Case Comments
Commentaires d'arrêt

Knowing Receipt and the Protection of Trust Property: *Banton* v. *CIBC*

Mitchell McInnes *
London

I. *Introduction*

Trust property somehow finds its way into a stranger's pocket. What can the trust beneficiaries do about it? What causes of action are available to them? What remedies are they entitled to receive? Although they may seem simple, these questions are actually quite complex. Outside of Canada, they have recently generated a large and sophisticated body of literature. Competing positions have been carefully developed and vigorously defended. There will, of course, be a period of uncertainty before answers conclusively emerge, but in the meantime, that debate already has had one important effect. The general problem of misappropriated trust property has been distilled into several discrete issues. And as the terms of engagement have been clarified, solutions have been brought closer to hand.

In this country, by contrast, the matter has been neglected. There has been relatively little effort to delineate and resolve specific issues. Analyses tend to be loose and results tend to be haphazard. The Ontario Court of Appeal's decision in *Banton* v. *CIBC Trust Corp.*,[1] which provides the occasion for this comment, is illustrative. The court reached a suitable conclusion, but perhaps only fortuitously. There is certainly nothing in the structure of its analysis that compelled the right answer.

This paper critically examines the Court of Appeal's treatment of the central issue in *Banton*: a stranger's liability for "knowing receipt" of trust property. The general thesis is that many of the difficulties that occur in civil litigation arise from a failure to locate particular types of claims within a broader intellectual framework.[2] More specifically in the present context, Canadian courts struggle with knowing receipt because they consider it in isolation. A principled development of that

* Mitchell McInnes, of the Faculty of Law, University of Western Ontario, London, Ontario. The analysis in this comment benefited immeasurably from discussions with Dr Robert Chambers. I also would like to thank Mysty Clapton for her editorial assistance. Research funding was provided by the Ontario Law Foundation.

[1] (2001), 197 D.L.R. (4th) 212, aff'g (1999), 182 D.L.R. (4th) 486 (Ont. S.C.J.) (leave to appeal to S.C.C. dismissed [2001] S.C.C.A. No. 242 [hereafter *Banton*]).

[2] The general thesis is adapted from Professor Peter Birks: see generally, "Property and Unjust Enrichment: Categorical Truths" [1997] New Zealand L. Rev. 623 [hereafter "Property and Unjust Enrichment"]; "Definition and Division: *A Meditation on Institutes*" 3.13 in P. Birks, ed., *The Classification of Obligations* (Oxford: Clarendon, 1997) 1. Compare G. Samuel, "Can Gaius Really Be Compared to Darwin?" (2000) 49 I.C.L.Q. 297 (skeptical as the viability and value of legal taxonomy).

concept, however, requires that it be rationalized within the entire package of actions and remedies that are available for the protection of property interests.

II. *Protection of Property At Law*

Before considering the manner in which property is protected in *equity*, it will be useful to consider the situation in *law*.

The first thing to notice is that law generally[3] does not contain a *vindicatio*. In other words, with the exception of land,[4] there is usually no means by which the plaintiff can appear in court and demand possession of property on the simple ground that it belongs to her.[5] Although it may be a necessary element to other types of claims, a property right in itself is not a basis for relief.

The impossibility of directly vindicating property rights places additional pressure on other means of protecting the plaintiff's interests. Most of that pressure is borne by tort law. That point can be seen most clearly in the history of the action in conversion.[6] The plaintiff initially was required to prove that the defendant was at fault insofar as he dishonestly misappropriated something that he knew belonged to another. In time, however, the courts recognized the intolerable gap in that scheme. If the defendant dealt in good faith with the plaintiff's property, he could not be held liable in conversion. And moreover, even if the defendant still retained the goods, the lack of a *vindicatio* precluded the plaintiff from simply recovering them on the basis of her subsisting property interest. The allegation of dishonesty under conversion consequently became untraversable; it still appeared in the pleadings, but the courts would not allow the defendant to dispute it. At that point,

---

[3] Some exceptions and qualifications exist. For instance, a person with an immediate right to possession can, in limited circumstances, exercise a right of recaption to recover chattels. And as discussed *infra* note 9, the tort of detinue sometimes allows recovery *in specie* where monetary damages would be an inadequate remedy. Likewise, equity's jurisdiction sometimes can be called in aid of legal rights to provide specific performance of a promise to transfer unique property: *Semelhago* v. *Paramadevan* (1996), 136 D.L.R. (4th) 1 (S.C.C.).

[4] Although its origins lie in tort, the modern action to recover of land, otherwise known as ejectment, has "broken every meaningful link with the tort of trespass" and is "essentially a *vindicatio* which gives specific recovery": J. Davies, "Tort" in P. Birks, ed., *English Private Law*, vol. 2 (Oxford: Oxford University Press, 2000) at 501.

[5] In fact, the classic Roman law action from which the *vindicatio* takes its name did not entitle the claimant to recover property *in specie*. In most instances, the defendant was placed under a personal obligation to pay the value of the goods: B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 101.

[6] Professor Fleming recognized the connection: *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 61. "For want of a vindicatory action, English law early had to employ a tort remedy as substitute." Going further, he said at 61 that "the action is proprietary in substance, only tortious in form." The latter statement may be misleading, however, insofar as it suggests that the gist of conversion is a direct vindication of a property right. In fact, while parasitic on a property interest, wrongful conduct is the gist of the tort. Moreover, the plaintiff's claim is not for the property itself, but rather for damages arising from its misappropriation: P. Birks, "Personal Property: Proprietary Rights and Remedies" (2000), 11 King's College L.J. 1 at 6-10 [hereafter "Personal Property"].

the action was effectively transformed from a fault-based wrong into one of strict liability.[7] And it remains true today that the tort can be committed even if the defendant acted "innocently," for example by honestly purchasing a television that had been stolen from the plaintiff. Indeed, he may be held liable even if he no longer holds the goods in question. It is enough if, at some point in the story, he dealt with property in a way that (perhaps unbeknownst to the defendant) seriously interfered with the plaintiff's interests. Significantly however, even though conversion assumed the burden created by the absence of a *vindicatio*, its remedy is still purely monetary. The defendant may be held liable for compensatory damages or perhaps disgorgement,[8] but the plaintiff is not entitled to recover the property *in specie*.[9]

Finally, outside of tort, legal property interests are protected by the action in unjust enrichment.[10] Under the test formulated in *Pettkus* v. *Becker*,[11] the court must be satisfied that: (i) the defendant received an enrichment, (ii) the plaintiff suffered a corresponding deprivation, and (iii) there was an absence of any juristic reason for the enrichment. If those elements are established, the plaintiff

---

[7] That statement requires an explanation. "Strict liability" carries two meanings. For instance, when applied to the action in unjust enrichment, it indicates that the defendant is required to make restitution even though he did not breach any obligation. Relief consequently may be triggered by facts entirely external to that party. However, when applied to a tort, the phrase "strict liability" indicates that the defendant can be held for having breached an obligation even though he neither intended the breach nor carelessly brought it about. For instance, he may commit the tort of conversion by violating the underlying obligation (*i.e.* the duty to refrain from seriously interfering with property) even though he was not, and should not have been, aware of the plaintiff's interest.

[8] *United Australia Ltd.* v. *Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.). Compare M. McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" [2000] Restitution L. Rev. 516 [hereafter "Disgorgement for Wrongs"].

[9] Of course, conversion is not the only means by which tort protects property interests. The action in trespass may be available. And a third possibility, detinue, sometimes is most preferable of all because it allows the plaintiff, in the court's discretion, to recover her goods, rather than merely damages. The availability of such relief does not, however, mean that detinue is the common law's *vindicatio*. The action does not consist of the direct assertion of a property right *per se*, but rather of a wrong. Furthermore, in contrast to conversion, the operative wrong is fault based, rather than strict. Liability in detinue does not arise from the mere detention of goods. The plaintiff must prove, as well, that the defendant wrongfully refused to comply with her demand for the return of the property. Finally, it is worth noting that a property interest may be protected through the extraordinary remedy of replevin. If the plaintiff claims that the defendant unlawfully took her property, she may be able to obtain a court order that restores the goods to her pending the ultimate resolution of her case.

[10] The action in unjust enrichment is not limited to the protection of property interests. Restitutionary relief can be awarded with respect to services as well: *Deglman* v. *Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785 (S.C.C.).

[11] (1980), 117 D.L.R. (3d) 257 at 274 (S.C.C.). The action in unjust enrichment must be distinguished from the concept of "unjust enrichment by wrongdoing." The latter arises if the defendant obtains a benefit as a result of committing a civil wrong. In such circumstances, the plaintiff may, on the basis of a cause of action other than unjust enrichment, seek the remedy of disgorgement. Disgorgement differs from restitution insofar as it can apply to *all* of the defendant's ill-gotten gains, and not just those that were subtracted from the plaintiff.

receives a personal judgment for restitution. The defendant must give back the value of the benefit that he received from her. For present purposes, the critical point is that liability under the legal action for unjust enrichment is generally strict.[12] Despite occasional suggestions to the contrary,[13] it is clear that the plaintiff may be entitled to relief even if the defendant's receipt was entirely innocent.[14] With respect to mistaken payments, for instance, the common law has long held that is enough for the plaintiff to prove that she did not truly intend to part with a benefit; she need not additionally implicate the defendant in her error.[15] And as recent decisions have confirmed, the case in which an enrichment is taken from the claimant without her knowledge is *a fortiori*.[16] That does not mean, however, that every apparent instance of unjust enrichment results in restitution. Liability is strict, not absolute. Depending upon the circumstances, various defences may be available. As explained below, the most important possibilities are *bona fide* purchase and change of position.

III. *The Facts of Banton* v. *CIBC*

Having canvassed the means by which property interests are protected in law, it is now possible to address the same issue in equity. *Banton* v. *CIBC* provides the vehicle for discussion. Reduced to essentials, the facts are quite simple.[17] In 1992, at the age of 85, George Banton transferred his house to his sons in trust. The trustees were required to use that property, or its sale proceeds, for "the maintenance and support of [their father] ... in the event the same is required." Following his death, any remaining assets were to accrue to his children, including the trustees. After George moved into a retirement home in 1993, the trustees sold the house for $210,000 and transferred the proceeds to him. He then deposited that money into his own bank account, which already held a credit of approximately $225,000.

---

[12] Exceptions do exist. While restitution usually is triggered by the plaintiff's impaired intention, the reason for reversing an enrichment sometimes turns on the defendant's misconduct. The most notable example arises under the concept of free acceptance that Canadian courts habitually use in the resolution of cohabitational property disputes: M. McInnes, "Reflections on the Canadian Law of Unjust Enrichment: Lessons From Abroad" (1999) 78 Can. Bar Rev. 416 at 426-431.

[13] *Royal Bank* v. *The King*, [1931] 2 D.L.R. 685 (Man. K.B.); *Campbell* v. *Campbell* (1999), 173 D.L.R. (4th) 270 (Ont. C.A.), critiqued in M. McInnes, "Unjust Enrichment — Restitution — Absence of Juristic Reason:" *Campbell* v. *Campbell* (2000) 79 Can. Bar Rev. 459.

[14] *Air Canada* v. *Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 (S.C.C.); *Central Guaranty Trust Co.* v. *Dixdale Mortgage Investment Corp.* (1994), 121 D.L.R. (4th) 53 (Ont. C.A.).

[15] *Kelly* v. *Solari* (1841), 9 M. & W. 54, 152 E.R. 24 (Ex. Ct.).

[16] *Lipkin Gorman* v. *Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.); *Trustee of F.C. Jones & Sons* v. *Jones*, [1997] Ch. 159 (C.A.).

[17] The trial involved several issues that are irrelevant to the present discussion: see A.H. Oosterhoff, "Consequences of a January/December Marriage: A Cautionary Tale" (1999) 18 Estates, Trusts & Pensions J. 261.

It is the transfer of the sale proceeds that ostensibly triggered the dispute in *Banton* v. *CIBC*. The real motivation for the litigation, however, undoubtedly stemmed from subsequent events. In 1994, the Banton children became distressed as their father, then nearing 90, entered into an intimate relationship with Muna Yassin, a 31-year-old waitress who worked at his retirement home. By the end of the year, George had been estranged from his family, seduced into marriage and persuaded to draft a will that left his entire estate to his new wife, with a gift over to the Salvation Army.

George died in 1996 with assets that had grown to nearly $473,000. After the payment of the debts and expenses, approximately $256,000 remained. The obvious question then emerged: who was entitled to that money? There were several possibilities. Muna first tried to enforce the will in her own favour. Justice Cullity, however, refused probate on the ground that George lacked testamentary capacity and on the ground that the document had been induced by undue influence.[18] Muna then argued that she was entitled, as a widow, to a preferential share of $200,000, plus one-third of the residue, under the *Succession Law Reform Act*.[19] She was correct in principle, but the value of her claim ultimately depended upon whether or not George had been entitled to receive the sale proceeds. If so, Muna could take the bulk of the estate by virtue of the intestacy legislation. If not, the Banton children, acting through the trustees, could recover most of the assets as beneficiaries of the 1992 trust.

Cullity J. held, and the Court of Appeal affirmed, that the transfer of the sale proceeds in 1993 was improper. Under the terms of the trust, that property could be used only for "the maintenance and support of George Banton ... in the event the same is required." There was, however, no evidence that George actually *required* anything for that purpose. The explanation for the transfer lies, instead, in the fact that the trustees mistakenly believed that their father continued to own the trust property absolutely.

Thus arose the central issue with which this paper is concerned. Trust property found its way into a stranger's pocket — what could the beneficiaries do about it?[20] What actions could the Banton children bring against their father's estate? What remedies were they entitled to receive?

IV. *Protection of Property in Equity*

Equity, like law, provides various means for protecting property interests. Chancery's regime, however, differs in some important respects.[21]

---

[18] *Banton* v. *Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.).

[19] R.S.O. 1990, c. S.26, ss. 45(2), 46(2).

[20] Although George was a beneficiary under the trust, he was not, in the circumstances, entitled to receive the property. Consequently, he was treated as a stranger for the purposes of the litigation.

(a) *Equity's Vindicatio*

The primary difference lies in the fact that equity, unlike law, does allow for the direct vindication of property interests. It is best to begin with the rights that beneficiaries enjoy with respect to original trust property. So long as they can prove their subsisting equitable interest, they are generally entitled to recover the property from a third party who has come into possession. A court can facilitate that result by finding that the defendant holds the property on constructive trust.[22] Significantly, because the action is in the nature of a pure *vindicatio*, liability is imposed on a strict basis and regardless of any wrongdoing. That is not to say, however, that the concept of fault is entirely irrelevant. Although the *vindicatio* is equity's most powerful means of protecting property,

[21] It must be stressed that this paper is concerned with beneficiaries' rights against a stranger. Of course, a breach of trust generally will support claims against a defaulting trustee as well. See generally A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Scarborough: Carswell, 1998) c. 13.

[22] The precise nature of the event underlying the constructive trust is a matter of considerable debate. Professor Birks dichotomizes private law into causative events and legal responses, and further exhaustively classifies events as instances of intention, wrongdoing, unjust enrichment or miscellaneous other. While recognizing the possibility that the same set of facts may support more than one analysis, he claims that the effective element of the *vindicatio* falls into the fourth category. Equity has decided that, aside from any intent, wrong or unjust enrichment, the receipt of another's property warrants a proprietary response. Significantly, however, Birks states that that response is *not* triggered by the plaintiff's subsisting property interest *per se*. In his analysis, property itself is always a legal response and never a triggering event (even though, as in the case of the *vindicatio* or conversion, a causative event may presume the existence of a property right): "Property and Unjust Enrichment", *supra* note 2. Professors Grantham and Rickett deplore what they characterize as Birks' marginalization of property. They accept his dichotomization of private law and agree that property rights initially arise as responses. They insist, however, that such rights, once in existence, do not remain inert, but rather serve as causative events in themselves. In their view, the very notion of property entails, *inter alia*, the right of recovery that is contained in the *vindicatio*: "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] New Zealand L. Rev. 668; *Enrichment & Restitution in New Zealand* (Oxford: Hart Publishing, 2000) c. 3 [hereafter *Enrichment & Restitution*]. Dr. Penner reaches a similar conclusion by different means. In the situation under consideration, he classifies the stranger as a "constructive trustee of an express trust interest." On that analysis, the beneficiaries' right of recovery stems the settlor's initial intention in creating the express trust. That act of intention impresses upon the trust property a right that equally compels an express trustee *and* a stranger to hold an asset on the beneficiaries' behalf: *The Law of Trusts*, 2d ed. (London: Butterworths, 2000) at 120. Finally, the *vindicatio* has been explained as an instance of unjust enrichment. The stranger is enriched by the possession of the property, even though the beneficiaries retain title. There is a corresponding deprivation because the property belongs to the beneficiaries. And the stranger's enrichment is unjust because the beneficiaries did not intend for him to have possession: M. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] Restitution L. Rev. 118 at 123-127 [hereafter "Perfect Quadration"]; A.W. Scott & W.F. Fratcher, *The Law of Trusts*, 4th ed. (Boston: Little Brown & Co., 1987) at para. 289, as quoted in *Banton*, *supra* note 1 at 222. Compare Oosterhoff & Gillese, *ibid.* at 401-405. The classification of the underlying event is practically significant. Different bases of liability require different elements of proof, are susceptible to different defences and perhaps support different remedies.

it is susceptible to a major limitation. The beneficiary's interest is extinguished, thereby precluding any possibility of its vindication,[23] to the extent that a *bona fide* purchaser for value acquired a legal interest[24] in the property without notice of the pre-existing equitable rights. Of course, to qualify as "equity's darling," the purchaser must have been entirely without fault. An example arose in *Banton*. The trust property consisted initially of the house and then of the sale proceeds. George's receipt of those proceeds did not qualify as a *bona fide* purchase because he did not give value and because, as discussed below, he had notice of the prior equitable interests. However, when he deposited the money into his account, the bank, which did not have notice of the trust, did become a *bona fide* purchaser for value. It effectively bought the money from George in exchange for its promise to repay a similar amount, plus interest, on demand.[25] Consequently, at that point, the trust beneficiaries lost the ability to vindicate their interest in the original trust property.

The possibility of proprietary relief does not, however, necessarily end with the intervention of a *bona fide* purchaser. Even if the original trust asset has become immune to direct vindication, the beneficiaries may be able to assert a proprietary interest in its traceable proceeds. *Banton* again provides an illustration. George no longer held the original trust property, but he did hold its product — *i.e.* the chose in action representing the right to demand payment from the bank.[26] Were the trust beneficiaries entitled to a proprietary interest in that new property? If so, on what basis? In answering those questions, Canadian courts typically write in terms of a "tracing claim" or a "tracing remedy."[27] That language is, however, misleading. As Millett L.J. explained in *Boscawen* v. *Bajwa*:

> Tracing properly so-called, however, is neither a claim nor a remedy but a process... It is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the

[23] Because the effect of the defence is extinguishment, the beneficiaries cannot exercise a *vindicatio* even if the purchaser subsequently learns of their prior equitable interest. Nor if he transfers the property to someone with full knowledge of the facts. A narrow exception to extinguishment does arise, however, if the property finds its way back to the original trustee. In that situation, the beneficiaries' interest is revived and the property once again is held on their behalf. See generally, R. Chambers, *An Introduction to Australian Property Law* (Sydney: Law Book, 2001) c. 29.

[24] The *bona fide* purchaser of an *equitable* interest does not enjoy the same status. Equitable interests generally take priority in the order that they were created.

[25] *Foley* v. *Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002.

[26] The stated facts have been simplified. The traceable proceeds of the trust property were not actually held in George's account at the time of his death. In 1994, his sons exercised a power of attorney, that their father previously had created, in order to transfer the content of his account to CIBC Trust Corporation to be held under a new trust. That new trust, however, was invalid. Consequently, before the matter reached the Court of Appeal, CIBC had paid the remaining fund into court. This paper follows the Court of Appeal's lead in treating the money as still being held by George's estate.

[27] See *e.g. Citadel General Assurance Co.* v. *Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 at 437-438 (S.C.C.) [hereafter *Citadel*] ("tracing orders").

> money which they handled or received (and, if necessary, which they still retain) can properly be regarded as representing his property. He needs to do this because his claim is based on the retention by him of a beneficial interest in the property which the defendant handled or received.[28]

Consequently, to say that the Banton children were able to trace the value of the trust property into George's hands merely satisfies a preliminary exercise.[29] Since it is no more than an evidentiary process for locating value that has moved from one asset to another, tracing is neutral as to rights. It may lead to nothing,[30] it may lead to personal relief[31] or it may lead to proprietary relief. The Court of Appeal in *Banton* indicated that it would have been prepared to support the third possibility if the beneficiaries had asked for it.[32] That is correct, but it does leave unresolved the difficult task of identifying the exact basis upon which relief is available.[33]

---

[28] [1996] 1 W.L.R. 328 at 334 (C.A.). See also L.D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997).

[29] The courts' approach to tracing in *Banton* was needlessly complicated. To reiterate, the original value of the trust property, as represented by the sale proceeds of the house, was $205,000. At the time of death, George held assets, including the traceable residue of the trust property, worth $473,000. Following payment of the estate's expenses, the parties were left to compete for $256,000. Muna's lawyer claimed that proprietary rights in that fund were split between the estate and the trust in proportion to their respective contributions. In effect, he argued that the estate's expenses should have been paid rateably by George and by the trust beneficiaries. The trial judge rejected that proposition on the ground that the equities were not equal. While the trust beneficiaries were innocent, George was a wrongdoer insofar as he received money to which he should have known he was not entitled. Consequently, Cullity J. presumed, and the Court of Appeal agreed, that the expenses were paid entirely from George's contribution: *Re Hallett's Estate* (1880), 13 Ch.D. 696 (C.A.). While that is correct, the courts also suggested that the estate's expenses *would have been* paid rateably from the two sources if George had been innocent throughout. There is, however, no reason why the estate, which had sufficient funds to satisfy its debts, should have been able to use any of the trust's assets for that purpose. And, in fact, the preferable view is that even between two innocents, a party should be presumed, when withdrawing money from a bank account, to deplete all of his own resources before touching the portion belonging to the other: Smith, *ibid.* at 209-212.

[30] For example, beneficiaries may be able to trace the value of trust property into the hands of a *bona fide* purchaser for value, but they are not thereby entitled to any relief.

[31] The clearest example involves the claim for knowing receipt, which is discussed below at Section IV(b).

[32] The nature of the beneficiaries' claim is somewhat unclear. At trial, Cullity J. repeatedly used language appropriate to a proprietary action: *supra* note 1 at 498 ("proprietary rights ... to recover trust funds"), 503 ("seeking to recover assets"), 504 ("seeking a proprietary tracing remedy"). He eventually held that the trustees, acting on the beneficiaries' behalf, were entitled to judgment for the value of the original trust property, secured by an equitable lien. An equitable lien is, of course, a form of proprietary relief. Unlike a trust, it does not confer beneficial ownership. Instead, it is a security interest that serves to facilitate the satisfaction of a personal obligation. The lien attaches to property which, if an obligation is not otherwise fulfilled, can be used to meet the debt. The Court of Appeal, in contrast, specifically stated that it was *not* concerned with proprietary relief because the estate contained sufficient assets to satisfy any judgment against it: *supra* note 1 at 219. It then confirmed the trial judge's order, including the imposition of a lien.

(b) *Knowing Receipt — Unjust Enrichment*

The claimants in *Banton* therefore did not attempt to recover the traceable proceeds of the trust property by directly asserting a subsisting title. They were content to rely upon equity's indirect protection of property interests. In light of the position at law, the Banton children might have expected to enjoy two options: a claim that their father acted wrongfully *and* a claim that he was unjustly enriched at their expense. Unfortunately, the matter is not so clear. Those two possibilities effectively were conflated.

The Court of Appeal's resolution of the beneficiaries' claim is curious in a number of respects. Most obviously, Morden J.A. (Charron and Borins JJ.A. concurring) did not refer to the leading authority, the Supreme Court of Canada's 1997 decision in *Citadel General Assurance Co.* v. *Lloyds Bank Canada*.[34] Instead, he relied almost exclusively on an American text, *Scott on Trusts*.[35] From that source, he determined that "the governing principle is the prevention of unjust enrichment." More specifically, restitution was available because George Banton "knew, or should have known, that the trustees were acting in breach of the terms of the trust in making the transfer to him."[36] He was fixed with constructive knowledge because, as the settlor and beneficiary of the trust, he should have

---

[33] That issue is the subject of considerable debate elsewhere in the Commonwealth. In *Foskett* v. *McKeown*, the House of Lords held that the rights that beneficiaries enjoy in the traceable proceeds of trust property arise by virtue of the original trust itself. Lord Millett said that "[t]he transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. ... The claimant succeeds if at all by virtue of his own title. ... [T]his branch of the law is concerned with vindicating rights of property and not with reversing unjust enrichment": [2000] 2 W.L.R. 1299 at 1322, 1327; see also Lord Browne-Wilkinson at 1304. Professors Grantham & Rickett have written in a similar vein: *Enrichment & Restitution, supra* note 22 at 456-458. Nevertheless, there is a growing body of opinion that insists that the beneficiaries' right to traceable proceeds *is* a response to unjust enrichment: P. Birks & C. Mitchell, "Unjust Enrichment" in P. Birks, ed., *English Private Law*, *supra* note 4 at 594-595; L.D. Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 L.Q. Rev. 412 at 423-425 [hereafter "Unjust Enrichment, Property"]; A.S. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q. Rev. 412. On that view, the new asset constitutes an enrichment that was acquired with the beneficiaries' property and therefore at their expense. Moreover, that enrichment is "unjust," and hence reversible, because it was acquired without the beneficiaries' consent.

[34] *Supra* note 27; see also *Gold* v. *Rosenberg* (1997), 152 D.L.R. (4th) 385 (S.C.C.). Two weeks earlier, a differently constituted panel of the Court of Appeal did rely upon *Citadel*: *A&A Jewellers Ltd* v. *Royal Bank of Canada* (2001), 53 O.R. (3d) 97 (C.A.).

[35] *Scott on Trusts*, *supra* note 22.

[36] *Supra* note 1 at 221. Following the trial judgment, Morden J.A. also stated that restitution was available because "the equities are not equal between the estate and the [trust]": at 221. Of course, those two formulations are not necessarily synonymous. To premise liability upon a "balancing of the equities" appears, on one interpretation at least, to grant judges a relatively open-ended discretion to determine which party is more deserving. Of course, that is precisely the approach that historically raised concerns of palm tree justice and that inhibited the proper development of the law of unjust enrichment: see *e.g. Pettkus* v. *Becker*, *supra* note 11 at 260-262 *per* Martland J.; *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127 at 140 (C.A.).

known that he was not, in the circumstances, entitled to the sale proceeds.

While there are difficulties with Morden J.A.'s formulation of the cause of action, the bulk of his reasons are, coincidentally, consistent with the approach adopted by the Supreme Court. In *Citadel*, Justice LaForest classified the action for knowing receipt as a species of unjust enrichment and, applying the test articulated in *Pettkus* v. *Becker*,[37] held that a personal obligation to make restitution[38] was triggered by the fact that the defendant acquired property belonging to the plaintiff in circumstances that would have raised a reasonable person's suspicion. The historical explanation for that misleading terminology lies in the fact that a beneficiary *prima facie* is entitled to sue a trustee and no one else. Consequently, in order to extend the scope of liability to strangers, it was thought necessary to pretend that such a person was a trustee. That fiction was achieved through the application of the phrase in question: L.D. Smith, "Constructive Trusts and Constructive Trustees" (1999) 58 Cambridge L.J. 294. Of course, given the very real danger of confusion between personal and proprietary relief, the fiction should be exposed and references to "constructive trustees" should be abandoned: *Paragon Finance plc* v. *D.B. Thackevar & Co.*, [1999] 1 All E.R. 400 at 408-9 *per* Millett L.J. (C.A.). It is the "lack of inquiry" as to the misapplication of trust property that "renders the recipient's enrichment unjust."[39]

It will be recalled that the *legal* claim in unjust enrichment is strict. Consistency would suggest that the *equitable* action that is open to trust beneficiaries would be of the same character. Somewhat surprisingly, however, the most striking feature of the analysis in *Banton* and *Citadel* is that restitutionary relief is premised upon the defendant's failure to fulfil an obligation to investigate the provenance of an enrichment. Although Morden J.A. did not address the matter, LaForest J. expressly defended that fault requirement.

> [The] plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly *deprived* but, rather, because the defendant has been unjustly *enriched*, at the plaintiff's expense. To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind not the plaintiff's knowledge, or lack thereof. Indeed, without constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received.[40]

---

[37] *Supra* note 11 and accompanying text.

[38] LaForest J. held that the defendant was a "constructive trustee": *supra* note 27 at 438. That terminology is unfortunate. As previously explained, a constructive trust impressed upon property in a stranger's hands pursuant to equity's *vindicatio* is a true trust. The stranger holds that property for the benefit of the claimants, who enjoy a proprietary interest in the asset. In contrast, a person who is a "constructive trustee" is not really a trustee at all. His liability is personal, rather than proprietary, and while the claimants are owed an obligation, they do not have an interest in any particular asset (subject to the imposition of an ancillary lien, as in *Banton*). It is for that reason that the defendant may be a "constructive trustee" even if he no longer holds any property. While a true trust invariably presumes the existence of trust property, a personal obligation does not.

[39] *Citadel*, *supra* note 27 at 434.

[40] *Ibid.* at 435 (emphasis in original).

That analysis cannot withstand scrutiny. There certainly is nothing inherent in the three-part cause of action that logically demands that the grounds for liability "*must necessarily* focus on the defendant's state of mind." The first and second elements of the claim in unjust enrichment say nothing at all about the specific reason for restitution. Significantly, however, they do require proof of an enrichment and a *corresponding* deprivation. It is not enough for a gain and a loss to arise coincidentally; they must be obverse manifestations of the same event.[41] That requirement in turn suggests that, contrary to LaForest J.'s argument, it is impossible to entirely separate the parties' positions when assessing the issue of "justice" at the third stage of analysis.[42] And indeed, to say that an enrichment (and its corresponding deprivation) is "unjust" is merely to say that a particular event is reversible as a matter of precedent.[43] The courts might decide that a transfer must be undone for a variety of reasons: some pertaining to the plaintiff, some pertaining to the defendant and some pertaining to neither party.[44] Invariably, however, the "injustice" equally affects both parties. A mistaken payment, for instance, supports restitution on the basis of the claimant's impaired intention. Nevertheless, the defendant's enrichment is "unjust" (*i.e.* reversible) just as the plaintiff's deprivation is "unjust" (*i.e.* reversible). He cannot retain a benefit that the system believes she should be able to recover.

Moving from the inherent logic of the action to matters policy, Justice LaForest suggested that strict liability would be "unfair" because it could require a defendant to give back a benefit that was innocently received. Others have written in a similar vein. In the English Court of Appeal, Nourse L.J. held that it would be "commercially unworkable" to allow beneficiaries to recover the value of misappropriated property without establishing, at a minimum, that the recipient should have known that the disputed funds were held in trust.[45] Going further, Bradley Crawford Q.C. apparently would prefer to premise

---

[41] *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161 at 194 (S.C.C.).

[42] The function of the third stage of analysis is a matter of some debate. Following Dickson J.'s reference in *Pettkus* v. *Becker* to an "absence of juristic reason," it sometimes is thought that restitution follows upon the plaintiff's proof of an enrichment and a corresponding deprivation unless there is a compelling reason for refusing recovery: see *e.g. Murray* v. *Roty* (1983), 147 D.L.R. (3d) 438 (Ont. C.A.); *Duncan* v. *Duncan* (1987), 78 A.R. 171 (Q.B.). The better view, however, is that the plaintiff also bears the burden of establishing a positive reason for reversing the defendant's enrichment: M. McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights Into the Law of Restitution" (1999) 37 Alta. L. Rev. 1 at 9-13. Compare L.D. Smith, "The Mystery of Juristic Reason" (2000) 12 Supreme Court L. Rev. 211

[43] *Peel* v. *Canada* (1992), 98 D.L.R. (4th) 140 at 151-153, 164-165 (S.C.C.); P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989) at 19, 23.

[44] P. Birks & R. Chambers, *Restitution Research Resource 1997*, 2nd ed. (Oxford: Mansfield Press, 1997) at 2-3; McInnes, "Unjust Enrichment — Restitution — Absence of Juristic Reason", *supra* note 13 at 461-462.

[45] *Bank of Credit and Commerce International (Overseas) Ltd.* v. *Akindele*, [2000] 4 All E.R. 221 at 236 (C.A.).

liability on the defendant's actual knowledge that an asset was held in trust.[46] To order restitution on the basis of constructive knowledge, he fears, exposes banks to an unreasonable burden. With respect, however, it is difficult to see a practical need for *any* degree of fault.

The central tension in the law of unjust enrichment arises from the desirability of both reversing unintended transfers *and* protecting the security of receipts. The plaintiff asserts a right to recover the value of an enrichment with which she did not freely part. The defendant asserts a right to control wealth that is in his possession. Broadly speaking, there are two strategies for mediating a compromise between those competing values.[47] The first, as manifested in *Banton* and *Citadel*, favours the defendant by using a fault requirement to limit the plaintiff's right to relief. The concern that liability may create a hardship for the recipient is addressed by the fact that he should have known that he was not entitled to the benefit in question. The second strategy more readily recognizes a right to restitution, but then safeguards the recipient through a series of strong defences. That is the approach that has been adopted at law. Liability *prima facie* arises, without regard to fault, upon proof that the plaintiff did not truly consent to an impugned transfer. The burden then falls upon the defendant to exculpate himself. Of those two strategies, the second is preferable because it more sensitively addresses the competing interests. It adequately protects the defendant without unduly denying the plaintiff.

Although several defences are available under an action in unjust enrichment, two warrant special attention: *bona fide* purchase and change of position. If successful, the former entirely relieves the defendant of liability. An example arose on the facts of *Banton*. As previously explained, the bank that received the misappropriated trust property from George was a *bona fide* purchaser for value without notice. As such, it was immune to the *vindicatio*. And for the same reason that it could have defeated a claim for the return of the property *in specie*, so too it could have defeated a restitutionary claim for the value of that property. The policy of protecting good faith transactions precludes both proprietary and personal relief.[48]

In contrast, if the defendant received an enrichment as a donee, he merely warrants the protection afforded by the change of position defence. His liability

---

[46] "Constructive Thinking? The Supreme Court's Extension of Constructive Trusts to Banks on the Basis of Constructive Notice of a Breach of Trust by a Customer" (1999) 31 Can. Bus. L.J. 1. Prior to *Citadel*, there was authority to that effect: *Canadian Imperial Bank of Commerce* v. *Valley Credit Union Ltd.* (1990), 63 D.L.R. (4th) 632 (Man. C.A.); *Bullock* v. *Key Property Management Inc.* (1997), 33 O.R. (3d) 1 (C.A.).

[47] M. McInnes, "The Law of Unjust Enrichment: A Reply to Professor Weinrib" [2001] Restitution L. Rev. 29.

[48] Accordingly, as regards *bona fide* purchasers, LaForest J. was correct in saying that "without any constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property." He also was correct in saying, in that particular context, that it would be "unfair to require a recipient to disgorge a benefit that has been lawfully received." *Citadel*, *supra* note 27 at 435. The proposed model of strict liability plus defences does not, however, suggest otherwise.

is diminished only to the extent that he incurred an exceptional expenditure in good faith reliance upon his enrichment.[49] That proposition can be illustrated by a variation of the facts in *Banton*. Suppose that the trustees improperly distributed $10,000 of the sale proceeds to a stranger who, despite having given no consideration, had no grounds for suspecting anything untoward and who honestly believed that he was entitled to the windfall. Assume further that he held $6000 in a bank account and that the two funds were never mixed. Before being apprized of the beneficiaries' interest, the stranger spent 60% of the trust money on household expenses (say, groceries and electricity) and the remainder on a vacation that he would not have taken but for his enrichment. His bank account remained untouched. As matters currently stand, the beneficiaries have no right of action against him. The equitable *vindicatio* is frustrated by the fact that the trust property was dissipated in a way that did not leave behind a traceable residue. And the equitable claim in knowing receipt is frustrated by the fact that the stranger neither knew, nor should have known, during the period in which he was in possession,[50] that his enrichment consisted of misappropriated trust property. Something surely is amiss. As a result of the fault element in the equitable species of unjust enrichment, the stranger is *overly* protected. He was entitled to spend the beneficiaries' money with impunity *and* he continues to enjoy the benefit of his own money which, but for the misappropriation, he would have been required to spend on household expenses. A much better balance between the parties' interests would be achieved by adopting the legal model of strict liability plus defences. The stranger *prima facie* would be liable for $10,000 based simply on the fact that the beneficiaries did not consent to the transfer. He would be entitled to plead change of position with respect to the $4000 vacation because he honestly incurred that expense in the mistaken belief that he was entitled to retain the windfall. He could not, however, resist liability with respect to the trust money that he spent on groceries and electricity. While made in good faith, those expenditures did not occur *in reliance* upon the enrichment. They pertained to household debts that had to be met in any event. In the final analysis, then, the stranger would be required to repay $6000. While he undoubtedly would prefer a fault based scheme that entirely absolved him of responsibility, he would not be unfairly prejudiced by the result achieved through the strict regime. He simply would be required to effect restitution to the extent that his assets (represented by the $6000 that still sits in his account) continued to be swollen by his unjust enrichment.[51]

---

[49] *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1 (S.C.C.); *RBC Dominion Securities Inc.* v. *Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.).

[50] It is sufficient that the stranger, while initially entirely innocent, acquired constructive knowledge while in possession of the property: *Citadel*, *supra* note 27 at 431, citing *Agip (Africa) Ltd.* v. *Jackson*, [1990] Ch. 265 at 291.

[51] Interestingly, having overlooked the Supreme Court's decision and therefore feeling unconstrained by precedent, Justice Morden, relying once again on American materials, actively entertained the possibility of adopting the regime of strict liability plus defences that *Citadel* expressly rejected: *supra* note 1 at 222, quoting *Scott on Trusts*, *supra* note 22 at para. 292.2. Because the matter was not argued by the parties, and consequently

Although the fault requirement contained in the action for knowing receipt is unnecessary as a matter of logic and unsustainable as a matter of policy,[52] it does enjoy the support of history, at least in a narrow sense. Some degree of wrongdoing has long been a prerequisite to restitutionary recovery of the value of misappropriated *trust* funds. That is not to say, however, that a strict claim in unjust enrichment is wholly foreign to equity.[53] Consider the action for personal restitution that *estate* beneficiaries enjoy against a person to whom property mistakenly is transferred. The *Diplock* principle, as it is known,[54] is triggered by the misapplication of the deceased's assets and applies without regard to the recipient's fault. Significantly, while some of its features are difficult to defend,[55] it does confirm that there is nothing inherent in the chancellor's jurisdiction that is inimical to strict liability.[56]

---

did not require a resolution, Morden J.A.'s comments are rather cryptic. It would, of course, be absurd for equity to embrace, on the same set of facts, two species of unjust enrichment, one strict and the other fault based.

[52] To the contrary, Dr. Smith has argued that liability should remain fault based because it often is difficult to determine whether or not property, and in particular money, is subject to a trust. He is concerned that "[b]anks, stockbrokers, lawyers and others will routinely be required to go to trial to establish their defences, no matter how honest and careful are their procedures": K. Barker & L.D. Smith, "Unjust Enrichment" in D. Hayton, ed., *Law's Future* (Oxford: Hart Publishing, 2000) 411 at 426; see also Smith, "Unjust Enrichment, Property", *supra* note 33 at 428-436. It is difficult to think of a less sympathetic group of defendants. And while the societal costs of legal proceedings are always a concern, there seems a clear choice between allowing trust beneficiaries to recover unjust enrichments on the one hand and shielding bankers, stockbrokers and lawyers from the mere risk of litigation on the other. Moreover, it is doubtful that strict liability truly would open the floodgates. That certainly has not been the experience at law, where neither unjust enrichment nor conversion require fault.

[53] Indeed, on one view, the *vindicatio* is a species of unjust enrichment that gives rise to proprietary, rather than personal, restitution: *supra* note 22. Likewise, there is growing consensus that property rights to traceable proceeds are triggered by a strict model of unjust enrichment: *supra* note 33.

[54] *Re Diplock, Diplock* v. *Wintle*, [1948] Ch. 465 (C.A.), aff'd (*sub nom. Ministry of Health* v. *Simpson*), [1951] A.C. 251 (H.L.).

[55] First, an action lies against the recipient of misappropriated estate assets only if the beneficiaries have exhausted their remedies against the party primarily responsible — *i.e.* the deceased's personal representative who improperly transferred away the property. That limitation is anomalous and possibly unjustifiable. While the courts certainly should guard against double recovery, estate beneficiaries perhaps should enjoy the usual power to elect between alternative claims. Second, *Diplock* was decided before the development of the change of position defence, with the result that liability exists even if, in honest reliance upon an enrichment, the defendant incurs an exceptional expenditure. From a modern perspective, that seems unacceptable. Liability should be strict, but to ensure a proper balance between the parties' interests, the beneficiaries' *prima facie* claim should be subject to suitable defences.

[56] Compare C. Harpum, "The Basis of Equitable Liability" in P. Birks, ed., *The Frontiers of Liability*, vol. 1 (Oxford: Oxford University Press, 1994) 9 at 22-24 (suggesting, on historical grounds, that the *Diplock* principle can be confined to the administration of estates).

The analysis can be summarized. (1) While it did not adversely affect the outcome in *Banton*, the fault requirement contained in the equitable species of unjust enrichment that applies to trust litigation is capable of producing unacceptable results. (2) Such results are avoided at law through a regime of strict liability plus defences. (3) As revealed in cases outside of the trusts area, equity is not adverse to the notion of strict liability. Looking beyond the immediate context, and having regard to the manner in which property interests are usually protected, the conclusion to be drawn from those propositions seems clear. Restitutionary relief should be available to trust beneficiaries without proof of fault. The concept of *knowing* receipt should be expunged from the law of unjust enrichment. The defendant's knowledge should be irrelevant. Liability *prima facie* should arise from the mere fact that the beneficiaries did not consent to the transfer of their property.

(b) *Knowing Receipt — Wrongs*

The preceding argument is not intended to suggest that fault should be entirely irrelevant to the issue of a stranger's liability, but merely that it should not be a prerequisite to *restitutionary* relief. To reiterate, there are three main possibilities for protecting equitable property interests. Two of those options have already been discussed: the *vindicatio* and the claim in unjust enrichment. Both of those should proceed on a strict basis. Fault does, however, properly play a role in the third general head of liability: wrongdoing. Just as legal property interests are protected through conversion and other torts, so too trust beneficiaries' interests are protected by various means from wrongful interference.

The Supreme Court of Canada recently confirmed the existence of two forms of wrongdoing in the trusts context.[57] The first, which is relatively unimportant,[58] arises if a stranger acts as a trustee *de son tort* by purporting to administer trust property. Such a person incurs the same obligations and liabilities as a true trustee. The second form of wrongdoing, usually addressed under the label of "knowing assistance," arises if a stranger dishonestly participates in a breach of trust.[59] The threshold for liability is high. The stranger

[57] *Air Canada* v. *M & L Travel Ltd.* (1993), 108 D.L.R. (4th) 592 at 606-607 (S.C.C.); citing *Barnes* v. *Addy* (1874), L.R. 9 Ch. App. 244 at 251-252. The traditional approach refers to three heads of accessory liability: trustee *de son tort*, knowing assistance and knowing receipt. As formulated in *Citadel* and *Banton*, however, the third possibility is not a form of wrongdoing *per se*, but rather a species of unjust enrichment that requires proof of fault.

[58] There have not been any cases on point in over a century: Crawford, *supra* note 46 at 12.

[59] *Air Canada* v. *M & L Travel Ltd.*, *supra* note 57. Compare *Royal Brunei Airlines Sdn. Bhd.* v. *Tan*, [1995] 2 A.C. 378 (P.C.). The Privy Council's formulation is preferable insofar as it merely demands proof that the stranger dishonestly participated in a breach of trust. Beneficiaries should not be required to prove, as they do in Canada, that the stranger dishonestly participated in the trustee's *dishonest* breach. As Lord Nicholls said at 385, "[t]hat would make no sense". The stranger's liability should not depend upon the trustee's

must have *actually known* (or at least been reckless or wilfully blind to the existence) of the underlying breach. In contrast to the claim in knowing receipt, it is not enough that the defendant *should have* realized that something was wrong. If the action for knowing assistance is established, liability typically takes the form of a personal obligation to provide compensation for the beneficiaries' loss. Exceptionally, the stranger may be compelled to disgorge any benefits received as a result of the wrong.[60]

A question remains. Knowing receipt traditionally was perceived, like knowing assistance, to be a form of accessory liability. In each instance, the stranger's responsibility was premised upon the wrongful participation in a breach of trust. That remains true in England. Knowing assistance is seen as species of fraud and knowing receipt most often is regarded as the equitable analogue of conversion.[61] Interestingly, English beneficiaries do not enjoy a personal claim for unjust enrichment. In Canada, however, knowing receipt has been reconceived, in cases like *Banton* and *Citadel*, as a form of unjust enrichment. Is anything missing in this country? Does Canadian law need the equitable analogue of conversion alongside the restitutionary action?

The answer to that question largely turns on the extent to which Canadian judges wish to protect beneficiaries.[62] There is a difference between the two types of claim in terms of the measure of relief. Unjust enrichment supports restitution and nothing else. The defendant invariably is required to give back the value of the benefit received from the plaintiff.[63] Consequently, the defendant is never responsible for more than he actually gained and the plaintiff is never entitled to recover more than she actually lost. A wrong, in contrast, generally supports compensation for *all* of the plaintiff's losses, without regard to any benefit to the defendant (but subject to any rules limiting liability, such as the common law principles of remoteness and mitigation). Alternatively, it may support disgorgement of *all* of the defendant's gains, without regard to any deprivation to the plaintiff (but again subject to rules of remoteness). Consequently, there would be situations, albeit unusual, in which trust beneficiaries would prefer to analyze a set of facts in terms of wrongdoing,

---

degree of culpability. Given the action's focus, the Privy Council's decision also appears preferable insofar as it uses the label "dishonest assistance," rather than "knowing assistance." Confusion may be avoided by more accurately identifying the requisite degree of knowledge. See also *Twinsectra Ltd.* v. *Yardley* [2002] U.K.H.L. 12.

[60] *Warman International Ltd.* v. *Dwyer* (1995), 182 C.L.R. 544 (H.C. Aus.); *Fyffes Group Ltd.* v. *Templeman*, [2000] 2 Lloyd's L.R. 643 (Q.B.).

[61] L.D. Smith, "W(h)ither Knowing Receipt" (1998) 114 L.Q. Rev. 394. Compare Birks, "Personal Property", *supra* note 6 (arguing that the concept of knowing receipt accommodates two claims, one for wrongdoing and the other, which historically has been suppressed, for unjust enrichment).

[62] It seems certain that equity will never provide a true analogue to conversion by developing a wrong of strict liability. As previously explained, the fault element was stripped from conversion only because law does not have a general *vindicatio*. Equity, of course, does have a *vindicatio* and therefore does not similarly need to burden its wrongs.

[63] *Air Canada* v. *British Columbia*, *supra* note 41 at 193-94.

rather than unjust enrichment.[64] Compensation and disgorgement are always at least as wide as restitution.

The fact that the defence of change of position is limited to claims in unjust enrichment may provide another reason for preferring a wrong-based claim. Suppose that George Banton, while fixed with constructive knowledge of the breach of trust, honestly believed that the money was his to keep. Further suppose that, in reliance upon his enrichment, he took an extended vacation that consumed all of those funds. He might be entitled to plead change of position. Although the point has yet to be decided, it certainly is possible that the good faith requirement in that defence will be defeated only if the defendant *actually* knew that he was not allowed to retain the windfall. If so, the Banton children could not demand restitutionary relief from their father's estate. Furthermore, they could not exercise a *vindicatio* (for want of any remaining property to vindicate), nor sue for knowing assistance (because George did not have actual knowledge of the trustees' breach). But if equity provided a wrong that was triggered by constructive knowledge, they would be entitled to compensation and perhaps disgorgement.

It may be, however, that trust beneficiaries already enjoy sufficient protection from strangers by virtue of the *vindicatio*, the claim in unjust enrichment, and the wrongs of trustee *de son tort* and knowing assistance. Moreover, if the restitutionary claim continues to be fault-based, it certainly would be odd if equity also offered a wrong of knowing receipt. The essential elements of both claims would be identical: the beneficiaries would be required to prove that the stranger obtained trust property in circumstances that would have raised a reasonable person's suspicion. And while the remedies would be different, it is unlikely, for the reasons explained above, that the restitutionary option would ever be exercised. Moreover, the problem of duplication could not be overcome by removing the receipt element from the wrong. To do so would emasculate the action for knowing assistance. Beneficiaries would never bother to prove actual knowledge under that type of claim if they could secure the same relief by proving constructive knowledge under knowing receipt.

Finally, a wrong of knowing receipt would remain problematic even if the claim in unjust enrichment was strict. The constituent elements of a cause of action ought to align with its associated responses.[65] In this instance, the wrong

---

[64] Consider, for instance, a situation in which a trust holds a sufficient number of shares to control a particular company. The trustee wrongfully distributes a large number of those shares, valued at $5000, to a stranger, who, as a reasonable person, should have been aware of the underlying breach. The stranger subsequently sells the shares for $5000 to a *bona fide* purchaser for value who did not have notice of the beneficiaries' interest. A claim in unjust enrichment against the stranger would yield a personal judgment for $5000. That is the value of the shares that the beneficiaries lost and that the stranger gained. Further suppose, however, that the depletion of shares caused the trust to lose control of the company, with the result that the beneficiaries, for some reason, eventually suffered an additional loss of $2000. They could hope to recover full compensation for their cumulative $7000 loss only if they could treat the stranger as a wrongdoer.

[65] McInnes, "Disgorgement for Wrongdoing", *supra* note 8.

would require the stranger's receipt of the beneficiaries' trust property. The response, however, could not be limited to the restoration of the value of that property because that measure of relief would constitute restitution, which is available only under the action in unjust enrichment.[66] The wrong instead would trigger compensation for all of the beneficiaries' losses and perhaps, in the alternative, disgorgement for all of the stranger's gain. It makes no sense, however, to focus upon one event (*i.e.* the stranger's receipt of the beneficiaries' trust property) for the purposes of triggering liability, but to focus on others (*i.e.* all of the losses inflicted on the beneficiaries or all of the benefits obtained by the stranger) when actually quantifying liability. On the contrary, it might be suggested that the receipt element does not affect the quantification of relief. Rather, it merely justifies differing degrees of fault within the area of wrongs. According to that argument, the defendant who receives an enrichment as a result of participating in a breach of trust is somehow worse than an one who does not. He therefore can be subject to the more exacting standard of constructive, rather than actual, knowledge. That argument is, however, unconvincing. It may be entirely fortuitous that an accessory receives a benefit and moreover a benefit paid out of the trust, as opposed to some other fund. Furthermore, there is no necessary correlation between the existence of a benefit and the level of culpability, nor between the value of the benefit and the quantum of liability. Why should the beneficiaries' ability to place responsibility for, say, a $1,000,000 loss upon an honest, but imperceptive, stranger depend upon the rube's bad luck in being paid, say, $100 in trust property by a scheming trustee?

V. *Conclusion*

Although it reached the correct conclusion, *Banton* v. *CIBC* represents a missed opportunity. Steps should have been taken toward rationalizing the plaintiffs' restitutionary claim within an integrated scheme of actions and remedies aimed at protecting property generally and trust property in particular. As part of that exercise, the concept of knowing receipt should eventually be abandoned. Liability in unjust enrichment should be strict. And in light of the other avenues of relief open to trust beneficiaries, there may be no need for a wrong based on the acquisition of trust property in circumstances that would raise the suspicion of a reasonable person. The action for knowing assistance may sufficiently addresses the problem of the dishonest accessory.

---

[66] McInnes, "Perfect Quadration", *supra* note 22.