

FRAUD, UNCONSCIONABILITY AND KNOWING ASSISTANCE

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In some circumstances, a person who participates in a breach of trust may be held personally liable to the beneficiaries for 'knowing assistance' in a breach of trust. The Supreme Court of Canada has held that the defendant's conscience is sufficiently affected only if he or she had actual knowledge that the breach of trust was fraudulent. The author argues that this interpretation is too narrow. The author's position would focus the purpose of imposing liability for knowing assistance on the protection of the vulnerable and the prevention of the abuse of power.

Dans certaines circonstances, une personne prenant part à un abus de confiance peut être tenue personnellement responsable vis-à-vis les bénéficiaires pour «knowing assistance» dans un abus de confiance. La Cour suprême du Canada a décidé que la conscience du défendeur ou de la défenderesse est suffisamment affectée uniquement si il ou elle avait effectivement connaissance que l'abus de confiance était frauduleux. L'auteur exprime l'avis que ceci est trop restreint. La position prise par l'auteur ferait en sorte que le but de la responsabilité pour «knowing assistance» serait tourné vers la protection des personnes vulnérables et la prévention de l'excès de pouvoir.

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Introduction

The imposition of equitable liability for 'knowing assistance' has attracted the interest of the courts and commentators in recent years.¹ It is clear that a third party who knowingly assists the trustee to commit a breach of trust may be held personally liable to the beneficiary.² It is also clear that liability for knowing assistance must be carefully controlled, for those who deal with trustees should be able to do so without interference from the beneficiaries. This is fair to third parties, who are strangers to the trust relationship, and it also furthers the beneficiaries' interests — if equity held third parties to the same obligations as the trustee, the trustee would find it difficult to find anyone with whom to transact business. Situations in which the stranger to the trust is personally liable to the beneficiary should therefore be regarded as exceptional. As such, the imposition of liability should be determined by clear and justifiable principles. This article analyses the principles which have emerged in recent cases, especially the Supreme Court of Canada's decision in *Air Canada v. M & L Travel Ltd.*³ It argues that the courts are over-zealous in restricting the scope of liability and have failed to approach the issue with sufficient flexibility.

As a starting point, the leading authorities accept that imposing liability for knowing assistance is essentially a matter of conscience.⁴ As put by Iacobucci J., speaking for the majority of the Court in *Air Canada*, "whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition

¹ C. Harpum, "The Stranger as Constructive Trustee" (1986) 102 L.Q.R. 114; R. Sullivan, "Strangers to the Trust" (1986) 8 E. & T.Q. 217; P.L. Loughlan, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 Oxf.J.L.S. 260; H. Norman, "Knowing Assistance — a plea for help" (1992) 12 Legal Studies 332. Recent Canadian cases include *Air Canada v. M. & L. Travel Ltd.* (1991), 77 D.L.R. (4th) 536, aff'd (1994), 108 D.L.R. (4th) 592 (S.C.C.); *Canadian Imperial Bank of Commerce v. Valley Credit Union* (1990), 63 D.L.R. (4th) 632 (Man. C.A.); *Winslow v. Richter* (1989), 61 D.L.R. (4th) 549 (B.C.S.C.); *Henry Electric Ltd. v. Farwell* (1986), 29 D.L.R. (4th) 481 (B.C.C.A.); *Austin v. Habitat Development Ltd.* (1992), 94 D.L.R. (4th) 359 (N.S.C.A.); *Andrea Schmidt Construction Ltd. v. Glatt* (1979), 104 D.L.R. (3d) 130 (Ont. H.C.J.), aff'd (1980) 112 D.L.R. (3d) 371 (Ont. C.A.); *MacDonald v. Hauer* (1977), 72 D.L.R. (3d) 110 (Sask. C.A.); *Trilec Installations Ltd. v. Bastion Construction Ltd.* (1982), 135 D.L.R. (3d) 766 (B.C.C.A.). See also *Baden, Delvaux & Lecuit v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.*, [1983] B.C.L.C. 325; aff'd [1985] B.C.L.C. 258 (C.A.); *Belmont Finance Corp. Ltd. v. William Furniture Ltd.* (No. 1), [1979] Ch. 250, 1 All E.R. 118 (C.A.); *Agip (Africa) Ltd. v. Jackson*, [1990] Ch. 265, aff'd [1991] Ch. 547; *Eagle Trust plc. v. S.B.C. Securities Ltd.*, [1993] 1 W.L.R. 484 (Ch.D.); *Polly Peck International v. Nadir* (No. 2), [1992] 4 All E.R. 769 (C.A.); *Powell v. Thompson*, [1991] 1 N.Z.L.R. 597 (H.C.); *Nimmo v. Westpac Banking Corp.*, [1993] 3 N.Z.L.R. 218 (H.C.); *Equitcorp Industries Group Ltd v. Hawkins*, [1991] 3 N.Z.L.R. 700 (H.C.); *Marshall Futures Ltd. v. Marshall*, [1992] 1 N.Z.L.R. 316 (H.C.).

² *Ibid.*, and see also D.W.M. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 399-403; A.H. Oosterhoff and E.E. Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (Toronto, Carswell, 1992) at 459-480. The origin of the modern doctrine is found in *Barnes v. Addy* (1874), 9 Ch. App. 244.

³ *Supra* footnote 1.

⁴ See the authorities cited *supra* footnote 1.

of personal liability".⁵ While this much is agreed, controversy arises over its translation into specific rules and guidelines. In recent years, many courts and commentators maintain that the stranger's conscience is sufficiently affected only if he or she is guilty of a 'want of probity'. They argue that this exists only if the trustee's scheme was fraudulent and dishonest and, in addition, if the defendant had actual knowledge that it was assisting in a fraudulent scheme.⁶ In my view, this is too restrictive. Liability for knowing assistance should be based on a broad principle of unconscionability, in the sense of an abuse of power. That is, the defendant who knowingly abuses a position of influence over the trustee, and indirectly over the beneficiary, should be liable for knowing assistance. As will be shown, this would include the situations covered by the 'want of probity' analysis, but it would also include some situations involving participation in a negligent, or even an innocent, breach of trust.

This article therefore examines how fraud and the abuse of power can indicate whether the stranger's assistance in a breach of trust is unconscionable. It begins by comparing the purpose of liability for knowing assistance with other forms of liability for interfering in the administration of a trust. From this, the article demonstrates that the 'want of probity' analysis is too narrow to permit knowing assistance to fulfil the function it ought to fulfil — it is not enough to ask only if the defendant had actual knowledge of a fraudulent and dishonest breach of trust. It then identifies the factors which the courts should consider in a case of knowing assistance. The most important of these is the relative power and vulnerability of the parties. The article therefore explores its relationship to unconscionability generally, and then how it relates to the specific issue of the knowledge.

I. *The Purpose of Liability and the Role of Fraud*

A. *Related forms of liability*⁷

Before describing the basis in knowing assistance, we should distinguish it from two other grounds on which the courts hold strangers to a trust personally liable to the beneficiaries. The first, trusteeship *de son tort*, is based on the

⁵ *Supra* footnote 1, per Iacobucci J. at 606, referring to *Re Montagu's Settlement Trusts*, [1987] Ch. 264 at 285.

⁶ See e.g. Sullivan, *supra* footnote 1 at 243; Harpum, *supra* footnote 1; Norman, *supra* footnote 1 at 333-336; *Air Canada*, *supra* footnote 1; *Canadian Imperial Bank of Commerce v. Valley Credit Union*, *supra* footnote 1; *Scott v. Riehl* (1958), 15 D.L.R. (2d) 67 (B.C.S.C.); *Eagle Trust plc*, *supra* footnote 1; *Re Montagu's Settlement Trusts*, *ibid.*; *Agip (Africa) Ltd. v. Jackson*, *supra* footnote 1; *Polly Peck International v. Nadir* (No. 2), *supra* footnote 1; *Nimmo v. Westpac Banking Corp.*, *supra* footnote 1; *Equiticorp Industries Group Ltd v. Hawkins*, *supra* footnote 1; *Marshall Futures Ltd v. Marshall*, *supra* footnote 1.

⁷ For a general discussion of the forms of liability, see Sullivan, *ibid.* at 217-223; Harpum, *ibid.* at 114-118; Norman, *ibid.* at 332-333; Waters, *supra* footnote 2 at 399-403, 409-410; Oosterhoff and Gillese, *supra* footnote 2 at 459-461. Compare to the general principle stated in the *Restatement, Trusts* (2d) §326- "A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."

defendant's implicit acceptance of the duties of a trustee. It applies if the defendant purports to administer the trust property as though a trustee in its own right.⁸ By assuming the role of trustee, the defendant implicitly undertakes to fulfil the obligations of the trustee and hence it is appropriate to hold it to those obligations. The situation in knowing assistance is different: the defendant does not purport to assume the role of the trustee and there is no undertaking, express or implied, to act on the beneficiaries' behalf.

The second form of liability, knowing receipt, is based on unjust enrichment. It applies where the defendant acquires trust property with notice that the transfer breached trust in some way. The defendant's knowledge of the impropriety means that it would be unjustly enriched if permitted to retain the property as against the beneficiary. This does not apply to knowing assistance, because there is no need to prove that the defendant in knowing assistance acquired any of the trust property.⁹ Indeed, the court may hold the defendant liable for knowing assistance if it did not gain from the breach of trust, and even if the beneficiary did not suffer any loss.¹⁰

B. *Knowing assistance, culpability and fraud*

The basis of liability for knowing assistance lies in the moral culpability of the defendant's conduct. Equity is a court of conscience, and it is the knowing interference in the administration of a trust which is sufficiently culpable to bind the defendant's conscience to account to the beneficiary for the trustee's wrong. The authorities differ on how they should measure the defendant's culpability and when it is sufficient to impose liability, but they agree that it is central to

⁸ See Harpum, *ibid.* at 127-130; Sullivan, *ibid.* at 223-233; Waters, *ibid.* at 399-400, 409-410; Oosterhoff and Gillese, *ibid.* at 479-481. The term is sometimes used in the broader sense of anyone on whom a constructive trusteeship is imposed as a result of their own wrongful participation in a breach of trust: see e.g. *Canada Safeway Ltd v. Thompson*, [1951] 3 D.L.R. 295 (B.C.S.C.): the defendants conspired with the director of the plaintiff company to sell shares to the plaintiff, with the result that the director made an unauthorised profit at the plaintiff's expense. They were treated as trustees *de son tort* for their profits, although they never assumed the role of trustees. Cf. *MacMillan Bloedel v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.), where similar facts were seen as falling under knowing assistance.

⁹ For this reason, it may be incorrect to describe the defendant as a constructive trustee, because he or she does not acquire the trust property.

¹⁰ See e.g. *Canada Safeway Ltd v. Thompson*, *supra* footnote 8; *MacMillan Bloedel*, *supra* footnote 8. Loughlan, *supra* footnote 1, argues that there should be no liability without loss, which would exclude liability for an unauthorised gain. In her view, the basis for the recovery of unauthorised profits lies in the trustee's undertaking to act solely in the interests of the beneficiary; the stranger to the trust gives no such undertaking and hence should not be liable if the trustee makes an unauthorised profit. I do not dispute that it may seem harsh to force the defendant to account for profits earned by the trustee to a beneficiary who has lost nothing. However, the public policy behind liability for unauthorised gains can be legitimately extended to the stranger to the trust. If the stranger knows that its actions assist the trustee to obtain a unauthorised profit, then its conscience may be sufficiently affected to warrant personal liability for the benefit received by the trustee. This does not mean that the liability of the defendant in knowing assistance would invariably be the same

knowing assistance.¹¹ Of course, the culpability of the defendant's assistance depends partly on the nature of the activity that he or she assisted. So, for example, assisting a fraudulent breach of trust is clearly more culpable than assisting an innocent or negligent breach of trust. Nevertheless, knowing assistance remains primarily concerned with the culpability of the defendant, and only secondarily concerned with culpability of the trustee.

Unfortunately, Iacobucci J.'s judgment in *Air Canada* obscures this fundamental point. As stated above, he acknowledges that the "basic question" is "whether the stranger's conscience is sufficiently affected" to impose liability.¹² In *Air Canada*, the issue arose because the trial judge found that the defendants did not act in bad faith and therefore excused them from liability.¹³ This could have been refuted on the facts. The breach of trust consisted of a deposit of trust funds to an overdrawn general account, where the bank seized them to satisfy a demand loan. The defendants were employees and directors of the trustee, a corporation. In good faith, they attempted to repair the breach by replacing the funds and compensating the beneficiary, but failed to find replacement funds. Their attempts to repair the breach should not have been relevant, because they occurred some time after the breach itself; the real issue was their good or bad faith at the time of the breach.¹⁴ However, Iacobucci J. did not challenge the trial judge's finding on this basis. Instead, he dismissed the notion that the plaintiff must prove that the defendant acted dishonestly: "The issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized ... It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly."¹⁵ This is a curious statement: it seems to deny that the defendant's conscience should be the focus of the enquiry. Of course, Iacobucci J.'s approach to knowing assistance would not impose personal liability on a defendant who acts in good faith. That is, it is difficult to see how a defendant acts in good faith if it knowingly participates in a design which it knows is dishonest.¹⁶ Nevertheless,

as the trustee's liability. It would still be controlled by test of conscience. In particular, liability still requires knowledge of the trust relationship. For example, if the trustee innocently but wrongfully earns an unauthorised profit with the assistance of the defendant, and the defendant did not know that the trust was breached, the defendant's conscience is not sufficiently affected to impose liability. The trustee, of course, would be still liable to the beneficiaries for the gain.

¹¹ See the sources cited *supra* footnote 1.

¹² *Supra*, footnote 1 at 606.

¹³ Flanigan Dist. Ct. J., (26 April 1988).

¹⁴ Cf. *Arthur Andersen Inc. v. The Toronto-Dominion Bank* (1994), 14 B.L.R. (2d) 1.

¹⁵ *Supra* footnote 1 at 618.

¹⁶ But if the trust is a statutory trust, the defendant is deemed to know of the existence and terms of the statutory trust: *Air Canada*, *supra* footnote 1 at 608. See also *Scott v. Riehl*, *supra* footnote 6; *Wawanesa Mutual Insurance Co. v. J.A. (Fred) Chalmers & Co.* (1969), 7 D.L.R. (3d) 283 (Sask. Q.B.); *Trilec Installations Ltd. v. Bastion Construction Ltd.* *supra* footnote 1; *Henry Electric Ltd. v. Farwell*, *supra* footnote 1; *Andrea Schmidt Construction Ltd. v. Glatt*, (1979), *supra* footnote 1. On presumed knowledge of law, see Sullivan, *supra* footnote 1 at 239-240. Cf. *Nimmo v. Westpac*, *supra* footnote 1 at 226-228.

it would have been preferable to stress that the central question remains the unconscionability of the defendant's conduct. As stated above, the culpability of the trustee's actions is indeed relevant, but only insofar as it reflects on the defendant's own culpability.¹⁷

This brings us to the question of the trustee's culpability, for the centrality of the defendant's conduct does not exclude consideration of the nature of the trustee's conduct. As stated above, participating in a fraudulent breach is more blameworthy than participating in an innocent or negligent breach of trust. In this context, fraud is "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take".¹⁸ This clearly applies to a conversion of trust funds for the trustee's own purposes.¹⁹ However, the trustee need not have intended to benefit personally from the breach,²⁰ nor is it necessary to show that the trustee intended to deprive the beneficiary of its property permanently.²¹ Hence, it is fraudulent to pay the trustee's or defendant's debts with trust funds, even if the trustee or defendant intends to repay the beneficiaries in full.²² It is also fraudulent to put trust funds at risk by failing to safeguard them from a known risk of seizure by the trustee's creditors.²³ Even if there is no intention to divert the funds for the payment of debts, the knowledge of that possibility makes the breach fraudulent.²⁴

¹⁷ See Harpum, *supra* footnote 1 at 116 and 127: "In cases of knowing assistance, the emphasis on participation by the stranger in the fraud of the trustee necessarily implies that the stranger will be liable only if he acts in bad faith." See also Norman, *supra* footnote 1 at 335.

¹⁸ *Baden, Delvaux*, *supra* footnote 1 at 406, referred to by Iacobucci J. in *Air Canada*, *supra* footnote 1 at 618. See also Lord Selborne in *Barnes v. Addy*, *supra* footnote 2 at 251, and Harpum, *ibid.* at 146: "The phrase connotes an act done in deliberate contravention of, or in reckless indifference to, the rights of the beneficiary who might thereby be prejudiced."

¹⁹ E.g. *MacDonald v. Hauer*, *supra* footnote 1: a trustee pledged trust property as security for a margin account in his own name, with the intention sharing the profits from the account with the stranger to the trust.

²⁰ See *infra*, text accompanying footnote 80, on the relevance of the receipt of a benefit.

²¹ E.g. *Air Canada*, *supra* footnote 1.

²² E.g. where the defendant takes trust property for its own use, as in *Austin v. Habitat Developments*, *supra* footnote 1, or when a payment is improperly made to a non-beneficiary, as in *Air Canada*, *ibid.*, and *Eaves v. Hickson* (1861), 30 Beav. 136, 54 E.R. 840 (Ch.).

²³ In *Air Canada*, Iacobucci J. described a number of cases (including *Air Canada*) in which trust funds were held in an overdrawn general account, without notification to creditors that the funds were not beneficially owned by the trustee, as examples of fraud. See *Air Canada*, citing *Trilec Installations Ltd. v. Bastion Construction Ltd.*, *supra* footnote 1; *Henry Electric Ltd. v. Farwell*, *supra* footnote 1; *Wawanesa Mutual Insurance Co. v. J.A. (Fred) Chalmers*, *supra* footnote 16; *Scott v. Riehl*, *supra* footnote 6 (Esso J. dissented in *Scott v. Riehl*, but on the basis that it was not foreseeable that the bank would seize the funds, i.e. that the funds were not at risk).

²⁴ E.g. *Trilec Installations Ltd. v. Bastion Construction Ltd.*, *ibid.*

Controversy arises when the breach is merely innocent or negligent. According to the 'want of probity' analysis, there is no liability unless the defendant was implicated in fraud.²⁵ Consequently, there is no liability if the breach was innocent or negligent; only fraud is sufficient. The narrow position derives from the well-known passage from *Barnes v. Addy*, where Lord Selborne discussed the circumstances in which the courts impose liability on a stranger:

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, 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.²⁶

The passage is clear: the defendant is liable in knowing assistance if, and only if, the breach itself is fraudulent. It explains the narrowness of the current doctrine, but it is wrong to treat the *dicta* as a comprehensive statement of all the circumstances in which the courts impose personal liability on a stranger to the trust. In particular, cases in which the stranger's participation constitutes inducement or instigation of the breach of trust, rather than mere assistance, lie beyond its scope. In these cases, the defendant is liable for the breach, even if the trustee acted negligently or innocently.²⁷ For example, in *Eaves v. Hickson*,²⁸ the defendant knowingly sent a forged marriage certificate to the trustee, in order to deceive the trustee into distributing funds to his illegitimate children. The trustee clearly breached the trust, but his conduct was innocent, or at worst negligent. Nevertheless, the defendant was liable because he had knowingly induced the breach of trust. Similarly, in *Miller v. Brenner*,²⁹ the defendant tricked the beneficiary's stockbrokers into buying unauthorised investments with trust funds. As in *Eaves v. Hickson*, the stockbrokers were not guilty of fraud, but the defendant was nonetheless liable to the beneficiaries.

These cases are important because they contradict one argument underlying the 'want of probity' analysis. Some commentators argue that the defendant

²⁵ See the sources cited *supra* footnote 6.

²⁶ *Supra* footnote 2 at 251-252.

²⁷ In addition to the authorities cited in the text, see *Wilson v. Moore* (1833), 1 My. & K. 126, 39 E.R. 629 (Ch.) aff'd (1834), 1 My. & K. 337, 39 E.R. 709 (C.A.); *Fyler v. Fyler* (1841), 3 Beav. 550, 49 E.R. 216; *Elliot v. Hatzie Priore Ltd.* (1913), 13 D.L.R. 238 (B.C.C.A.); and the Court of Appeal in *Air Canada*: unlike the Supreme Court, it did not discuss whether M. & L.'s breach was fraudulent or not; it merely stated that "where the breach of trust by the corporation is expressly induced by a director, that director should bear personal liability for the breach", *supra* footnote 1, 77 D.L.R. at 554. See generally Harpum, *supra* footnote 1 at 141-144; Sullivan, *supra* footnote 1 at 244-245.

²⁸ *Supra* footnote 22.

²⁹ *Trusts & Guarantee Co. Ltd. v. Brenner*, [1933] 4 D.L.R. 273 (S.C.C.).

who participates in an innocent or negligent breach of trust is itself not culpable of anything greater than innocence or negligence.³⁰ By this reasoning, the defendant's conscience is not sufficiently affected to impose personal liability. However, the inducement cases show that the culpability of the defendant may be greater than that of the trustee. Some writers have responded to this apparent contradiction by arguing that the inducement cases are examples of a separate form of liability.³¹ This draws an artificial distinction: cases on inducement and assistance concern the same sort of conduct, with the same sort of remedy. The central concern in each remains the culpability of the defendant, and the degree of participation and the nature of the breach are factors which help the court determine the level of culpability in a given case.

Even though some regard inducement as a separate head of liability, with a different set of underlying principles, the authority of *Barnes v. Addy* has not remained unchallenged. In *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, Ungood-Thomas J. stated that the terms 'dishonest and fraudulent design'

are to be understood according to the plain principles of a court of equity ... and these principles, in this context at any rate, are just plain, ordinary commonsense. I accept that dishonest and fraudulent, so understood, is certainly conduct which is morally reprehensible; but what is morally reprehensible is best left open to identification and not to be confined by definition."³²

This aspect of *Selangor* was disapproved by the English courts in *Belmont Finance Corp. Ltd. v. William Furniture Ltd. (No. 1)* and *Baden, Delvaux*, because they took it to mean that something short of a fraudulent breach of trust would be sufficient for knowing assistance.³³ To the critics, it appeared that Ungood-Thomas J. had lost sight of the need to prove that the defendant was guilty of morally culpable behaviour. In essence, they relied on the argument that the defendant could only be morally guilty if implicated in fraud, and this could only happen if the trustee acted fraudulently.³⁴ This view now dominates

³⁰ Norman, *supra* footnote 1 at 334; J. Martin, "Fusion, Fallacy and Confusion; A Comparative Study" [1994] Conv. 13 at 27.

³¹ Harpum, *supra* footnote 1 at 141-144. Sullivan, *supra* footnote 1, does not describe it as a separate form of liability, but states that liability in both the assistance and inducement cases is imposed because the defendant is either implicated in another's fraud (assistance), or guilty of fraud (inducement). She seems to limit the stranger's liability for inducement to a fraudulent inducement at 244; Harpum, however, states at 144 that "it makes no difference to [the defendant's] liability whether he acted out of a misplaced zeal for his client or for reasons of fraudulent self-interest."

³² [1968] 2 All E.R. 1073 at 1104-1105. In England, *Selangor* was followed in *Karak Rubber Co. v. Burden (No. 2)*, [1972] 1 W.L.R. 602, 1 All E.R. 1210 (Ch.D.) and *Rowlandson v. National Westminster Bank Ltd.*, [1978] 1 W.L.R. 798 (Ch.D.).

³³ *Belmont Finance (No. 1)*, *supra* footnote 1 at 130, *per* Buckley L.J. and at 135, *per* Goff L.J.; *Baden, Delvaux*, *supra* footnote 1 at 406.

³⁴ Harpum, *supra* footnote 1 at 152: "The basis of liability is no longer the stranger's implication in the fraud of the trustees, but his notice of their breach of trust." See *contra*: Loughlan, *supra* footnote 1 at 268; P. Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb. L.J. 491 at 508n.

the English courts; it is fairly clear that they will not impose liability unless the breach was fraudulent and dishonest.³⁵

Prior to *Air Canada*, Canadian courts took different views of this question. One line of cases required a fraudulent breach,³⁶ but another line followed *Selangor*.³⁷ The point was not essential to the decision in *Air Canada* because the breach was clearly fraudulent;³⁸ nevertheless, Iacobucci J. declared that only fraudulent or dishonest breach of trust would be sufficient,³⁹ but without asking a fundamental question: *why* is nothing short of fraud sufficient? Suppose the trustee is not guilty of fraud, but still manages to lose all the trust property through negligence; and suppose that the defendant knows that the trustee is committing a negligent breach of trust which will cause substantial loss to a beneficiary. Why should we not treat the defendant's decision to provide assistance as evidence that his or her conscience is sufficiently affected to impose personal liability?

Undoubtedly, it is morally culpable to deliberately and knowingly participate in a fraudulent design. However, the blanket refusal to treat participation in other breaches as sufficiently culpable to warrant liability is too restrictive.⁴⁰

³⁵ See the English cases cited *supra* footnote 6. Cf. *Powell v. Thompson*, *supra* footnote 1 (fraud not required).

³⁶ E.g. *MacDonald v. Hauer*, *supra* footnote 1; *Scott v. Riehl*, *supra* footnote 6; *Canadian Imperial Bank of Commerce v. Valley Credit Union*, *supra* footnote 1.

³⁷ *Andrea Schmidt Construction Ltd. v. Glatt*, *supra* footnote 1; *Trilec Installations v. Bastion Construction*, *supra* footnote 1; *Horsman Bros. Holdings Ltd. v. Panton*, [1976] 3 W.W.R. 745 (B.C.S.C.); *Henry Electric Ltd. v. Farwell*, *supra* footnote 1; *Winslow v. Richter*, *supra* footnote 1. In fact, not all of these cases represent a real challenge to the first line. Some of these cases should be treated as examples of knowing receipt, where fraud is not a relevant consideration. E.g. *Andrea Schmidt Construction Ltd. v. Glatt*, one of the defendants, a mortgagee, caused trust funds to be used to a debt owed by the trustee to it. Another defendant could have been liable for inducing the breach of trust because he "expressly directed" the breach of trust (see 138); as explained in the text, the traditional doctrine does not require proof of fraud for inducement. In the remaining cases, fraud was present on the facts (even if not acknowledged by the court), because it was clear that the trustee took an unjustified and improper risk with the trust property. E.g. in *Trilec Installations v. Bastion Construction*, the defendant, the principal officer of a corporate trustee, conceded that when he deposited trust funds to a general account that he "knew ... that the funds probably would be taken, as they were, by others than the beneficiaries of the trust" at 767. In *Henry Electric Ltd. v. Farwell*, funds were deposited to an account which, although not overdrawn, was in jeopardy of seizure by the bank. In *Winslow v. Richter*, the trustee, a beneficiary, refused to distribute property to a co-trustee.

³⁸ McLachlin J., in a separate concurring judgment, left this point open: *Air Canada*, *supra* footnote 1 at 595.

³⁹ *Air Canada*, *ibid.* at 618.

⁴⁰ For further support, see *Powell v. Thompson*, *supra* footnote 1 at 613, *per* Thomas J.: "in my view it does not matter whether the trustee's conduct was fraudulent or negligent, devious or foolish, heinous or indifferent. Once a breach of trust has been committed, the commission of which has involved a third party, the question which arises is one as between the beneficiary and that third party. If the third party's conduct has been unconscionable, then irrespective of the degree of impropriety in the trustee's conduct, the third party is liable to be held accountable to the beneficiary as if he or she were a trustee."

Culpability should be based on a broad set of factors, especially the relative power of the parties. Suppose that the defendant's relationship with the trustee puts in it a position to influence the administration of the trust, and it knowingly abuses that position: surely the courts should consider this when assessing the defendant's culpability.⁴¹ This would resolve the central difficulty with the narrow approach of the 'want of probity' analysis: it is unsatisfactory, not because it indicates guilt where it should not, but because it fails to indicate guilt where it should.

II. *Vulnerability, Power and Culpability*

A. *The relationship to the law of fiduciaries*

Broadening the test for culpability to include the relative power of the parties moves knowing assistance a little closer to the law of fiduciaries. One of the characteristics of the fiduciary relationship is one party's vulnerability to another.⁴² If the defendant abuses a position of power over the trustee and, through the trustee, over the beneficiary as well, then there is a temptation to find that the defendant is a fiduciary of the beneficiary. This would broaden liability considerably, because the courts do not limit a fiduciary's liability to knowing or deliberate defaults. However, the defendant in knowing assistance should not be classed as a fiduciary simply because it was in a position of influence over the trustee. The strongest reason against finding the fiduciary relationship is the absence of any direct relationship between the beneficiary and the defendant. The beneficiary has not normally placed trust and confidence in the defendant, and the defendant has not purported to accept any such trust or confidence from the beneficiary.⁴³ Of course, in many cases the defendant is an agent of the trustee, and as such it owes contractual and fiduciary duties to the trustee. These duties may require the defendant to act in the best interests of the trustee and, depending on the nature of the obligations, they could require the defendant to ensure that the trustee fulfils its fiduciary obligations to the beneficiary.⁴⁴ However, this does not make the defendant the fiduciary of the trust beneficiary. For example, in *Winslow v. Richter*,⁴⁵ the plaintiff and his wife separated, and agreed that he would transfer his interest in the matrimonial home to her, and in exchange she would pay him half the proceeds if she sold it. When she sold the home, her solicitor received the sale proceeds and paid the full amount to her.

⁴¹ See also Loughlan, *supra* footnote 1 at 264: the fiduciary relationship between the trustee and beneficiary puts the beneficiary in a vulnerable position, which the stranger should not be permitted to exploit: "The third person should not in equity be allowed to exploit the greater opportunities for advantage-taking given to him by the existence of the initial fiduciary relationship".

⁴² Cf. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, *per* McLachlin J.

⁴³ *Ibid.* at 262-263, 265.

⁴⁴ *Baden, Delvaux, supra* footnote 1 at 406. Peter Gibson J. remarked that the fiduciary obligations of company directors include an obligation to prevent the misapplication of property held by the company as trustee, even if the funds are taken by the company itself.

⁴⁵ *Supra* footnote 1.

The plaintiff brought proceedings against the solicitor, on the basis that she was his fiduciary. He argued that his wife was a trustee of his interest in the home, and that the defendant was in a fiduciary relationship with his wife; through these two relationships, he maintained that the defendant also owed him a fiduciary duty to protect his interest in the home. The court quite properly rejected this contention: the defendant made it clear to the plaintiff that she did not act for him and that he should seek advice elsewhere. Hence, the plaintiff could not argue that he reposed any trust or confidence in her, nor that she accepted any such trust or confidence.⁴⁶

By contrast, the majority in *Austin v. Habitat Developments* decided this point incorrectly.⁴⁷ The defendants, Whitehood and Robinson, ran Eastland, a corporation hired by the plaintiffs to manage real estate. Eastland collected income from the properties and held it in a trust account. Robinson withdrew money from the trust account for his own purposes, and Whitehood hid this fact by presenting the beneficiary with misleading accounts. Freeman J.A. held the defendants liable, on the basis that they were themselves fiduciaries of the beneficiary, for the following reasons:

At all relevant times Mr. Whitehood was president, both he and Mr. Robinson were directors, and both had signing authority over the trust account. There were no other shareholders. Both of these key employees were agents of Eastland. Both, therefore, were in a fiduciary relationship with the respondents to the same extent as their principal.⁴⁸

The defendants were clearly liable, on the grounds of either of knowing assistance or the lifting of the corporate veil. Finding that they were fiduciaries of the plaintiffs, solely on the basis that their company concluded a trust agreement with the plaintiff, was both unnecessary and excessive. To be sure, they breached their fiduciary duties to Eastland, and participated in Eastland's breach of its fiduciary duties owed to the beneficiary; however, as stated by Hallett J.A. in a separate concurring judgment, it was "not appropriate nor necessary to invoke equity's blunt tool of imposing fiduciary obligations" to find a remedy suitable to the case.⁴⁹ This is sound, and should be applied in the majority of cases. Only if the trustee's employees or agents have given an undertaking directly to the beneficiary should they be considered fiduciaries of the beneficiary.

B. *The vulnerability of the beneficiary*

Examining the relative power and vulnerability of the parties requires an examination of the relationships between the trustee and each of the beneficiary and defendant. Looking first at beneficiaries, we may distinguish those who

⁴⁶ The plaintiff was permitted to amend his statement of claim in order to plead the case in knowing assistance.

⁴⁷ *Supra* footnote 1.

⁴⁸ *Ibid.* at 368-369.

⁴⁹ *Ibid.* at 361, *per* Hallett J.A.

enter the trust relationship for commercial reasons from those who do not. For example, the beneficiary of a trust which secures a commercial loan clearly stands in a different position from a minor beneficiary of a family trust. In many cases, the commercial beneficiary is capable of gaining considerable influence and power over the management of the trust. Through this influence, it should be able to protect its interests and it therefore has less need of protection by the court. The courts should therefore ask if the beneficiary had other means of safeguarding its interests before imposing personal liability on the defendant.

This point is clearly illustrated by *Air Canada*.⁵⁰ As stated above, trust funds were improperly deposited to an overdrawn general account. To explain further, the defendants, Valliant and Martin, were the sole shareholders and directors of a corporate travel agency, M. & L. Travel Limited. On M. & L.'s behalf, Valliant and Martin signed a contract with Air Canada under which Air Canada agreed to provide blank ticket stock to M. & L. The contract provided that the ticket proceeds "shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline". At the same time, the contract permitted M. & L. to retain the ticket proceeds for up to fifteen days, and it did not expressly require M. & L. to keep the ticket proceeds in a separate account before payment.⁵¹ the relationship was not one of trust. Indeed, it was M. & L.'s practice to deposit the ticket proceeds into the general account, from which it made payments to Air Canada within one or two weeks of the deposit. As explained above, M. & L. breached its trust by depositing about \$25,000 in ticket proceeds to an overdrawn general account, where the bank seized it to satisfy an outstanding demand loan.⁵² Valliant and Martin, as the shareholders, directors and officers of M. & L., were responsible for handling of the ticket proceeds and were ultimately found guilty of knowing assistance in M. & L.'s breach of trust.

Considering that the trust was created under a commercial contract, one may ask whether Air Canada obtained protection from the courts which it could have obtained through private negotiation with M. & L. For example, given that it knew that Valliant and Martin were the sole shareholders and directors of M. & L., why did it not require them to personally guarantee the repayment of M.

⁵⁰ *Supra* footnote 1.

⁵¹ For this reason, Valliant argued that the contract did not create a trust. Valliant relied on *M.A. Hanna Co. v. Provincial Bank of Canada*, [1935] S.C.R. 144, which in turn followed *Henry v. Hammond*, [1913] 2 K.B. 515; both cases regard the presence or absence of a prohibition commingling of funds as the conclusive factor in determining whether a trust exists. Iacobucci J. acknowledged that the presence or absence of a prohibition is a relevant consideration, but only insofar as it clarifies the intention of the parties: *Air Canada*, *ibid.* at 602-605. That is, the absence of an express prohibition cannot be conclusive if there is clear evidence of an intention to create a trust. In the light of the express reference to the trust (quoted in the text above), there was really no argument that

⁵² There was no real doubt that this was a breach; admittedly, contract did not require the trust property to be segregated, but depositing the funds in an overdrawn account, without informing the bank of Air Canada's interest, was a clear failure to safeguard the trust property from unjustified risks.

& L.'s debt?⁵³ And why did it not require M. & L. to segregate the trust funds or notify the bank of its interest in the general account? Alternatively, Air Canada might have insisted on the right to monitor M. & L.'s business and the trust property, and thereby gain the initiative in protecting its own interests. To be sure, adding these safeguards to the contract probably would have come at a price. For example, if Valliant and Martin gave personal guarantees, they might have caused M. & L. to demand higher commissions from Air Canada. This would have compensated them for the increase in their exposure to the risk of personal liability. In effect, by getting the court to impose personal liability, Air Canada obtained the personal guarantees that it was not willing to pay for in the contract.

Of course, Air Canada could not have protected itself entirely by contract. It would be impossible to foresee and plan against all acts of mismanagement. In particular, it could not have protected itself from fraud, especially if the fraud consisted of a deliberate scheme to hide information from the beneficiary. This provides a good reason for restricting personal liability for assistance in a fraudulent or dishonest breach of trust: these are the types of misconduct which are the most difficult for beneficiaries to guard against in advance. By contrast, one would normally expect a commercial beneficiary, such as Air Canada, to be capable of protecting itself from innocent or negligent breaches of trust.

Whether the same considerations should apply to non-commercial beneficiaries is another question. Here, the beneficiary is not normally capable of bargaining for terms to protect its interests, and so there is a stronger argument for treating them more favourably than the commercial beneficiary. To be sure, the beneficiary is not legally incapable of informing itself about the management of the trust. The trustee is under a duty to keep accounts and to be ready to produce them to the beneficiary when requested, and may be required to pass the accounts in court.⁵⁴ However, this is unlikely to be as effective as the rights which the commercial beneficiary might bargain for. For example, the accounts would not necessarily reveal that the trustee is failing to exercise due care in selecting investments. As a result, this type of beneficiary is generally more vulnerable to mismanagement than the commercial beneficiary. In some respects, the situation is similar to that found in tort cases on negligence and pure economic loss. The courts are more likely to award damages to a non-commercial plaintiff than they are to a commercial plaintiff, especially if the

⁵³ Cf. Hallett J.A. in *Austin v. Habitat Development*, *supra* footnote 1 at 361, rejecting the majority's view that the defendants were fiduciaries of the plaintiffs solely on the basis of their influence over the trustee: "If the respondents, who would appear to be businessmen and professions, expected [the defendants] to be their fiduciaries with respect to moneys collected on their behalf, the respondents ought to have contracted with them personally."

⁵⁴ *Sandford v. Porter* (1889), 16 O.A.R. 565 at 571, *per* MacLennan J.A. The Public Trustee and Official Guardian may assist certain beneficiaries, and the court has a general supervisory jurisdiction over all trusts; see generally Oosterhoof and Gillese, *supra* footnote 2 at 643-652.

commercial plaintiff could have protected itself by contract.⁵⁵ Similarly, they should be more willing to find the defendant liable to a non-commercial beneficiary in cases of knowing assistance.⁵⁶

C. *The influence of the defendant*

The question of power and vulnerability is not just a matter of the beneficiary's relationship with the trustee. The real question is the vulnerability of the beneficiary to the defendant. This is determined partly by the relationship between the trustee and the beneficiary, and partly by the relationship between the defendant and the trustee. If the defendant has considerable influence over the trustee, and the beneficiary is relatively powerless in its dealings with the trustee, then the beneficiary is vulnerable to the defendant. Should the defendant then participate in a breach of trust, its culpability is greater than the defendant who has little or no influence over the trustee's actions.

One observation should be made at this point: in most cases of knowing assistance, the trustee has appointed the defendant as its agent for carrying out certain tasks of trust administration.⁵⁷ This gives the agent its influence over the trustee, although the degree of influence varies considerably according to the nature of the relationship with the trustee. For example, if the trustee is a corporation and the defendant is its controlling mind, his or her power over the trustee clearly exceeds that of the beneficiary. Hence, it is appropriate to hold the controlling mind liable for participating in the company's breach of trust, whether or not the breach is fraudulent.

The case law is sufficient to support this principle, although not expressed in terms of an imbalance of power. Under the 'want of probity' analysis, the court would have to accept that either the breach was fraudulent, or that the participation amounted to inducement. Both arguments would be valid. The first argument maintains that the distinction between fraudulent, innocent and negligent breaches disappears if the controlling mind is a knowing participant. As explained above, *Air Canada* defined fraud as taking of a risk *known* to be unjustified.⁵⁸ The corporation's knowledge would normally be the knowledge of its controlling mind. Hence, if the controlling mind knew that certain acts expose the trust property to an unjustified risk, the trustee would have the

⁵⁵ See e.g. *C.N.R. v. Norsk*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289 *per* La Forest J. at 356 (D.L.R.) (La Forest J. favoured a general rule against recovery in negligence for harm to the plaintiff's contractual rights with a third party, which is analogous to the defendant's interference with the rights of the beneficiary in knowing assistance). See also *British Columbia Hydro and Power Authority v. N.D. Lea and Associates* (1992), 11 C.C.L.T. (2d) 258 (B.C.S.C.), *Leigh and Sullivan Ltd. v. Aliakmon Shipping Company Ltd.*, [1986] A.C. 785 (H.L.), and *Smith v. Bush*, [1990] 1 A.C. 831 (H.L.).

⁵⁶ Cf. *Powell v. Thompson*, *supra* footnote 1 at 619-620, where Thomas J. indicated his willingness to consider such factors for the purpose of considering the unconscionability of the defendant's conduct.

⁵⁷ For a contrary example, see *Eaves v. Hickson*, *supra* footnote 22.

⁵⁸ *Supra*, text accompanying footnote 18.

knowledge required to make the breach fraudulent. Iacobucci J. seems to acknowledge this in *Air Canada*, where he states that

where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue.⁵⁹

In effect, the dishonesty of controlling mind becomes the dishonesty of the corporation because they are so closely connected.

Alternatively, given the controlling mind's authority over the trustee, the court could treat its participation as inducement, rather than assistance. A number of cases prior to *Air Canada* adopt this argument.⁶⁰ Indeed, in these circumstances, there is an air of artificiality in the distinction between inducement and assistance.⁶¹ For example, suppose that other employees in the company know that the person who is the controlling mind would participate in the breach of trust: on its own, this may be sufficient to persuade them to breach the trust. In a real sense, the willingness of the controlling mind to assist the breach may induce others to commit it.⁶²

In essence, these two arguments are the same. Both implicitly acknowledge that the power of the controlling mind is such that its actions cannot be separated from those of the trustee. As a result, the distinctions between inducement and assistance, and between fraud and negligence or innocence, are artificial and confuse the issues in other cases of knowing assistance. As a general rule, the decision of the controlling mind to participate in a breach of trust is sufficiently culpable to impose liability.

The defendant's relationship with the trustee is equally important when we consider the position of junior employees. Unlike the controlling mind (or other senior officers of the trustee), junior employees generally respond to instructions; they do not issue them. Hence, they put their career at risk if they challenge instructions, even if they know the instructions involve a breach of trust. Furthermore, the difficulty they would face in finding other employment increases their powerlessness.⁶³ Indeed, their dependency on the employer-

⁵⁹ *Supra* footnote 1 at 618. Cf. *Wilson v. Lord Bury* (1880), 5 Q.B.D. 518 at 535 (C.A.) per Bagallay L.J. (diss.). Cf. *Baden, Delvaux*, *supra* footnote 1 at 405 per Peter Gibson J.: if a company is a trustee, "I can see no reason in principle why a claim in equity should not lie if it is alleged that the individuals who control the company (and ex hypothesi a company can only act through individuals), and not the company itself, have the relevant fraudulent design in relation to the trust property."

⁶⁰ See e.g. *Andrea Schmidt Construction Ltd. v. Glatt*, and Court of Appeal in *Air Canada*, *supra* footnote 1 at 554: "where the breach of trust by the corporation is expressly induced by a director, that director should bear personal liability for the breach." The Supreme Court did not address the issue, perhaps because it found that the breach was fraudulent.

⁶¹ *Sales*, *supra* footnote 34 at 505, 508n; *Harpum*, *supra* footnote 1 at 144.

⁶² *Sales*, *ibid.*

⁶³ Cf. the analysis of the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (especially La Forest J.).

trustee is roughly similar that of the beneficiary, for both rely upon the trustee for the security of their economic interests. For these reasons, the vulnerability of the beneficiary to the junior employees is far less than it is to the controlling mind (or other senior officers of the trustee). In the case of commercial beneficiaries, it is minimal. Accordingly, the current state of the law is broadly satisfactory, and junior employees should not be liable for anything short of a fraudulent breach of trust. I would take this a step further, and submit that this should also apply to cases of inducement. That is, the courts should not hold the junior employee liable for inducing a breach of trust unless the breach is fraudulent. Again, we could argue this in different ways. For example, the relative powerlessness of junior employees suggests that they cannot induce their employer to breach a trust, except in only the most unusual circumstances. This would mean that the controlling mind's participation in a breach normally amounts to inducement, and the junior employee's participation normally amounts to assistance.⁶⁴ As such, it falls within the formulation of the law expressed in *Air Canada* and the leading English cases, even though it derives from the analysis of the vulnerability of the parties.

Outside agents are clearly not subject to the same degree of control as employees. Depending on the circumstances, they may have considerable influence over the trustee, and still retain a high degree of economic independence from the trustee. For example, a solicitor advising a lay trustee of a family trust exerts considerable power over the trustee; but at the same time, he or she would not suffer unduly if the trustee ended their relationship. The vulnerability of the beneficiary to the trustee, and of the trustee to the solicitor, suggests that the solicitor should be liable for all breaches of trust in which it participates.⁶⁵ At the same time, there would be cases where the trustee confines the agent's tasks to specific instructions. In these cases, the agent's influence over the trustee is slight. In this respect, the position of the agent resembles the position of the junior employee.

III. *Knowledge: Subjective or Objective?*

The issue of knowledge is crucial to any analysis of the defendant's conscience, for the defendant is not morally culpable unless he or she knew, or should have known, of the trustee's wrongdoing. This immediately raises a fundamental

⁶⁴ Cf. *Austin v. Habitat Development Ltd.*, *supra* footnote 1: where the defendant, a senior officer of the trustee, prepared financial statements which failed to disclose his co-defendant's fraud. Although the defendant's actions could have been described as a failure to act, they were still sufficient to amount to assistance: see Hallett J.A. at 364-365, Freeman J.A. (Jones J.A. concurring) at 372. Arguably, they would not have amounted to assistance if the defendant was merely a junior employee.

⁶⁵ See e.g. *Winslow v. Richter*, *supra* footnote 1 at 558: "a solicitor who acts as agent of the trustee, and who knowingly assists the trustee in disposing of trust property in a manner which is inconsistent with the terms of the trust, whether or not that disposition is tainted with fraud or dishonesty, will become liable to the *cestuis que trust* for any loss resulting therefrom."

question: should the test of knowledge be subjective or objective? Different Canadian courts have given differing answers to this question,⁶⁶ but in *Air Canada*, Iacobucci J. followed the view of the majority of Commonwealth courts and stated that "the knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice".⁶⁷ Clearly, this is a very narrow test, but there are strong arguments in its favour.⁶⁸ The objective test could work a hardship on defendants, because they do not necessarily benefit directly from the breach; nor do they undertake to protect the beneficiary's interests. If they did either, then liability under knowing receipt or trusteeship *de son tort* would apply. Under these categories, the courts impose liability for negligent or (in the case of trusteeship *de son tort*) innocent failures to appreciate that the trustee's actions amount to a breach. However, liability in knowing assistance concerns the interference with rights created under a relationship with a third party. As such, it should normally apply only if an intentional, knowing interference with the relationship. This is not only fair to the defendant: it is also consistent with the standard of blame used in the comparable common law torts of inducing breach of contract and conspiracy.⁶⁹ Furthermore, it would uphold the fundamental principle that the trustee alone is responsible for protecting the beneficiary's interests, and that those who deal with the trustee need not investigate into the terms of the trust.⁷⁰

⁶⁶ Some cases required subjective knowledge: e.g. *Canadian Imperial Bank of Commerce v. Valley Credit Union*, *supra* footnote 1; *Scott v. Riehl*, *supra* footnote 6. Others required objective knowledge: *MacDonald v. Hauer*, *supra* footnote 1 (on the facts, the defendant had actual knowledge); *Horsman Bros. Holdings Ltd. v. Panton*, *supra* footnote 37. In *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1983), 145 D.L.R. (3d) 663 (Ont. H.C.), a defendant who was held liable under knowing assistance knew that a breach of fiduciary duty was committed, but not necessarily that the breach was fraudulent and dishonest.

⁶⁷ *Supra* footnote 1 at 608. In England, *Selangor* supported the objective test, but the dominant view of commentators is now in favour of the subjective test: see e.g. Harpum, *supra* footnote 1; Norman, *supra* footnote 1; P. Birks, "Misdirected Funds Again" (1989) 105 L.Q.R. 528. The recent cases are less clear. Compare *Agip (Africa) v. Jackson*, *supra* footnote 1, *per* Millett J. at first instance and Fox L.J. in the Court of Appeal. In *Eagle Trust v. S.B.C. Securities*, *supra* footnote 1, Vinelott J. stated that it was now settled law that the subjective test applied. See also *Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd.* (1975), 132 C.L.R. 373 (Aust. H.C.). In New Zealand, the issue remains unsettled. Compare *Powell v. Thompson*, *supra* footnote 1 at 611: "there is no reason why, fixed with some knowledge, the third party's failure to make further inquiry should have to be of the order of a 'wilful and reckless' default" with *Nimmo v. Westpac Banking*, *supra* footnote 1 at 226: "the defendant must consciously have acted improperly", and *Marshall Futures v. Marshall*, *supra* footnote 1 at 325-326.

⁶⁸ At present, the subjective standard does not apply to all types of trusts. In particular, the defendant is deemed to have knowledge of a statutory trust. Furthermore, the defendant is presumed to know of the legal consequences of facts. For example, a defendant who has knowledge of the terms of the trust cannot argue that it did not know that certain actions would constitute a breach of trust. See the authorities cited *supra* footnote 16.

⁶⁹ Martin, *supra* footnote 30 at 27.

⁷⁰ Sullivan, *supra* footnote 1 at 217-223. Cf. *Nimmo v. Westpac*, *supra* footnote 1 at 236-237.

These principles are especially sound in the commercial context. However, the non-commercial context presents different considerations. Again, a comparison with the common law affirms this. Interference with a relationship between the plaintiff and a third party is not normally actionable in negligence, but *C.N.R. v. Norsk* confirms that there may be exceptions.⁷¹ Similarly, in exceptional cases, the courts should be willing to apply an objective test to knowing assistance.⁷² Whether the case is exceptional should depend upon the relative power of the parties. Again, the common law provides some support for this position, for a number of courts regard the presence of an imbalance in power between the parties as a factor in favour of imposing a duty of care.⁷³ This should answer the objection that the objective test would lower the degree of culpability to an unacceptable level.⁷⁴ The defendant who stands in a position of authority over the trustee and negligently uses that authority in a manner which he or she should have known would harm a relatively vulnerable beneficiary, is surely guilty of morally culpable behaviour.

In any case, when the defendant is in a close relationship with the trustee, the distinction between subjective and objective knowledge becomes so fine that it has little real meaning. When faced with doubt, there is a strong inclination to presume that a defendant in a position of power had subjective knowledge of the trustee's wrongdoing. For example, in the case of the controlling mind of a corporate trustee, it is difficult to argue that "the right hand would not know what the left hand was doing."⁷⁵ *Air Canada* illustrates this point quite clearly. Valliant must have known that the contract with the bank created a trust in order have knowledge of the breach. However, it is not clear from the report that Valliant understood that the contract created a trust; indeed, before the court he argued that it did not create a trust,⁷⁶ and it was not clear that he actually read the terms which referred to the trust.⁷⁷ Nevertheless, Iacobucci J. held that Valliant was wilfully blind to the breach of trust, if he did not have actual knowledge of it. This is a fair result, although the

⁷¹ *Supra* footnote 55. For further discussion, see A.L. Mactavish, "Tort recovery for economic loss: recent developments" (1993) 21 Can. Bus. L.J. 395.

⁷² See also *Powell v. Thompson*, *supra* footnote 1 at 612: "there is no sound reason why the negligent conduct of a third party who assisted the trustee to commit a breach of trust should be put beyond the purview of unconscionable conduct which should attract the burden of trusteeship." (Not followed in *Nimmo v. Westpac*, *supra* footnote 1 at 226-228, *Marshall Futures v. Marshall*, *supra* footnote 1 at 325-326.)

⁷³ *Supra* footnote 55.

⁷⁴ E.g. Harpum, *supra* footnote 1 at 126-127, Martin, *supra* footnote 30 at 27.

⁷⁵ *Henry Electric v. Falwell*, *supra* footnote 1 at 483, *per* Carrothers J.A.. Cf. *Andrea Schmidt Construction v. Glatt*, *supra* footnote 1.

⁷⁶ *Supra* footnote 51.

⁷⁷ Although Valliant signed the contract, it is not clear that he actually read the terms which referred to the trust, or that he adverted to the possibility that the contract created a trust or other form of security. Griffiths J.A., in the Court of Appeal, stated that Martin, Valliant's co-defendant, testified that Valliant was familiar with the contents of a predecessor contract which contained similar terms: *supra* footnote 1, 77 D.L.R. at 539. If he did fail to read the relevant terms, he would certainly be guilty of negligence and would have had objective knowledge of the trust and the breach. Even if Valliant had subjective knowledge of the trust, it is not clear that he knew that he was participating in a breach of trust. The

subjective-objective distinction obscured the analysis. As a shareholder, director and officer of the trustee, Valliant was certainly capable of gaining ready access to all the information necessary to reveal the trustee's wrongdoing. Hence, it is right to infer that his knowledge of the trustee's affairs, whether properly described as subjective or objective, sufficiently affected his conscience so as to hold him personally liable.

A. *The receipt of a benefit, knowledge and culpability*

The courts are not entirely clear on how the receipt of a benefit should affect the questions of knowledge and culpability. If the defendant receives trust funds from the breach of trust, the beneficiary could bring proceedings under knowing receipt or knowing assistance. The chances of success are greater under knowing receipt, because it is quite clear that the courts may impose liability if the knowledge was objective, and if the breach was innocent or negligent.⁷⁸ However, knowing receipt does not apply if the defendant benefited indirectly from the breach.⁷⁹ A number of cases state that the receipt of a benefit may provide evidence that the defendant knew that the trustee's actions were improper, although it is not conclusive.⁸⁰ Other cases do not tie the presence or absence of a benefit to the question of knowledge, but treat it as one of the factors which affect the defendant's culpability.⁸¹ For example, in *Re Barney*,⁸² two

breach consisted of depositing the ticket proceeds in the overdrawn general account. If, at the time of making a deposit, Valliant was not aware that the account was overdrawn, could it be said that he suspected fraud by M. & L.? Arguably, merely depositing the funds to the general account was enough to raise a suspicion of wrongdoing. Of course, Valliant's objective knowledge was not entirely irrelevant: as the signing officer of M. & L., the extent of M. & L.'s liability under the contract would be determined by his constructive knowledge of its terms. Compare to *Williams-Ashman v. Price and Williams*, [1942] 1 Ch. 219 (Ch.D.), where a solicitor was not liable for a breach of trust of which he did not have actual knowledge, although he had documents in his possession which would have revealed the breach.

⁷⁸ See generally Sullivan, *supra* footnote 1 at 240-243. But cf. *Montagu's Settlement Trusts*, *supra* footnote 5.

⁷⁹ For example, knowing receipt did not apply in *Air Canada*, although the defendants benefited because the deposit of the funds to the general account effectively released them from their personal guarantees to the bank.

⁸⁰ *Supra* footnote 1, *per* Iacobucci J. at 609: "If the stranger received a benefit as a result of the breach of trust, this may ground an inference that the stranger knew of the breach ... The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference." McLachlin J. stated that it was not necessary to decide whether liability could be imposed in the absence of personal benefit because it was clear that Valliant did receive a benefit (the bank's seizure of the funds from the general account released him from his personal guarantee). See Sullivan, *supra* footnote 1 at 251.

⁸¹ In *Air Canada*, both the Supreme Court and the Court of Appeal noted that Valliant and Martin benefited from the breach: *supra* footnote 1 at 619, and 77 D.L.R. at 556. See also: *Henry Electric*, *supra* footnote 1 at 486, *per* Carrothers J.A. (Cheffins J.A. concurring), at 489, *per* Esson J.A. (dissenting on other grounds); *Scott v. Riehl* (1958), *supra* footnote 6; and *Andrea Schmidt Construction Ltd.*, *supra* footnote 1.

⁸² [1892] 2 Ch. 265.

friends of an executrix advised her on the management of a testamentary trust. The trust property consisted of a business left by the testator, and the beneficiaries were his widow and children. The executrix felt that the family would be better off if she continued the business, although the terms of the trust forbid her to do so. The friends were aware of this, but advised her nonetheless on the management of the business, knowing that the executrix would breach the trust if she followed their advice. The business eventually collapsed, and the children brought proceedings against the friends. The court refused to hold them liable, in part because the trustee did not act fraudulently, but also in part because they were not paid for their advice and did not otherwise benefit from their actions. This is a sound result. Had they offered their advice with the expectation of receiving some sort of reward, then there would have been stronger ground for arguing that they took advantage of the vulnerability of the family for their own benefit, and therefore should have been personally liable.

Conclusions

I have argued that liability in knowing assistance should not be restricted to situations involving fraud. It should also apply to situations where the relationships between defendant, trustee and beneficiary are such that it is unconscionable for the defendant to participate in the breach of trust. This happens when the beneficiary cannot be expected to protect its own interests and the defendant exerts considerable influence and power over the trustee. In these situations, the defendant's decision to participate in the breach of trust is sufficiently culpable to warrant the imposition of liability.

To some extent, the current doctrine already allows the courts some scope for considering the nature of the relationships between the parties. For example, if the defendant is in a close and dominant relationship with the trustee, it is easier for the court to draw the inference that the defendant had subjective knowledge of the breach of trust. Similarly, the court is more likely to describe the defendant's participation as inducement, rather than assistance; in the current doctrine, this makes it unnecessary to prove that the breach was fraudulent. However, failing to consider the imbalance in power can obscure the relationship between culpability and the abuse of position. Furthermore, it may exclude relevant factors from consideration, such as the capacity of the beneficiary to protect its own interests. For these reasons, the courts should openly turn to the unconscionability analysis.

A final word concerns the significance of *Air Canada* beyond the area of knowing assistance. Prior to the Supreme Court's decision, the opposition to broadening knowing assistance beyond situations involving actual knowledge of fraud came largely from English courts and commentators. This is not surprising; in recent years, the English courts have taken a restrictive view of liability in other areas of law. There are two notable examples: they continue to reject the remedial constructive trust as unworkable,⁸³ and in tort law, they

⁸³ *Lloyd's Bank plc. v. Rosset*, [1991] A.C. 107 (H.L.).

overruled earlier authorities and now support a general exclusionary rule against the recovery of relational economic loss in negligence.⁸⁴ The Canadian courts took the opposite approach to both issues. The remedial constructive trust is an accepted part of Canadian law,⁸⁵ and there is no general exclusionary rule against the recovery of relational economic losses in negligence.⁸⁶ We might therefore expect the Canadian courts to take a flexible view of liability for knowing assistance. To this extent, Iacobucci J.'s judgment in *Air Canada* stands outside the broad trends in Canadian law. It may be nothing more than a temporary deviation from the course generally taken by Canadian courts. The decision itself is largely *obiter dicta*: in a separate concurring judgment, McLachlin J. stated that a number of the key issues should have been left open, simply because they did not arise on the facts of the case. In particular, she noted that the defendants had actual knowledge of the fraudulent breach. Hence, there was no need to decide if constructive knowledge was sufficient. She also noted that the breach was clearly fraudulent, and so it was not necessary to decide knowing assistance could apply to a breach committed in good faith. Nevertheless, it is interesting to note that, in England, the restriction of knowing assistance began in 1979, with *Belmont Finance (No. 1)*, and it was later followed by the developments in constructive trusts and pure economic loss. We may therefore ask whether the judgment in *Air Canada* indicates a similar beginning against the flexible, liberal view of liability found in decisions such as *C.N.R. v. Norsk*.

⁸⁴ *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.), overruling *Anns v. Merton London Borough Council*, [1978] 1 A.C. 728 (H.L.). Cf. *C.N.R. v. Norsk*, *supra* footnote 55.

⁸⁵ See generally Oosterhoff and Gillese, *supra* footnote 2, Part III.

⁸⁶ *C.N.R. v. Norsk*, *supra* footnote 55.