personal gains respectively. That is, the employee has an access that may be exploited independently (unilaterally or jointly) for personal gain.

Further, the detection concern that animates the strict character of fiduciary accountability is fully applicable to assistants.[21] Because of their assistant roles, they have a facility to serve themselves that others do not.[22] They acquire an access to asset value that may be exploited in ways that are difficult or impossible to detect. It frequently will not be possible to determine whether subjectively their work actually was compromised by anticipated personal benefits or conflicts of interest or duty.

Most assistants engaged by fiduciary employers are fiduciaries to those employers (because they undertake an other-regarding function). Now recognise that when those employers are fiduciaries to others, the assets to which assistants gain access include assets that are intended to benefit the beneficiaries of the fiduciary functions of their employers. That access of assistants to beneficiary assets necessarily is limited in the same way as the access of their employers. The assistants implicitly match the undertaking of their employers in assuming an other-regarding access. Because their access is defined by that limited purpose undertaking, we impose on them the default proscription on unauthorised conflicts or benefits.

Assistants understand this intuitively, though they may find it convenient to deny it *ex post*. The access of an assistant normally is a derivative access, being acquired through the access acquired by the fiduciary (whether or not there is any issue of improper delegation). In most cases that derivative access will be authorised by the relevant party (the settlor of a trust, the principal of an agent). The authorising party granting access *to the fiduciary* understands that assistants may be employed by the fiduciary to actually perform the work of the undertaking, and that other assistants may incidentally gain access to beneficiary assets because of their function or their proximity. The authorising party thus *authorises the fiduciary to authorise* direct or incidental access *to the assistants* of the fiduciary. It is the conjunctive understanding of the *authorising party* that the access of an assistant is limited in the identical way it is limited for the fiduciary — it is acquired for the limited purpose of the task or function assumed. Consequently, in terms of the *fiduciary* regulation crafted by the courts, that access to beneficiary assets cannot be used for the unauthorised personal advantage of either the fiduciary or the assistant, or the fiduciary and assistant jointly.

The understanding *of the assistant* as to the nature of the access patently is the same. The access acquired to beneficiary assets is fenced to beneficiary

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21 R Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209.

22 See the discussion ibid 210–13.

advantage. The assistant, like the fiduciary, undertakes to act in the interest of the beneficiary (ie undertakes an other-regarding function). Most assistants know they are being engaged to participate in some manner in the performance of the fiduciary function. They know their engagement is other-regarding in the dual or linked sense that their service is intended to benefit the fiduciary incipiently and the beneficiary ultimately. That makes them, on a conventional analysis, fiduciaries to the beneficiary. Having undertaken to serve the beneficiary, we (the community) require that their engagement not be compromised by unauthorised conflicts or benefits. The beneficiary therefore is entitled to take action directly against assistants personally when those assistants compromise their undertaking to serve. That, it will be appreciated, is not because the access of an assistant is *derived* from the access of the fiduciary. Rather, the animating principle is that those who undertake to serve others are accountable to those others when they choose to serve themselves.

It must be added that it is not necessary that a party authorising a fiduciary actually authorise the access acquired by an assistant, or even understand that the fiduciary will or may employ assistants. Nor is it necessary that an assistant actually understand that particular assets are beneficiary assets. The law assigns fiduciary accountability to those who in fact do, or purport to, perform an other-regarding task or function.[23]

It must also be understood that, while the access of an assistant initially is derivative, the wrong is not. For fiduciary accountability generally, a breach occurs when an actor entertains an unauthorised personal conflict or benefit. No other element is required to establish liability. The fact of the conflict or profit is enough.[24] Thus, when *assistants* entertain direct or collateral conflicts or benefits in the course of their engagement in or with the other-regarding task or function, they separately or independently (sometimes jointly) fully satisfy the terms of the accountability. They *personally*, as opposed to derivatively, commit the fiduciary wrong of compromising their performance. Their access was acquired derivatively, but their wrong was primary or personal. Their liability does not depend on having knowledge of a breach by the fiduciary, or even that there was a breach by the fiduciary. They are directly personally liable to the beneficiary on conventional principle.

The necessity of fiduciary accountability for assistants is perhaps best illustrated initially by the case of an assistant who directly exploits the access acquired derivatively through the fiduciary without any involvement (or impetus) on the part of the fiduciary. An assistant may exploit beneficiary assets by, for example, using equipment for personal ends, accepting a bribe to affect performance in some way, taking a business opportunity, selling confidential

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23 An obvious example is the trustee *de son tort*. Consider also Finn (n 5) [414].

24 *Parker v McKenna* (1874) LR 10 Ch App 96, 118; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, 386.

information or using confidential information in competition with beneficiary interests. The assistant here is not knowingly assisting in a breach of duty by the fiduciary. The opportunism is confined to the assistant. The direct fiduciary accountability of the assistant to the beneficiary cannot be doubted. Compare that to instances where from the outset the fiduciary and assistant act jointly to extract separate personal gains from the beneficiary assets. The misconduct of the assistant is indistinguishable from that in the first case and, consequently, there is no basis for saying that now the assistant is no longer accountable as a fiduciary, and is liable only for knowing assistance. Next compare instances where an otherwise innocent assistant becomes aware that the proposed actions of the fiduciary will constitute a fiduciary breach. If the assistant then chooses to facilitate that opportunism, to be a 'team player' or to otherwise please the employer, that again cannot be distinguished from the preceding cases in terms of the nature of the misconduct. The assistant has again chosen to exploit beneficiary assets.

Recognise that when an assistant independently exploits *beneficiary assets* the effects are different for the beneficiary and the fiduciary.[25] The exploitation of beneficiary assets directly by an assistant affects beneficiary welfare. That is the primary wrong, and it is directed by the assistant primarily at the beneficiary. The fiduciary may separately suffer secondary effects from the exploitation of beneficiary assets by the assistant (loss of work, damage to reputation), but importantly, may not be inclined to take action against the assistant. It may be that the fiduciary is not significantly affected, does not want to draw attention to its own failure to control the opportunism of its assistants,[26] or values the assistant more than the beneficiary. It will then not pursue the assistant. To that extent, the incentive for the assistant to behave is distorted. The beneficiary may take action against the fiduciary for the effects caused by the conduct of an assistant, but that will be of no avail where the fiduciary is not legally accountable for the actions of its assistants,[27] is insolvent or designed from the outset to be a shell.

The limited access of assistants is enough, on conventional principle, to establish the direct fiduciary accountability of assistants to beneficiaries. It does

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25 Exploiting beneficiary assets is a singular conduct that affects the beneficiary asset pool and the fiduciary asset pool differently. The effects are simultaneous but distinct. It is not at all radical to conclude that a singular conduct is, or ought to be, actionable by or against multiple parties (the beneficiary and fiduciary against the assistant, the beneficiary against both the fiduciary and the assistant). A want of loyalty must be actionable by a beneficiary against every person who has assumed a limited access to the beneficiary assets.

26 Employers often have considerable incentive, for reputational reasons, to not pursue workers for their misdeeds. Pursuing workers who take bribes or trade on inside information highlights firm deficiencies or malpractices.

27 Fiduciaries are not accountable for all misdeeds of their assistants. See *Speight v Gaunt* (1883) 22 Ch D 727.

not matter in a conventional analysis how an actor acquired a limited access. It only matters that the access is limited. That said, it should be appreciated that there is considerable collateral support for direct accountability. First, there is the law of knowing assistance itself. That accountability is direct. The assistant is personally liable to the beneficiary. The judicial acceptance of that personal liability confirms that there is no conceptual objection to recognising direct accountability between an assistant and beneficiary. Secondly, consider the negligence liability of assistants. They are personally responsible to those who foreseeably are injured by their actions. It does not matter that their access to their victim may have originated in the relation formed between the victim and their employer. Accordingly, there being direct liability for a want of care, it would be incongruous if there were no liability for the more septic mischief of a want of loyalty.[28] Thirdly, the beneficiary is a third-party beneficiary of the service contract between the fiduciary and assistant to the extent of the undertaking of both parties to that contract to not exploit beneficiary assets.[29] Third party beneficiaries are today, in most jurisdictions, entitled to directly enforce identified benefits. Fourthly, under agency law, agents who exceed their authority are liable directly to affected third parties for breach of warranty of authority. An assistant who exploits beneficiary assets acts without authority, and would be liable for breach of warranty of authority (because fiduciary breaches are not authorised). That independent liability could, for the purposes of fiduciary regulation, be cast as an action for breach of warranty of *loyalty*. Fifthly, where a fiduciary and assistant act jointly to exploit beneficiary assets, they may be found to be partners in that effort, and consequently to be jointly and severally liable for the opportunistic gain. In short, the neighboring jurisprudence is robust in support of recognising the direct fiduciary accountability of assistants to beneficiaries.

The accountability is fact-based. It is in that sense correct to say that the mere status of assistant to a fiduciary (whatever particular nominate status that might be) (eg agent, employee, solicitor) does not create fiduciary accountability *to the beneficiary*. Some assistants may be engaged in wholly separate aspects of the broader business of the fiduciary and never have de facto direct or incidental access to the beneficiary assets of a particular fiduciary relation of their employer. Only the assistants that have access should be liable, and only for unauthorised conflicts or benefits that are associated (however remotely) with the assets or the undertaking. Assistants will have such access when they are authorised by the

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[28] In *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, 633, Fletcher Moulton LJ noted that a beneficiary could sue the agent for negligence, but regarded that as 'a very poor substitute for the protection afforded by the principle of equity that no one may allow himself to be in a position in which his interest conflicts with his duty'.

[29] R Flannigan, 'Privity: The End of an Era (Error)' (1987) 103 *Law Quarterly Review* 564.

fiduciary to be directly or indirectly involved in the fiduciary undertaking, or where they acquire de facto access through other means (eg proximity, influence).[30]

Appreciate further that recognition of the independent breach claims against an assistant by the beneficiary and the fiduciary will not produce a conflict between the fiduciary duty of the assistant to the beneficiary and the fiduciary duty of the assistant to the fiduciary. The content of the two duties is identical. The assistant must not exploit *beneficiary assets* so as to disadvantage either the beneficiary or the fiduciary.[31] Consequently the duties separately owed will never conflict, even though the two enforcement actions will yield unique remedies for different persons who suffer different injury from a singular exploitation.[32]

Consider in that regard a fiduciary exploiting beneficiary assets ostensibly for its benefit alone. Where the fiduciary does so, the specific exploitative acts may be performed or carried out by certain of its assistants. It may be that none of those assistants appear to have exploited their access. It may be thought that they simply are choosing to comply with instructions. That, however, would not be a proper response. Those assistants have a conflict of interest. Recognise that initially those assistants have a singular fiduciary accountability to both the fiduciary and the beneficiary. The duty of the assistants *to the fiduciary* dissolves, however, when the fiduciary uses the assistants to arrange or execute the exploitive acts. The fiduciary implicitly is consenting to what otherwise would be a breach of duty to *it* by its assistants exploiting beneficiary assets. But that still leaves assistants who participate in the exploitation in a conflicted state. They no longer have a duty to their fiduciary, but they still have a duty to the beneficiary. That continuing duty is in conflict with their *interest* in, for personal reasons (eg securing or advancing their employment prospects), following the instructions of their fiduciary employer. As far as the beneficiary is concerned, both the fiduciary and the assistant remain formally committed to *loyally* pursuing the best interest of the beneficiary. The beneficiary did not consent to either the fiduciary or the assistant entertaining unauthorised conflicts or benefits. Thus, those who

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30 Some assistants, though not directly engaged in the fiduciary work, will have access by proximity. They may be at premises, meetings or events where confidential information may be acquired. A solicitor at a law firm might, for example, troll the files of colleagues to collect confidential information to use for insider trading. See *Finkelstein v Ontario Securities Commission*, 2016 ONSC 7508.

31 There is no *fiduciary* duty to act in the best interest of either party (breach of the separate best interest duty does not have fiduciary liability consequences unless the actions of the fiduciary are self-regarding) and thus there can be no fiduciary breach when the interests of the fiduciary and the beneficiary are not congruent.

32 A difficulty that may be thought to arise concerns who might be entitled to any profits that an agent may be required to disgorge. On principle, because the agent exploited *beneficiary assets* (opportunities, information, equipment, etc), the beneficiary would have the primary entitlement. See *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11, 21, 22 (Stirling and Mathew LJJ).

'merely' comply with exploitive instructions breach their personal duty to the beneficiary. It will only be a stronger case of breach for those assistants who on behalf of the fiduciary actually initiate the exploitation that benefits the fiduciary. Accordingly, on a conventional analysis, assistants may be liable for breaching their fiduciary duty to the beneficiary even though they are not liable to the fiduciary for exploiting beneficiary assets.

I now turn to contrast the position of assistants with that of third parties who interact with fiduciaries in transactions or relations involving beneficiary assets. Consider the position of (1) a purchaser (not being an assistant) who purchases an asset with knowledge that the seller is acting in a fiduciary capacity and (2) a bank that maintains an account with knowledge that the funds in the account are beneficiary assets. As I noted earlier, these two actors (purchaser, bank) appeared regularly in the jurisprudence preceding *Barnes*.

A purchaser who knows of the fiduciary capacity of a seller normally does not undertake to act in the interest of either the fiduciary or the beneficiary. That is, the access of the purchaser is not a limited access. Subject to encumbrances, the seller is offering to sell open access, and the purchaser agrees to buy open access, to the asset. What is the position, however, if the purchaser has the further knowledge that the fiduciary is acting in breach of duty (a want of authority or a want of loyalty), or is intending to use the proceeds of the sale for unauthorised purposes? That further knowledge does not by itself implicitly raise or constitute an undertaking on the part of the purchaser to now begin to act in the interest of the beneficiary. The knowledge nevertheless does have a distinct legal consequence. If the purchaser proceeds with the sale, that action will constitute a knowing assistance by the purchaser in the breach committed by the fiduciary. The purchaser, however, will not be a fiduciary committing a fiduciary breach. Without an undertaking to serve (without a voluntary assumption of a limited access), there can be no fiduciary accountability.[33] Thus, while we (the community) impose a knowing assistance accountability on the purchaser, that is not fiduciary accountability. At no point did the purchaser do what is separately required by the community to attract that kind of accountability (ie purport to serve the welfare of the beneficiary).

The position is essentially the same in the bank example. The starting point is that banks are not status fiduciaries with respect to funds deposited with them (as opposed to, for example, confidential information conveyed to them).[34] Banks normally receive deposits on an open access basis. They *rent* the funds to use for their own purposes. The question that arises in the present context is whether

[33] An assumption of a limited access does not mean that an actor must have agreed formally to serve in some capacity. An actor might simply proceed voluntarily to perform an other-regarding function.

[34] *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002; *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461.

banks become fiduciaries when they know that funds in an account are beneficiary assets. On principle that does not change the nature of the access of the bank. The bank still accepts the funds on an open access basis (for its own purposes). Does anything change because the bank has the further knowledge that an instruction received from the fiduciary actually involves a breach of duty by the fiduciary? That further knowledge does not bring into being an undertaking to serve the beneficiary, and accordingly the position is unaltered. Again, however, the knowledge does have a separate impact. It establishes that the bank is knowingly assisting in a breach of duty.

There is, however, another side to the position of a bank. Banks receive and generate confidential information about their depositors and, accordingly, because their access to that information is limited (because it is confidential), they are accountable as fiduciaries to the fiduciary with respect to any personal exploitation of it.[35] When they have knowledge that the account is used in a fiduciary capacity, they thereby also gain confidential information about *the beneficiary*.[36] Their continuation of the account implicitly extends their undertaking of service to the beneficiary and renders them accountable as fiduciaries to the beneficiary for any conflicts or benefits associated with their access to the information. Thus, there are dimensions of banking that are regulated by the availability of direct actions by beneficiaries, whether or not there concurrently is available an action for knowing assistance.

Lastly, to further clarify the accountability of an assistant to a beneficiary, consider the standard corporate form. It might be thought that the forgoing analysis supports the view that directors owe a fiduciary duty directly to shareholders. It does not. A corporation is not a status fiduciary to its shareholders (or its lenders) because shareholders do not transfer their assets (their share subscription monies) to the corporation on a limited access basis.[37] Rather, they give the corporation open access to their funds. The corporation receives the monies for *its* purposes. The shareholders exchange their funds for a basket of rights and duties primarily defined by the applicable legislation.[38] Accordingly, because a corporation is not accountable as a fiduciary on a status basis to its

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35 Some judges appear to not comprehend that the duty of confidence is a manifestation of fiduciary accountability. See *Walsh v Shanahan* [2013] EWCA Civ 411. Then see R Flannigan, 'The [Fiduciary] Duty of Fidelity' (2008) 124 *Law Quarterly Review* 274, 274–85. Accepting the confidentiality of information is to acquire only a limited access to it.

36 They may also thereby acquire valuable confidential information about other parties, as for example the wealth of the settlor of a trust fund, or tensions in family affairs.

37 Conversely, shareholders are fiduciaries to their corporation for the purpose of defining the will of the corporation. Shareholders, like directors, receive will definition powers on a limited access basis, and therefore are fiduciaries to that extent. See Flannigan (n 18).

38 All voluntary corporate stakeholders, including shareholders, negotiate the terms of their status. There is no inherent principle of 'shareholder primacy'. See R Flannigan, 'The Political Imposture of Passive Capital' (2009) 9 *Journal of Corporate Law Studies* 139, 157–63.

shareholders, its directors cannot be accountable. That said, the above analysis remains applicable to directors where on the facts a corporation undertakes to serve some other party, for example, as a trustee of a formal trust for a shareholder or some third party. In such a case the corporation assumes the fiduciary status of a trustee, and both it and the directors acquire a limited access to the assets intended to benefit the trust beneficiaries. The directors therefore are separately directly accountable as fiduciaries to the beneficiaries when they exploit the assets.

In summary, there is a distinction that must be made between actors who undertake to serve beneficiaries and those who do not. The former are directly accountable as fiduciaries to those beneficiaries because of their undertaking. The latter are not fiduciaries, but they will be distinctively accountable when they knowingly assist the commission of a breach of duty by the fiduciary.[39] Consider now the cases that various judges and commentators have regarded as constitutive of the law of knowing assistance prior to the abstract formulation found in *Barnes*. That review is required if we are to understand how the knowing assistance doctrine has displaced, in the minds of some, the fiduciary accountability of assistants.

III Knowing Assistance Before *Barnes v Addy*

The first reported case appears to be *Crane v Drake* in 1708.[40] The executor of an estate was personally indebted to a prospective purchaser of an estate asset (a lease). The two men agreed that the lease payment would be reduced by the amount of the personal debt. A creditor of the testator challenged the validity of the purchase. The report of the case indicated that on appeal the Lord Chancellor stated that 'the defendant [a purchaser who was not an assistant] was a party, and consenting to and contriving a *Devastavit* [a misappropriation]'.[41] The purchaser was ordered to pay the creditor the amount of the claim. That is, the purchaser was held personally liable for the joint exploitation of beneficiary assets by the executor and the purchaser.

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39 In *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [68], the Court stated that '[counsel] correctly points out that neither a knowing recipient nor a dishonest assistant has ever promised either expressly or inferentially to subordinate his own interests to those of the beneficiary. Neither is a fiduciary.' In a sense, that puts the cart before the horse. The question is *whether* an actor undertakes to subordinate his or her interest. An actor who gives that limited access undertaking is then subjected to fiduciary accountability.

40 (1708) 2 Vern 616; 23 ER 1004.

41 Ibid 616; 1004. A *devastavit* is the mismanagement or misappropriation of assets held in a fiduciary capacity.

The next several cases confirmed that personal liability arose where there was participation with knowledge of breach.[42] The doctrine of knowing assistance then essentially crystallised in several judgments of Sir John Leach. In *Keane v Robarts* he declined to hold liable bankers who had acted as agents (making them for present purposes assistants rather than just bankers) because they did not know of the intention of the executors to misapply the assets.[43] Prior to reaching that conclusion, he described the substance of the prior cases:

> With a view to this cause, I have carefully examined every authority upon this subject, and I think the result may be thus stated: Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust …
>
> Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is *primâ facie* inconsistent with the duty of an executor …
>
> If a party, dealing with an executor for the personal assets pays his money to the executor so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it; but if, in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor.[44]

Importantly, Sir John Leach confirmed that a party to a breach of trust was 'responsible to' the beneficiary. Knowing that monies are going to be used by the fiduciary for private purposes made that actor 'equally a party to the breach of trust'. Observe, on the other hand, that Sir John Leach did not distinguish between assistants employed by the fiduciary and others not so engaged but who transact with the fiduciary. Perhaps reflecting a false perception of conceptual symmetry, his abstract references were to 'every person' or 'a party'. That began the unprincipled conflation of assistants, who properly are accountable as fiduciaries, with others who are only accountable for knowing assistance.[45] His general

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[42] *Andrew v Wrigley* (1792) 4 Bro CC 125; 29 ER 812; *Farr v Newman* (1792) 4 TR 621; 100 ER 1209; *Dickenson v Lockyer* (1798) 4 Ves Jun 36; 31 ER 19; *Hill v Simpson* (1802) 7 Ves Jun 152; 32 ER 63; *Beckford v Wade* (1805) 17 Ves Jun 87; 34 ER 34; *M'Leod v Drummond* (1810) 17 Ves Jun 152; 34 ER 59; *Watkins v Cheek* (1825) 2 Sim & St 199, 205; 57 ER 321, 324.

[43] (1819) 4 Madd 332, 56 ER 728 ('*Keane*').

[44] Ibid 357–9; 737.

[45] The prior cases cited by counsel, or noted by Sir John Leach, had involved purchasers (who were not assistants), or bankers, rather than actors who were employed to assist the fiduciary. Notably, *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 385, which involved a purchase by an assistant (a solicitor), was not mentioned. While *Keane* (n 43) itself involved bankers, they had undertaken to act in an agency capacity (an assistant capacity). *Keane* thus appears to be the case that initiated

formulation of the yet unlabeled doctrine of knowing assistance had the effect of masking or displacing the conventional fiduciary accountability of assistants. Judges thereafter would commonly approach *assistant* liability as a distinct question of knowing assistance.

The following year, in *Whitcomb v Minchin*, Sir John Leach is reported to have held that 'as a trustee for the sale of an estate could not purchase the estate himself, so the agent of the trustee employed for the purpose of sale could not purchase it'.[46] That was to recognise the conventional fiduciary accountability of the assistant arising from the synchronal or linked undertakings of the fiduciary and the assistant to not personally exploit beneficiary assets. Then, in *Myler v Fitzpatrick*, he concluded that while a 'mere agent is to account to his principal only', the allegation was that the solicitor employed by the trustees had acted as 'a delegated trustee, employing the trust monies for his private profit'.[47] He essentially recognised that the need to regulate opportunism (fiduciary regulation) negated the principle that an agent is only accountable to his principal.[48] Whether as assistant, or trustee *de son tort*, those who acquire de facto access for a limited purpose are accountable as fiduciaries to the beneficiaries.

Sir John Leach contributed again in *Wilson v Moore*.[49] The beneficiaries under a will had sued the agents of the executors for facilitating the misapplication of beneficiary assets. Sir John Leach initially observed that if the agents were liable, 'it is because, in the consideration of a Court of Equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will'.[50] He stated that all parties to a breach of trust 'are equally liable; there is between them no primary liability'.[51] He found the agents 'responsible' to the beneficiaries because they 'well knew that the stock in question belonged to the estate of the testator; and they were parties to the application of the produce of the stock to relieve the embarrassments of the sons, in payment of a debt due from the sons to themselves'.[52]

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the conflation (ie that failed to recognise that assistants to fiduciaries, as per the decision a decade earlier in *Ex parte James*, are directly accountable as fiduciaries to beneficiaries).

[46] (1820) 5 Madd 91; 56 ER 830 ('*Whitcomb*').

[47] (1822) 6 Madd 360, 360–1; 56 ER 1128, 1128–9.

[48] Earlier cases had illustrated that agents were only liable to their principals. See *Saville v Tancred* (1748) 3 Swans 158; 36 ER 808; *Nickolson v Knowles* (1820) 5 Madd 47; 56 ER 812. It must be obvious, however, that the assertion begs the question whether/when agents may be accountable to third parties. The courts plainly have dismissed that assertion in creating liability for knowing assistance. See also *Pollard v Downes* (1682) 2 Chan Cas 121; 22 ER 876.

[49] (1833) 1 My & K 126; 39 ER 629.

[50] Ibid 146; 637.

[51] Ibid.

[52] Ibid 146–7; 637.

On appeal Lord Brougham affirmed the judgment.[53] He stated that there was no doubt that the agents 'were accessaries [sic] to this breach of trust; for how could they more directly abet it, than by making themselves instrumental in its accomplishment, and partakers of its advantages?'[54] He was not swayed by the asserted commercial fears:

> It is true, a purchaser must not be held bound at every step of each transaction in business to pause and institute inquiries; to try issues, and take accounts. But if the proof be thrown on those who would impeach his dealings with the executor; if they be held bound to shew that in those dealings he knew the executor was misapplying the trust funds, and that he aided him in the malversation, surely no hardship is inflicted, should he be held answerable for a conduct plainly improper.
>
> The course and progress of the decisions in all the courts of law, as well as equity, have been to restrict rather than enlarge the facilities of misapplication by persons intrusted with other men's property, and the facility of persons putting it away who have illicitly come into possession of it. Far from this greater strictness being regarded by the Judges as interfering with commercial dealings, they have held it wiser to make the rules more rigid which check fraudulent transactions, in proportion as the system of traffic has become more extensive; and this, notwithstanding all the difficulty thrown in their way by the nature and incidents of negotiable securities.[55]

Lord Brougham concluded that the agents were accountable to the beneficiaries. The only requirement for that accountability was that 'the misappropriation or intended misappropriation be known to the party'.[56]

Next consider *Fyler v Fyler*, where a trustee sought the advice of solicitors (assistants) regarding the investment of trust funds.[57] The solicitors had another client who was significantly indebted to them, who was looking to borrow money on leasehold security. The solicitors recommended to the trustee that he lend to the second client on the leasehold security. The trustee did so without having the requisite authority. Lord Langdale concluded that, subject to an inquiry as to consent, the trustee was in breach of trust for accepting unauthorised security. As for the solicitors, Lord Langdale stated generally that 'solicitors who knowingly procured this to be done for their own benefit, ought to be considered as partakers in the breach of trust'.[58] He found them not liable, however, because it had not been proved that they knew that leasehold security was not authorised by the terms of the trust, and therefore they did not know that there was a breach of duty (a breach of authority) by the trustee.

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[53] (1834) 1 My & K 337; 39 ER 709. He also approved the 'luminous' exposition of the law by Sir John Leach in *Keane* (n 43).

[54] Ibid 353; 715.

[55] Ibid 358; 717.

[56] Ibid 362; 718.

[57] (1841) 3 Beav 550; 49 ER 216.

[58] Ibid 568; 224.

That analysis, while consistent with the earlier cases, was strikingly incomplete. When the trustee, in his capacity as trustee, sought the assistance and advice of the solicitors regarding potential lenders, the solicitors acquired, through their advising function, access to the beneficiary assets. It was a limited access because it was other-regarding. The solicitors were not entitled to entertain conflicts or benefits. Yet that is exactly what happened. Specifically, they acted while conflicted (because of their interest in having their client repay the debt owed to them) to realise a personal benefit. There is no indication in the case that they disclosed their conflict of interest to the trustee or received consent. It was a classic breach of fiduciary duty engineered by an assistant independently of the fiduciary (the trustee). The lack of knowledge of the solicitors as to the lack of authority of the trustees to take leasehold security was wholly irrelevant to that breach. The trustee was guilty of his own separate breach (of authority), but with respect to the solicitors conflict of interest, the trustee was, along with the beneficiaries, the victim of the solicitors. Because the solicitors had only a limited access to the beneficiary assets, and then profited from those assets, they ought to have been found liable to the beneficiaries for breach of fiduciary duty.

It now is instructive to note several decisions where the court described the principle of knowing assistance in concise terms. In *Portlock v Gardner* Vice-Chancellor Wigram explained the probable result of knowledge of a breach: '[I]f the conduct of [the fiduciary] amounted to a breach of trust, and [the assistant], being aware of that breach of trust, became a party to it, the Court would probably have dealt with him as with an actual trustee, to the extent of his participation'.[59] Then in *Pannell v Hurley*, a case involving bankers, Vice-Chancellor Knight Bruce crafted an abstract formulation:

> Money is due from A to B, in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against the other, which is done without C's consent. Can it be a question in equity whether such a transaction can stand? [60]

There were a number of other cases dealing with bankers. In *Bodenham v Hoskyns*, Vice-Chancellor Kindersley stated that:

> I am constrained to arrive at the conclusion, that the bankers — although I must exonerate them from any deliberate intention to commit a robbery or commit a fraud — that the bankers were not only parties to the simple fact of the transfer, but were parties to the fraud in question in this sense, that they were aware of the circumstances which made it a fraud in [the fiduciary] [being a solicitor acting as a receiver] to make the transfer to his private account; [and] they, being cognisant of that throughout, concur in a transaction, the effect of which is, that, for their own pecuniary benefit, an

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59 (1842) 1 Hare 594, 606; 66 ER 1168, 1173.

60 (1845) 2 Coll 241, 245; 63 ER 716, 718. See also *Bridgman v Gill* (1857) 24 Beav 302; 53 ER 374.

> act is done by [the fiduciary] which is a fraud upon the plaintiff. Now, according to the plain principles of a Court of Equity, such an act never can be sustained. A person cannot retain the benefit which he has derived from being a party to such an act.[61]

On appeal the court adopted the reasoning of the Vice-Chancellor, who, it was reported, had acquitted the bankers 'of any design of doing that which in their minds was dishonest or improper' and imputed to them only ignorance of the equitable principle.[62] The applicable rule was that 'a person who knows another to have in his hands or under his control monies belonging to a third person cannot deal with those monies for his own private benefit, when the effect of that transaction is the commission of a fraud on the owner'.[63] The appeal judges concluded that the Vice-Chancellor had 'done justice between the parties'.[64] In *Gray v Johnston*, an Irish appeal to the House of Lords, Lord Cairns said that to hold bankers liable there must be a breach by the fiduciary, and the bankers must be 'privy to the intent' to misapply the beneficiary assets.[65] In *Ex parte Adair* the court explained that business convenience did not justify the exploitation of beneficiary assets.

> No doubt it would be of the utmost inconvenience, in the ordinary course of the business of life, to hold that a banker is bound to inquire into the sources from which moneys paid in by his customers are derived, or to require any proof of the application of those moneys by his customer as justifiable or proper upon legal or even upon moral grounds. By the very terms of the contract between them, the banker is bound to honour the customer's drafts; and, performing this contract, he is freed from all responsibility either to the customer or to other persons. But if by the terms of the contract, expressed or implied, the banker takes into his possession moneys of which his customer has become the owner in a fiduciary character, he contracts the obligation and the duty not to part with such money, even at the mandate of the customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty.[66]

Then in *Gray v Lewis* Vice-Chancellor Malins found bankers liable for offending the 'well settled' rule that 'all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds'.[67]

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61 (1852) 16 Jur 721, 723 (Pt 1).
62 (1852) 2 De G M & G 903, 905; 42 ER 1125, 1126.
63 Ibid.
64 Ibid 906.
65 (1868) LR 3 IR 1, 11.
66 (1871) 24 LT (ns) 198, 203.
67 (1869) LR 8 Eq 526, 543.

Also instructive are cases that involve the principle referred to earlier that agents are only accountable to their principals.[68] In *Morgan v Stephens* Vice-Chancellor Stuart described the legal position:

> The necessities of mankind require that the fullest protection should be afforded to the character of agent, and to that protection he is entitled by the principles of this Court. But it would be highly dangerous to allow a solicitor to quit his proper character and to get into his hands the assets of a testator, either through the authority, negligence or confidence of an executor, and then to protect himself from liability in respect of such moneys of which he knew the trusts, by treating such acts as done merely in the character of agent. The grossest frauds might be perpetrated if a solicitor were allowed to get a testator's assets into his own possession, and then to say that the money was paid to his principal by whom he had been employed, and to shelter himself under the character of a mere agent when he paid the money over with the full knowledge of all the trusts, and that a gross breach of trust was being committed.[69]

The same position was expressed by Vice-Chancellor Bacon in *Lee v Sankey*, another case dealing with solicitors employed by trustees:

> It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to cestuis que trust in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing.[70]

It will be understood that the same reasoning would dispose of arguments that other assistants (eg employees, accountants) are only accountable to their employers.

Another point to take from the cases is that liability for knowing assistance was not restricted to breaches *of loyalty* (fiduciary breaches) by the *fiduciary*. The courts generally found liability for assisting in a breach of 'trust'. Breaches of trust included breaches of authority as well as breaches of loyalty. When we come to the assistant, it should be evident that there will always be a fiduciary breach on the part of the assistant where a personal conflict or benefit is associated with assistance in either a self-dealing or a want of authority by the *fiduciary*.[71] Not

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[68] See the discussion of *Myler v Fitzpatrick* (nn 47–8). See also *Lockwood v Abdy* (1845) 14 Sim 437; 60 ER 428; *Maw v Pearson* (1860) 28 Beav 196; 54 ER 340; *Hardy v Caley* (1864) 33 Beav 365; 55 ER 408; *Harries v Rees* (1867) 17 LT (ns) 418.

[69] (1861) 3 Giff 226, 236; 66 ER 392, 397.

[70] (1873) LR 15 Eq 204, 211.

[71] The cases did not appear to suggest that knowing participation in breaches of *care* trigger fiduciary accountability. Consider *Portlock v Gardner* (1842) 1 Hare 594; 66 ER 1168. That, however, is a possibility. An assistant would be liable for a breach of *loyalty* when a participation in a breach of *care* was calculated to produce personal advantage (eg facilitating shirking by the fiduciary to benefit a competing business in which the assistant has a personal interest).

being authorised to extract value in an assistant capacity, the assistant can only be acting in a personal capacity for personal gain in either case, contrary to the undertaking of the assistant to serve the beneficiary loyally. Thus, no breach of *loyalty* by the *fiduciary* (who only breached authority) is required to find a breach of *loyalty* by the *assistant*. It is enough that the limited access of the assistant is paired with personal advantage to the assistant.

The last decision of immediate interest involved directors. The claim in *Salomons v Laing* was that the directors of one company had colluded with a second company to transfer funds to it for an unauthorised purpose.[72] The question was whether the second company was properly a party to the suit. Lord Langdale did not appear to correctly frame the issue (essentially passing over the fiduciary role of the directors, and referring to each corporation as 'they'), but his analysis was consistent with the forgoing jurisprudence:

> [The two companies] are guilty of collusion in uniting and combining together for the purpose of completing that fraud. But it is not necessary to declare that they have been guilty of fraud and collusion: it is enough to say that they were parties to the same breach of trust, the one in paying, and the other in receiving these monies for a known illegal purpose, to which neither of them had any right to apply it ...
>
> I have not the least doubt they are properly made parties to this suit. They are not third parties; they have made themselves principal parties to this misapplication; they have themselves obtained the money, knowing the purpose to which alone it ought to be applied, knowing the persons to whom it belonged, and yet getting it out of the hands of persons having the management of it for one purpose, in order to apply it to other and quite different objects.[73]

Although, again, Lord Langdale did not in the above remarks properly incorporate the role of the directors, his analysis essentially did equate the liability of the assistant (the second corporation) with the liability of the fiduciaries (the directors of the first corporation). They had 'made themselves principal parties'.

The forgoing early jurisprudence of *knowing assistance* thus was generally consistent. There was one rule. A third party who knowingly assisted in a breach of fiduciary duty was directly personally liable to the beneficiary. The rule was justified by the need to control both the opportunism of the fiduciary and the opportunism of each third party that knowingly joined in or facilitated the breach. The fiduciary and the third party were equally liable. There was no agency immunity for the third party and no privity disqualification for the beneficiary. There was no valid business convenience or business reliance objection to the rule.

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72 (1850) 12 Beav 377; 50 ER 1105 ('*Salomons*'). Consider also that a fiduciary may be liable for a breach of *care* for failing to supervise an assistant who breaches his duty of *loyalty*. See *Attorney-General v Corporation of Leicester* (1844) 7 Beav 176; 49 ER 1031.

73 Ibid 382–3; 1107.

And there was no discernible requirement that the conduct of either the fiduciary or the assistant had to be dishonest in some common law fraud or mala fide sense.

At the same time, however, the generality of the framing of the clear rule operated unduly widely. It applied to everyone who interacted with fiduciaries in the performance (or ostensible performance) of their nominate undertaking. That obscured the *fiduciary* accountability of *assistants* who undertook to serve beneficiaries. That matters, it should be evident, because the prerequisites for liability are different in each case. For example, fiduciary liability does not depend on knowledge of breach. Also, because assistants have a direct duty to beneficiaries, there is no need to establish a breach of duty (any duty) by the fiduciary. It is only necessary to prove the de facto access of an assistant and an unauthorised conflict or benefit (unilateral or joint).

The case that perhaps best illustrates the *fiduciary* accountability of assistants is *Ex parte James*.[74] The decision by Lord Eldon, many will recognise, is one of the early pillars on which the conventional accountability rests. The case involved in part the question whether the solicitor to a commission of a bankrupt could acquire assets of the estate. Lord Eldon first observed that each of the assignees on the commission was a fiduciary, saying that each was 'as much a trustee as an executor'.[75] He then turned to the accountability of the assistant:

> As to the solicitor, if there is any utility in applying the principle against the assignee, the application as against the solicitor is more loudly called for. He is to do his duty to the assignees, enabling them to do their duty to the creditors; always remembering also their duty to the bankrupt; if by a fair, prudential, and cautious, dealing with the estate a surplus can be secured. Upon the same principle, that requires the assignees to make no benefit, the solicitor, who is to direct and inform them in the very act, by which they are to make no benefit, cannot possibly make a benefit.[76]

That was a clear declaration of the equivalence of the duty owed personally by the fiduciary (the trustee assignee) and the assistant (the solicitor) to not extract gain from the beneficiary assets. The acquisition by the solicitor was set aside in favour of the beneficiaries.

Other cases dealing with assistants (as opposed to purchasers and bankers) are to the same effect. I noted above, for example, the decisions in *Whitcomb* and *Wilson*.[77] Another relevant case is *Attorney-General v Corporation of Leicester*,[78] where the Attorney-General sued both the municipality (acting as trustee for a charity) for want of care and its assistant (the town clerk) for want of loyalty in profiting from the trust assets. Counsel for the clerk had argued that he was a

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74 (1803) 8 Ves Jun 337; 32 ER 385.

75 Ibid 346; 388.

76 Ibid 346–7; 388.

77 See n 46, 49 supra.

78 (1844) 7 Beav 176; 49 ER 1031.

mere agent and therefore accountable only to his principal. Lord Langdale, however, was not persuaded:

> Now, in the first place, it cannot be disputed, that if the agent of a trustee, whether a corporate body or not, knowing that a breach of trust is being committed, interferes and assists in that breach of trust, he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust.[79]

Consider also *Re Bloye's Trust*.[80] The court observed that a person selling property under a power of sale in an annuity contract was a trustee and therefore could not purchase the property. Lord Cottenham explained that the disability extended to the solicitor who acted for the seller: '[T]o say that the principal is incapacitated but that the agent is not, would be an absurd distinction, the reason remaining the same, and being as applicable to one as to the other'.[81]

These cases established that assistants were personally accountable as fiduciaries directly to beneficiaries. It is hard to comprehend how it could be otherwise, whether an assistant exploits the beneficiary assets independently, or jointly with the fiduciary. The fiduciary and the assistant synchronously assumed only a limited access to the beneficiary assets, and the targeted mischief obviously is identical. Consequently the justification for the conventional accountability has equal application to assistants potentially compromised by opportunistic impulse. Our regulation of opportunism would be radically deficient in scope if beneficiaries were not entitled to directly hold profiteering assistants to the fact-based strict fiduciary accountability that regulates everyone. Consider then how it has transpired that the accountability appears to have been sidelined. We begin with *Barnes v Addy*.[82]

IV *Barnes v Addy*

The specific holding of the Court of Appeal in *Barnes v Addy* was unremarkable. The Vice-Chancellor below had dismissed an action against two solicitors separately engaged in completing a transfer of beneficiary funds to a new trustee, who subsequently misapplied them. The Court noted that there was no evidence that either solicitor had any dishonest design, and dismissed the appeal.

It must first be understood that the action brought by the beneficiaries did not involve any claim that either solicitor had breached a fiduciary duty to anyone. Presumably that was because counsel for the beneficiaries recognised that neither solicitor was conflicted or took an unauthorised benefit in the course of their

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79 Ibid 179; 1032.

80 (1849) 1 Mac & G 488; 41 ER 1354. (Note that the quotation is not accurately reproduced in the ER report.)

81 Ibid 496; 1357.

82 *Barnes* (n 6).

performance. Rather, the claim was that in the circumstances it was a breach of trust for the solicitors to arrange for trust assets to be conveyed to a sole trustee. The claim in essence was that the two solicitors had not acted in the best interest of the beneficiaries because they enabled the subsequent misapplication by the sole trustee (either a breach of nominate duty or a breach of care). Lord Selborne declared that, in the absence of knowledge or suspicion of an improper design, solicitors are not obliged to satisfy themselves 'that there is nothing which can by any possibility be called in question in any part of the transaction'.[83] The two solicitors had done the paperwork and given advice that was proper, and therefore had acted appropriately.

While not a marginal decision, *Barnes* thereafter became prominent for Lord Selborne's summary of what eventually would be labelled the doctrine of knowing assistance. He described to whom the responsibilities of a trustee, arising 'by reason of the fiduciary relation', could be extended:

> Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[84]

A first observation is that this description subsequently would be construed in some quarters as articulating two 'limbs' of liability beyond that of trustee *de son tort*: knowing assistance and knowing receipt.[85] That was not justified by the actual content of the judgment. Initially Lord Selborne stated that the responsibility could extend to those making themselves trustees *de son tort* or to 'those actually participating in any fraudulent conduct of the trustee'.[86] There was no mention of knowing receipt at that point. In the following sentence, however, liability was said to arise when 'agents receive and become chargeable with some

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[83] Ibid 253.

[84] Ibid 251–2.

[85] In *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [111]–[112] ('*Farah*'), the High Court of Australia traced the initiation of the 'knowing receipt' formulation to the 1966 edition of an equity text. See Robert Megarry and PV Baker (eds), *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 202.

[86] It seems clear that in this sentence Lord Selborne was recognising the distinction between liability as a trustee *de son tort* and liability for knowing participation. Persons are accountable as a trustee *de son tort* when they appropriate trustee functions. That accountability formally is distinct from that for participating in a breach by a fiduciary.

part of the trust property', or when 'they assist with knowledge in a dishonest and fraudulent design'. Those supposedly are the two limbs. Recognise, however, that no wrong was identified when Lord Selborne stated that agents 'receive and become chargeable with' trust property. That tells us nothing. What is the reason the agent is 'chargeable'?[87] Merely receiving trust property is not per se a wrong, as agents and others often receive (or possess authority over) beneficiary assets for the purposes of their undertakings. To say 'chargeable' is to beg the question. The preceding cases established that liability accrued for those who knowingly assisted in a breach of trust (by trustees or other fiduciaries). Sometimes that knowing assistance involved the third party acquiring possession or some sort of title to beneficiary assets. Many cases of purchasers and bankers were of that kind. But those purchasers and bankers were not liable merely because they received the assets. They were liable because they knowingly assisted a breach. Accordingly, there were not two limbs of liability clearly distinguished in the case.

A second observation concerns the characterisation of knowing assisters as constructive trustees.[88] It seems clear that Lord Selborne was using that term to define how those who profit from fiduciary breaches are to account. Those who knowingly assist may or may not be fiduciaries to the fiduciary or to the beneficiary. Purchasers who are not assistants, and bankers, for example, normally are not fiduciaries to the other contracting party (seller, depositor) or their beneficiaries. Accordingly, when they knowingly assist, they must be deemed to be constructive trustees for remedial purposes. Assistants who assist in a breach, on the other hand, are actual fact-based fiduciaries, and the nature of their duty to account is immediately clear.[89]

A third observation relates to Lord Selborne's remark that ended his paragraph of description. According to him:

> [A]nd I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.[90]

In addition to being factually implausible, that sentence is internally incoherent.[91] The only responsibility that is 'incumbent, by reason of the fiduciary relation', is

[87] In *Farah* (n 85), the Court stated (at [112]) that: 'Persons who receive trust property become chargeable if it is established that they received it with notice of the trust'. That does not advance our comprehension. In what sense are persons chargeable merely because they have notice that property is trust property?

[88] Query the distinct fraud characterisation in *Rolfe v Gregory* (1865) 4 De G J & S 576; 46 ER 1042.

[89] There is no discernible justification for subjecting the authorised access of an assistant to a lesser regulation than that applied to the unauthorised access of a trustee *de son tort*.

[90] *Barnes* (n 6) 252.

[91] It is implausible, in the absence of express exculpation, to *imply* that the settlors of trusts 'expressly intend' to exonerate agents from the responsibilities that would be imposed by the

the duty of loyalty. If therefore 'those who create trusts do expressly intend' to exonerate assistants from the responsibilities of fiduciaries, they will be exonerating them from the 'fraud and dishonesty' qualification expressed earlier in the sentence. The possible negative effect is to suggest that fiduciary accountability is about something other than breaching loyalty.[92]

The last, and critical, observation is that Lord Selborne apparently did not consider whether some actors who knowingly assist might be accountable because they are fiduciaries directly to beneficiaries, and that the doctrine of knowing assistance is actually only required for those who assist but who are not themselves fact-based fiduciaries. Had he recognised that distinction, our jurisprudence might subsequently have developed differently. As it was, because the case involved assistants (solicitors), it seemingly indicated that the doctrine of knowing assistance exclusively defined the accountability of assistants.

V Assistant Fiduciary Accountability After *Barnes v Addy*

The general development of the doctrine of knowing assistance following *Barnes*, with all its controversy, is of little immediate relevance to my demonstration of the *fiduciary accountability* of assistants to beneficiaries.[93] That knowing assistance jurisprudence only defines the content of the knowing assistance doctrine, and so moves to the sideline upon recognition that knowing assistance regulation is too broadly conceived when it is assumed to define the accountability of assistants.

Once the jurisprudence prior to *Barnes* is understood, the statement of abstract principle by Lord Selborne must be regarded as rather more concealing principle than illuminating it. Having failed to mark the fundamental distinction between assistants and others that latently informed the earlier cases, the summation by the court prompted many judges subsequently to restrict their assessment of assistant liability to the question of knowing assistance. But not all judges took that path. Several cases require attention.[94]

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ordinary default application of applicable laws fashioned by the community as the reasonable terms of engagement for agents of all classes.

92 There is further incoherence in saying that it is the 'fiduciary relation' status that imposes the responsibilities. What then are the responsibilities imposed by the 'trust relation' status?

93 As to controversy, consider *Selangor United Rubber Estates v Cradock, Ltd* [1968] 2 All ER 1073; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97; *Williams v Central Bank of Nigeria* [2014] 2 All ER 489; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43; *Christine DeJong Medicine Professional Corporation v DBDC Spadina Ltd*, 2019 SCC 30.

94 There are cases where the fiduciary accountability of assistants to beneficiaries was determined on conventional principle without the court having to confront arguments that assistants cannot be directly accountable as fiduciaries to beneficiaries. The most prominent is *Boardman v Phipps* [1967] 2 AC 46. In that case *Barnes* was cited by members of the court, but there was no general

In *Martinson v Clowes* North J first recognised that a mortgagee exercising a power of sale could 'not purchase the property on his own account'.[95] He then immediately added that it was 'clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either'.[96] The sale was set aside as against the beneficiary (the mortgagor), even though the court said that it was not imputing to the mortgagee 'any intention to act unfairly or dishonourably'.[97] In *Cowper v Stoneham* the beneficiaries of a trust sued both the trustees and the solicitors who acted for them.[98] The solicitors brought a motion to have the action against them dismissed, insisting that they did not have the primary liability. Stirling J allowed the action to proceed, referring to *Wilson v Moore* for the principle that: 'All parties to a breach of trust are equally liable, there is between them no primary liability.'[99] In *Kavanagh v Workingman's Benefit Building Society*, in the Irish Court of Appeal, a corporate mortgagee had appointed one of its directors as a receiver agent to collect rents. Another creditor of the mortgagor argued that the commission paid to the receiver was not permissible. One of the judges, Walker LJ, declared that the director had 'appointed himself receiver, and the principle of equity, which prevents a man asserting a position in point of interest inconsistent with his duty, prohibits the making of the claim against the mortgagor'.[100]

The decision of the Court of Appeal in *Powell & Thomas v Evan Jones & Co* was a particularly significant contribution to the jurisprudence.[101] Shipowners employed an agent to raise capital for them. The agent in turn employed a sub-agent. The sub-agent arranged a lender, and without disclosure, took a second commission from the lender. In response to a claim by the agent for its commission, the shipowners counterclaimed against the sub-agent directly for the secret commission. The Court of Appeal agreed with the trial judge that there was privity between the shipowners and the sub-agent, but that in any event the sub-agent was a fiduciary to the shipowners. According to Collins MR the knowledge of the sub-agent that he was being employed to benefit the shipowners imposed on him 'a personal incapacity to receive any secret

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engagement with the jurisprudence on point, and no discussion of present relevance. Despite the lack of engagement with the prior jurisprudence, *Boardman* obviously supports fiduciary accountability for those who assist fiduciaries.

[95] (1882) 21 Ch D 857, 860. See also *Hodson v Deans* [1903] 2 Ch 647.

[96] Ibid.

[97] Ibid 861.

[98] (1893) 68 LT (ns) 18.

[99] Ibid 19.

[100] (1896) 1 IR 56, 59.

[101] [1905] 1 KB 11. Consider the references to this case in *Sphere Drake Insurance Limited v Euro International Underwriting Limited* [2003] EWHC 1636 (Comm), [42], [45].

reward'.[102] Stirling LJ added that the sub-agent could not validly accept the second commission without the direct authorisation of the shipowners.[103] Mathew LJ, in turn, stated that agents sometimes (often), with the consent of their principal, employ others, and that 'the ordinary course of business in such a case' is that the employed person assumes the position of agent to the principal.[104] He added that: 'It would be difficult in such cases to suppose that the principal would assent to the conduct of the business in which he was interested being transferred to a person who did not in carrying it out undertake the obligations of an agent towards him.'[105] The decision obviously was a strong one. Soon, however, the decision was undermined.

In *Bath v Standard Land Co Ltd* a corporation undertook, in a 'peculiar' agreement, to pay the plaintiff's debts and manage his property, with both sharing in profits.[106] In the course of managing the property, the corporation employed some of its directors to serve it in separate capacities (eg solicitor, auctioneer, accountant), and included their bills as costs of management. The plaintiff claimed that the separate payments to the directors for those services were improper and should not have been included as costs in the accounts. That claim ought to have succeeded. The payments made to the directors in their separate professional capacities were not authorised by the agreement. This was not a case of a shareholder or creditor claiming that the directors were accountable to them as fiduciaries. Rather, the corporation was a fiduciary to the plaintiff (as all parties conceded) pursuant to the agreement intended to relieve him from bankruptcy, and the directors were hired in their separate capacities to assist in the performance of that agreement. The plaintiff, it should be added, did not sue the directors. His claim was made only against the corporation for having made improper payments and including them as costs in the accounts.

Two members of the Court of Appeal disagreed with the decision of the trial judge that the corporation was not entitled to include in the accounts any charges for the separate payments. Cozens-Hardy MR noted *Powell & Thomas* (and other cases), but he was 'unable to discover that it in any way assists the plaintiff'.[107] He did not support that remark with analysis of any kind. Instead, without citing authority, he offered a 'broad principle':

> I base my decision upon the broad principle that directors stand in a fiduciary position only to the company, not to creditors of the company, not even to individual

[102] Ibid 19.
[103] Ibid 21.
[104] Ibid 22.
[105] Ibid.
[106] [1911] 1 Ch 618 ('*Bath*'). It is not clear why two of the judges (at 624, 629) described the agreement as peculiar. Both described it as a sort of joint adventure, incorporating a mortgage relation.
[107] Ibid 627.

> shareholders of the company, still less to strangers dealing with the company. This principle applies equally whether the relation between the company and the stranger is one purely of contract, such as principal and agent, or is one of trustee and cestui que trust.[108]

The first part of that broad principle is accurate. Directors are not status fiduciaries to shareholders or creditors of their corporation. Shareholders and creditors, in those capacities, advance funds on an open access basis. It is not correct, however, to then say 'still less to strangers dealing with the company'. The fiduciary accountability of directors to strangers depends on whether the directors have a limited access to the assets of particular strangers. They do have such access when their corporation is in a fiduciary arrangement with the stranger, and they are involved directly or incidentally in the performance of that fiduciary undertaking. Accordingly, because the separate payments were not authorised, the profit to the directors should have been recoverable by the plaintiff had he sued them. As it was, the corporation was not entitled to include the payments in the accounts because it was a breach of authority for it to have made those payments.

Buckley LJ, in a separate opinion, did not deny the relevance of *Powell & Thomas*. He treated the decision as 'an illustration of the proposition that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it'.[109] He listed other cases that similarly illustrated the proposition. He insisted however that the case before him was different. The corporation, he observed, would not be receiving the payments. To him, that meant that the 'principle … that the trustee [the corporation] is receiving profit obviously does not apply'.[110] It must be even more obvious however that the issue was not whether the corporation received any profit. The issue was whether the payments by the corporation were breaches of authority such that the payments could not register against the interest of the plaintiff. Ultimately Buckley LJ was reduced to saying that it was erroneous to declare that 'the remuneration is to be disallowed on the mere ground that the recipient was a director'.[111] That, it should be evident, missed the mark. An unauthorised benefit produces conventional fiduciary liability for anyone who has a limited access, as did the directors in this case.

Fletcher Moulton LJ dissented. His views were grounded in both principle and precedent. He first observed that 'to establish a fiduciary relation between the [beneficiary] and an agent of the trustee you must look at the facts of the case and

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[108] Ibid.
[109] Ibid 643.
[110] Ibid 644.
[111] Ibid 647.

see whether they establish such a relationship'.[112] While the agent status of an agent does not by itself 'suffice to make him responsible' to the beneficiary, it 'does not shelter him from the responsibilities flowing from the knowledge he actually possesses'.[113] Fletcher Moulton LJ cited the statement of Lord Cottenham in *Re Bloyes Trust* that: '[T]o say that the principal is incapacitated but that the agent is not, would be an absurd distinction'.[114] He then explained that an agent to a trustee undertakes a status (agent) that produces a duty to not exploit the *cestui que trust* (the beneficiary):

> In such a case the agent for sale is an agent for the trustee, but he is an agent who has full knowledge that the sale is by a trustee who has the duty to account to his cestui que trust, and the law as laid down here by Lord Cottenham is only sustainable because his accepting with that knowledge the position of agent for carrying out the sale, (though contractually his employment is solely by the trustee,) affects him with a duty to the cestuis que trust.[115]

He proceeded to say that there were many other cases 'in which persons who have no direct connection with the [beneficiary], but who are in contractual relation with the trustee alone, are by reason of their knowledge of the position of the trustee, their employer, saddled with responsibilities towards the [beneficiary]'.[116] That initially turned into a misstep because he then stated that many of the banker cases were in that category. Bankers, it was noted earlier, normally do not undertake to serve the beneficiary. He promptly rescued his analysis, however, when he then narrowed his focus to assistants. He said that a court would 'be far more ready to interfere in the case of a solicitor or other agent employed *pro hac vice* with full knowledge of the circumstances, and aware that he was employed as the hand by which the breach of trust was to be carried out'.[117] Specifically, assistants would be liable for their breaches of loyalty to beneficiaries:

> But in my opinion they are liable for matters of personal conduct inconsistent with their full knowledge of the fiduciary character of the duties which, in the name of the company, they have to carry out. And first and foremost among such matters of personal conduct stands the making of personal profit. That is a matter the responsibility for which no man can place on the shoulders of another. It is an act for which he alone is responsible. No man can be compelled to make a gain or to allow

112 Ibid 633.
113 Ibid 634.
114 Ibid.
115 Ibid 634–5.
116 Ibid 635.
117 Ibid 636.

> himself to be put in a position which, in the view of equity, forbids him to say that he has not made a gain.[118]

Fletcher Moulton LJ finished his analysis with a survey of relevant cases. His understanding of the cases was as follows:

> In the whole of these cases the Court must have found that the knowledge of the agent that the matter in which he was acting was one in which his principal was a trustee, sufficed under the circumstances of each case to place him in a fiduciary relation with the cestui que trust of his principal, because they affirm the right of the cestui que trust to interfere in the transaction.[119]

In the end, given the strength of the Fletcher Moulton judgment, and the relative weakness of the judgments of Cozens Hardy LJ and Buckley LJ, the *Bath* decision cannot credibly be regarded as having terminated the jurisprudence that recognised the direct accountability of assistants to beneficiaries. That said, there are a number of subsequent decisions involving directors where the majority judgments in *Bath* were accepted.

In *HR v JAPT* Lindsay J noted the 'very powerful dissent' by Fletcher Moulton LJ in *Bath*.[120] He stated, however, that he could not prefer that dissent unless he could 'find that there is some distinction or later authority that frees me to do so'.[121] Regrettably, he did not investigate the jurisprudence prior to *Bath*. Had he done so, he would have understood that in historical context the majority judgments in *Bath* were deficient. In *Rowe v Cross* the Guernsey Court of Appeal observed that the court below had been invited by 'bold' counsel to adopt the dissenting judgment in *Bath*.[122] The Court stated that it was 'with some wisdom' that the argument was not pursued at its level.[123] It offered not one word of analysis, nor a shred of precedent, to support that remark. Then, in *Gregson v HAE Trustees Ltd*, the court stated, again without any analysis, that *Bath* had 'stood for almost 100 years' and could not be challenged.[124] That, it will be appreciated, is an empty justification. The passage of time does not cure or validate conceptual error.

Consider also the judgment of Rimer J in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd*.[125] The case involved, as a first issue,[126] the alleged personal fiduciary accountability of a director of a corporation. The corporation

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118 Ibid 637.
119 Ibid 639.
120 [1997] OPLR 123.
121 Ibid 131.
122 (1998) I ITELR 341, 355–6.
123 Ibid 356.
124 [2009] 1 All ER (Comm) 457, [28].
125 [2007] EWHC 915 ('*Sinclair*').
126 Consider how, on a separate issue, the judgment of Rimer J was received in *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [71]–[72].

had received funds from investors (beneficiaries) who advanced the funds pursuant to a 'trader agreement', and not as shareholders or lenders. Had the funds been advanced to the corporation to purchase its shares, or as loans, there could be no fiduciary claim because the access of the corporation and its directors to the funds advanced in a shareholder or lender capacity would have been open, rather than limited. The corporation would have received the monies for its own purposes. It was different here, however, because the trader agreements provided that the corporation would invest the funds directly on behalf of the investors (akin to a broker function). Accordingly, because the trader agreements contemplated only a limited (other-regarding) access to the funds, the corporation was a fiduciary to the 'traders'. The director of the corporation would then also be a fiduciary to the traders because his de facto access to the funds was understood by everyone to be a limited access. When subsequently the funds were misapplied by the corporation and the director, both of them ought to have been personally liable as fiduciaries to the investors.

Rimer J offered a different analysis. The argument of the claimant trader was that a fact-based fiduciary relation had been created between the trader and the director personally because of the assurances of the director that he personally would oversee the investment. Rimer J rejected the argument, reasoning that the traders had not regarded the director 'as assuming a collateral personal fiduciary duty'.[127] The assurances, in his view, were just part of the 'sales pitch'. Rimer J here misconceived the critical (and only) element necessary for accountability. Fiduciary accountability does not depend on the *beneficiary* subjectively or objectively understanding that the ostensible fiduciary is assuming a *legal duty*. Rather, it is only necessary that one physically assumes a limited access. To explain once again, we (the community) have crafted legal forms of regulation that we apply to various kinds of arrangements. One such form of regulation is fiduciary accountability. We apply that regulation to limited access arrangements. We do that to control the opportunism that inherently is latent in such arrangements. Thus, when actors undertake for whatever reason (motive) to serve others, the access they acquire to assets linked to their function is a limited access. And because it is a limited access, those actors simultaneously become subject to the default regulation that we designed to control the mischief of opportunism. That is, it simply is the choice to undertake to act in the interest of another that triggers the default proscription to not potentially compromise the execution of the undertaking by entertaining unauthorised conflicts or benefits.

In the case of an assistant, that determination or conclusion of limited access is the implicit natural consequence of the creation of the relation of an assistant to a fiduciary. Thus, because the corporation was a fiduciary to the trader, so too was the director to the extent of his engagement in the fiduciary function (which

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127 *Sinclair* (n 125) [86].

was total). The assurances of the director to the trader were only redundantly relevant in that they could be taken as evidence of the undertaking by the director to act in the interest of the trader. Rimer J was of the view that the assurances 'had nothing to do with expressions of loyalty and fidelity' by the director.[128] But again, the requirement of 'loyalty and fidelity' need not be established by direct expressions of that nature. The requirement of loyalty and fidelity is imposed by the community (though its judges) whenever a limited access is assumed. There also was no requirement, as Rimer J asserted, that there must be proof that the trader relied on the assurances given. Reliance has no relevance in the application of conventional fiduciary accountability. The director ought to have been personally liable for breaching his direct fiduciary duty to the trader.

It thus appears that the subsequent support for the majority position in *Bath* is deficient. There either was no analysis by the judges or the analysis was frail. Nothing suggests that we may confidently dismiss the substantial opposed earlier authority.

We come next to two modern decisions of the Supreme Court. Consider first *Holland v Revenue and Customs Commissioner*.[129] The issue was whether a director of a corporate director was personally liable to the revenue authorities for decisions respecting the payment of dividends by multiple corporations. According to the Court, that depended on whether the director could be characterised as a de facto director of the multiple corporations so as to impose on him a fiduciary duty not to misapply their funds by paying unlawful dividends.[130] The majority of the Court concluded that the director was not personally liable merely by reason of having made the decisions in his capacity as a director of the corporate director. The majority insisted that 'something more' was required.

The majority analysis rests on two misconceptions: (1) that on the facts there was a breach of fiduciary duty and (2) that to hold the director personally liable would fail to respect the separate legal personality of the corporate director. Recognise first that the issue here, at least as formally framed by the Court, was the same issue of assistant fiduciary accountability. The corporate director clearly was a fiduciary to the each of the multiple corporations. The question would then be whether the director of the corporate director was separately personally accountable as a fiduciary directly to the multiple corporations (multiple beneficiaries). Despite that ostensible conceptual congruence, however, none of the cases discussed above were cited by the Court. Only cases on the question of the nature of de facto director status were examined. That is a considerable

128 Ibid [88].
129 [2010] UKSC 51 ('*Holland*').
130 As described by Lord Collins, ibid [55].

concern with the analysis. The Court was not fully informed by, or forced to contend with, what ostensibly was relevant authority.

There was no fiduciary breach by the director. Fiduciary breaches must be distinguished from other kinds of breaches that directors might commit. They may fail to perform their negotiated or default nominate duties, or they may act without authority or care. Those are not fiduciary breaches per se. A fiduciary breach occurs only if the challenged actions involve an unauthorised personal conflict or benefit. In *Holland* the impugned conduct was the payment of dividends in contravention of applicable restrictions. That was either a want of authority, a want of care or a breach of the nominate duty to act in the best interest of the corporate director. There was no fiduciary liability on the facts stated because it was not alleged that the director entertained an unauthorised conflict or benefit in relation to either the corporate director or any of the multiple corporate beneficiaries.[131]

There was also no failure to respect the separate legal personality of the corporate director. The fiduciary accountability of an assistant (here the director) is independent of the fiduciary accountability of the fiduciary (the corporate director). Each accountability arises from the limited access that each actor acquires.[132] The continued separate legal personality of the corporate director actually is necessary to define both its own accountability and that of its director(s). The access of the director initially is derived from the undertaking of the corporate director. And the separate personality of the corporate director must also remain live in order for it to be jointly liable with the director when the two collaborate to extract separate personal gains from the beneficiary assets. As the dissenting Lords noted, the separate personality argument was irrelevant.[133]

In the end the majority position in *Holland* cannot properly be understood as a decision about fiduciary accountability or the corporate veil. It may be that the corporate veil argument has traction for some dimensions of the relation between a corporate director and its directors, but it does not repel the ordinary personal fiduciary (or tort or criminal) liability of the directors individually.[134]

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131 Had there been an unauthorised conflict or benefit, that would be 'something more' than merely performing the functions of a director of the corporate director.

132 Any opportunistic action that then occurred would be, if required, 'something more'. That said, the 'something more' requirement is misleading with respect to fiduciary accountability. It may suggest to some that for liability directors must be engaged in actions outside the scope of their defined duties. Fiduciary accountability, as a parallel regulation, applies to conflicts and benefits arising within the scope of authorised nominate functions.

133 The separate personality argument likely would fail in any event as courts are reluctant to allow the corporate veil to deflect liability for a fiduciary breach. Consider *Gencor ACP Ltd v Dalby* [2000] EWHC (Ch) 1560; *Trustor AB v Smallbone* [2001] 2 BCLC 436 (Ch); *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.

134 R Flannigan, 'The Personal Tort Liability of Directors' (2002) 81 *Canadian Bar Review* 247.

Lord Walker in dissent (with Lord Clarke) initially observed that the decision of the majority would 'make it easier for risk-averse individuals to use artificial corporate structures in order to insulate themselves against responsibility to an insolvent company's unsecured creditors'.[135] That concern is significant, as the history of corporate law has been to counterbalance the limited liability of shareholders with the open liability of the persons who are presumed to actually project corporate risk.[136] That said, the common reasoning of the two dissenting judges is not entirely clear. Both judges insisted that de facto director status was a question of fact. According to Lord Walker, accountability associated with de facto director status depended on an 'assumption of responsibility', where 'that expression is understood as focusing on what the individual in question did, rather than what he was called'.[137] Looking at what Mr. Holland actually did, which was to act singularly as 'the guiding mind of a single corporate director',[138] demonstrated 'that he was undertaking responsibility and exposing himself to a claim for breach of fiduciary duty'.[139] For his part, Lord Clarke pointed to the dominance of Mr. Holland when separately concluding that:

> The question is thus one of fact. What did Mr Holland do? There can be no doubt that the decision to pay dividends was a directorial act and not a mere managerial act. It seems to me that, if (as the deputy judge has held), Mr Holland in fact deliberately procured the payment of the dividends by the directors of Paycheck Directors and had the de facto power to do so, he was a de facto director. As such, he owed a fiduciary duty to the company and the procuring of the payment of the dividends was a breach of fiduciary duty and, on the deputy judge's findings of fact, an unlawful act.[140]

From a corporate law perspective the analysis of the dissenting Lords obviously is problematic in various respects. Beyond that, their reasoning, like the majority judgments, so far as it engaged fiduciary accountability, was constrained by the framing of the issue as one of de facto director status. If the case had actually involved a fiduciary breach, the analysis would properly and more simply have proceeded as a question of assistant liability. The first question would be: Had the director acquired a limited access to beneficiary assets? The answer to that question was a clear yes. But again, while there was fiduciary accountability, there was no fiduciary breach.

I end this discussion of *Holland* by noting that the two dissenting Lords both referenced the earlier decision of the court in *Standard Chartered Bank v Pakistan*

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135 *Holland* (n 129) [101].
136 R Flannigan, 'The Political Imposture of Passive Capital' (2009) 9 *Journal of Corporate Law Studies* 139.
137 *Holland* (n 129) [121].
138 Ibid [123].
139 Ibid [121].
140 Ibid [139].

National Shipping Corp.[141] That is the second decision of the Supreme Court that requires attention. The decision need be examined only briefly.

Standard was a case of fraudulent representation (deceit). Lord Hoffmann delivered the leading judgment. The individual defendant Mehra argued that he could not be liable because his representations were made on behalf of his corporate principal and could only be attributed to his principal. Lord Hoffmann found that argument 'irrelevant'.[142] The assumption of responsibility analysis formulated in the earlier decision of the Court in *Williams v Natural Life Health Foods Ltd*[143] did not, in his view, apply to liability for fraud: 'No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable".'[144] As Lord Hoffman explained, Mehra was being sued for his own tort, not for the company's tort. His liability had nothing to do with the separate legal personality of his corporate principal. He was liable 'not because he was a director but because he committed a fraud'.[145]

That reasoning is equally applicable to a breach of fiduciary duty (both on principle and because a fiduciary breach is equitable fraud). An assistant (director) to a fiduciary (corporate director) is sued for his own breach of the personal fiduciary duty owed to the beneficiary that arises independently upon undertaking to serve that beneficiary. The assistant is liable not by reason of being a director, but by reason of personally committing a fiduciary breach by taking personal advantage of a limited access to beneficiary assets. Every person who assumes a limited (other-regarding) access to the assets of another is accountable as a fiduciary to that other. The *Standard* decision, in abstract terms, is entirely consistent with that conventional principle.

Lastly we come to one modern case that conveniently illustrates that the issue of assistant fiduciary liability remains untidy. In *Markel International Insurance Co Ltd v Higgins* Teare J concluded that two directors and an employee of a corporate agent were on the facts liable as fiduciaries to the beneficiaries (the principals of the corporate agent) because they knew they 'were being entrusted' with authority over the business of the beneficiaries, and thus had created a relation of 'trust and confidence'.[146] Teare J appeared to have been influenced by the continuing 'hesitant' discussion of the issue in a leading agency law text.[147] Referencing earlier commentaries on the point, the text stated that 'a general

141 [2002] UKHL 43 ('*Standard*').
142 Ibid [20].
143 [1998] 2 All ER 577 (HL).
144 *Standard* (n 141) [22].
145 Ibid.
146 [2008] EWHC 1135 (Comm), [224].
147 Ibid [225].

duty in a sub-agent to account to the principal ... seems desirable'.[148] Notably, and more narrowly, the text and the earlier commentaries all indicated that it was accepted that direct assistant liability was currently recognised for the particular case of breaches of fiduciary duty. That was relevant to the decision of Teare J because the conduct involved was self-dealing. That said, neither the authors of the text nor Teare J investigated the jurisprudence reviewed above. As well, on appeal, the finding of a direct fiduciary liability was not discussed, the Court of Appeal side-stepping the issue and instead confirming only other grounds of accountability (including dishonest assistance).[149] On the other hand, the judgment of Teare J recently was taken as good authority in *Brent London Borough Council v Davies*.[150] It will be no surprise at this point that I believe it was entirely correct for Teare J to find direct fiduciary liability despite the hesitancy of the text writers and the side-step of the Court of Appeal. Both principle and sound authority justified that finding.

VI Conclusion

We have seen that there is a strong line of English authority that holds assistants accountable as fiduciaries directly to beneficiaries (eg *Ex parte James*, *Whitcomb v Minchin*, *Wilson v Moore*, *Re Bloye's Trust*, *Powell & Thomas v Evan Jones & Co*). That authority, supported unambiguously by conventional principle, has never been definitively reviewed and then repudiated by any court. Assistants are not like other third parties. They expressly or implicitly undertake to serve the beneficiaries of the fiduciaries that employ them. Today however it sometimes is assumed that assistants are only liable pursuant to the distinct doctrine of knowing assistance. That view is partly the result of the failure of the court in *Barnes v Addy* to recognise the distinction between assistants and others. It is also partly due to the influence of the cases that assert innacurately that agents are accountable only to their principals. It is also due to courts simply ignoring or skirting over cases like *Ex parte James* and *Powell & Thomas*.

The access to beneficiary assets that assistants employed by fiduciaries commonly acquire is understood by everyone to be a limited access. On conventional principle, that must attract fiduciary accountability. The rationale for the accountability of the assistant is precisely the same as it is for the fiduciary. We cannot have our relations of service compromised by opportunistic impulse.

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148 FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th ed, 2006) 159. The 'hesitancy' has continued into the 21st edition. See Peter G Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st ed, 2018) [5-012].

149 [2009] EWCA Civ 790.

150 [2018] EWHC (Ch) 2214, [356]–[357]. Consider also *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC (Ch) 639.

There is no compelling reason to excuse assistants from that conventional regulation and subject them only to a less strict accountability for knowing assistance. There is no conceptual symmetry in equating the accountability of assistants with other third parties. The true symmetry is the equation of the accountability of all those who assume a limited access.