IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY No. P18 of 2013

BETWEEN:

Westpac Banking Corporation
ACN 007 457 141

First Appellant

SG Australia Ltd
ACN 002 093 021

Second Appellant

National Australia Bank Ltd
ACN 004 044 937

Third Appellant

HSBC Bank Australia Ltd
ACN 006 434 162

Fourth Appellant

Standard Chartered Bank
ARBN 097 571 778

Fifth Appellant

Commonwealth Bank of Australia
ACN 123 123 124

Sixth Appellant

Lloyds TSB Bank plc

Seventh Appellant

Banco Espirito Santo SA

Eighth Appellant

SEB AG

Ninth Appellant

Bank of Scotland plc

Tenth Appellant

Credit Agricole SA

Eleventh Appellant

UniCredit Bank Austria AG

Twelfth Appellant

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Credit Lyonnais

Thirteenth Appellant

Commerzbank AG

Fourteenth Appellant

KBC Bank Verzekerings Holding NV

Fifteenth Appellant

Skopbank

Sixteenth Appellant

DZ Bank AG Deutsche Zentral-Genossenschaftsbank

Seventeenth Appellant

Calyon

Eighteenth Appellant

Gentra Ltd

Nineteenth Appellant

The Gulf Bank KSC

Twentieth Appellant

AND

The Bell Group Ltd
ACN 008 666 993 (In Liq)

First Respondent

The Bell Group Ltd
ACN 008 666 993 (In Liq)
as trustee separately for each of

Dolfinne Pty Ltd
ACN 009 134 516 (In Liq)

Industrial Securities Pty Ltd
ACN 008 728 792 (In Liq)

Maranoa Transport Pty Ltd
ACN 009 668 393 (in liq)

Neoma Investments Pty Ltd
ACN 009 234 842 (In Liq)

Second Respondent

Bell Group Finance Pty Ltd
ACN 009 165 182 (In Liq)
(Receiver and Manager Appointed)
Third Respondent

Bell Group (UK) Holdings Ltd (In Liq) (In Administrative Receivership)
Fourth Respondent

Bell Publishing Group Pty Ltd
ACN 008 704 452 (In Liq)
Fifth Respondent

Ambassador Nominees Pty Ltd
ACN 009 105 800 (In Liq)
Sixth Respondent

Belcap Enterprises Pty Ltd
ACN 009 264 537(In Liq)
Seventh Respondent

Bell Bros Pty Ltd
ACN 008 672 375 (In Liq)
Eighth Respondent

Bell Equity Management Ltd
ACN 009 210 208 (In Liq)
Ninth Respondent

Dolfinne Pty Ltd
ACN 009 134 516 (In Liq)
Tenth Respondent

Great Western Transport Pty Ltd
ACN 009 669 121 (In Liq)
Eleventh Respondent

Harlesden Finance Pty Ltd
ACN 009 227 561 (In Liq)
Twelfth Respondent

Industrial Securities Pty Ltd
ACN 008 728 792 (In Liq)
Thirteenth Respondent

Maradolf Ltd
ACN 005 482 806 (In Liq)
Fourteenth Respondent

Maranoa Transport Pty Ltd
ACN 009 668 393 (In Liq)
Fifteenth Respondent

Wanstead Pty Ltd
ACN 008 775 120 (In Liq)
Sixteenth Respondent

Western Transport Pty Ltd
ACN 009 666 308 (In Liq)
Seventeenth Respondent

Wigmores Tractors Pty Ltd
ACN 008 679 221 (In Liq)
Eighteenth Respondent

W & J Investments Ltd
ACN 000 068 888 (In Liq)
Nineteenth Respondent

Dolfinne Securities Pty Ltd
ACN 009 218 142 (In Liq)
Twentieth Respondent

Neoma Investments Pty Ltd
ACN 009 234 842 (In Liq)
Twenty-first Respondent

TBGL Enterprises Ltd
ACN 008 669 216 (In Liq)
Twenty-second Respondent

Wanstead Securities Pty Ltd
ACN 009 218 160 (In Liq)
Twenty-third Respondent

WAON Investments Pty Ltd
ACN 008 937 166 (In Liq)
Twenty-fourth Respondent

Western Interstate Pty Ltd
ACN 000 224 395 (Provisional Liquidator Appointed)
Twenty-fifth Respondent

Geoffrey Frank Totterdell
in his capacity as liquidator (with ALJ Woodings) of each of the First, Sixth, Seventh, Eighth, Tenth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twenty-first, Twenty-second and Twenty-fourth Respondents

Twenty-sixth Respondent

Antony Leslie John Woodings
in his capacity as sole liquidator of the Third, Fifth, Ninth, Eleventh, Twelfth, Thirteenth, Seventeenth, Twentieth and Twenty-third Respondents

and as liquidator (with GF Totterdell) of each of the First, Sixth, Seventh, Eighth, Tenth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twenty-first, Twenty-second and Twenty-fourth Respondents

Twenty-seventh Respondent

The Law Debenture Trust Corporation plc
as trustee of the BGNV Trusts as defined in the schedule to the Writ of Summons in CIV 1464 of 2000

Twenty-eighth Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification as to form

1. The appellants certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The first group of issues concerns the correctness of the finding of the majority in the Court of Appeal[1] that there had been a breach of fiduciary duties by the Directors of Bell group companies (issues of **principal liability**). In particular:

   (a) whether fiduciary duties are *proscriptive* (not prescriptive), and limited to the duties not to profit and not to act in a position of conflict;

   (b) whether the duties of company directors (*i*) to exercise powers for proper purposes; and (*ii*) to act *bona fide* in the interests of the company, are additional "fiduciary duties";

   (c) whether the majority was correct in its conception of both the nature of the directors' duties at issue, and the standard by which their conduct was to be assessed;

   (d) whether, applying the proper standard and law to the facts found by the trial judge, the majority was correct in concluding that the Directors breached fiduciary duties to act for proper purposes, and *bona fide* in the interests of the company.

3. The second group of issues concerns the correctness of the majority's finding that the appellants were liable as accessories to breaches of duty by the Directors of the Bell group companies (issues of **accessorial liability**). In particular:

   (a) whether liability under either limb of *Barnes v Addy* (1874) LR 9 Ch App 244 (*Barnes v Addy*) is, in these circumstances, available otherwise than in respect of a breach of one of the two fiduciary (proscriptive) duties;

   (b) whether, in any event, liability under limb one of *Barnes v Addy* is available where there was no receipt of trust property, where no relevant "property" was received and where the parties' dealings, at all material times (including at the time of enforcement of securities and dispersal of sale proceeds), were governed by and carried out in accordance with binding and effective contracts which were fully performed;

   (c) whether liability under limb two of *Barnes v Addy* can now be imposed whenever it is shown that a third party is on notice of a breach of duty which is more than trivial and too serious to be excusable on the basis that the fiduciary has acted honestly, reasonably and ought fairly to be excused, without a pleading or proof of a dishonest and fraudulent design.

4. The third group of issues concerns the correctness of the majority's approach to remedies if the Court does not accept the appellants' submissions on *Barnes v Addy*

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[1] *Westpac Banking Corporation & Ors v The Bell Group Ltd (In Liq) & Ors* [2012] WASCA 157 (**AJ**), per Lee AJA & Drummond AJA (the **majority**), (Carr AJA dissenting on these issues). These submissions adopt the terms appearing at Attachments 1 and 2 of the Court of Appeal's reasons (AB9/4472).

liability (issues of **remedy**), namely:

(a) whether, in ordering equitable compensation rather than an account of profits, the majority was right to award compound interest to reflect a "cardinal principle of equity that there be disgorgement of profits gained";[2]

(b) in any event, was there a proper basis for awarding compound interest at the rate determined by the majority in the present case;

(c) did *Wallersteiner v Moir* (No 2) [1975] 1 QB 373 mandate a rate of compound interest at 1% above a commercial overdraft lending rate charged by one trading bank.[3]

10 **Part III: Section 78B of the Judiciary Act 1903**

5. The appellants do not consider that notice is required to be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Citations

6. The reasons of the primary judge have been reported at *The Bell Group Ltd (in Liq) v Westpac Banking Corporation* (No 9) (2009) 39 WAR 1; (2008) 70 ASCR 1 (in part); and *The Bell Group Ltd (in Liq) v Westpac Banking Corporation* (No 10) (2009) 71 ASCR 300. The reasons of the Court of Appeal have been reported at *Westpac Banking Corporation v The Bell Group Ltd (in Liq)* (No 3) (2012) 89 ASCR 1.

Part V: Narrative Statement of Facts

20 7. The appellants are 20 banks who, immediately prior to 26 January 1990, were unsecured creditors of various companies in the Bell group.[4] On and about 26 January 1990, various financing and security documents were executed by all Bell group companies in favour of the appellants (the impugned "**Transactions**"), extending until 30 May 1991, credit facilities and debts then due by certain Bell group companies to some of the appellants. Some 14 months later, on 18 April 1991, the parent Bell group company (the first respondent) entered provisional liquidation and other Bell group companies followed after. At various times, the appellants exercised their securities and recovered about $284 million from the sale of a number of Bell group assets.[5] On 18 December 1995, the respondents commenced proceedings against the appellants
30 claiming, *inter alia*, statutory insolvency liability and alleging liability as knowing recipients and knowing assistants in respect of breaches of duty by Directors of the Bell group.

8. At first instance, Owen J held that the Directors, in causing the Bell group companies to enter into the Transactions, had breached fiduciary duties to act *bona fide* in the best interests of the breached companies and for proper purposes;[6] and that the appellants

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[2] Lee AJA [AJ: 1236](AB8/3751).
[3] Two related issues will be addressed separately in response to the respondents' written submissions on their Notices of Contention and Cross-Appeal. Those issues are: (a) whether compound interest can be awarded in aid of statutory claims (Notice of Contention, para 1); and (b) whether the Court of Appeal erred in declining to grant the respondents an account of profits (Notice of Cross-Appeal, para 2).
[4] [2008] WASC 239 (Owen J) (**J**), [J: 25-26](AB2/542).
[5] [J: 36](AB2/545), [J: 90](AB2/559); and Owen J Orders 30 April 2009, [3.4-3.7](AB7/3197).
[6] [J: 6035- 6128](AB5/2079).

were liable under the first, but not second limb of *Barnes v Addy*.[7] Owen J ordered the appellants to repay to the respondents all monies received pursuant to the Transactions (some $347 million),[8] together with compound interest on that sum calculated by reference to the best use which the *respondents* could have made of the money; the rate being 1% *below* a published rate for unsecured overdraft facilities, the 'Westpac Business Indicator Rate' (**WBIR**), being a mid-point between WBIR and the Supreme Court rate,[9] later adding monthly rests.[10] Owen J also found that the statutory insolvency claims were made out in part but did not need to grant any relief on them, and did not hold that they would have justified compound interest.[11]

9. On appeal, the majority confirmed breach of fiduciary duties by the Directors in respect of the interests of unsecured creditors, namely, duties to act for proper purposes and *bona fide* in the interest of the companies. The majority held the appellants liable under *both* limbs of *Barnes v Addy*.[12] As to relief, Lee AJA started with Owen J's principal amount of $347 million but then held that Owen J erred in awarding equitable compensation by reference to what the respondents had lost. Rather, Lee AJA held that equitable compensation "had to reflect the cardinal principle of equity that there be disgorgement of profits gained."[13] Lee AJA's reference to profits was a reference to an "estimated" or "indicative" profit that the appellants "may have received."[14] He then interpreted the "official bank rate, or minimum lending rate" referred to in *Wallersteiner v Moir (No 2)*[15] as translating to WBIR and so ordered compound interest at 1% *above* WBIR, with monthly rests.[16] Drummond AJA agreed.[17]

10. Carr AJA rejected any liability on the basis of fiduciary law or *Barnes v Addy*, but would have granted relief solely on the statutory (insolvency) claims. To the proceeds of asset sales (some $284 million), he would have added compound interest, but heavily adjusted to meet the circumstances of the case, *viz*: at 1% above the *RBA rate*, not WBIR; yearly, not monthly rests; and without interest on the amounts which, had the Transactions not occurred, would have been distributed to the appellants by the Bell group companies upon their notional liquidation; and with allowance for income tax on the compound interest presumed to be earned on the relevant funds.[18]

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[7] [J: 8749-8755](AB 7/2794), [J: 9758](AB7/3045).
[8] Owen J Orders 30 April 2009, [3.1-3.11](AB7/3197) (the Australian dollar sum of the orders, including interest, legal fees, and stamp duty).
[9] [J: 9715-9716](AB7/3034), [J: 9718](AB7/3035).
[10] [2009] WASC 107 (**Remedies**), [24](AB7/3138).
[11] [J: 9149](AB6/2895), [J: 9219](AB6/2912), [J: 9728-9729](AB7/3037).
[12] Lee AJA [AJ: 1007](AB8/3708), [AJ: 1050](AB8/3715), [AJ: 1054](AB8/3716), [AJ: 1068](AB8/3718), [AJ: 1074](AB8/3719), [AJ: 1085](AB8/3721), [AJ: 1100](AB8/3724), [AJ: 1109](AB8/3726). Drummond AJA [AJ: 2079](AB9/3983), [AJ: 2087](AB9/3986), [AJ: 2096](AB9/3990), [AJ: 2416](AB9/4101), [AJ: 2432-2433](AB9/4106), [AJ: 2450-2457](AB9/4114).
[13] [AJ: 1236](AB8/3751).
[14] [AJ: 1233](AB8/3751).
[15] [1975] QB 373 at 388.
[16] Lee AJA, [AJ: 1233-1240](AB8/3751), [AJ: 1281](4)(iv)(AB8/3761).
[17] Drummond AJA, [AJ: 2678](AB9/4180).
[18] Carr AJA [AJ: 2964](AB9/4273), [AJ: 2985](AB9/4283), [AJ: 3051](AB9/4300), [AJ: 3059](AB9/4302) (on fiduciary law); [AJ: 3542](AB9/4437), [AJ: 3614](AB9/4455), [AJ: 3552](AB9/4440), [AJ: 3567](AB9/4445), [AJ: 3571-3572](AB9/4446), [AJ: 3586](AB9/4450), [AJ: 3599](AB9/4453), Orders 6, 7 (sums)(AB9/4462), 8-9 (interest)(AB9/4463). (Noting that Carr AJA, like Owen J, found subordination of the on-loans, which reduced his interest calculation).

Part VI: Argument

1. Principal Liability Issues

11. The decisions of Owen J and the majority in the Court of Appeal rested upon findings, not only that the Bell group Directors breached duties to act for proper purposes and in the best interests of the company, but also that those duties are *fiduciary* duties. The appellants challenge both the characterisation of the duties as fiduciary and the finding of breach.

12. If either or both of these issues are disposed of favourably to the appellants, then they have no accessorial liability in respect of the claims brought by the respondents. The absence of that liability has the practical effect of confining the respondents to relief under their statutory claims. That relief differs in fundamental respects from the relief awarded by the majority.

(i) *Under Australian law, fiduciary duties are limited to the proscriptive duties to avoid conflicts of duty and not make a profit*

13. This Court has stated and confirmed that fiduciary duties are *proscriptive*, exacting loyalty from the fiduciary by reference to the duties not to act or make decisions in a position of conflict; and not to profit. This principle was stated in Deane J's judgment in *Chan v Zacharia*;[19] was made clear in *Breen v Williams*;[20] repeated in *Pilmer v Duke Group Ltd (in Liq)*;[21] and described as "settled doctrine of fiduciary law in Australia" in *Friend v Brooker*.[22]

14. The reasons underpinning this principle have been fully articulated.[23] The doctrine has been followed by intermediate appellate courts,[24] and at first instance.[25]

15. The conduct in which the Directors were found to have engaged did not involve breach of any fiduciary duty.[26]

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[19] (1984) 154 CLR 178 (***Chan***) at 198-9.
[20] (1996) 186 CLR 71 (***Breen***) at 113 (Gaudron, McHugh JJ). See also at 93-4 (Dawson & Toohey JJ) at 135-7 (Gummow J).
[21] (2001) 207 CLR 165 (***Pilmer***) at 197-8 (McHugh, Gummow, Hayne & Callinan JJ).
[22] (2009) 239 CLR 129 (***Friend***) at [85] (French CJ, Gummow, Hayne & Bell JJ); at [92] (Heydon J agreeing).
[23] See eg *Chan* at 198-9 per Deane J; *Breen* at 113,132-137 per Gummow J; *Pilmer* at [73] – [75] (McHugh, Gummow, Hayne & Callinan JJ); and *Friend* at [85]-[86] (French CJ, Gummow, Hayne & Bell JJ).
[24] *Du Boulay v Worrell* [2009] QCA 63 at [32]-[34] (Keane JA, Muir & Fraser JJA agreeing); *St Alder v Waverley Local Council* [2010] NSWCA 22 at [48], [57] (Allsop P, Beazley JA & Handley AJA agreeing); *Blackmagic Design Ltd v Overliese* [2011] FCAFC 24 at [93], [105]-[108] (Finkelstein, Jacobson & Besanko JJ); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [174], [178] (Finn, Stone & Perram JJ).
[25] *Aequitas Ltd v Aefc* [2001] NSWSC 14 at [280]-[285] (Austin J); *P&V Industries Pty Ltd v Porto* [2006] VSC 131 at [21]-[24] (Hollingworth J); *Community Association DP No 70180 v Arrow Asset* [2007] NSWSC 527 at [216] (McDougall J); *Brand v Monks* [2009] NSWSC 1454 at [362]-[367] (Ward J); *Iacullo v Remly Pty Ltd* [2012] NSWSC 190 at [54], [55] (Black J); *VPlus Holdings Pty Ltd v Bank of Western Australia* (2012) 91 ACSR 545 at [66] (Stevenson J); *Spaulding v Adams* [2012] TASSC 61 at [90] (Crawford CJ).
[26] That is: (*i*) there were *no findings* of any breach of the two proscriptive duties of profit and conflict against any of the directors made by Owen J; (*ii*) there were *no findings* of any such breaches by Carr AJA; (*iii*) Lee AJA thought that: "Given the other findings made by his Honour in relation to [Alan] Bond's conduct, his Honour should have found that Bond breached his duty not to allow his personal financial interests to conflict with his duties as a UK director by participating in the meeting of directors of BGUK in a manner that caused the other directors to breach their duties to the company.": [AJ: 1085](AB8/3721); (*iv*) because Lee AJA's finding in this respect depended critically on an assumption of other breaches of duty by Bond and the other Directors, the finding cannot be sustained for the reasons set out elsewhere in these submissions; (*v*) further, relevantly for the relief granted against *the appellants*, there were no findings made by any judge at any level that the appellants had knowledge of any such a purported conflict or breach.

(ii) *The duties of directors to act bona fide in the interests of their company and for proper purposes are not fiduciary duties*

16. The majority concluded that they were not bound by the principles and settled doctrine outlined above. Lee AJA distinguished *Breen v Williams* on the grounds that what was there said about "proscriptive" and "prescriptive" duties was confined to its own special facts.[27] Drummond AJA considered *Breen v Williams* and *Pilmer*, but concluded that there was no decision binding on the WA Court of Appeal requiring him to hold that fiduciary duties of directors to their companies were so limited.[28]

17. Drummond AJA concluded[29] (Lee AJA holding to the same effect[30]):

> "In my opinion, until the High Court declares the law to be otherwise, long established authority requires the duties of company directors to act bona fide in the interests of the company and to exercise their powers for proper purposes to be accepted as fiduciary ones even though they may require the directors to take positive action." (underlining added)

18. There are a number of difficulties with the reasoning. *First*, as with the terms "trust" and "trustees", as well as "agent", "fiduciary" and "fiduciary duty" were not always used consistently in the cases. But this Court has now settled the doctrine.

19. *Secondly*, whether strictly a matter of precedent or not, the issue is one of equitable *principle*; and this Court *has* declared the law to be otherwise.

20. *Thirdly*, there are no good reasons why (amongst the many others that arise in a directorship) *these* two duties alone would be singled out to be 'fiduciary'; or why *directors* – apparently exceptionally amongst fiduciaries – should alone be subject to them as positive duties. The law recognises that companies are established for the purpose of assuming, and taking, commercial risk with limited liability for shareholders, and such responsibility is usually delegated to directors.[31] The law also recognises that in effecting those purposes, not every duty imposed on a director sourced in law, statute or equity, is or thereby becomes a fiduciary one. For example, the duty to exercise due care and skill (a duty amongst many others also required of trustees) is not.[32] As Gummow J observed in *Breen* at 137-138:

> "Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand

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[27] [AJ: 900](AB8/3685) ("Comments made in *Breen* on the distinction between prescriptive and proscriptive duties must be read in the context of the particular facts of that case which concerned a very limited fiduciary relationship of patient and specialist medical practitioner."). His Honour deals with fiduciary duties more broadly in "The Nature of Fiduciary Duties" at [AJ: 834-908](AB8/3667). Lee AJA did not deal with *Pilmer* or *Friend* in his analysis.

[28] [AJ: 1960-1961](AB8/3946). His Honour noted *Breen* and *Pilmer* at [AJ: 1943-1946](AB8/3942).

[29] [AJ: 1978](AB8/3952).

[30] [AJ: 921-922](AB8/3690), [AJ: 930-933](AB8/3691); Cf Carr AJA [AJ: 2858-2867](AB9/4242).

[31] *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260 at 281; *Daniels v Anderson* (1995) 37 NSWLR 438 (***Daniels v Anderson***) at 501; *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 (***Vrisakis***) at 449-450.

[32] *Giradet v Crease & Co* (1987) 11 BCLR (2d) 361 at 362 (SC), per Southin J (***Giradet***) at 362 ("to say that simple carelessness in giving advice is … [a breach of fiduciary duty] is a perversion of words."); *Permanent Building Society (In Liq) v McGee* (1993) 11 ACSR 260, 287-288; *Permanent Building Society v Wheeler* (1994) 11 WAR 187 at 237, 239; *Breen* at 137 per Gummow J; *Bristol & West Building Society v Mothew* [1998] Ch 1 at 16C-D per Millet LJ; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205 per Lord Browne-Wilkinson; *Nationwide Building Society v Vanderpump and Skyes* [1999] Lloyd's Rep PN 422 at 434 (Ch D); *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [77]. See also Conaglen, *Fiduciary Loyalty* (Hart, Oxford, 2010) at 35; Heath, "The director's 'fiduciary' duty of care and skill: A Misnomer" (2007) 25 C&SLJ 370 at 373.

established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty." (underlining added)

21. *Fourthly*, apart from the fact that the "long established authority" preceded this Court's settling of the doctrine, most, if not all, of the cases which led to an account or compensation were cases in which there *was* a breach of the true proscriptive fiduciary duties (in conflict or for profit), albeit often in the context of what was also a misuse of powers. However, as demonstrated below, a voidable exercise of a power, and breach of fiduciary duty, are not the same things.

22. *Fifthly*, directors are donees of powers[33] bestowed on them under a corporation's constitution. Such powers may be abused, for example, where, upon a construction of the terms, express and implied, in the instrument creating the power (here, the constitution of the company),[34] a director exercises a power for a foreign purpose. But the exercise of a power for a foreign purpose does not, of itself, amount to a breach of fiduciary duty.[35] In order to constitute a breach of fiduciary duty, it must be shown that the power was exercised by the directors in order to obtain a profit at the expense of the company or in pursuing an interest which conflicts with the directors' duties towards the company. Thus, for directors to exercise their power to allot shares in order to benefit their family trusts would be a breach of fiduciary duty. For directors to allot shares in order to defeat a troublesome minority, would not.

23. In the instant case, no Director sought to profit or made a profit by exercising his powers to cause the Bell group companies to enter into the Transactions. There was no relevant finding that any Director pursued an interest in a position of conflict in so doing. Thus, there was no basis for the majority to find that the Directors had relevantly breached their fiduciary duties.

(iii) *The majority misconstrued the duties to act bona fide in the interests of a company and for proper purposes*

24. The majority's assessment of the conduct of the Directors was grounded in a view that Australian courts should now be "unashamedly more interventionist" in the affairs of corporations than had hitherto been the case.[36] According to Drummond AJA, it was said that there should be a "very considerable readiness" by the courts to review how directors perform their duties.[37] The "deference" once paid by courts (including this Court) to the decisions of directors was said to be no longer appropriate, even where those decisions involved judgments on matters of business or management.[38] While Lee AJA did not expressly adopt this language, his approach to the content of the two

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[33] A "power" is "an individual personal capacity of the donee of the power to do something": *Ex parte Gilchrist: In Re Armstrong* (1886) 17 QBD 167 (Fry LJ); *Joint Stock Companies Act* 1844; *Limited Liability Act* 1855; *Companies Act* 1856.
[34] *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 (***Colonial Combing***) at 470-471 per Higgins J, referring to *Farwell on Powers*, (3rd ed. 1916), at 458.
[35] *Grimaldi v Chameleon Mining NL* (No 2) (2012) 200 FCR 296 (***Grimaldi***) at [174] (Finn, Stone & Perram JJ); *Colonial Combing* at 470-471 per Higgins J; Finn, *Fiduciary Obligations* (LawBook Co, Sydney, 1977) Chapter 9 at pp38-40, [82]-[85].
[36] [AJ: 2028](AB9/3969), quoting with approval Sealy, 'Bona Fides and Proper Purposes in Corporate Decisions' (1989) 15 *Monash University Law Review* 265.
[37] [AJ: 2029](AB9/3970).
[38] [AJ: 2029](AB9/3970).

directors' duties reflected the views expressed by Drummond AJA. In particular, both members of the majority imposed a substantive obligation on directors to avoid prejudice to creditors and impugned the decisions of the directors on matters of core business judgment.

25. The majority's approach was erroneous. It infected both their characterization of the correct legal principles and their evaluation of the facts of this case. Three matters should be noted at the level of principle.

26. *First*, the majority's approach represents a radical departure from orthodox and settled law, whereby the business judgments of directors "if exercised in good faith and not for irrelevant purposes, [are] not open to review in the courts".[39]

27. As a result, this Court has stressed that a management decision of a director may not be invalidated merely because a court considers the decision to be unreasonable,[40] unwise,[41] or the product of a reasoning process that gave insufficient weight to some matters or too much weight to others.[42]

28. There are good reasons for adopting such an approach to the assessment of directors' conduct, particularly where, as here, the decision in question is a management decision rather than one which, for example, relates to the power to issue shares which involves different questions of corporate control.[43] As Carr AJA recognized, a company is not a trust and directors ought not be equated with trustees.[44] Directors are required to address the demands and exigencies of commercial enterprises.[45] Many of their decisions must be high risk in nature. Whether the decisions were 'right' will often be evident only with the benefit of hindsight.[46] In addition, the very review of the decisions of directors must reflect the fact that they act, as here, collectively.[47] It is inevitable that a range of views and beliefs will therefore inform the decision-making process.

29. *Secondly*, the considerations just identified are reflected in determining whether the twin duties of a director to act *bona fide* in the best interests of the company and for proper purposes have been contravened. Neither of those tests, as explained by this Court, authorizes or contemplates an 'interventionist' approach by courts.

30. So far as the former duty is concerned, the question for the court is not whether, objectively speaking, a particular decision was or was not in the best interests of the company: it has long been held in corporate law that the expression "*bona fide* in the best interests of the company" means one thing, not two.[48] Rather, the question for the court is whether the directors honestly believed that to be so;[49] "the state of mind of

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[39] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 (***Harlowe's Nominees***) at 493-4, approved by the Judicial Committee of the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (***Howard Smith***) at 836.
[40] *Wayde v NSW Rugby League* (1985) 180 CLR 459 (***Wayde***) at 469 .
[41] *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 (***Richard Brady Franks***) at 136.
[42] *Wayde* at 469. See also *Harlowe's Nominees* at 493 and *Daniels v Anderson* at 501.
[43] *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 (***Whitehouse***) at 289-90.
[44] [AJ: 2797](AB9/4225), citing *Mills v Mills* (1938) 60 CLR 150 (***Mills***) at 185-6 per Dixon J and *Vrisakis* at 449-50.
[45] See note 31 above.
[46] As to using hindsight, see, in a different context, *Rosenberg v Percival* (2001) 205 CLR 434 at [16].
[47] *Mills* at 185-6.
[48] For example, see *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9 (***Shuttleworth***) at 23-24; [J: 4384](AB4/1606).
[49] *Richard Brady Franks* at 135-6; *Mills* at 163; *Ngurli Ltd v McCann* (1953) 90 CLR 425 (***Ngurli***) at 438; *Harlowe's Nominees* at 493; *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614 at 620, 627, 640.

those who acted, and the motive on which they acted, are all important".[50] As a result, the onus is on the claimant to establish that the directors did not act honestly in what they believed to be the interests of the company.[51] While objective considerations may be relevant, unreasonableness itself is not enough.

31. A similar recognition of the practical circumstances in which directors find themselves informs the latter duty. While the court objectively ascertains, as a matter of law, the proper purposes for which a particular power has been conferred upon the directors of a company, it does so with due recognition of the wide variety of circumstances in which such powers could properly be exercised.[52] (That consideration has particular force in the present case where the powers being impugned were, like those in *Richard Brady Franks*, management powers to enter into legal relations, and confer securities in favour of third-party financiers.) In *Richard Brady Franks*, Dixon J referred to the need for the plaintiffs to demonstrate that the directors' purpose was not in "furtherance of any purpose or advantage of the company".[53]

32. Once the proper purposes underpinning a power are identified, the court assesses whether the substantial or moving purpose of the directors - as determined by reference to the directors' states of mind – was inconsistent with those purposes.[54] It is only if the answer to that question is "Yes", that the duty will have been breached.

33. *Thirdly*, and critically, the majority's emphasis on the need to take an interventionist approach led them to take two steps that departed from the authorities just identified.

34. The *first step* was to reject the applicability of earlier High Court precedent on the basis that those authorities were 'old'[55] or reflected a 'traditional' view. In particular, the majority rejected the relevance of *Richard Brady Franks*.

35. That case, as Carr AJA noted, was "very nearly on all fours" with this case.[56] As Dixon J observed at 142:

> "The company was in difficulties. A liquidation might be found unavoidable and, it is said, they simply wished to secure the debts in question. There are many circumstances supporting this view of the transaction. But, on the other side, there is a body of evidence explaining the issue of the debentures on the ground, stated briefly, that it was part of an arrangement by which none of the depositors or guarantors was to call in his debts or liability for twelve months, in order to give the company an opportunity of improving its position without any one of them following the example of the directors who had called in his £250 and so, perhaps, precipitating a collapse."

36. Latham CJ recognized (at 136) that "[i]t is not for a court to determine whether or not the action of the directors was wise. The question is whether it is shown that they did not honestly act for what they regarded as the benefit of the company". Similarly,

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[50] *Hindle v John Cotton Ltd* (1919) 56 SC LR (***Hindle***) at 630-1 (PC), quoted with approval in *Australian Metropolitan Life Assurance Company Ltd v Ure* (1923) 33 CLR 199 (***Ure***) at 220 and *Howard Smith* at 835.
[51] *Ure* at 206, 220-1; *Richard Brady Franks* at 135-6; *Ngurli* at 445; *Regentcrest plc (in liq) v Cohen* [2001] 2 BCLC 80 at [120].
[52] Eg *Howard Smith* at 835; *Whitehouse* at 289.
[53] At 143.
[54] *Whitehouse* at 294; *Hindle* at 630-1; *Howard Smith* at 835; *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478 at 490, 491 per Kirby ACJ (with whom Priestley and Handley JJA agreed); *R v Byrnes* (1995) 183 CLR 501 at 515.
[55] Cf [AJ: 1994](AB8/3958).
[56] [AJ: 2815](AB9/4230) and [AJ: 2931](AB9/4263).

Dixon J held (at 142) that "the question is not whether the operation of the transaction was or might give a preference over ordinary creditors or benefit those receiving debentures at their expense, but whether the object was wholly the advantage of the directors or their associates so that the interests of the company were sacrificed or disregarded".

37. These constraints imposed on judicial review, as *Richard Brady Franks* demonstrates, do not cease to apply where a company faces financial difficulties or liquidation. That is to say, where a director causes a company facing liquidation to provide security to a third party, the question is not whether this gives a preference over other creditors or whether it benefits those receiving security at their expense, but whether the interests of the company were sacrificed or disregarded.[57] Further, the purpose or object of the directors is to be distinguished both from the effect of a transaction, and from a case where the directors realised that the transaction would have an effect and found it agreeable to their personal wishes.[58] *Richard Brady Franks* is thus inconsistent with the conclusion that the court will intervene, "irrespective of the directors' beliefs and business judgments, to ensure that creditors are properly protected."[59] (underlining added)

38. The *second* step involved, according to Drummond AJA, an "important illustration" of the more interventionist approach of courts, namely recognition of a duty on the part of directors not only to "have regard" to the interests of creditors but also to give "proper effect" to those interests.[60] This asserted duty was of "central relevance"[61] to the case and formed the primary foundation for the majority's finding of liability on the part of the Directors. Lee AJA similarly spoke of a duty not to exercise powers "for a purpose that had the effect of causing the companies to prejudice the interests of creditors".[62] In his opinion, an asserted belief of a director that the course of action constituted by entry into the Transactions was in the best interests of a company "could not be accepted as rational" given the director's obligation "to take account of, *and not prejudice*, the interests of creditors".[63]

39. As to the duty to consider the interests of creditors, in *Walker v Wimborne* Mason J said, in relation to the duty to consider the interests of "*the company*":[64]

> "... it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them." (underlining added)

40. Mason J thus emphasized that directors must *only* have regard to the company's interests, and observed that consideration of the interests of the *company* required, in

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[57] *Richard Brady Franks* at 144. The same consideration applies where a subsidiary provides a guarantee in favour of a related company's debts where the subsidiary is threatened by the failure of one of the members of a group: see Carr AJA, [AJ: 2869-2874](AB9/4244); *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, at 98 and 146-147.
[58] *Harlowe's Nominees* at 493; *Mills* at 163-164 per Latham CJ and Dixon J at 188.
[59] [AJ: 2031](AB9/3971).
[60] [AJ: 2031](AB9/3971).
[61] [AJ: 2031](AB9/3971).
[62] [AJ: 948](AB8/3694).
[63] [AJ: 993](AB8/3703).
[64] (1976) 137 CLR 1 at 7 (***Walker***).

particular circumstances, regard to be had to the interests of other persons (namely, shareholders and creditors).

41. The "studiously cautious language"[65] of Mason J reminds directors that the interests of the company do not necessarily equate to the interests of shareholders, and that their obligation to consider the interests of the company may require them to take account of the fact that other persons (such as creditors) have an interest in the company's undertakings. That is simply a recognition that "the best interests of the company will depend upon various factors including solvency".[66] It does not involve a prescribed standard of conduct towards creditors.

42. The fundamental character of the "duty" remains one to act in the best interests of the company, or to exercise powers for a proper purpose.[67] There is no independent duty that arises (either generally or upon insolvency) to consider the interests of creditors. Rather, *Walker* and *Spies v R*[68] identified the full range of factors to which directors must have regard in the exercise of their powers in an insolvency context.

43. As to the second of the duties identified by the majority, both Lee AJA and Drummond AJA held, in slightly different terms, that directors of insolvent, or near-insolvent, companies have an obligation "not to prejudice the interests of creditors".[69] Their Honours differed, however, in the precise way in which that obligation was said to arise.

44. According to the majority, it followed that the directors of a company have a duty not to commit the company to a course of action if it would entail a real risk of prejudice to creditors of a company in an insolvency context, regardless of whether they honestly believed that it would be in the best interests of the company to do so.[70] In the context of transactions like those at issue in these proceedings (or *Richard Brady Franks*), the majority thus imposed an obligation on directors of insolvent, or near-insolvent, companies to ensure a *pari passu* outcome for all creditors.

45. There is no "obligation not to prejudice the interests of creditors" (being, in the context of this case, an obligation to ensure a *pari passu* outcome for all creditors). There is nothing in *Walker v Wimborne* or *Spies v R*, or in the principles underlying them, supporting the existence of such an obligation nor the consequential limitation on the powers of directors.

46. Further, any such duty would conflict with the principle that it is directors in whom are vested the right and the duty of deciding whether the company's interests lie and how they are to be served.[71] The duty is to consider and balance the various and often conflicting interests of the company as a whole. That a sectional interest may be prejudiced does not lead to a breach of duty if the director considers or acts in the interests of the company as a whole.

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[65] Sealy, "Directors' Duties – An Unnecessary Gloss", (1988) 47 *Cambridge Law Journal* 175 (***Sealy***) at 176.
[66] *Angas Law Services Pty Ltd v Carabelas* (2005) 226 CLR 507 at [67], per Gummow and Hayne JJ.
[67] See Carr AJA at [AJ: 2819](AB 9/4232).
[68] See *Spies v R* (2000) 201 CLR 603 at 635 and 636, elaborating on the principle dealt with in *Walker*.
[69] Lee AJA at [AJ: 767](AB 8/3648). See also Lee AJA at, eg, [AJ: 770](AB8/3649), [AJ: 920](AB8/3689), [AJ: 948](AB8/3694), [AJ: 952](AB8/3695), [AJ: 954](AB8/3696), [AJ: 993](AB8/3703), [AJ: 999](AB8/3706), [AJ: 1007](AB8/3708), [AJ: 1017](AB8/3710), [AJ: 1092](AB8/3722), [AJ: 1093](AB8/3723); Drummond AJA at [AJ: 2041](AB 9/3973).
[70] Drummond AJA at [AJ: 2046](AB9/3975). See also Lee AJA at [AJ: 952](AB8/3695), [AJ: 1093](AB8/3723).
[71] *Harlowe's Nominee's* at 493.

47. The majority was therefore wrong to ask whether the course of action contemplated (and undertaken) by the Directors entailed a "real risk that the creditors of a company in an insolvency context would suffer significant prejudice",[72] and should instead have asked simply whether the Directors exercised a power otherwise than for the purpose for which it was granted, or acted otherwise than *bona fide* for the benefit of the company.

48. As the facts and reasoning in *Richard Brady Franks* demonstrated, a negative response to each question was required.

(iv) *The Directors did not breach their duties*

49. The Directors were not in breach of the duties identified above. That is to say, the Directors:

(a) honestly believed that entry into the Transactions was in the best interests of the companies[73]; and

(b) had a purpose of obtaining an advantage for the companies, being consistent with that for which the relevant powers to enter into the Transactions were conferred upon them.

50. In particular, the Directors' purposes, and their consideration of the interests of the companies, properly reflected the extent to which the interests of creditors informed the interests of the companies.

51. A full account of the relevant primary facts may be found in the appellants' Chronological Index of Factual Findings. However, once the legal framework by which the Directors' conduct falls to be assessed is properly understood, the relevant facts are few. Of central, and decisive, importance are the Directors' honestly held beliefs.

52. In that regard, it is important to recall, that Owen J expressly found that none of the Bell group Directors had been dishonest or was guilty of conscious wrongdoing,[74] had acted in their own interests in causing the relevant companies to enter into the Transactions,[75] had exercised their powers as a means to entrench their position of control of TBGL,[76] had exercised their powers as a means to protect their financial interest in BCHL and other BCHL companies[77] or had breached the duty to avoid conflicts of interest.[78]

53. At the date of the Transactions, the managing director and chief executive of TGBL was David Aspinall.[79] Aspinall was also a director of the other Australian Bell group companies.[80] Aspinall's role in the Bell group included managing the operations of the publishing assets, and the negotiation of the refinancing with the appellants from

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[72] Drummond AJA at [AJ: 2046](AB9/3975). See also Lee AJA at [AJ: 952](AB8/3695) and [AJ: 1093](AB8/3723).
[73] [AJ: 1988](AB8/3956), [AJ: 2795](AB9/4225), [AJ: 2056](AB9/3977), [AJ: 2072](AB9/3982), [AJ: 2474](AB9/4121), [AJ: 2772](AB9/4124), [AJ: 2910](AB9/4258).
[74] [J: 6031](AB5/2078).
[75] [J: 6125](AB5/2103), [J: 6127](AB5/2104).
[76] [J: 6127](AB5/2104).
[77] [J: 6127](AB5/2104).
[78] [J: 9745](AB7/3042).
[79] [J: 134](AB2/570), [J: 4983](AB4/1775).
[80] [J: 55](AB2/549), [J: 681](AB2/684), [J: 4983](AB4/1775).

July 1989. Aspinall was a very experienced media executive[81] with a detailed understanding of the publishing assets.[82] During 1990 and until April 1991 he was involved in consideration of, and attempted implementation of, the restructuring of the Bell group.[83] Negotiations with the appellants in relation to the refinancing were conducted on behalf of the Bell group, at least from July 1989, by Aspinall and his executive assistant, Colin Simpson.[84] Aspinall and Simpson conducted the negotiations strongly[85] and attempted to get the best deal possible for the Bell group companies including attempting to get some appellants to extend their facilities in substitution for other appellants who no longer wished to lend to the Bell group[86], seeking an extension to banking facilities without security[87] and seeking an extension to banking facilities with limited security.[88] Given the central role of Aspinall in the Transactions, Drummond AJA's observation that if Owen J had applied the subjective tests identified above, "he could not have found that Aspinall breached his duties to act *bona fide* and for proper purposes", is of particular significance.[89]

54. The other directors of TGBL (and the other Australian Bell group companies) at the relevant time were Peter Mitchell and Antony Oates.[90] Neither Mitchell nor Oates held an executive position with, or was employed by, TGBL. Both were non-executive directors. Mitchell was not involved in the day to day operation of the Bell group and its businesses, and relied heavily on Aspinall.[91] Oates may not have been as closely concerned in the day to day operations of the Bell group companies as Aspinall but had a greater involvement than Mitchell.[92] He had a continuing role in the dealings with the appellants.[93]

55. The directors of the relevant United Kingdom Bell group companies (BGUK and TGBIL) were Michael Edwards QC, Alan Birchmore, Alan Bond and Peter Mitchell.[94] Edwards handled the involvement of BGUK and TGBIL in the Transactions.[95] Birchmore, Mitchell and Bond had no day to day involvement in the management of the companies.[96]

56. Four essential matters absolve the Directors of any breach of duty.

Solvency

57. First, as at January 1990, the Directors did not believe the companies were actually insolvent.[97] They resolved on 24 January 1990[98] that TBGL was able to pay its debts

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[81] [J: 4984](AB4/1775), [J: 5091](AB4/1805).
[82] [J: 1822](AB2/979), [J: 4986](AB4/1776), [J: 5100-5122](AB4/1808).
[83] [J: 135](AB2/570).
[84] [J: 138](AB2/570), [J: 386](AB2/624).
[85] [J: 8978-8979](AB6/2851), [J: 9756](AB7/3044).
[86] [J: 5031](AB4/1788),[J: 5033](AB4/1788), [J: 5035-5037](AB4/1789), Section 4.5.1(AB2/624-629).
[87] [J: 5019](AB4/1785).
[88] [J: 5023](AB4/1786), [J: 5026](AB4/1786), [J: 5600](AB4/1967).
[89] [AJ: 2059](AB9/3978). See also [AJ: 2474](AB9/4121).
[90] [J: 55](AB2/549), [J: 134](AB2/570), [J: 136](AB2/570), [J: 137](AB2/570), [J: 681](AB2/684).
[91] [J: 136](AB2/570), [J: 5372](AB4/1891).
[92] [J; 5485](AB4/1935).
[93] [J: 5481](AB4/1934).
[94] [J: 55](AB2/549), [J: 682](AB2/684).
[95] [J: 5766](AB5/2007), [J: 5777](AB5/2010).
[96] [J: 5767](AB5/2008), [J: 5875](AB5/2035).
[97] [J: 6035(1)](AB5/2079); [J: 6086](AB5/2093).
[98] TGBL.01058.047(AB). To the same effect, the letter from Aspinall and Oates to the UK directors (including Mitchell) dated 23 January 1990 TBGL.07207.030(AB) (referred to at [J: 5078](AB 4/1802) as part of the package TBGL.07207.029-TBGL.07207.033(AB).

and meet its obligations in respect of the bondholders and that the realisable value of TGBL's assets exceeded the amount of its liabilities. They knew that the companies were of doubtful solvency, or nearly insolvent, but that is all.[99]

Two alternatives

58. Secondly, the Directors believed that they had two options: either to place the group companies into immediate liquidation, or to carry out a restructure of the group.[100] They believed that, unless restructured, the Bell group companies would have gone into liquidation. That was because one or more of the Australian banks would have caused one or other or both of TGBL and BGF to be wound up. If either TBGL or BGF was wound up, each other company in the Bell group would have been wound up.

Restructure is preferable to liquidation

59. Thirdly, the Directors believed that a restructure was preferable to a liquidation.[101] The restructure would focus on the publishing assets. A contemporaneous file note dated 22 January 1990, shortly before the Transactions,[102] confirmed that Aspinall had plans to become a more efficient newspaper operator and to consolidate in this business and pay off the group's borrowings after disposal of the BRL stake. Owen J accepted that Aspinall had great confidence in the future of the publishing assets, accepted the genuineness of his beliefs in this respect and thought that, generally speaking, they were based on a sound foundation.[103]

60. Aspinall was confident that the Bell group companies could meet recurrent expenses and believed that he had enough "tools" to sustain the operation of the Bell group to enable the restructure to occur post January 1990.[104] Aspinall was determined to confront Bell group's problems and he was intent on securing its survival.[105] Owen J accepted that Aspinall "considered that the first step in any restructure, or way forward, was to secure the medium-term financing facility. This would give him time to plan and implement a restructure, undoubtedly based on the 'tools' that he had available and the ideas that he had in his mind for utilising the tools....he certainly had some ideas in mind before the refinancing was entered into. But he had to achieve the refinancing to buy the 12 months' time that he considered he needed to plan and implement his ideas."[106]

61. It was common ground that the Directors believed, and an honest and intelligent director would have believed, that it was possible to restructure the financial position of the Bell group so that the companies in the Bell group could meet their obligations

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[99] [J: 6035(1)](AB5/2079), [J: 6086](AB5/2093) ("I think that Aspinall believed that 'the group' was not actually insolvent").

[100] [J: 1828](AB2/981), [J: 1881](AB3/995), [J: 4295](AB4/1581), [J: 4966-4967](AB4/1771), [J: 5018](AB4/1783), [J: 5055](AB4/1793), [J: 5060](AB4/1795), [J: 5370](AB4/1890), [J: 5434](AB4/1918), [J: 5900](AB5/2042), [J: 6035(1)-(3)](AB5/2079); [AJ: 2095](AB9/3989), [AJ: 2260](AB9/4050), [AJ: 2759-2764](AB9/4208).

[101] [J: 5018](AB4/1783); [J: 5083](AB4/1803), [J: 5384](AB4/1897), [J: 5438](AB4/1919); [AJ: 2863](AB9/4243).

[102] [AJ: 2773](AB9/4214) referring to TBGL.04735.032(AB). To the same effect, the letter from Aspinall and Oates to the UK directors (including Mitchell) dated 23 January 1990 TBGL.07207.032(AB) (referred to at [J: 5079](AB4/1802)) as part of the package TBGL.07207.029-TBGL.07207.033(AB).

[103] [J: 1822](AB2/979).

[104] [J: 5154](AB4/1826).

[105] [J: 5074](AB4/1799).

[106] [J: 5367](AB4/1890). See also [J: 5362](AB4/1888), [J: 6086](AB5/2093).

as and when they fell due.[107] A liquidation, on the other hand, would involve a "fire sale" destruction of the value of the Bell group's assets and the likelihood that some creditors would not be paid.

62. The Bell group held two principal assets: the publishing assets and the BRL shares.[108] Many of the Bell group companies either owed debts to, or were owed debts by, or held shares in, other Bell group companies, such that the worth of those assets would be determined by the value of the two principal assets.[109]

63. The Directors believed that liquidation would result in a substantial loss of value of those principal assets.[110] That is because a liquidator would conduct a "fire sale" of the group's assets.[111] The Directors believed that the Bell group had a surplus of assets over liabilities, but not if its principal assets were sold in a "fire sale".[112] In particular:

    (a) Aspinall believed the publishing assets were worth between $500-$600 million at the time.[113] The trial judge's finding was that liquidation would have reduced its value by $100 million or $200 million.[114]

    (b) The BRL shares had negligible realisable value as at January 1990 in the short to medium term,[115] but if "the brewery transaction" could be completed, Aspinall believed that those shares could be worth up between $200 million to $456 million by the end of 1990.[116] If liquidation occurred, then the opportunity to restore significant value for the BRL shares would be lost and there would be no prospect of restoring any value to the BRL shares.[117]

64. The Directors considered that it was in the interests of all the companies in the Bell group to enter into the Transactions. The Transactions afforded the only attainable opportunity to preserve and enhance the value of the key assets, and to restructure and pay or receive payment of debts to the direct or derivative advantage of each company in the group.[118]

65. In terms of liabilities, the total bank debt owed by companies in the Bell group, in

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[107] PLED.010.001 at 48A(c) particular (j)(AB1/191,193); PLED.012.001 at 122(e) and (f))(AB1/405,406), [AJ: 2920-2922](AB9/4260).
[108] [J: 31](AB2/543), [J: 32](AB2/544), [J: 48](AB2/548), [J: 463](AB2/640), [J: 1802-1804](AB2/974), [J: 1885](AB3/996).
[109] [J: 1882](AB3/995), [J: 4965](AB4/1771), [J: 5018](AB4/1783); Mitchell WITD.026.007.T at [105](AB); Aspinall WITD.026.011 at [34]-[36](AB).
[110] [J: 5018](AB4/1783), [J: 5436](AB4/1918), [J: 5438](AB4/1919).
[111] [J: 5018](AB4/1783), [J: 5083](AB4/1803), [J: 5436](AB4/1918), [J: 5438](AB4/1919).
[112] [J: 5018](AB4/1783), [J: 5436](AB4/1918).
[113] [AJ: 2770](AB9/4214). In mid-November 1989, the directors had approved the TBGL Annual Report 054.02.0002 (AB) valuing the publishing assets at $626 million as at 30 June 1989. The auditors had qualified that valuation by $125 million, implying a valuation of $501 million: [J: 1805-1806](AB2/975); [J: 6446]](AB5/2186), [AJ: 2803]](AB9/4227). There had been expressions of interest in purchasing the publishing assets for prices ranging from $300 million to $576 million on a debt-free basis: [J: 5102](AB4/1809), [J: 5097](AB4/1807).
[114] [AJ: 2901](AB9/4253).
[115] [J: 1798(4) and (5)](AB2/972), [J: 6035(4)](AB5/2079).
[116] [J: 1798(2)](AB2/972), [J: 5018](AB4/1783), [J: 5139-5140](AB4/1821), [J: 5417-5420](AB: 4/1908-1910), [J: 5422](AB4/1910[J: 5435-5436](AB4/1918), [J: 6035(4)](AB5/2079); WITD.026.007.T at [68](AB:). Hill and Henson, the independent directors of BRL, believed that the brewery transaction would be completed and BRL's financial problems would be resolved: [AJ: 2863](AB9/4243).
[117] [J: 5435](AB4/1918), [J: 6035](4)](AB5/2079); [AJ: 2863](AB9/4283), [AJ: 2901](AB9/4253). See also the evidence of Aspinall T: 30938(AB); Henson T: 13203, 13210(AB); Hill T: 13475(AB).
[118] Cf *Walker v Wimborne* at 6.

Australian dollars, was approximately $260 million.[119] Otherwise, the liabilities, which the trial judge found and the Court of Appeal confirmed,[120] included the disputed tax debts of approximately $34.3 million and the obligation in respect of the bonds (approximately $385.4 million plus £75 million).[121] In addition to those debts, there were also trade creditors, but both Owen J and Drummond AJA held the Directors were correct in their view that the Bell group would continue to meet these debts.[122]

66. The tax debts were in respect of three companies in the group and were disputed *bona fide*.[123] The Directors believed that the companies would succeed in their dispute with the DCT.[124]

67. The Directors believed that the obligations in respect of the bonds would be subordinated in a liquidation.[125] The Directors were aware that the convertible subordinated bonds were selling at 20% of their face value.[126] The Directors believed that, in a liquidation, the bondholders would have received little or nothing in a winding up, whereas the appellants and other creditors would likely be paid.[127]

The Transactions as a Necessary Step in any Restructure

68. Fourthly, the Directors believed that a restructure was only possible if refinancing of the Bell group's banking arrangements could be achieved, and the Transactions afforded the best available terms for such a refinancing, and were a necessary first step in any restructuring.[128] That is to say, the Directors believed that, unless the Transactions were entered into, the Bell group companies would be wound up at the suit of one or more of the Australian banks.[129]

69. While Owen J held that "there were a range of other possible transactions that might have been available to the directors"[130] to effect a restructure of the Bell group without the first step of the Transactions, no specific alternative, let alone one that would have been more advantageous to the companies, was identified either by his Honour or the respondents.[131] In any event, the Court of Appeal did not adopt Owen J's reasoning,

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[119] [J: 1192](AB2/807).
[120] [J: 2096](AB3/1046); [AJ: 2343-2344](AB9/4078).
[121] [J: 309](AB2/606), [J: 311](AB2/606), [J: 313](AB2/607), [J: 318](AB2/608). The bonds included two tranches of bonds issued directly by TBGL and BGF, amounting to $150m. It was not in dispute that these debts were subordinated. The "subordination" issue in the case related to the "on-loans" of almost A$400 million in bonds issued by BGNV (guaranteed on a subordinated basis by TBGL), the proceeds of which bond issues had been on-lent to TBGL (as to around $60 million) and BGF (as to around $340 million).
[122] [J:5005-5006](AB4/1781), [J:5438](AB4/1919), [J:5470(f)](AB4/1930); [AJ: 2343-2344](AB9/4078). Owen J included a small number of relatively minor external liabilities, totalling about $600,000, at [J: 2096](AB3/1046), but these were rejected by Drummond AJA at [AJ:2343-2344](AB9/4078).
[123] [J: 2014](AB3/1027).
[124] [J: 5158](AB4/1828), [J: 5442](AB4/1921). The auditors concurred with that view: [J: 2046](AB3/1034)[J: 5442](AB4/1921).
[125] [J: 5057-5058](AB4/1794), [J: 5060-5061](AB4/1795), [J: 5380-5385](AB4/1894).
[126] [AJ: 2852](AB9/4239).
[127] [J: 5438](AB4/1919).
[128] [J: 1881](AB3/995), [J: 5018](AB4/1783), [J: 5362](AB4/1888), [J: 5367](AB4/1890), [J: 5438](AB4/1919), [J: 5452](AB4/1924), [J: 6057](AB5/2086), [J: 6086](AB5/2093). Their plans were to refinance to a medium term facility to enable the Directors to concentrate on the publishing assets and improving their profitability, so as to preserve the opportunity to restore value to the BRL shares and to sell these and possibly an interest in the publishing assets and defease bonds [J: 5082-5](AB4/2092), [J:5364](AB4/1889); [J:5367](AB4/1890); [J: 5425](AB4/1911), [J: 5434-6](AB4/1917); WITD.026.001.T at [73], [78], [376], [598](AB) (Aspinall).
[129] [J: 1881](AB3/995), [J: 5018](AB4/1783), [J: 5370](AB4/1890), [J: 6035](AB5/2079).
[130] [J: 4306](AB4/1584).
[131] [J: 4306-4307](AB4/1584) Owen J accepted a submission advanced at first instance by the respondents, that there were theoretical alternatives [J: 4303](AB4/1583), but the respondents did not advance, and did not

and considered that the only alternative was liquidation.[132] That is of central importance in light of the fact that the honest belief of the Directors as to the necessity of the Transactions (and their indispensability to any restructure) is not in dispute.

70. The Directors negotiated hard with the appellants over a period of six months in an attempt to achieve the most favourable terms by which they could refinance bank debt to permit a restructure of the group and avoid liquidation and consequent losses to all companies and their creditors.[133] The respondents themselves alleged that if a lender or lenders, other than the appellants, had been willing to advance BGF sufficient moneys as at 26 January 1990, they would only have done so upon the same, or substantially the same, terms as the Transactions.[134]

71. The majority's views concerning the reasonableness or rationality of the Directors' beliefs are, for the reasons given above, irrelevant. Those conclusions were, in any event, factually wrong, and frequently a corollary to the erroneous views as to the nature of the directors' obligations regarding creditors.[135] Moreover, a finding that the decisions of the Directors lacked reasonable grounds was not a proper basis for a conclusion of breach. Any lack of reasonable grounds did not entail that the Directors' decisions were "irrational, if not bizarre ... – which is to say one that is so unreasonable that no reasonable person could have arrived at it".[136] As Carr AJA correctly held, Owen J made no finding of irrationality but, rather, he found that the Directors honestly believed that entering into the Transactions was in the best interests of each of the companies in the group.[137]

72. Equally, once it is appreciated that the Directors honestly believed that the Transactions were in the best interests of the companies, the suggestion of the existence of a "scheme" to transfer control of the Bell group assets to the appellants (and other purposes) cannot be sustained.[138] Such a finding was inconsistent with the case as pleaded or found by Owen J, and inconsistent with the actual beliefs and purposes of the Directors.[139] For example, Owen J expressly found that Aspinall's purpose was to buy 12 months' time in order to undertake a restructure.[140] Moreover, it made no commercial sense to conclude that directors, who had fought hard to

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seek to advance (see [J: 4304, 4307](AB4/1584), a case to establish that there was any chance of achieving an alternative, particularly where the position had been reached in January 1990 (after six months of negotiations) that either the refinancing went ahead promptly or the appellants would call up their loans leading to liquidation [J: 1828](AB2/981), [J: 1881](AB3/995), [J: 5018](AB4/1783), [J: 5055](AB4/1793), [J: 5434](AB4/1917), [J: 5900](AB5/2042), [J: 6035(2) and (3)](AB5/2079)). The majority in the Court of Appeal simply proceeded upon the basis that the decision to refinance constituted breach, in the abstract, without any regard to whether the alternative, liquidation, would be worse.

[132] [AJ: 1087](AB8/3721), [AJ: 2095](AB9/3989), [AJ: 2260](AB9/4050), [AJ: 2808-AJ:2814](AB9/4228)

[133] For example, see [J: 5019](AB4/1785), [J: 5020](AB4/1785), [J: 5023](AB4/1786), [J: 5026](AB4/1786), [J: 8978-8979](AB6/2851), [J: 9756](AB7/3044).

[134] [J: 1693](AB2/945).

[135] See, for example, [AJ: 9931](AB8/3703).

[136] *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [68]; *Wayde* at 469-70.

[137] [AJ: 2772](AB9/4214).

[138] [AJ: 945](AB8/3693). It is, in any event, important to note that none of the paragraphs in Owen J's judgment to which Lee AJA refers as constituting a finding of the existence of the scheme support his conclusion. Most are recitations of *allegations* made by the respondents, rather than *findings* by his Honour. His references are largely based upon findings made in the "objective insolvency" case, not in the section of the judgment containing findings against the Directors. Thus, they ignored findings about cash flow which the Directors believed would be received (and were in fact received), for example the asset sale proceeds including Bell Press of $25m [J: 5197](AB4/1839), [J: 5436](AB4/1918).

[139] Not only was Lee AJA's statement at [AJ: 945](AB8/3693) ("the principal object of [the Scheme] was to transfer control of the Bell group assets to the Banks for the conduct of an informal administration controlled by the Banks") never pleaded, but a similar notion was explicitly rejected by Owen J [J: 6066](AB5/2088).

[140] [J: 5362](AB4/1888), [J: 5367](AB4/1890), [J: 6086](AB5/2093).

refinance with no or minimal security, and who had strong belief in the future profitability of the publishing assets and the potential for restoring value to the BRL shares, had a purpose (never articulated by any of them and contrary to the purpose evident in the contemporaneous documentation) of transferring control of the companies' assets to the appellants to conduct an informal administration, in circumstances where the directors did not stand to gain (and did not receive) any financial or other personal benefit from doing so.

The Position of Creditors

73. The above account of the facts demonstrates, that the Directors' purposes and consideration of the best interests of the companies appropriately acknowledged the extent to which the interests of creditors informed the interests of the companies. In particular:

    (a) the Directors believed that the bondholders were subordinated to ordinary unsecured creditors.[141] Although two of the four judges who have considered this question came to a different conclusion,[142] the honesty of the Directors' views is not in dispute. Because the Directors considered the bondholders to be subordinated, they regarded them as the principal persons advantaged by a restructure compared to their position in a liquidation.[143] The trial judge accepted that it was "undeniable" that, based on his subordination finding (which accorded with the Directors' belief) had the companies gone into liquidation shortly after 26 January 1990 it was unlikely the bondholders would have received a return on their investments.[144]

    (b) the Directors believed that the disputes regarding the tax assessments would be resolved in the companies' favour.[145]

    (c) the Directors believed that the trade creditors' interests would not be affected by the Transactions because they would be paid in any event. [146]

    (d) the Directors were aware of the position of the appellants (who were of course creditors of companies in the group) and the bondholders holding bonds issued directly by TBGL and BGF, which were, on any view, subordinated.[147]

74. Once it is appreciated that the question is only whether the Directors honestly believed that the entry into the Transactions was in the best interests of the companies (informed, where appropriate, by the interests of creditors) and were exercising their powers consistently with the purpose for which they were given, the error in the majority's criticisms of the Directors' beliefs becomes plain.

75. The basis upon which Lee AJA held that the Directors failed to consider the interests of the DCT was that to hold their (honest) opinion that the companies would prevail

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[141] [J: 5057](AB4/1794), [J: 5058](AB4/1794), [J: 5060](AB4/1795), [J:5061](AB4/1795), [J: 5380-5382](AB4/1894).
[142] Carr AJA held that commercial people would regard a conclusion that the on-loans were unsubordinated "as totally lacking in commercial reality": [AJ: 3242](AB9/4354).
[143] [J: 5384](AB4/1897), [J: 5438](AB4/1919).
[144] Remedies, [52] (AB7/3145).
[145] [J: 5158](AB4/1828), [J: 5442](AB4/1921).
[146] [J: 5005](AB4/1781), [J: 5438](AB4/1919), [J: 5470(f)](AB4/1930); [AJ: 2344](AB9/4079).
[147] Nor was it wrong, given their belief that the group was not actually insolvent, for the Directors to take into account TBGL's shareholders: see *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [47].

was "imprudent and unreasonable".[148] His Honour simply erred by asking whether the Directors' view was correct, or whether they ought to have held a different view. The only relevant question was whether they honestly held the view they did.

76. Equally, the basis upon which Lee AJA held that the Directors failed to consider the interests of the BGNV bondholders was that they were not, as the Directors (and Owen J and Carr AJA) thought, subordinated.[149] Once more, the question is not whether the Directors' view about subordination was right or wrong. Indeed, the difficulty of the subordination issue provides a powerful illustration of the error in the majority's approach. It cannot be the law that whether directors breach their duty to act in *bona fide* and for proper purposes turns on an ultimate judicial finding on an issue of this type, despite the Directors' belief, on the material known, that the bonds and on-loans were subordinated.

77. Once the proper test is applied to the facts, the Directors are seen to have appropriately considered the interests of creditors.

78. Moreover, questions of "prejudice" were dealt with globally, notwithstanding that no "group" *Barnes v Addy* case was advanced, as Owen J accepted. It was necessary for each company to establish its individual claim against its directors for breach of duty owed to that company and prove knowledge by the appellants of that breach.[150] "Prejudice" was not proved on this basis. Thus, for example, Bell Equity's only asset was 3,323,981 BRL shares. As at 26 January 1990, the only realistic prospect of restoring value to the BRL shares was to proceed with the refinancing.[151] Bell Equity's only debt was a debt owed to BGF of $6.34 million.[152] It had no capacity to repay its debt to BGF unless value was restored to the BRL shares. Yet not only did the majority find that Bell Equity's directors breached their fiduciary duties in causing Bell Equity to enter into the Transactions, (as part of the global finding of prejudice) they found that equity required that the appellants account to Bell Equity for the proceeds of the sale of its proportion of the BRL shares, plus compound interest. Those proceeds would never have come into existence, but for the Transactions.

Summary

79. The Directors did not breach any of their duties. They honestly believed, on the basis of *their* assessment of the options facing the companies, on the basis of *their* assessment of the assets and liabilities of the companies, and on the basis of *their* judgment as to future events, that it was in the best interests of all companies to proceed with the restructure. The findings of Owen J and the majority involve second-guessing this decision upon their own analysis of these matters, and requiring compliance with the asserted obligation (in reality a new rule of law) that directors of companies of doubtful solvency must ensure that their decisions do not cause prejudice to any creditors.

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[148] [AJ: 979](AB8/3701). His conclusions were based upon matters not known to the Directors. [AJ: 968-974](AB8/3699), and he criticised the Directors for not going beyond the advice of their in-house expert [AJ: 975](AB8/3700) who was confident there would be no liability on the assessments [J: 5157](AB4/1828); [AJ: 975](AB8/3700).
[149] [AJ: 996](AB8/3705).
[150] [J: 4807-4808](AB4/1731).
[151] [J: 1798](AB4/972) [J: 5570-5772]](AB4/1958).
[152] MISP.00026.003 TIFF 079-080(AB_____); PLED.009.001 at [7C], [8(e)] (AB_____).

2. Accessorial liability (*Barnes v Addy*) issues

(i) *Barnes v Addy was not engaged*

80. Since the duties in issue were not fiduciary duties, there was no reason why the Directors, as fiduciaries, should be treated "as if trustees" for the purposes of *Barnes v Addy* liability. In those circumstances, the case for liability of the appellants (other than under the insolvency or Bankruptcy Acts regimes) should end there. However, there are also errors in the application by the majority of Lord Selborne's judgment in *Barnes v Addy* itself.

(ii) *No first limb liability*

10 81. The majority erred in upholding the trial judge's conclusion that the plaintiffs had made out a case of knowing receipt. This conclusion was erroneous for three reasons:

(a) *First*, there was no trust property;

(b) *Secondly*, in any event, here, the "property" said to have been received by the appellants was a basket of "rights" arising from the execution of the Transactions; and

(c) *Thirdly*, in any event, here, the parties were dealing under a series of unrescinded contracts which were binding and effective at law in accordance with their terms. There could be no question of the rights being "trust property" or subject to constructive trusteeship or knowledge of receipt of trust property in those
20 circumstances.

82. Each is considered in turn below. However, a preliminary observation should also be made. A critical element in establishing a cause of action for knowing receipt is knowledge of the existence of the relevant duty and breach of that duty. That means that any findings by this Court in relation to breach of directors' duty will only lead to liability under limb one of *Barnes v Addy* to the extent that the findings of Owen J and the Court of Appeal regarding the *knowledge* of the appellants (which are not challenged) are capable of supporting a finding of knowledge of the breaches so found.

The first limb of Barnes v Addy does not apply to company directors

30 83. This Court in *Farah* noted that "in recent times it has been assumed, but rarely if at all decided, that the first limb applies not only to persons dealing with trustees, but also to persons dealing with at least some other types of fiduciary".[153] In relation to that, two observations should be made.

84. *First*, the whole point of Lord Selborne's dictum in *Barnes v Addy* was to resist the unreasonable extension of the doctrine of trusts, as it had been established by the Court of Chancery, and avoid "unreasonable and inequitable applications" of the sound doctrines of equity.[154]

85. The law in Australia is that articulated by this Court in *Consul*, *Warman v Dwyer* and *Farah*.[155] In *Consul*, both Stephen J (with whom Barwick CJ agreed) and Gibbs J

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[153] (2007) 230 CLR 89 at [113].
[154] *Barnes v Addy* at 251.
[155] *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (***Consul***); *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (***Warman***); see also *Michael Wilson & Partners v Nicholls*

endorsed the existing principle of limb one of *Barnes v Addy*. Stephen J accepted the orthodox rule that there were two alternatives: receipt of *trust* property and knowing participation.[156] Gibbs J's judgment was to like effect. His Honour considered the first limb as applicable only to receipt of trust property "in the strict sense" but that the second limb extended to dealings with fiduciaries breaching their fiduciary duty, including dealings whereby property or a benefit was received. Thus, after quoting Lord Selborne's dictum, and the cases which had considered it, Gibbs J said:[157]

> "All these authorities, however, are dealing with trustees and trust property in the strict sense, and the question is whether the principle applies to impose liability on strangers who knowingly participate in a breach of fiduciary duty committed by a person who is not a trustee or is at most a constructive trustee." (underlining added)

and:[158]

> "I therefore conclude, on principle, that a person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation." (underlining added)

86. Hence, the extension Gibbs J contemplated related solely to the second limb. This extension was endorsed by this Court in *Warman* and also in *Farah*. There has been no extension by the Court of the first limb, so as to apply it beyond trust property in the strict sense. That limb one is inapplicable to receipt of property arising from breach of fiduciary duty is supported by *Warman* which applied limb two to deal with receipt in those circumstances.

87. Other observations of this Court are consistent with the first limb applying only to trust property in the strict sense.[159]

88. Trust property is unique because it involves the recognition of two separate proprietary interests, not present in the case of property owned absolutely (as in the case of property owned by a corporation). The separate equitable interest is in place at the outset, and *follows* the property. That is, there is a certain proprietary foundation for the receipt, and the relief. In this case, the companies' claims to the property could not arise before the contracts were avoided.

89. *Secondly*, it is particularly inappropriate to extend limb one to dealings by corporations, *a fortiori* trading corporations - the primary vehicles of commerce - which routinely and properly pay away or transfer their property to third parties. This is not the proper field of operation for the application of the strict principles of constructive trusteeship. Directors do not have the protections of a trustee, including, for example, the ability to seek judicial advice about whether a decision is justified.

90. There are no separate legal and beneficial estates involved.[160] Whilst a third party

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(2011) 244 CLR 427 at [106].
[156] *Consul* at 408.
[157] *Consul* at 396.
[158] *Consul* at 397.
[159] *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at [121]; see also *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 253; *Rogers v Kabriel* [1999] NSWSC 368 at [173].
[160] See *Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 (***Linter***) at 606 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

dealing with a trustee can "know" that the trustee is only the legal owner of property, a recipient of property from a corporation knows the precise opposite: that the company is the absolute owner of the property.

91. The directors are not absolute or limited owners of the property of the corporation. The correct position was confirmed by the High Court in *Clay v Clay*:[161]

> "It is to be recalled that, *in the past*, the term 'trustee' sometimes was used to describe the position of a director in relation to the company in question. Such a use of the term 'trustee could at best be metaphorical because property of the company was not vested in the directors. Again, in *Knox v Gye* Lord Westbury said:
>
> > "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee', but the term is used inaccurately. He is not a trustee ...
> >
> > The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration - in other words a complete trustee - holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord *Mansfield*, that nothing in law is so apt to mislead as a metaphor."

The majority wrongfully extended the concept of property for the purposes of limb one

92. The trial judge found that the appellants received "the basket or aggregation of rights" arising from the execution of "instruments conferring rights on [them] to protect or further [their] commercial position".[162] In this way, he found that the appellants "received" trust property when, for example, a respondent entered into a facility agreement or guarantee.[163]

93. Drummond AJA held[164] that the rights which were "created and conferred on the banks" by execution of the various Transaction instruments constituted choses in action and, as such, constituted property capable of being held in trust. Further, he upheld Owen J's finding.[165]

94. To the extent that the findings involve the proposition that there was a receipt of property constituted by the "basket of rights" (the choses in action comprised in the Transactions *per se*), they were in error. The supposed justification for the finding was apparently that choses in action are "property capable of being held on trust".[166] But, the same proposition has been considered, and the application of *Barnes v Addy* rejected, by the House of Lords in *Criterion Properties Plc v Stratford UK Properties LLC*.[167] Entering into an executory contract which is valid at law (and remains valid at least until avoided) is not analogous to a receipt of property. Those rights were not property that could be "assigned to the Bank" nor could the appellants have reassigned

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[161] (2001) 202 CLR 410 at 430-431. See also *Linter* at 605.
[162] [J: 8737](AB6/2788), [J: 8739](AB6/2788).
[163] [J: 8739](AB6/2788); see also [J: 8750](AB6/2795).
[164] [AJ: 2158](AB9/4010.
[165] [AJ: 2169](AB9/4013).
[166] [AJ: 2158](AB9/4010).
[167] [2004] 1 WLR 1846 at 1855.

that right to the respondent company.[168]

95. None of the choses in action which arose on the execution of the securities were trust property received by the appellants. The position is *a fortiori* in the case of the facility agreements and guarantees.

96. The characterisation of the "trust property" as the "assets of the Bell group companies" "given over" to the appellants "by way of the securities" gives rise to two further problems.

97. *First*, property was not "given over" to the appellants in the sense of being transferred. By entering into the Transactions, the Bell group companies made contractual promises to the appellants and, in some cases, provided securities. The securities had an effect on the assets, but only subject to the terms of the Transactions. Neither the promises nor the securities resulted in the beneficial receipt by appellants of any of the assets of any Bell group company as at January 1990.[169] There was no beneficial receipt by the appellants of the respondents' assets. The appellants obtained some securities over assets. Those securities were held subject to the terms of the Transactions, and, at the very least, the equity of redemption.

98. *Secondly*, if the appellants received, by way of the securities, the worthwhile assets of the Bell group companies, it is those assets which would be the subject of the constructive trust. The contractual arrangements, (the facility agreements and the guarantees) would be untouched.

The majority wrongfully extended the concept of "receipt"

99. At all material times up to and including enforcement of the Transactions and dealings with the proceeds of enforcement, those Transactions were unrescinded and were binding and effective in accordance with their terms.[170] Before rescission, there can be no property to which a constructive trust can attach, and hence no trust property. And there can be no knowing receipt without knowledge that there was a receipt of trust property.[171] Each of these elements (trust property and knowledge) must be established at the time of receipt. This cannot occur under an unrescinded contract.

100. Here, at the date of the agreements (the time of pleaded receipt), there was no trust property, and no knowledge of trust property. Even at the time of the disposal and dispersal, there was no trust property (nor knowledge of trust property) and the proceeds belonged legally and beneficially to the appellants. Knowing receipt of trust property cannot be established retrospectively, especially at a time when the "property" has ceased to exist.

(iii) *No second limb liability*

101. This Court in *Farah* confirmed that the second limb required a "dishonest and fraudulent design" and that this required a "dishonest and fraudulent breach of fiduciary duty"; it was not sufficient to show a "breach of fiduciary duty" [185] or even a "significant breach of fiduciary duty" [180]. Rather, the "breach of fiduciary

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[168] *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40 at 46.
[169] Cf Hoffmann LJ in *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA) at 154 per Hoffmann LJ quoted in *Brown v Bennett* [1999] BCC 525 (CA) at 655.
[170] *Daly v The Sydney Stock Exchange Limited* (1986) 160 CLR 371 at 389-90; *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198.
[171] *Farah* at [112].

duty relied on must be dishonest and fraudulent" [179]. However, Drummond AJA amended this requirement by devising what he described as a "cumbersome but ... not unworkable test", namely the existence of a breach which was "more than trivial and ... too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly to be excused".[172] This simply deviates unwarrantedly from the requirements laid down in *Farah*. In particular, it undercuts the requirement for dishonesty.[173]

102. Drummond AJA's approach was based substantially on his view[174] that the Court in *Farah* at [184] "[dealt] with the kind of conduct by a trustee or fiduciary which will be 10 'dishonest and fraudulent' for the purposes of the second limb in *Barnes v Addy*". This is simply wrong. At [184], the Court merely pointed to the fact that breaches of duty varied greatly in seriousness.

103. Not only was Drummond AJA's approach inconsistent with the express decision of this Court, it reintroduces uncertainty. There is clarity in the test of dishonesty: *Belmont Finance Corporation Limited v Williams Furniture Ltd.*[175]

104. Moreover, the Court of Appeal's finding of a "dishonest and fraudulent design" was, on its face, erroneous having regard to the trial judge's conclusions that:

(a) the respondents only alleged "that the directors breached their fiduciary duties to the companies"; there was no allegation "that they did so dishonestly";[176]

20 (b) he would not (and did not) make any findings of dishonesty against any director[177] or bank officer or appellant;[178]

(c) there was no profit made in breach of duty, no conflict of interest and no pursuit of any interest in a position of conflict;

(d) he would not make a finding of knowledge of a dishonest and fraudulent design on the part of a guiding mind or minds of each appellant and that such a finding was essential to a finding of participation in dishonest and fraudulent design.[179]

105. A pleading of fraud and dishonesty[180] required that any such case had to be pleaded specifically and with particularity",[181] with the particulars "exactly given".[182] As this Court has recently affirmed,[183] this is fundamental to a fair trial. It properly attracts a

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[172] [AJ: 2112(c)](AB9/3996).
[173] It is clear that the High Court required "dishonesty" in its ordinary sense: [172-3].
[174] At [AJ: 2123](AB9/3999).
[175] [1979] 1 Ch 250 (CA) at 267, 270, 274. See also *Farah* at [173], *Macleod v R* (2003) 214 CLR 230 at [36]–[37].
[176] [J: 4813](AB4/1732).
[177] [J: 6031](AB5/2078).
[178] [J: 6202](AB5/2126).
[179] [J: 6159](AB5/2113). His Honour found "knowledge" on the basis of aggregation [J: 8742](AB6/2789), [J:8722-8724](AB6/2784), [J:8726](AB6/2785). To make out a case of participation in a dishonest and fraudulent design required the respondents to particularise the guiding mind or minds of the Bank who were alleged to have the relevant knowledge and prove that such person had that knowledge: *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 145; *ACCC v Radio Rentals Ltd* (2005) 146 FCR 292 at [199]; *NIML Ltd v MAN Financial Australia Ltd* [2006] VSCA 128 at [37]-[38]; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 582-583. Nor did the Court of Appeal make a finding of knowledge by the relevant guiding mind or minds of the appellants [AJ: 2199](AB9/4024).
[180] *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* [2012] HCA 39 at [26] per French CJ, Gummow, Hayne and Kiefel JJ.
[181] *Farah* at [170]; *Power v Ekstein* [2009] NSWSC 130 at [52].
[182] *Jonesco v Beard* [1930] AC 298 per Lord Buckmaster (with whom the other members of the House concurred) at 300.
[183] *Fortescue Metals Group Ltd* at [25].

Briginshaw onus.[184] Such a case had to be opened[185] and expressly put to those accused of such conduct, here, being the Directors and bankers.[186] Here, there was no pleading of a dishonest and fraudulent design,[187] there were no particulars of such allegation, no case of dishonest and fraudulent design was opened, there was no suggestion put to any of the Directors that they were engaged in a dishonest and fraudulent design and there was no suggestion put to any of the bank officers that the appellants were knowingly assisting or participating in a dishonest and fraudulent design (or any type of dishonesty or fraud). In those circumstances, and contrary to the conclusion of the majority, the finding was simply not open (as the trial judge correctly held).

Remedies and Interest

106. For the reasons set out above, the appellants were not liable to the respondents at general law. It follows that the only relief to which the respondents were entitled was that available pursuant to their statutory claims. The proper scope of that relief – which differs in material respects from relief available in aid of a *Barnes v Addy* claim – will be addressed in reply to the respondents' Notices of Contentions and Cross-appeal.

107. Were the Court to find, however, that liability under *Barnes v Addy* has been established, it would be necessary to consider the relief awarded by the majority. Against that contingency, the appellants submit that the majority's approach was in error for the reasons which follow.

(i) *Majority wrongly awarded equitable compensation on a profit disgorgement basis*

108. Lee and Drummond AJJA awarded the respondents equitable compensation. That compensation was comprised of: (a) the proceeds received by the appellants from enforcement of the Transactions; and (b) an amount of interest calculated so as to disgorge profits that might have been earned by the appellants on the proceeds.

109. The core of the majority's reasoning on equitable compensation was as follows:[188]

> "If the right to elect an account of profits was to be foreclosed in a case where it had been found that the Banks received property from which profits were obtained with knowledge that disposition of that property to the Banks had been effected by breach of fiduciary duty, then the equitable compensation provided in lieu had to reflect the cardinal principle of equity that there be disgorgement of profits gained." (underlining added)

110. The majority proceeded to calculate equitable compensation in order to disgorge profits which the appellants may have made from use of funds obtained by the Transactions. According to Lee AJA, this disgorgement analysis formed the "foundation for the assessment of equitable compensation".[189]

111. The majority's approach was erroneous on several levels. *First*, there is no principle

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[184] *Briginshaw v Briginshaw* (1938) 60 CLR 336. See *Farah* at [170].
[185] *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASCA 255 at [42].
[186] *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In Liq)* (2003) 214 CLR 514 at 534.
[187] The respondents proffered a draft pleading containing an allegation of "dishonest and fraudulent design" in 1999: MISA.00001.001 at [147(h)] (AB). However, this draft was never filed and the claim was never made in any subsequent pleading.
[188] [AJ 1236](AB8/3751), per Lee AJA, Drummond AJA agreeing: [AJ: 2678](AB9/4180).
[189] [AJ: 1259](AB8/3755).

of equity that profits must be disgorged, let alone a "cardinal" principle to that effect. The existence of the 'principle' is inconsistent with the well-established – and mutually exclusive[190] – remedies of equitable compensation and account of profits awarded by equity courts.

112. Equitable compensation seeks to compensate a claimant for losses suffered as a result of a breach of fiduciary duty.[191] In *Nocton*, Viscount Haldane LC spoke of compensating the claimant by putting him in as good a pecuniary position as that in which he was before the injury.[192] The modern Australian statement of the remedy – in *Re Dawson* [193] – is to the same effect. There, Street J (at 216) observed that a defaulting trustee is liable to place the trust estate in the same position as it would have been if no breach of trust had been committed.

113. The remedy's concern with the loss suffered by the claimant informs and confines its scope. It is "essential" that equitable compensation only compensate a claimant for losses that were caused by the breach.[194] In *Target Holdings Ltd v Redfern,*[195] Lord Browne-Wilkinson expanded upon this limitation (at 432):

> "[T]he defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same."

114. His Lordship's ultimate conclusion was that equitable compensation is "designed to achieve exactly what the word compensation suggests; to make good a loss in fact suffered by the beneficiaries and which, using hindsight and commonsense, can be seen to have been caused by the breach".[196] This reflects the law in Australia.[197] A necessary consequence is that whether the defaulting trustee or fiduciary has made, or could have been expected to make, a profit is not the focus of the inquiry: "it is no part of its function to strip profits from the defendants".[198]

115. In contrast, an account of profits seeks to disgorge the profits obtained by the defendant connected with his wrongdoing.[199] The extent to which the claimant has suffered injury or loss is irrelevant to the quantification of the amount to be accounted

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[190] A party may not obtain both equitable compensation and an account of profits from the same defendant: *Warman* at 569-70; *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521.
[191] *Nocton v Lord Ashburton* [1914] AC 932 (***Nocton***) at 956-7; *Re Dawson* [1966] 2 NSWR 211 at 216.
[192] At 952.
[193] [1966] 2 NSWR 211 at 216; see also *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (***O'Halloran***) at 272.
[194] *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556; approved in *O'Halloran* at 273.
[195] [1996] 1 AC 421.
[196] At 439.
[197] See eg *Maguire v Makaronis* (1997) 188 CLR 449 at 469-70; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [35]; *O'Halloran* at 272-3; *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 at [171].
[198] *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56 per Handley JA, with whom Mason P and Beazley JA agreed.
[199] *Colbeam Palmer Limited v Stock Affiliates Pty Limited* (1968) 122 CLR 25 at 32; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110; *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111.

for.[200] For the same reason, it is irrelevant whether the claimant could itself have obtained the profit in fact made by the defendant.[201]

116. It may be accepted that a profit made by a defendant may, in particular circumstances, be taken into account in determining the loss in fact suffered by the claimant where the profit was one that could have been made by the plaintiff itself. It is that possibility to which Tadgell J was referring in *Hill v Rose* when observing that "it might be appropriate to compensate the plaintiff's loss by reference to the defendant's gain".[202] However, as his Honour recognised, the focus of inquiry remains the calculation of an amount that will compensate a claimant for "loss [suffered] by reason of a breach of the fiduciary's obligation".[203] Any suggestion that equitable compensation can be awarded on a 'gains based' or disgorgement basis, independently of the loss in fact suffered by the claimant, should be disavowed by this Court. The correct position was stated by Windeyer J in *Colbeam* (albeit in an intellectual property context) as follows:

> "If a plaintiff elects to take an inquiry as to damages the loss to him of profits which he might have made may be a substantial element of his claim.... But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so."[204]

117. The approach to relief of Lee and Drummond AJJA completely elided the distinctions drawn out above between equitable compensation and an account of profits. Despite having correctly rejected an account of profits, their Honours approached the question of compensation on the basis that they were both entitled *and required*[205] to focus their attention on the profits gained by the appellants rather than the losses suffered by the respondents. To proceed in this way necessarily results in an award of equitable compensation that bears no relationship to the loss in fact suffered by the respondents.

118. *Secondly*, their Honours' erroneous approach to equitable compensation was reinforced in their specific consideration of the question of interest. Their Honours rejected Owen J's approach to interest because it focused on the amount of interest which the respondents (as claimants) would likely have made if the proceeds of the Transactions had remained in their hands.[206] According to the majority, the 'cardinal principle' of disgorgement required interest to instead be calculated so as to reflect an "appropriate approximation of the profit earned by the Banks".[207]

119. However, the majority's approach failed to recognise that the distinctions between equitable compensation and an account of profits drawn out earlier in these submissions are mirrored in equity's approach to interest in aid of these two remedies. Each remedy requires a different approach to the determination of whether to order

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[200] *Warman* at 557.
[201] *Warman* at 558.
[202] [1990] VR 129 at 143. Tadgell J cited *McKenzie v McDonald* [1927] VLR 134 as an example of that situation. In that case, Dixon AJ referred to the profit obtained by the defendant in breach of fiduciary duty before awarding equitable compensation at a lesser amount that reflected the claimant's loss: at 146-7.
[203] At 143. At 144, Tadgell J similarly recognized that the aim of equitable compensation was to "place the party who suffers following the breach of duty as nearly as possible in the position in which he would have stood had there been no breach."
[204] *Colbeam* at 32.
[205] According to Lee AJA at [AJ: 1236](AB8/3752), the equitable compensation awarded "had" to reflect the cardinal principle. Expressed in this way, the so-called cardinal principle admits of no discretion on the part of the Court, which serves only to reinforce the error made by the majority.
[206] [AJ: 1235](AB8/3751), [AJ: 1238](AB8/3752).
[207] [AJ: 1242](AB8/3752).

compound interest and, if so, how it should be calculated.

120. In *Nocton*, Viscount Haldane LC recognised that interest could be awarded in aid of equitable compensation to make good "the amount of interest lost by what [the defendant] did".[208] In the context of equitable compensation, the Court's "jurisdiction in selecting the appropriate rate of interest is exercisable solely for compensatory purposes."[209] The interest component of an award of equitable compensation focuses on the best use that the claimant could be expected to have made with the funds taken by the defendant or, put another way, the income forgone by a claimant as a result of the defendant's wrong.[210] This was the premise adopted by Owen J at trial when calculating the amount of interest to be awarded[211] although, as dealt with below, Owen J erred in his application of that premise to the evidence before him.

121. Conversely, where an account of profits is ordered by the Court, an award of interest may be made to ensure that the full amount of profit obtained by a defendant is disgorged to the claimant. It is in that context that presumptions have been developed by equity courts that assist in determining the rate of interest to be applied.[212] The majority failed to recognise this critical difference. Lee AJA cited *Grimaldi* in support of his approach to the calculation of compound interest[213] but failed to recognize that *Grimaldi* was concerned only with the different question of an award of interest in aid of an account of profits.[214]

122. *Thirdly*, the majority proceeded on the basis that it was modifying or correcting the calculation of the trial judge's award of equitable compensation without acknowledging that, by doing so, it was in fact ordering a different remedy, governed by different rules, presumptions and purposes.[215] In particular, the majority failed to express any appreciation of the fact that, if compound interest were to be used as a component of a remedy directed to stripping the defendants' profits rather than compensating the plaintiffs for lost revenues, a different analysis (calibrated so as to identify the defendants' *profits* rather than *revenues*) was required. The failure to attend to that inquiry resulted in an award of compound interest which, contrary to well-settled authority, punished the appellants[216] and unjustly enriched[217] the respondents by, *inter alia*, impermissibly straying from an account of profits to an account of revenue.[218]

123. *Fourthly*, the analysis carried out by the majority was based on a false premise: namely, that "it had been found" that the appellants had received property from which profits "were" obtained.[219] However, no finding to that effect was ever made by Owen

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[208] *Nocton* at 958 (underlining added).
[209] *Re Dawson* at 407.
[210] See eg *Duke Group Ltd v Pilmer* (1999) 73 SASR 64 at [809].
[211] As recognised by Lee AJA at [AJ: 1235](AB8/3751). See Owen J at [J: 9716-9717](AB7/3035). At [J: 9714](AB7/3034), his Honour noted that "[t]he rationale in the cases for compound interest is based on the best use of the money thesis."
[212] See *Jones v Foxall* (1852) 15 Beav 388 at 393; *Attorney-General v Alford* (1855) 4 De GM & G 843 (***Alford***) at 851; *Burdick v Garrick* (1870) LR 5 Ch App 233 at 241-2. In each case, the award of interest was made in aid of an account of profits.
[213] At [AJ: 1231](AB8/3750-3751): (2012) 200 FCR 296 at [547]-[552].
[214] *Grimaldi* at [546]: "the account ordered by the primary judge".
[215] See eg, [AJ: 1236](AB8/3751), [AJ: 1242](AB8/3752).
[216] See *Vyse v Foster* (1872) 8 Ch App 309 at 333; (1874) LR 7 HL 318.
[217] *Warman* at 561.
[218] An account of revenue is impermissible: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (***Harris***) at [328] per Heydon JA.
[219] [AJ: 1236](AB8/3751).

J or any member of the Court of Appeal. The highest the sparse evidence went was that the respondents had performed an arithmetic calculation, for the purposes of the proceedings, which suggested that profits "may" have been obtained by the appellants.[220] This evidentiary issue is considered further in relation to issue 2 below, but it serves to reinforce the errors in the majority's framework for analysis of the amount of equitable compensation to which the respondents were entitled.

124. For these reasons, this Court should find that the majority applied incorrect principles to the calculation of the amount of equitable compensation to which the respondents were entitled. Having determined (correctly) that equitable compensation, rather than an account of profits, ought to be awarded, the majority should have calculated that compensation by reference to the position that the respondents would have been in but for the breach. That analysis in turn required the majority to consider the likely amount of interest that the *respondents* would have received if the proceeds of sale of the Transactions had been retained by them.

125. Usually, interest in such a context will be calculated on the basis that the respondents would have placed the monies on interest bearing deposit since 1990 (as Owen J recognised).[221] However, the present case is different for three reasons. *First*, the Court of Appeal found that, absent the Transactions, the companies would (and should) have been liquidated.[222] Upon liquidation, the companies themselves would not have retained the monies and earned interest for some 20 years but would have distributed them to creditors, whether as lump sums or in the form of periodical dividends. In such cases, the correct compensatory approach is simple, rather than compound, interest.[223] *Secondly*, the respondents chose not to adduce evidence of typical deposit rates in the period since 1990.[224] No other evidence was led as to how the respondents would have utilised the proceeds of sale of the Transactions if they had been retained by them. The evidence of WBIR rates is not apt to fill this evidentiary lacuna because the WBIR was an idiosyncratic overdraft rate of interest charged by one bank to some customers in some circumstances, not one credited to depositors and "it is common knowledge that banks generally charge a higher rate of interest on overdrafts than they give to depositors".[225] Nor, for the reasons given by Carr AJA,[226] was it appropriate for Owen J to adopt – "for want of any better measure"[227] – a rate of 1% below WBIR. This was particularly so given Owen J's refusal to admit evidence of actual deposit interest rates (calculated by reference to BBSW) that could have been obtained by the respondents if they had retained the proceeds of the Transactions.[228] *Thirdly*, if the Court accepts the appellants'

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[220] Third Witness Statement of Anthony Leslie John Woodings dated 11 June 2003 WITP.00001.054 at [160]ff(AB____) referred to in [J: 9706](AB7/3032) and [AJ: 1233](AB8/3751).
[221] [J: 9717](AB7/3035).
[222] Lee AJA [AJ: 1087](AB8/3721); Drummond AJA agreeing at [AJ: 2095-2096](AB9/3989).
[223] *Re Colorado Constructions* (1976) 1 ACLR 334 at 336. A company in liquidation may also be equated for present purposes with a non-accumulating trust estate, in respect of which simple, rather than compound, interest will usually be awarded: Heydon and Leeming, *Jacobs Law of Trusts in Australia* (2006) at [2209].
[224] "There is no evidence of typical deposit rates in the period since 1990": Owen J at [J: 9717](AB7/3035).
[225] [J: 9717](AB7/3035).
[226] Carr AJA at [AJ: 3568](AB9/4446).
[227] Owen J at [J: 9718](AB7/3035).
[228] The evidence was contained in an affidavit of Mr Russell Armstrong, the Managing Director of Debt Markets at Westpac, dated 30 January 2009 WITD.032.004(AB____), WITD.032.004.001(AB____). Owen J admitted the affidavit but refused to grant the appellants leave to rely on it as evidence of the deposit rates that could have been obtained by the respondents, notwithstanding that a hearing on the question of relief had not occurred T: 37166 (AB_____), final orders had not been made T: 37165-37166 (AB_____), his Honour had adopted WBIR-1% without giving the parties an opportunity to address his Honour on that rate

submission that no knowing assistance claim was made out, the appellants' liability as mere knowing recipients provides a further justification for an award of simple interest only because it could not be said that the appellants engaged in fraud or serious misconduct or otherwise committed a "gross misapplication of trust funds".[229] If compound interest were to be awarded, this circumstance justified yearly, rather than monthly, rests for the reasons given by Carr AJA.[230]

126. Accordingly, any entitlement which the respondents may otherwise have had to compound interest at the proper measure must fail at the threshold. It was for the respondents to adduce – as the claimants in the proceedings – all evidence necessary for the Court to calculate the interest payable.[231] Further, there were many reasons why one could not safely presume that the respondents, in liquidation, could have made use of the monies at monthly rests and at a rate referable in some way to a rate published by a bank over a 19 year period. For one thing, the whole point of the liquidations would have been to realise the assets, pay off the debts and deregister the companies, meaning the monies would have returned to creditors, including in part, even without subordination, to the appellants for their own use.[232] The respondents are therefore confined to an award of simple interest at Court rates.

(ii) *No proper basis for a gains-based award of interest in any event*

127. Even if, contrary to the above submissions, the majority did not err in seeking to award compound interest on a purely profit disgorgement basis, the material relied upon by their Honours could not justify such an award in the present case.

128. According to Lee AJA,[233] with whom Drummond AJA agreed:[234]

> "The evidence before his Honour, referred to by his Honour at [J: 9706], included a calculation of estimated profit that pointed to a conclusion that the Banks may have received a return from the use of the funds obtained from the Transactions in an amount that exceeded in substantial degree the amount of compound interest obtained from applying the Westpac Business Indicator Rate on monthly rests (WITP.00001.054, [160] – [171]; WITP.00001.084, [9])." (underlining added)

129. His Honour also noted that the WBIR rate utilised in that evidence 'seemed' to be 'taken' as a base earning rate for the appellants.[235] (By whom the rate was 'taken' was not explained). On the basis of evidence characterized in this way, Lee AJA ordered the appellants to pay compound interest in an amount of $2.3 billion.

130. The approach adopted by the majority should be rejected.

131. *First*, no authority was cited by Lee AJA for the proposition that a mere possibility of

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(cf *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [69]) and his Honour acknowledged that adoption of a BBSW rate would reduce the award by some $550m below the rate his Honour had selected (*Remedies* at [21](AB7/3137)). At the relief hearing, Owen J ruled that it was not open to the parties to debate the determination of interest T: 37117 (AB____).

[229] *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 112; *Hungerfords v Walker* (1990) 171 CLR 125 at 148; *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1988) 91 FLR 271 at 285: "High authority confirms that fraud and serious misconduct by a trustee or fiduciary in a trustee-like position will lead to an award of compound interest…".

[230] [AJ: 3572](AB9/4447).

[231] cf *Farah* at [200]; *Tadrous v Tadrous* [2012] NSWCA 16 at [56]-[59].

[232] Section 477(1)(a) *Corporations Act*; *Re Wreck Recovery & Salvage Co* (1880) 15 Ch D 353.

[233] [AJ: 1233](AB8/3751).

[234] [AJ: 2678](AB9/4180).

[235] [AJ: 1240](AB8/3752).

profiting by a respondent is sufficient for the Court to conclude that compound interest should be awarded for the purpose of disgorging profit, let alone at the rate determined by the majority. Such a principle would flout the well-established prohibition on equity punishing a defendant as well as the prohibition on equitable remedies being used as a vehicle for the unjust enrichment of the claimant.[236]

132. *Secondly*, the "evidence" referred to by Lee AJA[237] provided no probative foundation for the orders made. The first document was adduced in support of a submission that Owen J should order an account of profits.[238] The figures contained in the document were calculations made by the liquidator of the respondents on an approximate basis and for the purposes of the proceedings.[239] The figures contained a number of simplifying assumptions and made no provision for any allowances in favour of the appellants.[240] They were not to operate as *evidence* on which the Court itself could fix an amount of profit to be disgorged, let alone an amount of equitable compensation,[241] and were not admitted on that basis.[242] The second document was again a calculation – also carried out by the respondents for the purposes of the proceedings – of the "potential total value of the [respondents'] claim"[243] *if* certain rates of compound interest were applied to the proceeds obtained by the appellants. The document expressly stated that the calculation was "admitted for a limited purpose" as a "mathematical calculation to assist in [sic] the Court".[244] In no way could the document constitute evidence of profits actually obtained, or even potentially obtained, by the appellants from the proceeds of the Transactions.

133. The true position, with respect to both the pleadings and evidence was as follows:

(a) the respondents' claim as framed was for compound interest at "the rate charged from time to time by Westpac (or other commercial banks) on overdrafts exceeding $100,000" or otherwise as determined by the Court.[245] The respondents did not seek to prove that Westpac had a general practice or ability of lending the amounts in question at 1% above WBIR on overdrafts exceeding $100,000, or that its rests were monthly, or that it had managed to do so successfully, so as to be every month adding the whole sum to the base amount on which further such lending could occur;

(b) at trial, the liquidator proffered some calculations *at* WBIR (not 1% above). As noted, these were admitted only as proof of arithmetic calculations on stated assumptions. Otherwise, the respondents chose to leave the role of WBIR in the practices of Westpac as unproven, and unrelated to the claim for compound

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[236] *Vyse* at 33; *Warman* at 561.
[237] See the two documents identified at the end of [AJ: 1233](AB8/3751): WITP.00001.054 at [160]-[171](AB____); WITP.00001.084 at [9](AB____).
[238] Section 11.2 of the affidavit (AB____) (which contains the paragraphs referred to by Lee AJA) is entitled "Account of profits" and commences: "With the assistance of members of my staff, I have attempt to quantify the sum that is likely to be required to be disgorged by the defendants if the Court were to order an account of profits."
[239] At [161](AB____).
[240] See WITP.00001.054 at [169](AB____).
[241] As the liquidator noted at [171](AB____): "Should the Court be minded to order an account of profits, I am of the opinion that once Westpac, alternatively the Banks, have provided an account of their use of the relevant funds, it will be possible to calculate the profits derived."
[242] See the objections taken at T: 13702(AB____), T: 13777-13778(AB____).
[243] WITP.00001.084 at [3](AB____) (underlining added).
[244] WITP.00001.084 at [10](AB____).
[245] PLED.008.002.001, Prayer for Relief J(a)(AB1/86).

interest as framed;[246]

(c) on appeal, the only evidence pointed to by the respondents of any actual lending rate by Westpac was one occasion involving a Bell group company, in 1989, at WBIR plus 0.6% (not 1%), and at quarterly (not monthly rests);[247]

(d) nothing at all was proved as to the lending practices of the 19 appellants other than Westpac, or how their practices related, if at all, to WBIR (noting also that 14 of the 20 appellants were based overseas);

(e) the respondents led no evidence as to what *proportion* of the interest charged by Westpac or any other appellant was profit, once deductions had been made for costs, expenses, skill and risk. In other words, no evidence was adduced in support of the inherently implausible propositions that each appellant lent out the proceeds of the Transactions without incurring any expenses of operating a banking business, and added the interest earned each month to the principal in full, without deduction for income tax, so as to lend it out and earn further interest on the ever increasing amounts.

134. No reference was made by the majority to these matters. Nor was any further or independent explanation given by their Honours as to why: (a) it would be presumed that a bank's *profit* would be 1% *higher* than a rate at which it lends out money; (b) it would be presumed, without evidence, that WBIR (amongst the numerous rates charged by Westpac) plus 1% appropriately reflected its profits from the monies it obtained; (c) it would be presumed that *each* of the 20 appellants earned profits on the subject moneys at WBIR plus 1% notwithstanding that they operated in a variety of different jurisdictions around the world and through turbulent periods; and (d) presumptions should be made in the respondents' favour (as to the existence of a profit and its amount) but no regard should be had, when selecting a rate or rest periods, to any possible allowances available to the applicants.

135. Nor was any reference made by the majority to the likelihood that the appellants would have been required to pay tax on amounts of interest income it may have received from the proceeds of the Transactions – such that it could not be said that 100% of the interest income could properly be compounded from month to month. The majority's approach to this issue was contradictory. The entirety of their Honours' consideration of tax constituted: (a) an acceptance that the *respondents'* liability to tax may have been relevant if equitable compensation had been awarded by reference to their loss;[248] and (b) a denial of the relevance of *that* tax liability (ie the respondents') where, as here, the foundation of the assessment of equitable compensation was disgorgement of profit possibly obtained by the appellants.[249] However, no explanation was essayed as to why the *appellants'* liability to taxation ought not be taken into account when awarding so-called gains based equitable compensation, as it would be if an account of profits had been awarded.[250]

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[246] T: 13702(AB_____), T: 13777(AB_____). Owen J merely 'presumed' that the WBIR was the rate referred to in the prayer for relief ([J: 9717](AB7/3035)) and, of course, did not add a per cent to it.
[247] AT: 2800(AB_____). The respondents placed no reliance on the interest rates disclosed in the January 1990 facility documents themselves.
[248] [AJ: 1250](AB8/3754), [AJ: 1258](AB8/3755).
[249] [AJ: 1259](AB8/3755).
[250] See eg *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 at 462: "In calculating compound interest on such sums as are found due on the taking of the account, it will be necessary therefore to deduct in each and every year the amount of corporation tax paid or payable by the defendants, since it is

136. The practical effect of the majority's approach was therefore to award interest on the basis that every one of the appellants lent 100% of the monies obtained by them from the respondents, recovered interest on those amounts, and enjoyed an identical profit margin in excess of 100%[251] for a period of 20 years, with no expenses incurred in the management and control of those monies, no liability to taxation in respect of any part of the interest received, and with no risk assumed, or skill exerted. There is no basis on which such assumptions could properly be made in an attempt to ensure the disgorgement of profit from a defendant.

137. *Thirdly,* their Honours failed to recognise that, but for the appellants' breaches, a substantial proportion of the moneys the subject of the compound interest award would have been paid to the appellants in the ordinary course if the respondents had been wound up in 1990 in the absence of the Transactions. The appellants were, after all, unsecured creditors of the respondents.[252] Requiring the appellants to pay compound interest on moneys inevitably due to them is both inconsistent with the compensatory nature of the remedy and punitive. Equity has sufficient flexibility to require this consideration to be taken into account by way of a reduction in the rate selected or the amount of principal upon which interest was charged. The approach adopted by Carr AJA in this respect was correct.[253]

138. *Fourthly,* these defects in the evidence and the majority's approach cannot be remedied by re-characterizing the award as an account of profits or as an award of interest in aid (or lieu) of an account. So far as the former is concerned, the Court of Appeal expressly rejected the respondents' entitlement to an account in this case. So far as the latter is concerned, the principles have been deliberately calibrated to avoid the possibility of a defendant being required to disgorge more than it has in fact obtained by way of profit. As Lord Cranworth LC recognized in *Alford*:[254]

> "What the Court ought to do, I think, is to charge him only with the interest which he had received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it." (underlining added)

139. There is no evidence that the appellants actually received amounts of interest. Nor is there evidence from which it could be concluded that the appellants "ought" to have received interest on the Transaction monies at a rate of WBIR plus 1%. The deficiencies in the evidence also deny a conclusion that a presumption ought to be imposed that the appellants received interest at that rate. It is clear from the passage just cited that the irrebuttable presumption was only to be applied at a rate that would

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only the net amount after payment of tax which would be available to them for investment in the succeeding year. The interest should accordingly be compounded year by year at the rate ordered by the judge less tax at the appropriate rate which would have been paid by the defendants."

[251] Given that WBIR was the rate *charged* by Westpac to customers, compound interest at a rate of 1% above WBIR necessarily means that the appellants were taken to have made a profit greater than the price of the goods (money) sold.

[252] Owen J at [J: 3307](AB3/1335) and [J: 9689](AB7/3028).

[253] [AJ: 3544-3548](AB9/4437-4439). Carr AJA found – premised, inter alia, on his reasoning on the subordination question, in which he dissented, and in respect of which no appeal has been made by the appellants – that the "vast bulk" of the moneys owing to the Bell group creditors ($333m) were owed to the appellants ($260m) (at [AJ: 3544](AB9/4438)) and that the appellants would have received repayment of that amount in its entirety (at [AJ: 3546](AB9/4439). Absent subordination, the total moneys owing to the Bell group non-subordinated creditors was approximately $733 million, of which amounts owing to the appellants ($260 million) constituted 35.5%.

[254] At 851. See also *Burdick v Garrick* (1870) LR 5 Ch App 233 at 242.

not be the product of injustice or result in punishment to a defendant.

140. More fundamentally, no remedy – let alone an equitable one – should be adopted unless the court has a proper basis to be satisfied that no injustice is being done to the party subjected to the award; and the plaintiffs are not being handed inequitable windfall gains. Injustice will be manifest, as here, when there are substantial reasons to conclude that the focus solely on inflow on the notional account (namely the presumed, continual earning of interest on an ever increasing base amount) does not fairly capture how that income would have played out in the real world, and simply ignores the expenses, skill and risk inherent in earning that inflow. Indeed, the approach of the majority violates the two protections afforded to a defendant in the accounting context: namely, (a) the principle that an account applies only to profits (not revenue) actually made;[255] and (b) the related principle that due allowance should be given for due skill, care and diligence in achieving the profits. It cannot be the law that a defendant enjoys such protections when an account is made, but loses any and all access to them where an award of interest is made as equitable compensation (albeit on a disgorgement basis).

141. For these reasons, the award of compound interest made by the majority was unsupported by the evidence before the court and did not reflect an amount that the appellants could fairly be presumed to have earned by way of profit in any event.[256]

(iii) *Misapplication of Wallersteiner v Moir (No 2)*

142. The legal and practical difficulties just identified were compounded by the majority's misreading of the English Court of Appeal's reasoning in *Wallersteiner*. In fixing compound interest at a rate "1% above the base earning rate",[257] it is clear that Lee AJA was purporting to apply that decision.[258] In *Wallersteiner*, the Court of Appeal had imposed compound interest at 1% above the "official bank rate or minimum lending rate" in operation from time to time.[259]

143. However, as Carr AJA recognised in dissent, and as the expression indicates, the 'official rate' or 'minimum lending rate' is "the rate which the Bank of England charged to trading banks and other like institutions for overnight money."[260] Carr AJA's approach comports with authority[261] and with common sense. The references in *Wallersteiner* to "the" official bank rate or minimum lending rate are inexplicable if the Court was in fact intending to refer to a particular commercial rate charged by a

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[255] *Harris* at [328] per Heydon JA: "the profits which must be accounted for are those to which the plaintiff is *entitled*: the gross receipts in the fiduciary's hands are not profits, and that which constitutes profit is what has been received less "fair remuneration"" (original emphasis); *Dart Industries* at 111: "[a]n account of profits is confined to profits actually made".

[256] Cf Lee AJA at [AJ: 1258](AB8/3755).

[257] [AJ: 1242](AB8/3752).

[258] His Honour referred to that decision at [AJ: 1237](AB8/3752).

[259] At 388, 399.

[260] Carr AJA at [AJ: 3571](AB9/4446).

[261] See eg *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1968] 1 WLR 1325 at 1336 ("a rate of one per cent in excess of the Bank of England official discount rate"); *FMC Meat Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221 at 227 ("1 per cent over the bank rate, calculated as the bank rate changes"); *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 849 ("bank rate or minimum lending rate plus 1 per cent"); *Polish SS Co v Atlantic Maritime Co* [1985] 1 QB 41 at 66-7 ("1 per cent above the base rate … [being] the London and Scottish clearing banks' lending rate"). See also *Oxford English Dictionary*, "minimum lending rate": "n. Finance the minimum percentage at which a central bank will discount bills (introduced in Britain for the Bank of England in 1971, suspended in 1981 but occas. briefly reintroduced); (more generally) the minimum interest rate charged on loans by a bank or other institution; abbreviated MLR."

specific, but unidentified, trading bank.

144. The central error, if the 1% margin approach was to be used, was that WBIR, so far as anything was known about it, was not a rate at which Westpac or any other appellant could have obtained these funds. It makes no sense to start with a published *lending* rate charged by a particular defendant (already a commercial overdraft rate), and then assume without evidence that it would make a profit 1% *above* that rate (ie a profit in excess of 100%) on every dollar lent, for every day it had that money. This confusion of concepts is a short error, but occasions an enormous monetary consequence.

(iv) *Conclusion on remedies*

145. If the appellants fail on the question of liability, equitable compensation ought to have been calculated so as to place the respondents in the position they would have been but for the impugned conduct (ie an orthodox compensatory basis). In light of: (a) the Court of Appeal's finding that liquidation would and should have occurred but for the Transactions; (b) the absence of evidence of applicable deposit rates; and (c) the fact that the appellants were not guilty of fraud or gross misconduct,[262] the proper approach was to award simple interest at court rates. If, contrary to this submission, compound interest was to be awarded, it should have been calculated at the rate and rests determined by Carr AJA (RBA+1% at yearly rests) subject to the proviso concerning tax liability identified by his Honour[263] and ensuring that interest is not paid on the sums that would have been distributed to the appellants upon the notional liquidation of the Bell group companies.

Part VII: Statutes

146. There are no statutes relevantly relied on for the appeal by the appellant.

147. For the avoidance of doubt, the case concerning preferential payments (sometimes described as the statutory claims) concerned s 565 of the *Corporations Act* (picking up claims under s 120 and s 121 of the *Bankruptcy Act 1966* (Cth)) and s 89 of the *Property Law Act 1969* (WA).

Part VIII: Precise Orders Sought

148. The appellants seek the orders set out in their Notice of Appeal.[264]

Part IX: Estimate of time

149. The appellants estimate that they will require in aggregate no more than two days for the presentation of oral argument, in chief and in reply, on all issues arising in the appeal (including the notice of contention) and the cross appeal.

Dated: 7 June 2013

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[262] Assuming that knowing assistance is not made out.
[263] At [AJ: 3599](AB9/4453).
[264] AB(10/4500).

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10