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

Filed on behalf of the Appellants:
Herbert Smith Freehills
MLC Centre
Martin Place
SYDNEY NSW 2000

Date of Document: 5 August 2013

Telephone no (02) 9225 5000
Fax No (02) 9322 4000
Ref: Hugh Paynter

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 IN REPLY

Part I: Certification as to form

1. It is certified that these submissions are in a form suitable for internet publication.

Part II: Appellants' Arguments in Reply[1]

2. The majority in the Court of Appeal departed from the principles established by this Court in decisions such as *Richard Brady Franks*[2] and extended the application of the principles in *Barnes v Addy*.[3] The respondents' submissions largely ignore the majority's approach and seek to maintain liability by reference to the trial judge's characterisation of the facts. That characterisation was itself marred by his Honour's erroneous objective approach in assessing the Directors' conduct.

3. Thus, the foundation of the respondents' submissions confirms rather than negates the existence of error in the judgments below, which manifest an inappropriate and novel intrusion of equitable principles into decisions of directors and corporate transactions. In essence, equity has been utilised to make banks liable for the restructuring business decisions of the directors of a major corporate group in financial difficulty. The majority formulated a new interventionist role for equity, subjecting directors' work-out business judgments to a merits review and to a new duty to ensure that no creditors suffer disadvantage from those decisions. This approach imposed the full range and unique operation of equitable remedies, which was exacerbated by an unprincipled and ad hoc selection of rates of compound interest as equitable compensation. This relief has generated a distorted and excessive windfall to the Bell companies which, but for the refinancing provided by the appellants, would have suffered immediate liquidation occasioning substantial losses to the detriment of all creditors.

1. Questions of principle regarding directors' duties

4. Before dealing with the respondents' submissions concerning the conduct of the Directors, it is appropriate to deal with three questions of principle that either arise at a logically anterior point, or are relevant, to an assessment of that conduct:

   (a) whether the pleaded duties were fiduciary, so as to attract *Barnes v Addy* liability;

   (b) whether the majority misstated the obligations imposed upon directors with respect to creditors; and

   (c) whether the majority departed from principle and undertook an interventionist approach in relation to the conduct of the Directors.

Barnes v Addy liability is confined to breach of conflict and profit rules (RS [31]-[45])

5. The respondents accept that, relevantly, liability under *Barnes v Addy* will arise only in circumstances involving a breach of fiduciary duty[4] but do not accept that fiduciary duties are limited to the proscriptive duties to avoid conflicts and not to make a profit. Rather, the respondents contend, erroneously, that fiduciaries (including company directors) are subject to a "fundamental", "basic", or "overall" obligation "to act in the

---

[1] Except where necessary for sense, the appellants have not sought to repeat here matters dealt with in their submissions in chief (**AS**). Absence of specific response to some aspect of the respondents' submissions (**RS**) thus should not be taken as agreement.
[2] *Richard Brady Franks v Price* (1937) 58 CLR 112 (***Richard Brady Franks***). See AS [26]*ff*.
[3] (1874) LR 9 Ch App 244. See the matters referred to in AS [81]-[105].
[4] RS [32].

interests of nominated others",[5] or, a "duty of loyalty to the interests of others",[6] of which the duties to act *bona fide* in the interests of the company, and to exercise powers for proper purposes, are merely "aspects".[7] *Barnes v Addy* liability is said to arise whenever there is "conduct by fiduciaries that is disloyal to their obligation to act in the interests of nominated others".[8]

6. There are several difficulties with such an approach. *First*, the asserted affirmative duty is not a fiduciary duty, but rather the foundational circumstance that constitutes a person as a fiduciary. That is to say, "fiduciary obligations arise *because* a person has come under an obligation to act in another's interests".[9] It is "as a result" of a person being a fiduciary that "equity imposes on the fiduciary proscriptive obligations".[10] The observations of Gummow J in *Breen v Williams* set out at AS [20] squarely apply.[11]

7. *Secondly*, to the extent that it is meaningful to speak of an obligation of loyalty being imposed upon a fiduciary, the obligation finds its complete expression in the "two overlapping proscriptive 'themes' which govern the fiduciary's liability to account to his or her beneficiary".[12] That is to say, that the "obligation of loyalty" does not extend beyond the two proscriptive duties. Put simply (and exhaustively): "Australian courts only recognize proscriptive fiduciary duties."[13]

8. *Thirdly*, "disloyalty to the obligation to act in the interests of another" as the touchstone for the application of *Barnes v Addy* would be too vague and uncertain a standard. The postulated distinction between "defective performance" and "no performance at all" of the duty to act in the interests of the beneficiary is illusory.[14] It cannot be the basis of *Barnes v Addy* liability.

Interests of creditors – obligation not to prejudice creditors (RS [116]-[125])

9. The respondents are unable to articulate the content of the asserted duty. They seek to disavow any requirement that directors treat all creditors equally but then contend that there must be some advantage for *all* creditors that is "not the same or equal".[15]

10. There is no obligation on the part of directors to ensure that all creditors are 'advantaged' whenever a company is in financial difficulty.[16] Such an obligation would wrongly assume that all creditors are always in aligned positions, both with the company and amongst themselves. Even if such an obligation did exist, there is no necessary inconsistency between conferring an advantage on one creditor and advancing the interests of creditors as a whole, as the facts of the present case demonstrate. The Directors were entitled to conclude that the conferral of an advantage (security) on some creditors (the appellants), conferred a benefit that was in the interests of the Bell companies, including their creditors generally. The benefit and

---

[5] See respectively, RS [32], [37]; RS [43]; RS [42]; RS [38]. See also RS [34], [40], [45], [51].
[6] RS [44]. See also RS [32], [41], [51].
[7] RS [32].
[8] RS [38].
[9] *Breen v Williams* (1996) 186 CLR 71 (***Breen v Williams***) at 113 (emphasis added). See also at 137: "Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of the other".
[10] *Breen v Williams* at 113.
[11] At 137-8 ("It would be to stand established principle on its head …").
[12] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (***Grimaldi***) at [178].
[13] *Breen v Williams* at 113.
[14] RS [44]-[45].
[15] RS [123].
[16] *Contra* RS [124] – [125].

object of that arrangement was that the Bell group companies obtained the opportunity to increase the realisable value of their assets in order that the group's liabilities to creditors *as a whole* could be improved. The respondents' submission that there was "no basis" on which the Directors could have considered the Transactions advantaged the interests of creditors as a whole is dealt with below.[17]

11. The respondents wrongly contend that the observations of Mason J in *Walker v Wimborne*[18] impose on directors "more than an obligation" to advert to the interests of creditors or "weigh them in the balance" against the interests of shareholders.[19] The duty of directors is to act in the interests of the company.[20] Compliance with that duty may require regard to the interests of persons other than shareholders (including creditors). The duty does not require directors to set at naught the interests of shareholders in an insolvency context (as the respondents appear to submit) or require directors to have discrete regard to specific categories of interested persons.

An interventionist approach (RS [126]-[134])

12. The interventionist approach expressly invoked by Drummond AJA was reflected in both his Honour's and Lee AJA's holdings that directors of companies in an insolvent context have an obligation not to prejudice the interests of creditors.[21] As set out at AS [42]*ff*, an obligation "not to prejudice" the interests of creditors, let alone an obligation not to engage in conduct that gives rise to "a real risk of significant prejudice"[22] to creditors, is not supported by the authorities.

13. *Richard Brady Franks* contains clear statements of principle that reinforce the wide variety of considerations to which directors may have regard and highlights the dangers in a court entering the boardroom and second-guessing directors' decisions.

14. *Richard Brady Franks* is not materially distinguishable from this case. The Directors in the present case also possessed the power to enter into the Transactions.[23] The company that granted the debentures in *Richard Brady Franks* was insolvent to such a degree that liquidation "might be found unavoidable" and the plaintiff had argued below that liquidation was inevitable.[24] The debts of the company were being called in and, in order to stave off demands for immediate repayment, the board resolved to issue debentures in order to obtain 12 months' "breathing space" in which it might "win through to success".[25] The insistence on security was due, undoubtedly, to the fear that the assets would be insufficient to pay all creditors. That such a grant of security could eventually prejudice creditors did not render the transactions other than in the interests of the company.[26]

2. Narrative of Facts (RS [4]-[29])

15. The respondents' statement of "further material facts"[27] is not an objective account of primary factual findings, to which the correct legal principles, as identified by this

---

[17] See paragraph [17]-[58] below.
[18] (1976) 137 CLR 1 (***Walker v Wimborne***).
[19] RS [122].
[20] AS [42].
[21] AS [43] and the references cited at fn 69 therein.
[22] RS [130].
[23] Cf RS [132]. See [J: 4477](AB4/1634), [J: 4483-4484](AB4/1636).
[24] Respectively, at 144 (cf RS [132]) and at 126.
[25] At 127.
[26] At 142-145.
[27] See the last sentence of RS [4].

Court, may be applied. Rather, the respondents' formulation blurs the line between findings of primary fact and (disputed) judicial characterisations, is selective, fails to recognise that many such characterisations are the product of the application of a particular (and disputed) legal test for which the respondents contend, and is intertwined with argument on matters of both fact and law.[28]

16. To take but one example, the respondents submit that "[i]n practical commercial terms, the bondholders claiming through BGNV were not subordinated creditors".[29] The respondents do not, however, refer to the Directors' understanding and the circumstances known to the Directors at the time, including facts that: (a) Aspinall "had no information to cause him to think, nor did he think, that the bonds or the on-loans were unsubordinated";[30] (b) there was no evidence to suggest that Mitchell was aware of the possibility of the on-loans not being subordinated;[31] and (c) the Directors were aware that the bonds were selling in the market at 20% of their face value,[32] consistent with the bonds being subordinated.[33] To this can be added the fact that two of the four judges hearing the case found that the on-loans were subordinated.

3. The facts concerning Directors' beliefs (RS [52]-[97])

17. None of the matters raised by the respondents provides an answer to the appellants' submission that the Directors honestly believed that entry into the Transactions was in the best interests of the companies.[34] Rather, each of those matters derives from or is infected by the erroneous approach of the trial judge.[35] As Drummond AJA correctly held, Owen J reached his decision "that the Australian and UK directors" had breached their fiduciary duties "by making an objective assessment of their conduct" and "by holding that they failed to do certain things that they should have done before committing the Bell companies to the Transactions".[36]

18. As Owen J put it: "I have no reason to doubt Aspinall's integrity. I think he held most of the belief's (sic) that he professed to have held. *The question, though, is whether the beliefs were based on reasonable grounds so as to be genuinely held...*".[37] However, as this Court has recently emphasised, a "genuine" belief and a "reasonable" belief are "radically different and distinct ideas".[38]

The available alternatives

19. The respondents contend both that there were alternatives other than either a liquidation or the Transactions, and that the Directors believed in the existence of such

---

[28] The same is to be said of the respondents' chronological index of "Primary Factual Findings", which is anything but. It contains extensive reference to findings unrelated to the Directors' case and contains extensive high level conclusions or characterisations, rather than primary facts.
[29] RS [6].
[30] [J: 5060](AB4/1795). Nor was there evidence that anyone else so believed: [J: 5061](AB4/1795).
[31] [J: 5385](AB4/1898). See further [J: 5379-5381](AB4/1893).
[32] [AJ: 2852](AB9/4239). See also [J: 5379](AB4/1893), [J: 5425](AB4/1911).
[33] [J: 5381(1)](AB4/1895).
[34] See AS [49].
[35] For example, at [J: 6086](AB5/2093), Owen J said that he had little doubt that Aspinall believed the basic things about which he gave evidence but continued (at [J: 6089](AB5/2094)): "Whatever Aspinall may have believed about the issues I have described, he did not take the action enunciated ... above [i.e., identifying creditors, having plans, etc.] and therein lies the failure to act in the best interests of the company and the failure to exercise powers for a proper purpose".
[36] [AJ: 2074](AB9/3982). Drummond AJA wrongly found that His Honour's objective approach was correct, on the basis of his views that courts are now entitled to be more "interventionist".
[37] See [J: 5371](AB4/1891).
[38] *Forrest v ASIC* [2012] HCA 39 (***Forrest***) at [22] per French CJ, Gummow, Hayne and Kiefel JJ.

additional alternatives.[39] This is incorrect.

20. The critical issue, of course, is whether the Directors *believed* that there was an alternative, and believed that it was preferable and in the interests of all companies to avoid a liquidation by restructuring. As Drummond AJA and Carr AJA correctly held,[40] Owen J found that the Directors believed that the *only* alternative to the refinancing was liquidation.[41]

21. Moreover, that liquidation was the only alternative was, objectively, obvious. The trial judge held that it was "the reality".[42] He held that, by 26 January 1990, had the refinancing not proceeded it is likely that the Banks would have made demands which could not have been met and the companies "would have been placed in liquidation and [the] fate that befell the publishing assets after April 1991 would have happened a year earlier", as the respondents acknowledge.[43]

22. The trial judge did not impugn the honesty of the Directors' beliefs.[44] Rather, his Honour's approach was that it was irrelevant that the Directors thought that liquidation was the only alternative to the refinancing. He held that the Transactions in themselves "visited prejudice" on the Bell companies and their creditors. He found that the question whether the Directors could have done anything else was irrelevant.[45]

23. That view was erroneous because it must have proceeded upon the basis that the trial judge believed that the Directors owed a duty "not to prejudice creditors". The critical matter, as he saw it, was not what the Directors believed as to the best way forward in the circumstances but whether there was a "prejudice" to creditors arising from the Transactions.[46] There is no duty "not to prejudice creditors".

The feasibility of the restructure

24. The respondents also rely on the trial judge's criticism of the feasibility of the restructure.[47] That criticism, however, was premised upon the trial judge's erroneous approach in conducting an objective evaluation of Aspinall's belief that it was possible to restructure.[48] When the question is approached from the perspective of the Directors' beliefs, the facts are clear.

25. *First*, Owen J found that Aspinall "considered that the first step in any restructure, or way forward, was to secure the medium-term financing facility... he had to achieve the refinancing to buy the 12 months' time that he considered he needed to plan and implement his ideas... Aspinall believed that 'the group' was not actually insolvent and

---

[39] See headings above RS [77] and RS [79].
[40] [AJ: 2260](AB9/4050); [AJ: 2764](AB9/4210).
[41] [J: 1881](AB3/995), [J: 5018](AB4/1783), [J: 5055](AB4/1793), [J: 5060](AB4/1795), [J: 5370](AB4/1890), [J: 5384](AB4/1897), [J: 5434-5436](AB4/1917), [J: 5900](AB5/2042). The respondents never sought to put to the Directors that these beliefs were untrue. While the respondents incorrectly seek to downplay the significance of [J: 1881](AB3/995), their analysis cannot, in any event, stand in the face of the other findings referred to at the beginning of this footnote.
[42] [J: 1828](AB2/981).
[43] The effect of the "cascading demands" referred to at RS [82], was that, absent the Transactions, all the companies would have been liquidated: see [J: 1877]ff(AB3/994), esp [J: 1886] and [J: 7066](AB5/2344).
[44] [AJ: 2059](AB9/3978), [AJ: 2072](AB9/3982), [AJ: 2772](AB9/4214), [AJ: 2910](AB9/4258).
[45] [J: 4304-4307](AB4/1584). He held that there were theoretical (rather than proven) alternatives, but the appellants submit that this is irrelevant to an assessment of the circumstances facing the Directors.
[46] His Honour at [J: 4306](AB4/1584) purported to ascertain "prejudice" in the abstract, without regard to the alternative actually facing the Directors, ie liquidation, and whether the alternative would be worse.
[47] RS [62]-[66].
[48] [J: 5090](AB4/1805). ("I consider it necessary to examine Aspinall's views on this ability to restructure").

that if he could get the banks sorted out, he had about 12 months to right the ship."[49] Further, it was admitted 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 as and when they fell due.[50]

26. *Secondly*, the Directors believed that the BRL shares would only be restored to value if the Transactions proceeded. They believed that if the refinancing proceeded, substantial value would be restored during 1990.[51] Such restoration would have substantially resolved the debt problems of the group.[52]

27. *Thirdly*, the BGNV bonds were listed[53] on the Luxembourg stock exchange. The offering circulars and the Trust Deeds specifically provided that Bell group companies could buy the bonds and then cancel them.[54] As at January 1990, the BGNV bonds were trading at 20% of face value and the Directors were aware of that fact.[55] Thus, the Bell companies had the right and opportunity (if the refinancing proceeded) to cancel the bond debt for around $117m.[56]

28. *Fourthly*, it was Aspinall's plan not to dispose of the publishing assets if possible (for example, if sufficient debt was reduced through defeasing bonds and selling the BRL shares) but he believed he could sell part of the assets or attract an equity investor if this became necessary.[57] In the six months up to January 1990, Aspinall had already received offers or expressions of interest for the publishing assets, or part thereof, from Stokes, News Corp, O'Reilly, Maxwell's Mirror Group and Rural Press.[58] Discussions with interested parties continued after the Transactions, and, in June 1990, a conditional letter of intent was signed with the Mirror Group for the sale of a 50% interest in the publishing assets for $175m cash, $75m assumed debt and a credit facility to repurchase the bonds.[59] In substance, this would have repaid/refinanced the appellants' facility, and preserved a half interest in the publishing assets plus the BRL shares, with a credit facility to acquire bondholder debt. The fact that this deal did not actually come to pass due to failure to gain Government approval is not to the point.[60]

29. The prospect of success of the restructure was, quintessentially, a business judgement for the Directors. However, the trial judge conducted a review of the issue[61] and, in

---

[49] [J: 5367](AB4/1890); [J: 6086](AB5/2093).
[50] See AS [61].
[51] [J: 5139-5140](AB4/1822) ("in excess of $200 million, if not more, bearing in mind that they would have had a net asset backing of approximately $456 million" "by the end of 1990"), [J: 5436](AB4/1918).
[52] Restoration to in excess of $200m would have been sufficient to repay three-quarters of the Bank debt of $260m [J: 1192](AB2/807); or buy-back the Bonds for their then trading price, with around $80m cash remaining [AJ: 2852](AB9/4239); in either case, leaving the companies with the Publishing Assets (valued at more than $500m: [J: 5124](AB4/1816)) and with the disputed tax claims ($34m) as the only potential significant liability. Mitchell correctly understood that a price of around $1 per BRL share would repay the Banks' debt [J: 5436(last bullet)](AB4/1919).
[53] Ie the majority of the bonds, being the first (1985 $75m 11%), second (1987 $175m 10%) and third (1987 5% £75m) BGNV bond issues [J: 309-312](AB2/606).
[54] See for example the offering circular for the first issue [TBGL.08045.024](AB) clauses 6(E) and 6(F) and the first Trust Deed [TBGL.08045.031](AB) clause 9(A).
[55] [AJ: 2852](AB9/4239)[SECL.08.0041], page 2 (AB).
[56] [AJ: 2852](AB9/4239), [J: 309-319](AB2/606).
[57] [J: 5087](AB4/1804).
[58] [J: 5096-5097, 5103](AB4/1807).
[59] [J: 5293-5294](AB4/1871).
[60] As Carr AJA noted, "[i]f one of these attempted part-sales of or joint ventures in relation to the publishing assets had been completed, or the BRL Brewery transaction had come to fruition earlier than it eventually did, Aspinall's judgment would have been vindicated": [AJ: 2841](AB9/4236).
[61] [J: 5090-5125](AB4/1805), [J: 5126-5141](AB4/1817), [J: 5163](AB4/1830).

doing so, erroneously criticised the views of Directors variously as "optimistic", "exceptionally optimistic", not "realistic", not "reasonable"[62] and based his findings of breach on those characterisations. This was an incorrect approach.

The absence of plans

30. The respondents also place significant reliance on the trial judge's view that the Directors' strategy was not of sufficient detail to warrant the description of a "plan".[63] This was nothing more than a characterisation of Aspinall's views by reference to some undisclosed standard or some minimum requirement in the corporate sphere for a "plan".[64] The trial judge unwarrantedly[65] took the view that directors cannot make decisions unless their beliefs are incorporated into "a single cohesive plan".[66] The duty to act *bona fide* involves no such prescriptive obligation.[67]

31. The courts consistently recognise that directors have particular talents which make them the proper persons (rather than judges) to make decisions concerning the company's interests.[68] The trial judge accepted that all the Directors were very experienced and "seasoned ... commercial campaigners".[69] The options facing the Directors were straightforward and limited. There was no requirement for them to undertake a formulaic analysis of the options.

32. The trial judge's reliance on the absence of a "plan" also appears to have involved the proposition that the "plan" was required to show "how the disadvantage [to creditors caused by the Transactions] would be overcome".[70] This relies once more on the erroneous proposition that directors have a duty not to disadvantage creditors.

The "effect" of the Transactions

33. The next matters upon which the respondents place heavy reliance are various findings made by the trial judge as to the "effect" of the Transactions. These include a series of conclusions such as the Transactions "ceded control" to the appellants, "[t]he Transactions meant that none of the companies could meet their financial commitments as they fell due", the Transactions placed the Directors "at the mercy of the [appellants]", and that the Transactions provided no value and had no possible benefit for the Bell group companies.[71]

34. The trial judge's characterisation of the "effect" of the Transactions was the result of the erroneous substitution of his own views about options, future prospects and events. For example: (a) he disagreed with the Directors' views that the appellants would release asset sale proceeds to permit the restructure to progress throughout 1990;[72] and (b) he ignored the Directors' view as to the feasibility of the restructure either because he regarded it as unduly optimistic or because of the absence of a detailed plan.[73]

---

[62] See respectively [J: 5124](AB4/1816); [J: 5128](AB4/1817); [J: 5183](AB4/1836); [J: 5198](AB4/1840).
[63] [J: 6039](AB5/2081), [J: 6088](AB5/2094). The trial judge described Aspinall's views as "ideas" or "strategies", not "plans" [J: 5363-5364](AB4/1889).
[64] [J: 5363-5364](AB4/1889).
[65] As Carr AJA recognised: [AJ: 2842-2843](AB9/4236), [AJ: 2858-2859](AB9/4242).
[66] [J: 5363](AB4/1889), [J: 6088](AB5/2094).
[67] Such prescriptive rules also form no part of fiduciary obligations (nor obligations of "loyalty").
[68] *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260 at 281; *Daniels v Anderson* (1995) 37 NSWLR 438 at 501; *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449-450.
[69] [J: 5091](AB/4/1805), [J: 8978](AB6/2851).
[70] [J: 6068](AB5/2089).
[71] Respectively, RS [65], [106]; RS [66]; RS [66]; and RS [98].
[72] [J: 5180](AB4/1835), [J: 5371](AB4/1891).
[73] [J: 5371](AB4/1891), [J: 6086-6089](AB5/2093).

35. The second of those errors has been dealt with above. In relation to the first, the trial judge accepted that Aspinall believed that the appellants would agree to release the proceeds;[74] and that the Transactions and the sale of non-core assets would allow him twelve months to restructure and secure the group's long term future.[75] Aspinall's view was a business judgment made by an experienced company director, on the ground at the time and directly involved in the negotiations with the appellants. It was not part of Owen J's role to consider whether Aspinall's judgment was correct or wise or reasonable.[76] Yet that is precisely what the judge proceeded to do.[77]

36. Owen J said that Aspinall "miscalculated" the views of the appellants on this issue and said "I do not consider that Aspinall's view as at the 26 January 1990 (that the banks would agree to release the proceeds) was realistic".[78] Not only was the approach erroneous, Owen J's analysis was substantially based upon matters not known to Aspinall (such as the privately held views of particular banks) and matters which occurred *after* 26 January 1990 (such as the reluctance of some appellants to release proceeds in April 1990).[79] Owen J's intervention was even more egregious when it is recognised that Aspinall's assessment of the situation was right: the appellants did agree to release proceeds during 1990.[80] Further, each of Owen J, Drummond AJA and Carr AJA accepted that it was unlikely, *after* the Transactions, that the appellants would have caused the group to go into liquidation, not least because they had already spent significant time and resources on the negotiations for the Transactions.[81]

37. The Directors believed that absent the Transactions, all Bell group companies would be liquidated with substantial loss of asset value to the prejudice of those companies, whereas the refinancing conferred the opportunity for the companies to be restructured so that they could pay their debts as and when they fell due. Thus, the "effect" of the Transactions, as perceived by the Directors (the only persons entitled and obliged to make the decision), was to provide a benefit to all companies.

The significance of the finding of no dishonesty

38. The trial judge held that no case of dishonesty *or* conscious wrongdoing was alleged or found.[82] The respondents similarly disavowed dishonesty *and* consciousness that the Directors were not acting in the interests of the companies.[83] The respondents accept that it was no part of their case that the Directors had acted dishonestly, in the sense that "the directors knew what they were doing was not in the interests of each company and they deliberately went ahead".[84]

---

[74] [J: 5168](AB4/1832).
[75] [J: 5083](AB4/1803), [J: 5362](AB4/1888), [J: 5367](AB4/1890), [J: 6086](AB5/2093).
[76] *Richard Brady Franks* at 136; *Wayde v NSW Rugby League* (1985) 180 CLR 459 at 469-470; *Regentcrest plc (In liq) v Cohen* [2001] 2 BCLC 80 at 105.
[77] See [J: 5167]-[5177])(AB4/1831).
[78] Respectively, [J: 5169](AB4/1832); [J: 5180](AB4/1835).
[79] Respectively, [J: 5169](AB4/1832); [J: 5173](AB4/1833).
[80] [AJ: 2786-2787](AB9/4221), where Carr AJA refers to other evidence which supported Aspinall's view.
[81] [J: 9036](AB6/2865), [AJ: 2360](AB9/4083), [AJ: 2784](AB9/4220). Contrary to Drummond AJA, there was evidence that the Directors had this view: (Whitechurch statement [WITP.00001.010.T](AB) at [117-120], [TBGL.07003.031](AB)).
[82] [J: 6031](AB5/2078) (nor was any such case put to the Directors).
[83] The disavowal was "it is unnecessary to plead and establish *that the directors acted dishonestly*, it's unnecessary to plead and establish that they were conscious that what they were doing was not in the interests of the company, *and* it's not necessary to plead and establish that they deliberately went ahead with the conduct in disregard of that knowledge": see [J: 4815](AB4/1733) (emphasis added).
[84] RS [58], which refers to [J: 4815](AB4/1733). Similarly, at [J: 4817](AB4/1733), Owen J said that respondents disavowed a case based on the fact that, for example, "the directors consciously acted in their own interests *and consciously not in the best interests of the company*" (emphasis added).

39. The respondents refer to Owen J's findings as to Aspinall's views regarding the effect of the minutes.[85] As Drummond AJA said,[86] Owen J did *not* find that "Aspinall did not honestly hold the beliefs he swore to. What he found was that Aspinall was unaware of matters which [Owen J found] he should have considered when deciding whether to commit the Bell companies to the Transactions". As Carr AJA held,[87] Owen J was concerned that Aspinall did not properly understand the legal concept of corporate benefit. But having found that Aspinall believed that what he was doing was in the best interests of the Bell group companies, both individually and as a group (or, as Drummond AJA put it, that Aspinall believed that there were benefits for the Bell companies from those Transactions)[88] it did not matter whether Aspinall properly understood the legal concept of corporate benefit.[89] That was plainly correct, particularly given that Owen J wrongly injected the requirement of "reasonable grounds" as a part of that concept.

40. Owen J found that "Aspinall and Simpson had taken the running in negotiations with the banks concerning the form of the documentation."[90] By the time of the meetings, Aspinall had been involved in negotiating the refinancing for over six months.[91] He had a detailed knowledge of the affairs of the Bell group companies.[92] Owen J found that Aspinall believed that the refinancing was the first step in any restructure, and that it gave him twelve months to effect a restructure and that he could right the ship within that time.[93] Prior to their approval of the Transactions, Mitchell and Oates, the two non-executive directors, went through the documents for two hours with Simpson and Watson, an external lawyer.[94] In the lead up to the approval of the Transactions, Owen J found that "[t]here would have been discussions from time to time with Oates and, to a much lesser extent, with Mitchell"; and a "store of knowledge about the Transactions and the documents" had been built up during the negotiations with the Banks.[95]

41. The decisions taken by TBGL, BGF and WAN to enter into the Transactions were made at meetings held on 25 January 1990. The meetings for other companies were held over the next 2 to 3 weeks. The minutes were drafted jointly by the appellants solicitors and the Bell group solicitors.[96] Owen J accepted that the Directors' meetings were held[97] and found that "[w]hen it came to holding the meetings, the documents and the minutes were available and were presented to the directors."[98] The minutes approved by the Directors recorded their resolution that "the execution by the Company of the Company's Transaction documents would be" "in the best interests of the Company as a whole after taking into account both its members' and creditors' interests" and "something of real and substantial benefit to the Company".[99] The trial judge noted that it was a premise of the respondents' case that "the directors actually

---

[85] RS [63].
[86] [AJ: 2061](AB9/3978).
[87] [AJ: 2781-2](AB9/4219).
[88] [AJ: 2474](AB9/4121).
[89] [AJ: 2781](AB9/4219).
[90] [J: 5604](AB4/1968).
[91] Aspinall became involved from July 1989: [J:50145015](AB4/1782).
[92] [J: 5016- 5018](AB4/1783), [J: 5082](AB4/1803).
[93] See [25] above.
[94] [AJ: 2751](AB9/4206).
[95] [J: 5604](AB4/1968), [AJ:2751](AB9/4206).
[96] [AJ: 2755](AB9/4207).
[97] [J: 5590](AB4/1964).
[98] [J: 5604](AB4/1968). See also [AJ: 2756](AB9/4208), [J: 5601](AB4/1967).
[99] [J: 5578](AB4/1960).

resolved to enter into the Transactions."[100]

42. Having found that the Directors approved the Transactions, and that they did so absent any belief that what they were doing was not in the interests of each company, it is thus simply not open to find that the Directors did not have a *bona fide* belief that the Transactions were in the interests of each company. As Drummond AJA and Carr AJA correctly held, Owen J did not impugn the Directors' honesty or reject their sworn evidence as to their beliefs.[101]

The Australian Directors: Summary

43. Overall, as to the three Australian Directors, the submission that they did not have a *bona fide* belief that the Transactions were in the best interests of the intertwined companies cannot stand: (a) it was not disputed that all three Directors actually met and passed the resolutions that it would be in the best interests of each company to enter into the Transactions;[102] (b) it was never alleged or put to the Directors that they did not honestly approve those resolutions or have those beliefs; (c) it was *admitted* that the Directors believed that, in order to avoid a winding up of the Bell group, it was necessary to consider and implement a restructuring of the financial position of each company;[103] (d) it was also *admitted* 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 as and when they fell due;[104] and (e) the trial judge found breach on the basis that the Directors did not undertake further investigations and consider the matters which His Honour regarded as relevant[105] – not on the basis that they did not hold the beliefs which they professed to hold.

The UK Directors: Summary

44. The basis upon which the respondents submit (and the trial judge found) that the UK directors did not have a *bona fide* belief that they were acting in the best interests of the company is also infected by the erroneous "objective" approach. That is, the trial judge's finding had nothing to do with the Directors' actual beliefs, but rather was a finding that they "fell at the last hurdle"[106] because they did not obtain the precise type of information which advisers had suggested they obtain.[107]

45. The critical issue facing the Directors at the meetings of BGUK and TBGIL on 24 January 1990 was expressly discussed by the Directors, (as recorded in the minutes), namely, that if the companies did not proceed with the refinancing, it was likely that they would go into liquidation.[108] The Directors resolved unanimously that it was in the best interests of the shareholders and creditors to proceed "on the ground that the ability of the Company to meet its creditors would be enhanced by giving [TBGL]

---

[100] [J: 5590](AB4/1964).
[101] [AJ: 2059, 2061](AB9/3978), [AJ: 2072](AB9/3982), [AJ: 2474](AB9/4121), [AJ: 2772](AB9/4214), [AJ: 2910](AB9/4258).
[102] [J: 5587, 5590](AB4/1963), [J: 5604](AB4/1968).
[103] There was a dispute about whether the restructuring had to be what the respondents referred to as a "valid and effective restructure", never articulated or defined with any greater precision, but implicitly involving a restructure with *pari passu* treatment of all creditors: [J:4304, 4306-4307](AB4/1584).
[104] See AS [61].
[105] [J: 6033](AB5/2079), [J:6088-6089](AB5/2094).
[106] [J: 5925](AB5/2049).
[107] [J: 5925-5926](AB5/2049).
[108] [J: 5897-5900](AB5/2041). Minutes of BGUK meeting [KPMGUK.16.0112](AB) at [3], [6].

more time to repay the Westpac Facility".[109] There was no allegation of dishonesty and no finding that they did not honestly believe this to be the case. Moreover, objectively, their view was plainly correct. BGUK's only possibility of recovering anything from its assets (being investments in Australian Bell companies) was totally dependent upon the value of those companies. BGUK had no obligations to the Bondholders or the ATO. Its only external creditors were the appellants.[110] Owen J's finding that they should have obtained more information before making a business judgment reveals, again, a misunderstanding of applicable principle.

4. Allegations of improper purpose (RS [98]-[103])

46. The respondents' submission that Mitchell and Oates acted for an "improper purpose" should be rejected. *First*, no judge (other than Carr AJA) applied the correct test. Accepting Aspinall was not "Bondcentric" meant that it was necessary to determine "the substantial object the accomplishment of which formed the real ground of the board's action".[111] This is tested by determining whether, without the improper purpose, the board would not have exercised the power.[112] As Carr AJA held, it did not follow, and there was no finding, that, but for the so-called motivation to assist BCHL, Mitchell and Oates would not have approved the Transactions, thereby allowing the Bell group companies to be placed into liquidation.[113]

47. *Secondly*, if any inference were to be drawn, it would favour the appellants. It could hardly be inferred, given Aspinall's role in and views about the Transactions, that Mitchell and Oates (and Bond) would have exercised their powers to cause the liquidation of all the companies. Moreover, they had delegated the refinancing to Aspinall, the managing director, who "*could not have cared less about BCHL*" and who was found to have been determined to confront the Bell group's problems and "*intent on securing its survival*".[114] TBGL and BCHL were not unrelated companies: BCHL held 68% of TBGL, the Bell group itself held 39% of BRL which, at the time of the Transactions, was seeking to undertake the brewery transaction with BCHL, from which the Bell group would benefit as BRL's major shareholder. As Carr AJA held, the fact that the course taken might also have benefited BCHL does not put the Australian Directors in breach of their fiduciary duties.[115]

48. *Thirdly*, the characteristics of improper purpose were based, in essence, on the following propositions:[116] that Mitchell had no involvement in the day-to-day operation of the Bell group and its businesses; that he was simultaneously a senior executive of BCHL; that a considerable part of his cross-examination was spent exploring his BCHL connection; that he was described by other employees as part of the "inner cabal" or the "kitchen cabinet" and was thus "a BCHL man" and "Bondcentric"; that Oates was a lot more involved in the affairs of the Bell group than was Mitchell but he, too, was a member of the BCHL "inner cabal" and was intimately involved in Mitchell's restructure plans, and thus was "Bondcentric"; and that a *Jones*

---

[109] BGUK Minutes [KPMGUK.16.0112](AB) at [7].
[110] [J: 2100](AB3/1048), [J: 5856](AB5/2030).
[111] *Mills v Mills* (1938) 60 CLR 150 (*Mills*) at 185-186 per Dixon J.
[112] RS [101].
[113] [AJ: 2962](AB9/4273).
[114] [J:1049-1050](AB2/768) and [J:5074](AB4/1799).
[115] *Mills* at 185-186; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493.
[116] [J: 5475-6](AB4/1932), [J:5486-5487](AB4/1935), [J: 6069-6092](AB5/2089),[J: 6098](AB5/2096).

v Dunkel inference should be drawn against the appellants by their failure to call Oates, notwithstanding he had been a director of the respondents.

49. These matters provided no basis (certainly no proper basis) for a finding that Mitchell and Oates acted for an improper purpose. It is commonplace for non-executive directors to hold executive roles in other companies, particularly other companies within the same group and affords no basis for drawing inferences about their purpose in acting as directors in those other companies. Here there was no finding of conflict. Stripped of the emotive or pejorative connotations, references to the "inner cabal" and "kitchen cabinet" (being nicknames used by BCHL staff) reflect nothing more than that Mitchell, Oates and Bond held the most senior executive positions in BCHL.[117]

50. The characterisation of the matters as "improper purpose" cannot sit with Owen J's findings as to the Directors' honest beliefs (see [17]-[45] above) or with his findings that no Director breached the duty to avoid conflicts of interest,[118] that no Director acted consciously not in the best interests of the companies[119] and that no Director acted in his own interests or in order to protect his financial interest in BCHL.[120]

51. It is also inconsistent with all the findings and objective evidence as to the genesis, negotiation and implementation of the refinancing, which show that the Directors both initiated the refinancing from July 1989 and thereafter negotiated and implemented it with the same aim in mind, namely to obtain a medium term refinancing to permit the restructure of the group by divestment of non-core assets (including the BRL shares) so as to permit the group to concentrate on the publishing business.[121]

52. Further, and in any event, a finding of improper purpose required that the allegation be put in cross-examination[122] and no such proposition was put to Mitchell despite the fact that the trial judge had (correctly) required this to be done.[123]

53. Moreover, it was not found that the appellants had knowledge of any breach, so that the point would lead nowhere.[124]

5. The *Charterbridge*[125] test (RS [104]-[106])

54. If it were to be found that the Directors failed to consider the interests of the companies, it would be necessary to consider whether an intelligent and honest person in the position of the Directors could have believed that the Transactions were for the benefit of the companies (the *Charterbridge* test). Breach of directors' duty is not made out merely because a director fails to consider the interests of a company. It must be shown that an intelligent and honest person in the position of the directors *could not*, in the whole *of the existing circumstances*, have reasonably believed that the transactions were for the benefit of the company.

---

[117] [J: 5496](AB4/1937).
[118] [J: 9745](AB7/3042).
[119] [J: 4817](AB4/1733).
[120] [J: 6125, 6127](AB5/2103).
[121] [J: 4986](AB4/1176), [J: 5146-7](AB4/1823), [J: 5436](AB4/1918), [J: 6438-9](AB5/2184), the TBGL 1989 Annual Report [054.02.0002](AB).
[122] *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In Liq)* (2003) 214 CLR 514 (***Permanent Trustee***) at 534; *Ghazal v Government Insurance Office* (1992) 29 NSWLR 336 at 344-346.
[123] Owen J observed to respondents' counsel at T: 31536(AB): "Eventually, you are going to have to put the question squarely to him about purpose".
[124] See Drummond AJA's summary findings on bank knowledge [AJ: 2416](AB9/4101). See also AS [82].
[125] *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 (***Charterbridge***).

55. For the reasons given above, an honest and intelligent person in the position of the directors plainly "could"[126] have reasonably believed that the Transactions were for the benefit of each of the companies. In particular, the respondents do not address the most pertinent objective circumstance which would be apparent to any director: namely, that the consequence of not entering into the refinancing would be the immediate liquidation of all the companies[127] with the loss of the BRL shares and destruction of the asset values of the companies. Unless that reality is taken into account, it is not possible to consider the actual choice which would have faced an honest and intelligent person in the position of the Directors. The cases recognise the benefit to the company of directors acting to avoid liquidation.[128]

56. The common circumstances of the companies were such that the Transactions were (and certainly could have reasonably been seen as) beneficial for all companies. The perspective of individual companies makes this clear. For example it was demonstrably in the interests of Bell Equity to proceed with the refinancing.[129] The same position applied to all companies owning hard assets (the BRL shareholders and the owners of the Publishing Assets) as there was a clear potential benefit for them in seeking to restructure and preserve their assets. The other companies owned no hard assets. Thus, their ability to recover any value under their internal loans and investments was totally dependent on the asset owing companies.

6. The alleged "reasonable foundation" requirement (RS [107]-[115])

57. Even assuming that there is an overriding "irrationality" test to be applied in the review of the exercise of directors' powers, it is not equivalent to a mere "reasonableness" standard. The correct test (as this Court has recently confirmed in another context) requires a finding that the decision was "irrational, if not bizarre ... – which is to say one that is so unreasonable that no reasonable person could have arrived at it".[130] Application of the "amiable lunatic" test does not confer upon courts a general jurisdiction to second-guess the merits of directors' business decisions.

58. Importantly, an assessment of a particular decision of directors cannot ignore the full context in which the decision was actually made. The submissions set out above demonstrate that it cannot be said that the Directors acted so unreasonably that no reasonable person could have reached the same conclusion that they did.

7. First limb *Barnes v Addy* is confined to trust property (RS [46]-[51])

59. The respondents' contention that there is "no reason to distinguish between dealings with a trustee and dealings with directors who have control over property to which the fiduciary obligation attaches"[131] should not be accepted for three reasons. *First*, it is contrary to the recognition that the "attribution to directors of the character of trustees of the assets of the company" was part of an endeavour that "miscarried",[132] and that

---

[126] The respondents wrongly state the test in RS [105] as whether an honest and intelligent person "could *(or would)* have believed that the Transactions" were for the benefit of the companies.
[127] [J: 1828](AB2/981).
[128] As well as *Richard Brady Franks* at 136 and 144, see *Equiticorp Finance Ltd (In liq) v Bank of New Zealand* (1993) 32 NSWLR 50 (at 98 and 146-147, 149); *Charterbridge*; similarly, to enhance access to finance from the banker to the group, in this case, BGF: *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran* (2005) 219 ALR 555 at 588; and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1643].
[129] See AS [78].
[130] *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [68].
[131] RS [48].
[132] *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at [37].

the application to a director of "all the consequences which would follow if he was a trustee" is misguided.[133] The respondents' reliance on the "analogy" between a director and a trustee is misplaced.

60. *Secondly*, for the reasons given in AS [88]-[91], there is a fundamental difference between the two circumstances. To submit that the two circumstances involve "a breach of the same kind of duty of loyalty to serve the interests of others"[134] ignores the very different character of the two situations and the fact that the trust context involves a critical element lacking from the company director context: viz., a dealing in property beneficially owned by a person other than the transferor.

61. *Thirdly*, the respondents' reliance on various authorities that have proceeded on the assumption that limb one extends to property dealt with in breach of a fiduciary duty does not advance the matter in light of this Court's express reservation of the correctness of such decisions in *Farah*.[135]

8. Property for the purposes of the first limb of *Barnes v Addy* (RS [135]-[153])

62. The respondents' submission that a receipt of property is to be found wherever there is a "bundle of rights in respect of things which may be transferred or which may exist for the first time in the hands of the recipient having been created by an instrument"[136] must be rejected. The respondents focus on the question whether a chose in action may constitute property. Plainly it may. The real question is whether the entry into contracts involving the creation of rights (rather than the transfer of an assignable right) constitutes a "receipt" of property.

63. The respondents assert that the appellants' rights under the contracts "diminished the property rights of the Bell companies".[137] But the notion of "receipt" requires a transference, not a mere correlation under contracts creating rights on both sides. Equally, the fact that property rights are *created* by a delinquent fiduciary does not mean that there is a "receipt". The reasoning in *Criterion* is persuasive.[138]

9. Second limb *Barnes v Addy:* dishonest and fraudulent design (RS [154]-[166])

64. The respondents do not identify the content of the phrase "dishonest and fraudulent design" for which they contend. Rather, they submit that "whatever the language used to express the standard", and "[o]n any view", the breaches of fiduciary duty alleged in these proceedings "constituted a dishonest and fraudulent design".[139] That submission is not reconcilable with (a) the rejection by this Court of a test for liability under the second limb of *Barnes v Addy* involving "a significant breach of duty/trust";[140] and (b) this Court's holding that an allegation that a person is a knowing participant in a dishonest and fraudulent design is "an allegation the seriousness of which means that it ought to have been pleaded and particularized" and assessed in accordance with *Briginshaw v Briginshaw*.[141]

---

[133] *Knox v Gye* (1872) LR 5 HL 656 at 675-6, cited with approval in *Clay v Clay* (2001) 202 CLR 410 at [41].
[134] RS [48].
[135] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (***Farah***) (2007) 230 CLR 89 at [113].
[136] RS [144].
[137] RS [149].
[138] *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 at 1855.
[139] RS [166].
[140] *Farah* at [183].
[141] *Farah* at [170].

65. Those aspects (at the very least) of *Farah* make plain that even serious breaches of fiduciary duty will not constitute a "dishonest and fraudulent design". That is not to say that a subjective appreciation of dishonesty is required.[142] But the test created by Drummond AJA misstates the relevant inquiry.

10. Liability under second limb (RS [167]-[187])

66. The respondents did not plead or run a case of participation in a dishonest and fraudulent design. They proffered a pleading which made that allegation in 1999 but withdrew it[143] and substituted the present pleading, containing no such allegation. At first instance, in response to an attack on the present pleading by the appellants the respondents replied that "[t]here is no need for the plaintiffs to prove that the directors had a 'dishonest and fraudulent design'" and that "[t]here is no requirement of a 'dishonest breach of trust'."[144] The respondents' attempt to maintain a new case on appeal is a response necessitated by this Court's subsequent decision in *Farah*.

67. The express reference to a claim of "knowing participation" in the present pleading[145] only identified a claim of knowing participation in something *other than* a dishonest and fraudulent design or dishonest breach of trust.[146] Had the respondents sought to allege a case of knowing participation in a dishonest and fraudulent design, they would have been required to cross-examine witnesses on that basis.[147] No such cross-examination took place. Having avoided the burden of pleading or maintaining that case at first instance, they cannot do so on appeal. In addition, a number of the "matters" referred in RS [167]*ff* formed no part of the pleaded case and thus cannot be relied upon.[148]

68. In any event, none of those matters establish a dishonest and fraudulent design. Most of them are labels or high-level characterisations of the facts by judges below (a number being unreferenced and not reliably paraphrased). There is nothing in the primary facts found which can properly be characterised as dishonesty. Specific responses to the matters relied upon by the respondents are made below. *First*, for the reasons set out above,[149] the findings of collateral purposes relied upon by the respondents[150] were unsound. Further, as noted above, the matter is irrelevant because there was no finding that the appellants knew of any such purpose.

69. *Secondly*, the respondents' reliance upon Lee AJA's description of the "Scheme"[151] is

---

[142] *Farah* at [173]. The respondents ignore the first aspect of the phrase, clearly a reference to a pleading of fraud, see *Forrest* at [26].
[143] AS [105].
[144] [SUBP.R13.001](AB) at [5(f)], [56]-[57], T:971(AB), [J: 4824](AB4/1735).
[145] See RS [185]. The respondents' paraphrase of the lengthy pleading and particulars in RS [184] is selective and presents a misleading picture of clarity. For example, the allegation of knowledge was, in fact, an allegation that the appellants "knew, believed, suspected or ought to have known" numerous individual matters. That allegation gives rise to an unquantifiable number of permutations, involves possibly actual knowledge of some matters, suspicion of others, or allegations of negligence in not knowing things. This is precisely the type of pleading which cannot be relied upon to support a case of dishonesty: *Forrest* at [26].
[146] A claim for participation in a dishonest and fraudulent design required, amongst other things, the particularisation of a guiding mind or minds of each of the appellants alleged to have the requisite knowledge: see the authorities referred to in footnote 179 of AS [104]. There was no such particularisation, and neither the trial judge nor the Court of Appeal made findings of knowledge on that basis. Contrary to RS [187], this involves no challenge to findings of Bank knowledge.
[147] *Permanent Trustee* at 534.
[148] To give but one example, there was never an allegation that the Directors participated in the adoption of minutes that did not reflect the substance of their decision-making.
[149] See [46]-[52] above.
[150] RS [167].
[151] RS [175]. The "Scheme", as defined, is merely the sum of the Transactions – see Plaintiffs' Eighth

misplaced. Lee AJA misstated Owen J's findings and his description is inconsistent with the pleading and the particulars, which contained no allegation of intention or purpose.[152] Lee AJA's characterisation is not a primary finding of fact and is unwarranted. In the case as pleaded and conducted by the respondents at first instance, there was nothing in the Directors' actions in entering into the "Scheme" (ie, in entering into all of the Transactions) which could be described as dishonest. The respondents' reliance on Lee AJA's view as to the "object of the Transactions"[153] is similarly misplaced.

70. *Thirdly,* the respondents rely upon a number of findings as to the Directors' diligence (Directors not possessing "necessary knowledge"; "no reasonable basis" for the Directors' views; "unfounded assurance"; disregarding advice).[154] All of these matters are characterisations of the Directors' conduct based upon the trial judge's objective approach as to what he regarded as necessary and relevant to the decision. None of them justify a finding of breach.[155] They certainly do not justify a finding of a dishonest and fraudulent design.

71. *Fourthly,* the respondents rely upon the "effect" of the Transactions (causing insolvency,[156] providing "no value"). These are the trial judge's views of the objective effect of the Transactions based upon an analysis of them *in vacuo*, ignoring the actual circumstances facing the companies (as believed by the Directors), namely that liquidation was the only available alternative to the refinancing. These matters provide no basis for a finding of a dishonest and fraudulent design.

11. Remedies and interest (RS [188]-[224])

(i) Introduction

72. The respondents' submissions seek to isolate the admitted power of a court to award compound interest from both established principle and the facts of this case. The presumption of profitability recognised since *A-G v Alford* does not authorise a court to select a rate of compound interest without reference to settled principle or a consideration of the case before it and the facts admitted or proved by evidence.[157]

73. The fact that examples can be found of interest being awarded at "commercial rates" in a range between 4% and 17% is not an answer to the appellants' complaint.[158] Much depends upon the facts of the individual case, whether the rates were compound or simple, the rates available on government debt, the level of inflation and the extent of agreement between the parties.[159] In any event, the English Law Commission has correctly described a rate at 1% above the Bank of England base rate as a "commercial rate", which "represents the rate paid by well-placed and well-informed borrowers ... [and] is the rate most frequently used in the commercial courts, on the grounds that [it] reflects borrowing by the largest and most secure businesses."[160] For the same reasons,

---

Amended Statement of Claim [19A](AB1/27).
[152] See AS [72].
[153] See RS [172].
[154] See, respectively, RS [168]; RS [170]; RS [173]; RS [174].
[155] See [17]*ff* above.
[156] RS [171].
[157] (1855) 4 De G M & G 843; 43 ER 737 at 741(*Alford*).
[158] Cf RS [194]–[195]. Similarly, it is erroneous for the respondents to point to the default court rate available in the Federal Court, while ignoring that a different approach has been adopted to the determination of court rates in the WA Supreme Court at all relevant times: cf RS [219].
[159] See eg *Hagan v Waterhouse* (1991) 34 NSWLR 308 (***Hagan***) at 391F-G.
[160] UK Law Commission Report No 287: Pre-judgment Interest on Debts and Damages (2004) at [3.12],

a rate of RBA + 1% is properly considered a similar "commercial rate". It is also to be recalled that half of the appellants' lending was in sterling and a large number of the appellants were, and are, based in the UK and Europe.

74. The ultimate aim of an equity court is to fashion the most appropriate remedy having regard to the nature of the case and the particular facts before it.[161] It would be erroneous for a court to select a rate within a range of say 4% and 17% on the basis of mere whim or without any evidence before it as to the likely profit available to a defendant in respect of the funds wrongly received.

75. In the present case, Lee and Drummond AJJA purported to award compound interest, and select a rate, by reference to: (a) two pieces of "evidence"; and (b) the reasoning of the English Court of Appeal in *Wallersteiner*. The "evidence" relied upon provided no basis for a finding that profits had likely been made by the appellants, let alone profits that "substantially exceeded" WBIR.[162] In addition, the majority misunderstood the reference in *Wallersteiner* to the official bank rate or minimum lending rate.[163] It follows that both the evidentiary and legal foundation relied upon by the majority below to order compound interest at a rate of WBIR plus 1% was erroneous.

(ii) Equitable compensation and compound interest

76. There is a clear distinction between an award of compound interest calculated in order to compensate a claimant for a loss which it had suffered and compound interest calculated in aid or in lieu of an account.[164]

77. If, as seems clear from the language used by the majority below, the award of compound interest was a form of equitable compensation for the respondents, then the majority erred and the appropriate award of interest is that identified at AS [125] – [126]. That conclusion is not answered by characterising the issue raised by the appellants as "semantic".[165] No substantive criticism is otherwise made by the respondents regarding the appellants' submissions on equitable compensation and the approach that should be applied when determining a compensatory award of interest.

(iii) Interest in lieu of an account

78. If, contrary to the above submission, the award of compound interest was in lieu of an account of profits, the majority nevertheless erred. The "presumption" of profitability relied upon so heavily by the respondents has a confined operation. The presumption merely justifies an award of compound interest so as to recoup an amount which is "so fairly to be presumed that [the defendant] did receive that he is estopped from saying that he did not receive it".[166] As recognised in *Wallersteiner*, the presumption supports a "conventional measure" of compound interest only.[167]

[3.37] **(2004 Law Commission Report)**.
[161] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559 (***Warman***).
[162] See AS [132]; cf [AJ: 1233](AB8/3751).
[163] See AS [142].
[164] See AS [108]–[126] (compensation) and AS [138]–[139] (account).
[165] RS [199].
[166] *Alford* at 741.
[167] *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 (***Wallersteiner***) at 398F-G. Earlier decisions are to the same effect. In *Rocke v Hart* (1805) 11 Ves Jun 58 at 60; (1805) 32 ER 1009 at 1010, Grant MR referred to the "rule" that had been "laid down as to interest, from which the Court does not depart without special reasons; not for the general reason, that more might have been made...for that exists in every possible case". In *Docker v Somes* (1834) 2 My & K 655; 39 ER 1095 at 1101, Brougham LC emphasised that an inquiry into the facts before the court was "necessary" and that more than a standard rate of interest (in that case 4%) would not be charged without special circumstances being proved. In *Burdick v Garrick* (1870) LR 5 Ch App

79. In many cases, the parties will agree on a particular rate to be applied. However, where there is no agreement, evidence will be required if the plaintiff seeks more than a "conventional" rate, particularly in cases where the amount of compound interest in issue is potentially large. It follows that difficulties in the evidence cannot be ignored merely by relying, as the respondents seek to do, on the existence of the presumption.[168] That presumption is a starting-point not an end point.

(iv) The incorrect rate was selected

80. The evidence before the Court did not substantiate the proposition that the appellants received a return from the use of the funds that "exceeded in a substantial degree" the amount of compound interest obtained from applying the WBIR.[169] In the absence of such evidence, the selection of WBIR, rather than some lower rate, was arbitrary.

81. Nor could WBIR + 1% be said to represent a conventional measure of the profit available to the appellants from funds received by them. *First*, interest at a bank's lending rate is plainly a measure of revenue, rather than profit.[170] *Secondly*, it is wrong to say that the WBIR was a "real base lending rate for commercial lending".[171] There was no evidence that WBIR was a *base* lending rate for banks in general, being a rate at which a bank lends to its most favoured customers. Indeed, the evidence suggested that WBIR was not Westpac's base lending rate to favoured customers.[172] The base rate charged by the six Australian appellants to the respondents on the A$130m bank facility which formed part of the Transactions was BBSW (plus a margin of 2%),[173] being a dramatically lower rate than that used by the majority below.[174]

82. The respondents do not cavil with the appellants' submissions as to the deficiencies in the evidence, other than to note that Mr Woodings (the liquidator of the respondents) was not the subject of cross-examination.[175] But Mr Woodings' affidavit merely annexed arithmetical calculations in relation to the particular rate which he selected.[176] The challenge made by the appellants was to the relevance of the evidence and the purpose for which it was admitted, not Mr Woodings' credibility.

83. Further, as noted above, the majority's decision to impose a rate of compound interest at 1% above the WBIR was based on a misreading of *Wallersteiner*. The majority confused "the" official bank rate or minimum lending rate with "a" rate nominated by the respondents from amongst numerous rates charged by only one of the appellants. While the respondents assert that their construction of *Wallersteiner* has been consistently adopted, they ignore the decisions to the contrary identified by Carr

---

233 at 243-4, Giffard LJ stressed that "[t]he question of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made"; and if a claimant sought more than the conventional measure, he "must make out a case for that purpose". In *Re Tennant* (1942) 65 CLR 473 at 507-8, Dixon J emphasised the need to fix a rate that represents a "fair or mean rate of return for money."

[168] RS [202].

[169] AS [127]-[141].

[170] Cf *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (***Harris***) at [328] per Heydon JA.

[171] RS [214].

[172] AS [125].

[173] Australian Bank Facilities Agreement dated 26 January 1990 [TBGL.00001.002](AB).

[174] Owen J noted in *The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 10)* [2009] WASC 107 (**Remedies**) that, if the Court had ordered interest at the BBSW rates proposed by the appellants rather than WBIR-1%, the impact would have been to reduce the judgment award by about $550 million: Remedies [21] (AB7/3137). By adopting WBIR +1% rather than WBIR -1 %, the Court of Appeal increased Owen J's judgment by about $800 million, making the difference about $1.35 billion.

[175] RS [224].

[176] AS [132].

AJA,[177] and both the uniform line of authority in England, as well as the 2004 Law Commission Report, making clear that the rate selected in *Wallersteiner* was 1% above the official rate set by the Bank of England.[178]

84. *Wallersteiner* should also be seen in its historical context. In the 19th century, mercantile rates (typically 5%) were set at 1% above the trustee rate (typically 4%). The trustee rate represented the return on Government debt.[179] *Wallersteiner* moved 19th century fixed rates into floating rates, reflecting modern volatility by adding 1% to the central bank rate. *Wallersteiner* did not authorise a movement from interest payable at rates set by reference to Government debt rates, to those set by reference to bank overdraft rates.

85. The appellants' approach to *Wallersteiner*, and the selection of a rate more generally, accords with basal principle. Equity is not a vehicle for the punishment of a defendant. The rate of interest awarded in reliance on a presumption is a conventional measure or "minimum" lending rate. The description of the rate in these terms recognises the caution with which Equity approaches the selection of a rate of compound interest in the absence of an examination of the actual profits earned by a defendant, no doubt reflecting 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.[180] If, as the respondents submit, no account is to be had to matters of skill, care and diligence in this context (as to which see [87]-[88] below), that circumstance only reinforces the appropriateness of a conventional or minimum rate because, to do otherwise, would likely be the product of injustice. If a claimant wishes to obtain more than a conventional or minimum rate, then it must put forward admissible evidence in support of that submission. It was open to the respondents to do just that in this case but they chose not to do so.

86. The appellants' approach also reflects the nature of the profit which the presumption recognised in *Alford* seeks to disgorge. Rather than starting with a revenue rate and making adjustments for skill, expenses, risk and tax, the "profit" obtained by a defendant that uses funds in the course of its business operations can be also seen as the saved expense of having to purchase those funds from other sources.[181] Conceptualised in these terms, there is nothing surprising in fixing the presumed conventional rate of profit at 1% above the price at which monies can be obtained on the overnight market. The appropriateness of that approach only increases where, as here, the defendants are financial institutions that necessarily purchase funds in a wholesale, rather than retail, market.

(v) Additional errors in rate selection

87. At no stage have the appellants sought to argue that a rate of compound interest based on the presumed profitability of a defendant must, *in every case*,[182] be reduced to reflect considerations such as risk, skill, care or diligence, the tax position of the

---

[177] [AJ: 3571](AB9/4446).
[178] AS [143], [AJ: 3571](AB9/4446). See 2004 Law Commission Report at [3.34], [3.37], [3.43] where the Law Commission recommends the maintenance of a practice of awarding compound interest at 1% above the base rate determined by the Bank of England, from time to time.
[179] *Jacobs' Law of Trusts in Australia* (7th ed, 2006) at [2208].
[180] *Vyse v Foster* (1872) LR 8 Ch App 309 (*Vyse*) at 33; *Warman* at 561.
[181] Finn, *Fiduciary Obligations* (1977) p 127ff, especially [288].
[182] *Contra* RS [202].

defendants, and the other considerations identified by the appellants.[183] What the appellants have submitted is that a failure to take these matters into account in the present case was productive of injustice. In simple terms, the rate of *revenue* selected by the Court of Appeal could rationally bear no relationship to the quantum of *profits* which the Court of Appeal presumed each of the 20 appellants to have made. Further, if presumptions can be made as to the conventional level of revenue of a defendant, there should be no difficulty in making analogous presumptions as to the conventional level of tax payable by a defendant on profits and/or the conventional level of expenses incurred in deriving such profits (to nominate two examples).

10 88. So far as the balance of the respondents' submissions are concerned:

(a) tax: the appellants rely on AS [135] in answer to RS [204]. Tax was in issue below,[184] and any difficulties in adjusting for tax do not arise for the reasons set out in the preceding paragraph;

(b) notional liquidation: the appellants rely on AS [137] in answer to RS [205]–[208];

(c) expenses, risk, skill, care and diligence: the appellants rely on AS [133]–[134], [136] and [140] in answer to RS [202] and [209]–[212]. Contrary to the respondents' submissions, each of these matters (including expenses, skill and diligence and risk)[185] was in issue below.

Part III: Appellants' Arguments on Notice of Contention and Cross Appeal

20 **12. Statutory claims (RS [225] – [237])**

89. Special leave is required before the respondents are permitted to make the submissions at RS [225] – [237].[186] Those submissions concern the avoidance of transactions under s 89 of the *Property Law Act 1969* (WA) (alienation of property with intent to defraud), s 120 (settlement of property) and s 121 (disposition of property with intent to defraud) of the *Bankruptcy Act 1966* (Cth) as the bankruptcy statutes apply by virtue of s 565 of the *Corporations Act* (together, **statutory claims**),[187] together with consequential relief.

90. The particular relief to which they would be entitled would differ in material respects from the orders made by the court below. For example, the respondents accept
30 Drummond AJA's analysis that avoidance under the *Bankruptcy Act* occurs no earlier than at the commencement of the winding up.[188] No orders have been made on that basis.[189] No grounds for special leave have been identified by the respondents.

---

[183] AS [134]-[136].
[184] AT:1350(AB), acknowledged by the respondents at AT: 2782(AB); [897] of the appellants' submissions in reply to the respondents' cross-appeal [APPA.000.088.001](AB), referring to [APPA.000.084.002](AB) [1680]-[1689].
[185] Expenses, skill and diligence: AT: 1350-1351(AB); acknowledged by the respondents at AT: 2782(AB), AT: 3857(AB); [APPA.000.088.001] (AB) [877], [896]; Risk: [APPA.000.088.001](AB) [875] (under the heading "Account of Profits and Disgorgement of Interest").
[186] Notice of Contention (AB10/4514) (**NOC**), grounds 1-4, [1]-[8].
[187] Owen J set out the bankruptcy provisions as they relevantly stood at [J: 9076-9090](AB6/2876).
[188] RS [226]. The appellants submit that avoidance under s 121 and s 89 operates from the date of service of the notice of avoidance. In any case, interest runs from the date of service of the notice of avoidance: *Star v O'Brien* (1996) 40 NSWLR 695 (***Star***) at 704C-705A, 707B-707C; *Sheldrake v Paltoglou* [2006] QCA 400 (per Keane JA, McMurdo P and Holmes JA agreeing); *Capital Finance Australia Ltd v Tolcher* (2007) 164 FCR 83 at 113-114 (Gordon J, Heerey and Lindgren JJ agreeing).
[189] See Owen J's orders (AB7/3192) and the Court of Appeal's orders (AB9/4483); cf Carr AJA's proposed orders: [AJ: 3614](AB9/4455).

(i) Compound interest not payable absent Barnes v Addy liability (RS [225]-[230])

91. The respondents identify three bases on which it is said that the Court may order compound interest in respect of the statutory claims.[190]

92. **Section 565**. The respondents contend that compound interest is available "under" s 565 of the *Corporations Act 2001*, based on the equivalent provision as it stood at the time the Transactions were entered into.[191] However, that section (both then and now) merely provides that an applicable settlement is "void". The section confers no power on the court to make any consequential orders in relation to a void settlement, let alone an award of compound interest.

10 93. Lee AJA acknowledged this difficulty.[192] However, his Honour nevertheless concluded that s 565 should be read "as contemplating the use of all appropriate remedial orders including those that would be regarded as appropriate in equity".[193]

94. This conclusion was erroneous. *First*, the substantial reliance placed by Lee AJA on the remarks of Gummow J in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494[194] was misplaced. Gummow J was there discussing the proper construction of s 82 of the *Trade Practices Act 1974* (Cth). Unlike s 565, s 82 expressly conferred a right to damages in favour of a person who has suffered, or was likely to suffer, loss or damage by conduct that contravened the Act. Gummow J's correct characterisation of s 82 as giving effect to "matters of high public policy" is not a label that may be given
20 to any statutory provision, no matter its content, in order that the provision might be construed to confer powers that do not exist.

95. *Secondly*, Lee AJA relied upon the enactment by Parliament of a different statutory regime (Pt 5.7B of the *Corporations Act*) at a time *after* the Transactions in the present case, to justify a right in s 565 to grant relief.[195] That approach should be rejected. Part 5.7B contains a detailed and comprehensive regime of rights and remedies in relation to voidable transactions. In particular, s 588FF empowers the court to order that there be paid to a company an amount that, in the court's opinion, fairly represented some or all of the benefits received because of the transaction.

96. The fact that Parliament saw it necessary to insert s 588FF into the *Corporations Act*
30 tells against Lee AJA's construction of s 565, not in favour of it. The Explanatory Memorandum to the Bill inserting s 588FF expressly recognised that s 565 conferred no such powers on the court.[196]

97. The difficulties in construing earlier legislation by reference to later legislation are well known. As Gummow J recognised, it is a curious way of revealing parliamentary intention at the time of the passing of the earlier provision.[197] However, these difficulties are heightened in the present case because: (a) the later legislation relied upon by Lee AJA concerned a different provision (s 588FF) within a different part of the Act (Pt 5.7B) to s 565; (b) s 565 does not engage the remedies available under s 588FF, even after the insertion of Pt 5.7B; and (c) the terms of s 565 are clear and do

---

[190] RS [225].
[191] RS [229].
[192] [AJ: 733](AB8/3638).
[193] [AJ: 741-742](AB8/3640).
[194] [AJ: 731](AB8/3636).
[195] [AJ: 733ff](AB8/3638).
[196] Extracted at [AJ: 735](AB8/3639).
[197] *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382.

not admit of a construction that authorises the Court to award compound interest.

98. *Thirdly*, none of the authorities cited by Lee AJA[198] support the conclusion reached by his Honour. *Marks* has already been dealt with. The second case – *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 - concerned the *Insurance Contracts Act 1984* (Cth). It does not stand for the proposition that subsequent legislation inserting a new Part into an Act may render an existing provision in a different part of the Act remedial or beneficial in nature. The third case – *Brennan v Comcare* (1994) 50 FCR 555 – concerned the proper construction of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and, in any event, cautioned against relying on judicial statements as to the intention of an Act in order to supplant or supersede the Act's proper construction.[199] The final case relied upon – *Morley v Statewide Tobacco Services Ltd* [1993] 1 VR 423 – concerned s 556 of the *Companies (Victoria) Code*, which imposed personal liability on a director in respect of debts incurred by a company in certain circumstances. That section has no relevance in the present case and is structured in radically different terms to s 565.

99. *Fourthly,* Lee AJA's conclusion is contrary to principle. It is well-established that, upon a transaction being rendered void by reason of s 565 of the *Corporations Act*, the claimant is left to its general law remedies, principally in restitution (i.e. formerly an action for money had and received).[200] Lee AJA's approach has the effect that s 565 itself now confers upon the court a wide range of remedial powers in order to remedy the effect of a transaction being void. If that were the intention of Parliament, one would expect to find it reflected in the words of s 565.

100. *Fifthly*, Lee AJA's conclusion is contrary to well-established authority concerning the *Bankruptcy Act*. That Act[201] does not empower a court to award interest. Rather, the "only foundation" for an award of interest, absent an equitable wrong, is the statutory power to award pre-judgment interest conferred by the applicable Supreme Court Act – here, the *Supreme Court Act 1935* (WA).[202] Section 32 of that Act - like its NSW and Federal Court equivalents – expressly confines the court's power to award interest to simple interest only.

101. **Common law**. Under Australian law, a claimant in respect of a transaction rendered void by s 565 of the *Corporations Act* or analogue legislation is limited to an award of simple interest.[203] So much is conceded by the respondents, who instead invite the Court to follow *Sempra Metals Ltd (formerly Mettallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] 1 AC 561.[204] That invitation should be declined.

102. *Sempra* concerned the ability of a claimant in an action for money had and received on the ground of mistake to claim, as a principal sum, an amount calculated to represent the value to the defendant of funds transferred to it. In finding that such a claim was

---

[198] [AJ: 739]ff(AB8/3640).
[199] At 572.
[200] *Star* at 705.
[201] The same reasoning applies to s 89 of the *Property Law Act 1969* (WA); cf [AJ: 505-507](AB8/3589).
[202] *Spedley Securities Ltd (in liq) v Western United Ltd (in liq) (No 2)* (1992) 7 ACSR 721 (***Spedley***) at 722. McLelland J described s 594 of the *Supreme Court Act 1970* (NSW) as "the only foundation for the inclusion of interest"; approved in *Ferrier and Knight v Civil Aviation Authority* (1994) 55 FCR 28 (***Ferrier***) at 92 (Beaumont, Gummow and Lindgren JJ) in relation to s 51A of the *Federal Court of Australia Act 1976* (Cth).
[203] See eg *Ferrier* at 91-3; *Star* at 702, 705-706; *Official Trustee v Alvaro* (1996) 66 FCR 372 (***Alvaro***) at 433-434; *Pegulan Floor Covering Pty Ltd v Carter* (1997) 24 ACSR 651; *World Expo Park Pty Ltd v EFG Australia* (1995) 129 ALR 685; *Issitch v Worrell* (2000) 172 ALR 586.
[204] RS [230].

maintainable, the Appellate Committee held that a court could order compound interest in respect of monies wrongly paid away by the claimant and recovered by a restitutionary award. In doing so, the House departed from the well-established position – reflected in *Westdeutsche*[205] – that where Parliament has provided for the payment of simple interest, in respect of common law restitutionary claims, the general law will not supplement the statute by providing for compound interest.

103. *Westdeutsche*, not *Sempra*, reflects the position in this country. The respondents have identified no reason, beyond assertion, as to why the existing statutory regime for the award of simple interest should be supplanted. In *SCI Operations*, McHugh and Gummow JJ[206] noted that the existing state of authority "does not favour" the acceptance of a free-standing right to recovery of interest where the defendant has had the use of the plaintiffs' money in circumstances which indicate an unjust enrichment of the plaintiff. In reaching this view, their Honours relied upon the existence of a right conferred by Parliament to award interest in respect of common law claims (in that case, s 51A of the *Federal Court of Australia Act 1976* (Cth)). The force of their Honours' reasoning is even stronger where, as here, the claims in issue are brought in reliance on statutory provisions. McHugh and Gummow JJ's reasoning is also consistent with the approach adopted in *Spedley* and *Ferrier* as discussed above. Their Honour's reasoning should be followed in this case.

104. However, even if the approach in *Sempra* were accepted, that would not assist the respondents in preserving the interest award made by the majority below. Under *Sempra*, a defendant must give up by way of interest an amount equal to that by which it was unjustly enriched – namely, the amount which the defendant would have to have paid in order to purchase an equivalent amount of money to that wrongfully received.[207] In *Sempra*, interest was awarded at the rate at which the Government (the defendant, through the Inland Revenue Commissioners) could borrow the relevant amounts on market.[208] This rate was selected because the UK Government could borrow more cheaply than commercial companies.[209] If anything, *Sempra* reinforces the correctness of the appellants' submissions regarding the appropriateness of the RBA cash rate +1% given their status as financial institutions which access funds on the wholesale, not retail, market.

105. **Equity**. Contrary to the respondents' submissions, it is not "well-established"[210] that a Court of Equity is able to award compound interest in aid of a statutory claim. Indeed, despite the long history of bankruptcy proceedings in Australia and the United Kingdom, the respondents identify no case in which such an award has been made.[211] To hold that equity could or should intervene in the absence of an equitable wrong would also be inconsistent with *Spedley* and *Ferrier* discussed above.

---

[205] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.
[206] *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 [72] – [76].
[207] See eg [2008] 1 AC 561 at 605-6.
[208] [2008] 1 AC 561 at 608.
[209] [2008] 1 AC 561 at 608.
[210] RS [227].
[211] In none of the cases at RS fn 439 was an award of compound interest made. Of the two cases that did consider interest awards, in *Alvaro* an award of simple interest only was made, and in *O'Halloran v O'Halloran* [2002] FCA 1305, no award of interest was made but, in any event, Allsop J referred (at [87]) to the treatment of interest in *Ferrier*, which provided for a simple rate, without disapproval.

(ii) Other relief - bank fees, legal fees, stamp duty and bank interest (RS [231]-[233])

106. The payments referred to at RS [231]-[233] were made under the Main Refinancing Agreements[212] and comprise (a) interest paid to the appellants after the Transactions and before the enforcement of the appellants' securities; and (b) other payments such as bank fees, legal fees and stamp duty. In RS [232], it is contended that these payments should be avoided (a) individually; or (b) as interdependent steps taken to achieve the alleged objective of the "Scheme" so as to fall within the statutory claims.

107. Prior to the NOC, these payments had not been impugned other than as a consequence of claims to avoid the Main Refinancing Agreements. The Prayers for Relief in respect of the statutory claims identified precisely the Transactions which were sought to be avoided.[213] The respondents cannot now change their case and seek to avoid these payments *separately* from avoiding the Main Refinancing Agreements.

108. The Main Refinancing Agreements, although the subject of Ground 2 of the NOC, are not the subject of any submissions by the respondents. Below, Owen J found that the Main Refinancing Agreements were not dispositions of property,[214] and this finding was not appealed or overturned.[215] In any event, the Main Refinancing Agreements were new contractual rights on which a commercial relationship was intended to operate and did not involve diminution of existing property. The reasoning of Drummond AJA and Carr AJA[216] in respect of the guarantees and indemnities applies to the Main Refinancing Agreements.

109. A further difficulty with the new argument is that it depends on treating all of the Transactions and payments on a "Scheme" basis. But the respondents did not seek to set aside all of the Transactions under the statutory claims, nor did Owen J deal with the statutory claims on the basis of any "Scheme" case.[217] Owen J was correct, including for the reasons given by Drummond AJA,[218] in not finding that the Transactions should, or could, be set aside more generally against all the respondents and their liquidators. A claim for avoidance under the relevant statutes requires an examination of each transaction on a transaction by transaction and company by company basis (as was done by Owen J) to establish whether or not it falls within statutory parameters.[219]

110. Finally, the "Scheme" case impermissibly seeks to challenge BGUK's transactions. Those transactions are not challenged under the statutory claims[220] or in the NOC; nor could they be, being transactions entered into by an English company in England.[221]

---

[212] As defined in [J: 9195(e)](AB6/2907).
[213] See prayers E to H of the Prayers for Relief [PLED.008.002.001] (AB1/84).
[214] [J: 9193-9206](AB6/2906), especially [J: 9205-9206].
[215] [AJ: 3173](AB9/4333) and [APPR: 000.032](AB) at [11] on p. 256.
[216] Respectively [AJ: 2498-2512](AB9/4127), [AJ: 3151-3162](AB9/4328).
[217] [J: 9064-9070](AB6/2873). The cases cited at RS footnote 450 are not applicable to the case that was made. Those cases are founded on dicta of Drummond J in *Official Trustee in Bankruptcy v Baker* [1994] FCA 1243. Drummond AJA himself explained ([AJ: 2509-2512](AB9/4131)) precisely what he meant by those comments: whether a particular instrument is avoided under the statutes depends upon whether it is by itself a settlement, disposition or alienation of property within the relevant statutory provision.
[218] [J: 9065](AB6/2873), [J: 9067-9070](AB6/2873), Sch. 38.22 (AB7/3105), and [AJ: 2512](AB9/4132).
[219] *Re Sims ex parte Sheffield* (1896) 3 Mans 340; *re Parry ex parte Salaman* [1904] 1 KB 129; *re McDonald ex parte McCullum* [1920] 1 KB 205; *Re Ebner v Official Trustee* (1999) 91 FCR 353.
[220] See [J: 9070](AB6/2874).
[221] Orders 1.3, 3.3 and 3.10 of the Final Orders (AB7/3192), and the monetary relief concerning them (orders 5.7, 5.9 and 5.16) were not attacked by the respondents under the statutory claims.

(iii) Guarantees and indemnities (RS [234]-[236])

111. For the reasons given by Drummond AJA and Carr AJA,[222] guarantees and indemnities do not comprise dispositions, settlements or alienations of property and reliance on the decisions in *Pacific Projects* and *Lyford*[223] is misplaced.

112. Lee AJA erred in finding to the contrary.[224] The cases cited do not support his Honour's conclusion and his Honour impermissibly adopted the effect of the 1996 changes to the *Bankruptcy Act*. As Drummond AJA[225] pointed out, those 1996 amendments might have brought about a different result, but they do not apply.

113. In respect of RS [234], the respondents are unable to rely on an overall "Scheme" case as avoidance must be dealt with on a transaction by transaction and company by company basis. In respect of RS [235], even if the guarantee is linked to a mortgage, it is the security document itself which creates the disposition, not the guarantee, and it is that disposition which is subject to avoidance.[226]

114. In respect of RS [236] (severability), the reasoning of Drummond AJA and Carr AJA[227] is correct and should be upheld. Clause 3.7(a) of the guarantees was properly severed; and the remaining clauses in the guarantees do not constitute dispositions of property for the reasons given by their Honours.

(iv) Non-plaintiff Transactions (RS [237])

115. The injunction ordered by Lee AJA had the effect of preventing the appellants from exercising rights under the Transactions against companies (including de-registered ones) who were not parties to the proceedings. Lee AJA made this "non-plaintiff order"[228] based on his conclusions in respect of the *Barnes v Addy* claims. In so doing, Lee AJA relied upon his profit-stripping thesis.[229] The respondents seek to uphold the injunction on the basis of the statutory claims. Drummond AJA's reasoning in respect of the statutory claims is against the respondents. His Honour correctly adopted a "transaction by transaction" approach on statutory liability.[230] Carr AJA also found against the respondents on this issue.[231] The injunction should be dissolved.

116. Furthermore, the respondents' claim for injunctive relief offends the principle that a Court should not issue orders affecting the rights or liability of non-parties. While Lee AJA held[232] that "[n]on-joinder of a party is not a bar to relief in the absence of demonstration of direct disadvantage to a third party", this decision is at odds with a wide body of authority.[233] Finally, such an order cannot be justified based on the "Scheme" argument for the reasons already identified.[234]

---

[222] Drummond AJA [AJ: 2498-2512](AB9/4127), especially [AJ: 2500](AB9/4128); Carr AJA at [AJ: 3151-3161](AB9/4328), especially [AJ: 3156](AB9/4329).
[223] Respectively, [1990] 2 Qd R 541 and [1995] FCA 1261.
[224] [AJ: 663-675](AB8/3623).
[225] [AJ: 2501](AB9/4128).
[226] [AJ: 2509-2512](AB9/4131).
[227] Respectively [AJ: 2507](AB9/4130) and [AJ: 3162](AB9/4331).
[228] [AJ: 1281(4)(iii)](AB8/3760).
[229] [AJ: 1271](AB8/3758).
[230] [AJ: 2512](AB9/4132).
[231] [AJ: 3535–3540](AB9/4436).
[232] At [AJ: 1273](AB8/3759).
[233] *Pegang Mining Co Ltd v Choong Sam (No 1)* [1969] 2 MLJ 52; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410; *Victoria v Sutton* (1998) 195 CLR 291 per McHugh at [77].
[234] See paragraph [109] above; and [J: 9070](AB6/2874), [AJ: 2512](AB9/4132).

13. Equitable fraud arising from imposition and deceit (RS [238]-[256])

117. The respondents seek judgment in their favour on the separate ground of equitable fraud, allegedly based upon the "fourth head" of equitable fraud as described by Lord Hardwicke in *Earl of Chesterfield v Janssen*.[235] This claim was rejected by Owen J, and also by Drummond AJA and Carr AJA.[236] While advanced in the NOC, it is a matter for cross-appeal. The NOC asserts that, by reason of the equitable fraud, the Transactions were "void", not voidable. Thus, the claim does not constitute a basis for supporting the existing orders.[237] Special leave should be refused.

No imposition and deceit made out

10 118. The "fourth" category of equitable fraud was described by Lord Hardwicke in *Earl of Chesterfield v Janssen* in terms that were set out by Owen J.[238] Story explained the nature of the fraud with which equity was concerned under the fourth category. [239]

119. Both Lord Hardwicke's formulation and Story's explanation show that it was (a) the coming together in the composition that created the relevant relationship between creditors; and (b) that the vice, or equitable fraud, was in procuring creditors to *give up some or all of their legal rights* as creditors on a false expectation or representation that all others were doing the same for the benefit of the debtor. In this case, there was no relevant common dealing,[240] nor procuring other creditors to give up their legal rights, nor any deceit or imposition.

20 120. The trial judge found that there was no deceit or imposition.[241] As to deceit, Owen J found that LDTC (the trustee for the bond holders) was not deceived in any material respect; nor did the appellants encourage the Directors to keep LDTC in the dark.[242] Carr AJA correctly characterised the case below as one which relied very heavily on the proposition that the appellants actively tried to deceive LDTC.[243] As Owen J summarised: "the imposition and deceit case advanced by LDTC fails on the facts: LDTC was not imposed on, nor was it deceived."[244] The facts included that (a) LDTC was provided with reports in October and November 1989 recording that the Bell group was engaged in negotiations to put the financing of its facilities "on a secured basis";[245] and (b) that Aspinall met LDTC on 26 January 1990 where Aspinall told
30 LDTC that the respondents were providing security to the appellants.[246] Nor was anyone else relevantly imposed on and deceived.[247]

121. At RS [241]-[242] the respondents seek to avoid the requirement for deceit or deception. They propose a new foundation for equitable fraud, namely, that "[i]n each of these cases, the parties to the equitable fraud have transacted so as to prejudice third

---

[235] (1751) 2 Ves Sen 125; 28 ER 82 at 100-101.
[236] [J: 9027-9030](AB6/2863), [AJ: 2609-2611](AB9/4164), [AJ: 3089](AB9/4311) respectively.
[237] See Owen J's orders (AB7/3192) and the Court of Appeal's orders (AB9/4483), e.g. orders 1 and 3.
[238] [J: 4860](AB4/1744).
[239] Story, *Commentaries on Equity Jurisprudence* (3rd Eng ed, 1820): [378], [379].
[240] Owen J at [J: 4890-4891](AB4/1751) and Drummond AJA at [AJ: 2635](AB9/4171). See also AT: 2327-8(AB) where the respondents acknowledged no authority exists to support the application of equitable fraud to a non-common dealing case.
[241] [J: 8988-8992](AB6/2853).
[242] See eg [J: 4294](AB4/1581), [J: 9027](AB6/2863), [J: 9045-9046](AB6/2868).
[243] [AJ: 3071](AB9/4305). See also Owen J [J: 8948](AB6/2844).
[244] [J: 9027](AB6/2863). See also [J: 9046](AB6/2868). As to other non-bank creditors, see [J: 9063](AB6/2872).
[245] Carr AJA [AJ: 3092](AB9/4312).
[246] [J: 8856-8857](AB6/2821).
[247] [J: 9063](AB6/2872).

parties (without their consent) or the public".[248] This formulation finds no support in Lord Hardwicke's dictum or other authority. It would attract equitable fraud to a vast array of contracts and dealings, on the ground only that a contract prejudiced a third party. On this basis alone, the equitable fraud case is not made out. Further, the combined effect of the respondents' proposed modifications to the principle (in RS [242] and RS [244]), would mean that the doctrine in equity would apply whenever: "The parties to the equitable fraud have transacted so as to prejudice third parties (without their consent) or the public ... [where the plaintiff stands] in a such a relation to one or more of the parties to the impugned transaction so as to be affected by the contract or the consequences." That is, a non-party could claim equitable fraud whenever it was prejudiced by someone else's contract, resulting in a vast expansion of equitable doctrine, applying to many commercial transactions, including reconstructions, with unpredictable ramifications.

122. On a correct application of principle, there was no relevant relationship between creditors here.[249] As Carr AJA found, relying on the dicta of French J in *La Rosa*,[250] no relationship between the sets of creditors gave rise to the equitable obligations found in the composition cases.[251] Further, no one procured the other creditors to give up some or all of their legal rights as creditors on a false expectation or representation that all others were doing the same for the benefit of the debtor.

123. Moreover, the respondents fail to deal with an inherent problem identified by Owen J.[252] If equitable fraud arose, *the respondents* participated in it. The fundamental principle of clean hands would prevent the respondents from seeking relief.

Public policy does not assist the respondents

124. At RS [245]*ff*, the respondents seek to support their contentions on the basis that the Transactions offended public policy. This misstates the relevance of public policy to this aspect of equitable fraud. A case of equitable fraud under the fourth limb does not arise because a court considers that a transaction offends public policy. Public policy underlies, rather than defines, the cause of action.

125. In any event, there is no public policy of the type the respondents assert. They assert the existence of a "public policy ... in favour of insolvent companies preserving and applying their assets for the benefit of the body of their creditors as a whole".[253] As Carr AJA noted, the respondents did not adduce any authority directly or nearly directly on point in circumstances where there have been "hundreds, possibly thousands, of cases concerning unsecured creditors taking security".[254]

126. The respondents suggest that the policy is supported by matters at RS [246]-[248]. However the proposition at RS [246] is not a statement of legal or equitable principle. It misapplies and overstates Mason J's observations in *Walker v Wimborne*[255] and suggests an actionable duty owed directly to creditors, contrary to *Spies v R.*[256] The proposition at RS [247] seeks to elevate the statutory provisions into a general doctrine

---

[248] RS [242].
[249] [J: 4890](AB4/1751) and Drummond AJA at [AJ: 2635](AB9/4171).
[250] *Re La Rosa: Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270 at 288.
[251] [AJ: 3089](AB9/4311).
[252] [J: 8989](AB6/2853).
[253] RS [245].
[254] [AJ: 3076](AB9/4307). See also Drummond AJA [AJ: 2640](AB9/4173). Cf. *Harris* at [23].
[255] (1976) 137 CLR 1 at 7. See AS [39]-[42].
[256] (2000) 201 CLR 603 at 635-636.

of equity. The statutes and their proper application circumscribe the statutory policy; they do not create new equitable ones.[257] Similarly for RS [248], Part 5.3A comprises the boundaries of so much of the Harmer Report as the legislature enacted.[258]

Case now alleged was not pleaded

127. The essential matter now relied upon[259] involves an unpleaded allegation of *mala fides* based upon an alleged intention to benefit the appellants at the expense of other creditors by placing assets beyond the reach of those creditors and applying them to discharge the appellants' debts. This was not the case maintained below[260] but is based substantially upon observations of Lee AJA,[261] made without reference to the pleaded case or the way in which the respondents put and conducted their case at first instance.

The remedial consequences of the equitable fraud

128. The submissions at RS [252]-[256] seek to uphold the orders for rescission of the Transactions on the grounds of equitable fraud. Story suggests the result of an equitable fraud is a void dealing. Since the alleged fraud was practised by the appellants *and* the respondents, there would be no reason for imposing novel rates of interest. The Transactions have already been undone under the Statutes; and interest under the relevant WA Statute (the *Supreme Court Act 1935*) accrued and paid. An equitable fraud claim would not add anything. Further, any claims to account, or to compound interest are subject to equitable principle: it is not a punitive jurisdiction. The applicants rely on the submissions above at [72]-[88] in respect of the proper application of equitable principle in respect of interest; and below in respect of any election to an account [129]–[138].

14. Account of profits (RS [257]-[263])[262]

129. Special leave to appeal on this issue should be refused. The respondents' submissions on this issue raise no principle of importance and have insufficient prospects of success to warrant the grant of special leave.

130. An account of profits is a discretionary remedy.[263] A court of Equity determines the most appropriate remedy "to fit the nature of the case and the particular facts".[264] Owen J, Lee AJA and Drummond AJA[265] considered the nature of the present case, and the particular facts before them, and determined that it was inappropriate to permit the respondents to preserve an election after judgment on liability had been handed down. There was no appealable error[266] in that approach.

---

[257] Carr AJA correctly emphasised the place of the insolvency statutes, holding that a creditor, prior to a winding up, is not precluded from taking security from a debtor company facing insolvency. Further, he noted the curious position that would flow if, following the impugned dealings, the relevant company had survived: the statutes would not operate, and yet on the respondents' case, equity would intervene in any event as the dealings would be void: [AJ: 3096](AB9/4314). See also Drummond AJA [AJ: 2640](AB9/4172). Owen J did not permit a case based on a fraud on the bankruptcy statutes: [J: 4901](AB4/1755).

[258] Owen J did not permit a case based on a fraud on the bankruptcy statutes: [J: 4901](AB4/1755).

[259] RS [243].

[260] See [SUBP.003.016](AB) at [6]-[11].

[261] RS fn 475, 476. See also AS[72]. The respondents refer, impermissibly, to findings of "intent to defraud" under the bankruptcy statutes, which involves different considerations. No such allegation was pleaded or particularised as part of the equitable fraud case nor was it put to any of the Directors or bank witnesses.

[262] Notice of Cross-Appeal at [2](AB10/4514).

[263] *Warman* at 559.

[264] *Warman* at 559, *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269 at [1].

[265] Respectively [J: 9707](AB7/3033), [AJ: 1222](AB8/3749), [AJ: 2678](AB9/4180).

[266] See *House v King* (1936) 55 CLR 499 at 504-5.

131. A court may decline to award an account of profits because of practical difficulties that will arise from the grant of that remedy.[267] It cannot seriously be maintained that the trial judge was in error in concluding that the enquiries necessary to ascertain the profit-making by each of twenty disparate banks since 1990 (and associated matters such as apportionment of profits by reference to appellants' exertions) would involve significant practical difficulties.[268] One of those difficulties is that (as noted below) the respondents did not seek an account of profits until 2000, some 10 years after the Transactions and 5 years after the litigation commenced.

132. His Honour's reference to public resources[269] reflects this Court's acknowledgement that "the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources."[270]

133. The absence of error is reinforced by the existence of an alternative remedy that was more appropriate on the facts of this case – namely, an award of interest. In the same way that a court "should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust",[271] it was permissible to have regard to the range of alternative remedies available to the respondents so that "the remedy [was] fashioned to fit the nature of the case and the particular facts".[272]

134. There is no dispute between the parties that an interest award may properly be fashioned so as to operate as a reasonable proxy for an account of profits.[273] The respondents did not adduce any admissible evidence[274] demonstrating that an award of interest was likely to prejudice them in any relevant sense, when compared to an account of profits. Indeed, the respondents' own submissions below and in this Court repeatedly emphasise that an award of interest may properly be made in lieu of an account and may render an account unnecessary.[275]

135. There are four further difficulties. *First*, an account should have been refused on the independent basis that the respondent liquidators were in control from 1991[276] but did not make a claim for an account until an amendment application to the pleadings in 2000. The respondents thus delayed for 9 years. The claim was not made when proceedings were commenced in 1995, a delay of 5 years. A claimant for an account "may not stand by and permit the defendant to make profits and then claim entitlement to those profits."[277] Neither Owen J nor the Court of Appeal dealt with this issue.

---

[267] *Fortuity Pty Ltd v Barcza* (1995) 32 IPR 517 at 532; *Dalysmith Corporation (Aust) Pty Ltd v Cray Personnel Pty Ltd* (NSWSC, 14 April 1997, Young J) at 41 adopted in *Two Lands Services Pty Ltd v Cave* [2000] NSWSC 14 at [90].
[268] [J: 9708](AB7/3033).
[269] [J: 9710](AB7/3033).
[270] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 189 [23]; see also *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 171: "A court must accord justice to the particular litigant. But it must also maintain its responsible use of scarce public resources and consider, in a general way, the impact which its orders have on other litigants and on the public generally."
[271] *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [10].
[272] *Warman* at 559, *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269 at [1].
[273] Of course, in the appeal, the appellants contend that the majority failed to fashion such an award in the manner required by the authorities and evidence before it.
[274] See AS [132].
[275] RS [201].
[276] [J: 9315](AB6/2934).
[277] *Warman* at 559.

136. *Secondly*, the respondents do not merely assert a right to elect between an account of profits and compound interest. Rather, they assert an "informed" right of election.[278] Put plainly, they assert a right to determine for themselves, after a review of all relevant documents obtainable via discovery and interrogatories,[279] whether an account of profits is likely to favour them versus an award of interest. The enormity of this exercise in the circumstances of the present case, as a mere prelude to an election, (possibly an election for existing relief) is a reason of itself to reject the claim for an account. In any event, it is not now a permissible course of action. An election should be made by the time judgment on liability is entered.[280]

137. *Thirdly*, the respondents' submissions at RS [261] incorrectly state the law regarding apportionment and allowances for care, skill, diligence, risk and expenses. *Warman* observed that a court "will" make allowances for skill, expertise and other expenses irrespective of whether or not an antecedent profit-sharing arrangement existed.[281] In addition, a claimant is only entitled to that proportion of the profits of the defendant attributable to the equitable wrong of which it complains.[282] The extent of any resulting apportionment is a matter of judgment that will depend upon the facts of the particular case.[283] The guiding aim is to ensure that the remedy of account does not become a vehicle for the unjust enrichment of the claimant.[284]

138. *Finally*, there is no basis, under Australian law, on which an account of profits can be awarded in aid of a common law cause of action brought in consequence of a statutory claim.[285] Contrary to the respondents' submissions, simple interest, not an account of profits, was awarded in *Alvaro*.[286] Even if such a remedy were available in respect of the statutory claims, precisely the same discretionary considerations would arise as led the courts below to decline to permit an account to take place.

A C Archibald	H K Insall	N Owens	J A Watson	D F C Thomas
T: (03) 9225 7478	T: (02) 9224 1505	T: (02) 8257 2578	T: (02) 8239 0248	T: (02) 9232 4478
F: (03) 9225 8370	F: (02) 9235 1042	F: (02) 9221 8387	F: (02) 8239 0299	F: (02) 9232 1069
archibaldsec@ vicbar.com.au	insall@ stjames.net.au	nowens@ stjames.net.au	watson@ banco.net.au	dthomas@ sixthfloor.com.au

Dated: 5 August 2013

Name: Hugh Paynter
Telephone: (02) 9225 5121
Facsimile: (02) 9332 4000
Email: hugh.paynter@hsf.com

[278] See the heading preceding RS [257].
[279] Notice of Cross-Appeal, [1] (AB10/4514).
[280] *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521-2; *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113.
[281] *Warman* at 562.
[282] *Colbeam Palmer Limited v Stock Affiliates Pty Limited* (1968) 125 CLR 25 at 42-3.
[283] *Warman* at 559.
[284] *Warman* at 561.
[285] *Contra* RS [263].
[286] See (1996) 66 FCR 372 at 433-4.