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THE NATURE OF KNOWING RECEIPT

Introduction

When a trustee or fiduciary of the claimant beneficiary transfers money or property to the defendant recipient in breach of duty, the claimant may have an equitable proprietary claim to recover the traceable proceeds of the transfer in the estate of the defendant, and a personal claim for knowing receipt. It seems that the conditions for the equitable proprietary claim are well established: it subsists against any recipient who still has the property or its traceable proceeds unless he is “equity’s darling” – a bona fide purchaser for value of legal title without actual or constructive knowledge.¹ But for many years there has been controversy over the “level of knowledge” necessary for personal liability in knowing receipt, i.e., whether it arises only when the defendant has actual knowledge of the breach of duty, or whether constructive knowledge will suffice. The Court of Appeal has recently held in *BCCI v Akindele*² that the requirement is that “the recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt”.³ This is unlikely to resolve the longstanding controversy.

The underlying problem is that the nature of the claim for knowing receipt has not been satisfactorily explained. The elements of the claim (as accepted in *Akindele*) are said to be as follows: “the [claimant] must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the [claimant], and thirdly, knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty.”⁴ This definition of knowing receipt appears to characterise it as a restitutionary claim, as a number of commentators have argued.⁵ A

¹ e.g. *Picher v Rawlins* (1872) 7 Ch App 259.

² [2000] 3 WLR 1423.

³ *Ibid* at p1439.

⁴ Hoffmann LJ in *El Ajou v Dollar Land Holdings* [1994] 1 All ER 685, 700.

⁵ Especially Birks, for example in P Birks, *Restitution – The Future* (1992, Federation Press, Annandale), 26ff; and see the dictum in the recent case of *Al-Sabah v Grupo Torras* (2/11/2000 unrep) para 122: knowing receipt is “a receipt-based liability which may on examination prove to be either a vindication of persistent property rights or a personal restitutionary claim based on unjust enrichment by subtraction”, to be contrasted with knowing assistance as a “fault-based liability”.

restitutionary claim can be taken for present purposes to be a claim to reverse a transfer of money or property arising from the fact that the transfer was vitiated.⁶ The definition implies that the claim serves to recover for the claimant the value of the money or property transferred from him to the defendant by making the defendant liable to repay this value to the claimant. In the case of a payment by a trustee or fiduciary in breach of duty, the vitiating factor is the lack of power or authority⁷ of the trustee or fiduciary to make the payment under the trust instrument or fiduciary mandate.⁸

A restitutionary claim arises in its nature from the fact of vitiation and the fact of receipt.⁹ These are sufficient to establish that the recipient has received property or money other than through a valid transfer and has no right to retain it. There is in principle no reason why the availability of the claim should depend on the recipient's knowledge of the fact that the transfer was vitiated. As Lord Nicholls said in an extra-judicial essay, in a passage quoted in *Akindede*:¹⁰ "personal liability [should] flow from having received the property of another, from having been unjustly enriched at the expense of another. It would be triggered by the mere fact of receipt, thus recognising the endurance of property rights." If the claim for knowing receipt is restitutionary, the law should move towards recognising that it is a strict liability claim, so side-stepping the controversy over the requisite degree of knowledge. This is the position taken by a number of commentators, in particular Birks,¹¹ whose views were followed by Lord Nicholls in the essay mentioned above.

In my view, this approach is misconceived. It is difficult to understand how the requirement of actual or constructive knowledge could ever have arisen if this is how knowing receipt should be understood. The explanation of the nature of knowing receipt offered below makes sense of a knowledge requirement. It also suggests that

⁶ A "vitiating factor" provides a reason why the transfer should not be binding on the owner by virtue of some defect in the way it was made e.g. mistake, lack of authority, duress, undue influence, etc. It is not necessary for present purposes to consider broader definitions of restitution. Some would prefer to describe the claim, so characterised, as a type of unjust enrichment claim, rather than a restitutionary claim, but the latter expression will be used here.

⁷ This should not of course be understood to imply that the trustee has contractual authority to act for the beneficiary.

⁸ By acting in excess of his authority under the trust instrument, the trustee commits a breach of duty, but it is strictly speaking the lack of authority not the breach of duty that is the ground for the restitutionary claim.

⁹ The usual view is that a restitutionary claim does not necessarily arise from a vitiating factor but can arise from some other sort of "unjust factor". It is not necessary to pursue this issue here.

¹⁰ Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in W Cornish et al, eds, *Restitution Past, Present and Future* (Oxford, 1998), at p238.

the level of knowledge necessary for liability in knowing receipt must correspond to the level that will preclude the equity's darling defence, which was the traditional position, but appears now to be in doubt.¹² If this explanation is right, it is fortunate that the court in *Akindele* and previous courts have resisted the temptation to effect a radical reform of the law on the basis of the restitutionary analysis of knowing receipt.

The nature of knowing receipt

The problem is to provide a general analysis that explains the main features of the law of knowing receipt, including the knowledge requirement. Knowing receipt is commonly said to be fault-based, which must mean that it is based on a some form of wrong or breach of duty. Not all legal claims arise from a breach of duty by the defendant. A restitutionary claim to reverse a vitiated transfer arises from the fact of receipt, which does not entail any breach of duty by the recipient. Similarly there are claims in contract¹³ that do not arise from a breach of duty by the defendant. In relation to knowing receipt the duty is obscured in the normal formulation of the claim and in explaining the claim the task is to identify it.

To this end it is helpful to consider first the position of an express trustee. One can distinguish between two aspects of the position of an express trustee. First, the beneficiary has equitable ownership of the trust property, corresponding to a proprietary liability of the trustee. This is the "division of ownership" or "separation of title". Secondly, the trustee has a duty to preserve and manage the trust property, by virtue of which he can be liable to restore any loss to the trust fund resulting from a breach of duty, i.e. to compensate the beneficiary.¹⁴ Consider in comparison the position of a recipient of trust property. If he is not equity's darling, he is subject to the equitable proprietary claim – his position corresponds with that of an express trustee with respect to the first aspect above, concerning ownership of the trust property. In consequence the recipient has a proprietary liability in respect of the property received or its traceable proceeds. This is the restitutionary claim in the sense

¹¹ Above n5.

¹² See the section below on equity's darling and knowing receipt.

¹³ Contract claims are often expressed to arise from a breach of a duty to perform the contract, but in many cases they do not arise from a breach of duty at all. An obvious example of such a contract claim is an insurance claim arising from an insured loss. The liability does not arise from a breach of a duty on the part of the insurer to ensure that the insured loss does not occur, but from the occurrence of loss. See further P Jaffey, *The Nature and Scope of Restitution* (Oxford, 2000), Appendix 1.

¹⁴ The trustee may sometimes be strictly liable in respect of any such loss, but this does not affect the general argument.

above: its function is to reverse the transfer of trust property because it was vitiated, and accordingly it arises against the recipient from the fact of receipt, and irrespective of knowledge.¹⁵ However, this claim extends only to the original trust property or its traceable proceeds, and unless the recipient also incurs a duty to preserve the trust property and make it available to the claimant, he will not incur any liability in respect of a loss of trust property, by disposal or consumption or otherwise. The important question is when a recipient should incur such a “duty of preservation”. An express trustee is subject to the duty because he has accepted the position of trustee, but the recipient has not of course accepted any such position. It is reasonable to say that the recipient should incur a duty of preservation if he knows, or if in the circumstances he ought to know, that he has received property transferred in breach of trust.¹⁶ This does not mean that the recipient should become subject to a duty in the same terms as an express trustee’s full duty of management (including investment). The recipient’s duty of preservation can quite reasonably be much more limited.

This analysis suggests that the liability for knowing receipt is a liability for breach of the duty of preservation that the recipient incurs once he has, or ought to have, the requisite degree of knowledge that the transfer was in breach of trust. It provides an obvious rationale for the actual or constructive knowledge condition for knowing receipt. On this approach, the claim for knowing receipt is by nature not restitutionary but tortious, in the sense that it arises from the breach of a duty arising under the general law not to cause a certain type of loss to the claimant, viz., loss of the subject matter of the claimant’s proprietary claim.¹⁷ (Although of course the analogous duty of management of an express trustee arises from his acceptance of the position and is not tortious.) The analysis also shows why the claim for knowing receipt, being a tortious claim for compensation, must be personal.

An obvious and immediate objection to this analysis concerns the measure of liability. The analysis implies that the measure of liability is the loss of traceable proceeds resulting from the defendant’s breach of his duty of preservation, i.e. the

¹⁵ Some would say that the claim is not restitutionary but proprietary, but it is not necessary to pursue this issue here: the point is considered in P Jaffey, above n13, Chapter 9.

¹⁶ In principle the duty of preservation could arise on the basis of strict liability – the recipient could be “at risk” – but one would expect the duty to arise more commonly on the basis of actual or constructive knowledge. The common law and equity have traditionally taken different views on this issue: see n31 below.

¹⁷ The associated claim for knowing assistance is more clearly tortious in nature: see Sir Leonard Hoffmann, “The Redundancy of Knowing Assistance” in P Birks, *The Frontiers of Liability* (Oxford, 1994) vol 1, 27.

difference between the value received, or the value of traceable proceeds at the time when knowledge of the breach of trust was or ought to have been acquired, if this is after receipt, and the value of traceable proceeds remaining. However, it is always said, as implied in the formulation of the elements of the claim above, and as would be expected for a restitutionary claim, that the measure is the value of the property received.¹⁸ But, if the equitable proprietary claim is taken into account, it becomes clear that this conventional understanding is misconceived. Where, as is usually the case, there is no reason to invoke a proprietary claim explicitly (because the recipient is not insolvent, and the traceable proceeds have not been invested and appreciated in value), the equitable proprietary claim is in effect incorporated into the knowing receipt claim. Thus the conventional measure of liability in knowing receipt is actually the sum of the defendant's liability to the equitable proprietary claim (in the measure of the remaining traceable proceeds) and his liability for any loss in the value of traceable proceeds from the time when the defendant incurred the duty of preservation. Strictly speaking, it is only the latter that is the personal liability in knowing receipt. Thus knowing receipt is disguised as a restitutionary claim and its tortious nature concealed.¹⁹

The claim for knowing receipt is not normally formulated in the way proposed. However, although this formulation requires a change in terminology and may suggest ways in which the law might develop, its principal advantage is that it makes sense of the law as it stands, in particular the knowledge requirement. By contrast, although the claim for knowing receipt is currently expressed in a way that presents it as a restitutionary claim, the restitutionary theory makes no sense of this principal feature of knowing receipt, and requires a radical change to the law to bring it into conformity with the theory. Thus one reason given by Nourse LJ in *Akindele* for rejecting the strict liability restitutionary theory of knowing receipt was that it was not open to the court, "at this level of decision",²⁰ to make such a change to the existing law in the light of the existing authorities.

¹⁸ Or at least the value of the traceable proceeds at some later time when the recipient acquired the relevant degree of knowledge, which implies that the claim is not restitutionary.

¹⁹ One might argue that any claim to reverse a transfer should be described as restitutionary, whether it arises from a vitiated transfer or not. On this basis, because knowing receipt, although a compensatory claim arising from a wrong, also has the effect of restoring the value lost by the claimant, it might be described as restitutionary in this sense as well as tortious.

²⁰ [2000] 3 WLR 1423 at 1440.

Nourse LJ also expressed doubt over the desirability of a strict liability approach in principle: he thought it might be unfair to recipients in commercial transactions.²¹ But this objection misses the point. If the claim for knowing receipt is restitutionary, then in principle it should, in the nature of a restitutionary claim, arise from receipt. Indeed a strict liability restitutionary claim *does* generally arise – in the circumstances that Nourse LJ was addressing, it is a proprietary restitutionary claim, viz., the equitable proprietary claim.²² And the law has developed the means to protect a party to a commercial transaction from the risk of unfairness resulting from this strict liability restitutionary claim – this is the role of the equity’s darling defence. The point is that the present law, which on the analysis proposed consists of a restitutionary claim to recover traceable proceeds and a tortious claim to compensate for any loss of traceable proceeds that the recipient should be held responsible for, provides a perfectly comprehensive and effective response to a vitiated transfer, including in particular a transfer in breach of trust, and allowing knowing receipt to develop into a personal restitutionary claim will only subvert this position to no purpose.

Equity’s darling and knowing receipt

The traditional rule (developed in connection with conveyancing cases in land law) is that a purchaser is equity’s darling when he has no actual or constructive knowledge of the breach of trust or fiduciary duty. The relevance of actual or constructive knowledge here must again be that it determines when the purchaser incurs a duty of preservation in respect of the money received. If the purchaser incurs such a duty, he cannot rely on his purchase to extinguish the beneficiary’s equitable proprietary claim to the money.²³ It must follow that a purchaser who is equity’s darling cannot be liable in knowing receipt: both depend on whether a duty of preservation arises in the circumstances. In other words, the level of knowledge required for liability for

²¹ *Ibid* at p 1440.

²² Some would argue not restitutionary but proprietary; see n15 above.

²³ The effect of the equity’s darling defence is to enable the recipient to rely on the transaction as being valid. This protects him from the loss he would suffer from having paid over or transferred something in return for the receipt if the transaction were not enforceable by him. He should not be able to rely on the transfer as being valid if he has a duty of preservation in respect of the receipt. The “innocent donee” is a donee who, not having actual or constructive knowledge, is not subject to a duty of preservation. In his case he has not paid over or transferred anything in exchange for the receipt and so bona fide purchase is not in issue. In the absence of a duty of preservation (i.e unless or until he acquires the requisite knowledge), he will be subject only to a restitutionary liability for the surviving value of the receipt and no further liability in knowing receipt or “handling”.

knowing receipt must be the same as the level of knowledge that will preclude the operation of the equity's darling rule in equivalent circumstances. This appears to have been the traditional position, under which constructive knowledge was the condition for both liability in knowing receipt and also the absence of the equity's darling defence.²⁴ But more recently, whilst it appears to remain generally accepted that absence of constructive as well as actual knowledge is necessary for the equity's darling defence, it has become controversial whether constructive knowledge will render a recipient liable in knowing receipt.²⁵ In a passage from his well-known judgment in *Re Montagu*,²⁶ Megarry V-C argued explicitly that the level of knowledge should be different in the two contexts. He said:

“[the equitable proprietary claim] is concerned with the question whether a person takes property subject to or free from some equity. [The claim for knowing receipt] is concerned with whether or not a person is to have [personal burdens and obligations] imposed upon him. I do not see why one of the touchstones for determining the burdens of property should be the same as that for deciding whether to impose a personal obligation on a [person]. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a [person's] conscience is sufficiently affected for it to be right to bind him by [personal obligations].”

On the argument above, this is misguided. When a purchaser is equity's darling, the beneficiary's equitable proprietary claim to recover back the traceable proceeds has been extinguished, but on Megarry V-C's approach, despite the fact that the beneficiary's claim to the traceable proceeds has been extinguished, the purchaser can still incur a liability for failing to preserve them for the beneficiary.²⁷ This makes no sense at all. Megarry V-C's decision in *Re Montagu* would be better explained on

²⁴ *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Karak Rubber Co Ltd v Burden* [1972] 1 WLR 602; Sir Peter Millett, “Tracing the Proceeds of Fraud”, criticising the view of Megarry V-C in *Re Montagu* [1987] Ch 264.

²⁵ Cases holding that actual knowledge or something approximating to actual knowledge is necessary for liability in knowing receipt include *Re Montagu* [1987] Ch 264, *Eagle Trust Plc v SBC Securities Ltd* [1993] 1 WLR 484, *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700.

²⁶ [1987] Ch 264 at 273, 278. The references to “constructive trust” are omitted: see further the last section below.

²⁷ This is not what Megarry V-C said himself but the implication of what he said in terms of the duty of preservation analysis proposed here.

the basis that with respect to the type of transfer in issue in that case – the gratuitous transfer of chattels by an executor to a legatee – the recipient does not incur a duty of preservation without actual knowledge, but with respect to the purchase of land (which was not in issue in the case), the recipient incurs a duty of preservation even if he has mere constructive knowledge. Whereas the traditional position with respect to equity’s darling arose in connection with conveyancing, the controversy over knowing receipt has generally arisen in commercial situations.

The level of the “duty of inquiry”

The crucial underlying issue in relation to the claim for knowing receipt and the equitable proprietary claim is whether there is a duty of preservation in the circumstances of the case. The question is usually whether the duty arises only from actual knowledge of the breach of trust or whether constructive knowledge suffices. This is the question traditionally addressed in terms of whether actual or constructive knowledge is the condition for liability in knowing receipt. More generally, one can say that whether a duty of preservation arises in respect of a particular receipt depends on the “level of the duty of inquiry” in the circumstances of the receipt. The level of the duty of inquiry refers to a scale of possible conditions for the accrual of the duty of preservation, running from a condition of actual knowledge of the breach of trust, through cases where this knowledge can be inferred from known facts, or is suggested by suspicious or anomalous circumstances, or would be found out by making inquiries, to the case where the recipient is “at risk”, in the sense that he automatically incurs a duty of preservation whether or not he could have found out about the breach of trust. This is the nature of the well-known *Baden Delvaux* scale or “categorisation” of knowledge.²⁸ The *Baden Delvaux* scale does not extend to the “at risk” position, but this is a natural extension to it.

The level of the duty of inquiry represents a balance drawn between the interests of owners of wealth and unauthorised recipients of such wealth. The higher the stipulated level of inquiry, the greater the risk borne by recipients, and the smaller the risk borne by owners in relation to the unauthorised transfer in question. There is

²⁸ Formulated by Peter Gibson J in *Baden Delvaux v Société Générale* [1993] 1 WLR 509, 575-76: “(i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which will put an honest and reasonable man on inquiry.” These are degrees of constructive knowledge.

no reason to expect that the condition for knowing receipt should be a uniform level of the duty of inquiry for all situations. It may be appropriate for a duty of preservation to arise only from actual knowledge of a breach of duty in relation to certain types of transfer, but in relation to other types of transfer for the recipient to be expected to make inquiries as a matter of course and accordingly to be subject to a test of constructive knowledge. An important factor in determining the appropriate level is whether there are possible inquiries open to the recipient of a certain type of transfer that will enable him to establish whether the transfer was in breach of trust. If such inquiries are not too onerous it is fair to expect the recipient to carry them out in order to enhance the protection given to owners against that type of transfer in breach of trust.²⁹ In relation to conveyancing such inquiries are available and practicable, and the defendant should be expected to carry them out. But no feasible inquiries appear to be available in relation to commercial transactions involving the transfer of goods or money or financial instruments. Thus, as the courts have recognised,³⁰ constructive knowledge should suffice in relation to land but generally not in relation to commercial transactions of this sort.³¹

As already mentioned, the judgment in *Akindele* was that liability for knowing receipt depends on whether “the recipient’s state of knowledge [is] such as to make it unconscionable for him to retain the benefit of the receipt”. As argued above, this liability should be understood to represent the combined liability of the recipient in respect of the equitable proprietary claim to traceable proceeds and the knowing receipt claim in respect of loss of traceable proceeds. It is the latter claim that depends on the recipient’s “state of knowledge”.³² Strictly speaking, to say that the claim arises if it is unconscionable for the recipient to retain the proceeds says nothing about the grounds for the claim to arise, because it is presumably always unconscionable not to satisfy a liability known to exist, whatever the grounds for the claim. The “unconscionability test” should be understood to mean that the defendant is liable in

²⁹ Some would say that the reason is that such a requirement is efficient.

³⁰ *BCCI v Akindele* [2000] 3 WLR 1423, pp1437-1439.

³¹ At common law in relation to conversion and traditionally also money had and received a recipient is “at risk”; this appears to be an accident of history, not a justifiable difference from the position in equity based on material differences in the types of circumstance dealt with at common law; the general application of the concept of the duty of preservation in relation to vitiated transfers at law and in equity will require the characteristically different positions in law and equity to be justified or harmonised.

³² In the case of the donee; in the case of a purchaser, the “state of knowledge” is of course relevant to the availability of the equity’s darling defence to the equitable proprietary claim.

respect of the loss of traceable proceeds where he has acted in breach of his duty of preservation in the circumstances. This formulation should be understood to mean that the level of the duty of inquiry may indeed vary according to the circumstances. This seems to be the reason for the court's depreciation of the use of classification of states of knowledge, whether simply in terms actual or constructive knowledge, or in the more refined terms of the *Baden Delvaux* categorisation, which Nourse LJ said "is of little value unless the purpose it is to serve is adequately defined."³³ The use of such a classification might be taken to imply that liability in knowing receipt is determined by reference to a certain point of the scale, applicable in all circumstances. But, though the *Baden Delvaux* classification cannot in itself determine when a duty of preservation should arise, it can be helpful in providing a means of articulating the duty of inquiry and comparing the level of the duty of inquiry in different circumstances.³⁴

Implications of the tortious nature of knowing receipt

One might expect, in accordance with the "objective" or impersonal approach³⁵ generally applicable to tortious duties, that the duty of preservation should be independent of the particular qualities of the recipient in question. This would suggest that, for the purposes of considering whether there has been a breach of the duty of preservation, a certain category of recipient should be expected to have a certain level of knowledge about a certain type of transfer, and about the types of precaution or inquiry that can be taken in respect of it, how easy they are to carry out and what they are liable to uncover, and a certain level of perceptiveness in relation to the circumstances surrounding the transfer, such as one would expect of the "reasonable recipient" in that position. Thus one might expect the law to develop in general terms a position on what, say, a reasonable banker or a reasonable commercial supplier of goods might be expected to know and understand in particular circumstances. The cases do not seem to be consistent on the issue of the relevance of the personal qualities of the recipient. The *Baden Delvaux* classification is clearly based on the

³³ *BCCI v Akindele* [2000] 3 WLR 1423, at p 1439.

³⁴ In just the way that the scale is helpful, according to Nourse LJ in *BCCI v Akindele*, in relation to knowing assistance: [2000] 3 WLR 1423, p1439.

³⁵ One might object to the use of "objective" and "subjective", because "subjective" here signifies that personal qualities are taken into account, not necessarily that there is subjective knowledge or intention.

objective approach.³⁶ In cases that take the view that actual knowledge is the condition for liability, it has sometimes been assumed, consistently with the objective approach, that the defendant is liable even without actual knowledge if, because of his obtuseness, he does not have the actual knowledge that a reasonable person would have had in the same circumstances.³⁷ But other cases suggest that there would be no liability in such a case.³⁸ The approach to this issue tends to confuse the question of the level of the duty of inquiry in relation to the type of transfer in question, which reflects a balance between the interests of owners and recipients in general, with the question whether the approach should be objective so far as a particular recipient is concerned.

As mentioned above, where the defendant is insolvent, it will be crucial to distinguish between the proprietary claim (the restitutionary equitable proprietary claim) and the personal claim (the tortious claim for knowing receipt). There is another reason why it might be important in principle to distinguish between the two claims. The identification of the knowing receipt claim as a tortious claim arising from a breach of duty opens up the possibility that it should be subject to the defence of contributory negligence.³⁹ This would not affect the restitutionary claim to recover traceable proceeds in the defendant's estate, but could in principle reduce the claim in respect of any loss of traceable proceeds. For example, say the defendant disposed of traceable value in circumstances that put him in breach of his duty of preservation, not because he knew of the breach of trust⁴⁰ but because he did not make inquiries that would have disclosed it; and also that the transfer to him was made in breach of duty by an incompetent fiduciary, who was appointed by the plaintiff despite a history of incompetence known to the plaintiff. In such circumstances, although the restitutionary claim to recover back any part of the property transferred or its traceable proceeds still in the defendant's estate should not be affected by the claimant's negligence,⁴¹ it might be appropriate to reduce the defendant's liability in

³⁶ See n28 above

³⁷ e.g. *Eagle Trust Plc v SBC Securities Ltd* [1993] 1 WLR 484

³⁸ e.g. *Re Montagu* [1987] Ch 264.

³⁹ It appears that the defence of contributory negligence is in principle capable of applying to any tortious liability, but it has been held not to apply to certain torts: see generally BS Markesinis & SF Deakin, *Tort Law* (Oxford, 4th edn., 1998), 689-90. Contributory negligence does not apply to conversion, by virtue of s.11(1) of the Torts (Interference with Goods) Act 1977.

⁴⁰ Presumably there would be no question of contributory negligence in such a case: cf the position for deceit: *ibid*, 690.

⁴¹ This is the rule with respect to a restitutionary claim to reverse a mistaken payment: *Kelly v Solari* (1841) 9 M & W 54.

respect of the loss of traceable proceeds, according to the relative degree of responsibility of the defendant as compared to the claimant.⁴² Where some or all of the property or its traceable proceeds has been lost as a result of the negligence of both parties there is no reason why the defendant should bear the whole loss.

“Constructive trust”

I have avoided using the expression “constructive trust” in the discussion above. The problem with the expression in this context is that it is used indiscriminately to refer both to the equitable proprietary claim and also to the personal liability in knowing receipt. It is, on my understanding, conventional usage to say that a recipient of property transferred in breach of trust who is not equity’s darling holds the property on constructive trust, even in the case where he has not committed a breach of the duty of preservation, i.e. where he cannot be liable for knowing receipt – this is the case of the “innocent volunteer” or donee without notice. Here “constructive trust” relates only to the issue of ownership of trust property or its traceable proceeds – i.e. to the existence of the equitable proprietary claim. But, on the other hand, it is sometimes said that a constructive trust arises only when the recipient has some requisite degree of knowledge. This usage implies that “constructive trust” refers to the existence of the duty of preservation. Thus in *Re Montagu Megarry V-C* referred to the knowing receipt claim as arising from a constructive trust, but the equitable proprietary claim as arising not from a constructive trust but simply from the equity’s darling rule and the tracing rules:⁴³ as it might be put, “there is more to being a trustee than merely taking property subject to an equity”.⁴⁴ In relation to an express trust, “trust” denotes both the equitable ownership and the trustee’s duty of preservation – these two aspects of the trust were distinguished earlier. In my view, *pace* Megarry V-C, it would be better to say that “constructive trust” refers to the existence of the equitable proprietary claim, on the basis that the essence of a trust is the ownership relation of separation of title, rather than the duty of preservation which arises from it when the recipient knows or ought to know of his proprietary liability.

⁴² One might also consider whether, even where the owner cannot be said to have been at fault, he should bear some part of the loss resulting from a transfer made by a fiduciary appointed by him.

⁴³ *Re Montagu* [1987] Ch 264, 285. See also *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669, 705.

⁴⁴ *BCCI v Akindele* [2000] 3 WLR 1423, p1436, paraphrasing Megarry V-C in *Re Montagu* [1987] Ch 264, 278.