IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P18 of 2013

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF WESTERN AUSTRALIA

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

Credit Lyonnais
Thirteenth Appellant

Commerzbank AG
Fourteenth Appellant

Date of filing: 15 August 2013
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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

RESPONDENTS' SUBMISSIONS IN REPLY

Part I: Certification for Internet Publication

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

Part II: The Issues

Statutory claims (AR [89]-[116])

2. The respondents' contention is not by way of cross-appeal. They do not seek a discharge or variation of any part of the judgment pronounced below: Rule 42.08. Furthermore, an award of compound interest in respect of the statutory claims would not go beyond the relief actually granted below. It is not to the point that, depending on this Court's decision, the ultimate relief might differ from that awarded by the Court of Appeal, such as by being calculated from a later commencement date or on a more limited range of transactions. That is a possible outcome of any notice of contention.

3. If, contrary to this submission, special leave is required, then it should be granted because the claims raise questions of public importance, namely:

   (a) the extent to which and manner in which equity can and will come to the aid of statutory avoidance provisions by an award of compound interest; and

   (b) the common law power to order compound interest to reverse unjust enrichment[1].

4. Further and in any event, the interests of the administration of justice warrant the grant of special leave. First, the banks concede that the appropriate relief under the statutory claims will need to be determined if they succeed on ground 2 of their appeal;it would be unjust to confine this inquiry by excluding any consideration of compound interest. Secondly, the availability of compound interest against defaulting fiduciaries is already an issue. The arguments and considerations that arise in that respect overlap with those that are relevant here. All the policy reasons why the common law would award compound interest are reasons why equity would do so. It is not only appropriate, but will assist the Court, to consider the availability of compound interest in both contexts.

Corporations Act 2001, s565

5. The banks' criticisms of Lee AJA's approach to s565[2] fail to address the essence of his Honour's reasoning (with which Carr AJA agreed)[3], namely:

   (a) In *Brady v Stapleton*[4] Dixon CJ and Fullagar J accepted that equitable remedies were available for dispositions of property contrary to the Statute of Elizabeth[5].

   (b) The relevant right of action was granted under, and governed by, the *Corporations Act 2001*, so that Act defined the scope of the remedial orders available[6].

   (c) Section 565 is a remedial provision which should be construed broadly so as to give the fullest relief which the fair meaning of its language will allow. That is the first point emerging from the passage in *Marks v GIO Australia Holdings Ltd*[7] which Lee AJA quoted[8], and is a well recognised principle of statutory interpretation[9].

   (d) Whatever may have been the limits of the remedies available under previous versions of the statute, the scope of the remedies available in consequence of an order made under

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[1] Applying *Sempra Metals Ltd v IRC* [2008] 1 AC 561 (***Sempra***).
[2] AR, [92] to [100]
[3] [AJ 3231].
[4] (1952) 88 CLR 322.
[5] [AJ: 721], [AJ: 726]-[AJ: 728]. Cf RS [227].
[6] [AJ: 489].
[7] (1998) 196 CLR 494 (***Marks***) at [99] - [102].
[8] [AJ: 731].
[9] The principle is established in the decisions cited by Gummow J in *Marks* at [99], namely *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44; and *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

s565 is to be considered in the context of that statute. That is the second point of significance emerging from the passage quoted from *Marks*.

(e) Section 565 is to be construed purposively.A construction that would promote the purpose or object underlying the Act (whether expressly stated in the Act or not) shall be preferred to a construction that would not do so[10].

(f) Section 565 defines neither the form of the proceeding nor the remedy for the right it provides[11].

(g) Discerning the nature of the remedy that the legislature contemplated if a transaction were found to be void by reason of s565 may be aided by considering the remedies that were expressly provided for such cases after 23 June 1993[12].

(h) The remedies provided for after 23 June 1993 were extremely wide and intended to involve the Court in making a flexible determination to do justice between the parties and make orders to fit the particular circumstances. Having regard to the extrinsic material to which regard was required to be had, they should be seen as introducing flexibility as to the grant of remedies, not creating remedies where the legislature considered none had existed[13]. Section 565 is to be construed consistently with that purpose.

(i) The nature of s565 was such that it was dealing with conduct of a kind for which equity would exercise jurisdiction to provide an appropriate remedy[14].

6. The respondents do not claim, and Lee and Carr AJJA did not find, that s565 is the source of the jurisdiction to make the orders consequent on avoidance of the Transactions under s565. equity is the source of that jurisdiction. The proper interpretation of s565, as described above, supports the conclusion that a wide range of remedies is available in equity where a transaction is void by operation of s565.

7. Thus the main point remains that equity will provide remedies when a transaction is avoided under s565. The authorities relied on by the banks at AR [99] and [100] do not support their argument to the contrary, because they are all cases of mere preferences. This is a case of intent to defraud by means of a transaction that provided no value to the Bell companies. The banks have not addressed the authorities establishing that equitable remedies are available in respect of the statutory provisions that apply in such a case and on which the respondents here relied[15].

8. As to the commencement date of the calculation of interest, the authorities relied on by the banks[16] are similarly cases of recovery of preferences or uncommercial transactions rather than dispositions of property with intent to defraud creditors. In the case of *Star v O'Brien*[17] that fact formed the basis of Beazley JA's reasoning. In *Capital Finance Australia Ltd v Tolcher*, Gordon J expressly based her decision on the fact that at the time of the uncommercial transaction before the court "there was nothing inherently wrong with it"[18]. The same cannot be said of the current Transactions, which presented "an overwhelming case of intent to defraud"[19]

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[10] [AJ: 736]; *Acts Interpretation Act 1901* (Cth) s 15AA (as it stood at 28 October 2008, being the date of delivery of the trial judge's principal reasons for decision).
[11] [AJ:733]
[12] [AJ:733]
[13] [AJ:734]-[AJ:737]
[14] [AJ:738]
[15] The authorities are cited at RS, [227]
[16] AR, [90], fn 188.
[17] *Star v O'Brien* (1996) 40 NSWLR 695 at 706.
[18] (2007) 164 FCR 83 at [148]
[19] [AJ:557]

9. In *Ferrier*[20] the Full Court noted the approach of the bankruptcy courts of the United States to interest in cases of dispositions with intent to defraud creditors, where interest is awarded from date of transfer, unlike cases of mere preference where it is awarded only from the date of demand. The Full Court described the general approach of the United States courts as having reached a result "broadly the same as that which commends itself to us".

Compound interest at common law AR [101]-[104]

10. As the House of Lords recognised in *Sempra*, there are circumstances where an unjust enrichment cannot be fully reversed without an order for compound interest. *Sempra* was a case of premature payments of advance corporation tax made by mistake and in response to an unlawful demand. The payments were made between 1981 and 1994 and were not set off against actual tax liabilities of the claimant for up to 10 years. In the meantime, the Revenue had the use of money to which it was not entitled, even if it did not use the money in any trade.

11. The majority in *Sempra* identified and applied the following principles:

(a) The benefit a defendant is presumed to have derived from money in its hands is the opportunity to turn the money to account during the period of enrichment.[21]

(b) Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of money that is received prematurely. Restitution requires the whole of the time value of money paid prematurely to be transferred back.[22]

(c) The enrichment must be measured even where this is impracticable (at [46]).

(d) It is open to the recipient to demonstrate that there was no actual enrichment when the money fell into its hands, despite the opportunity to turn it to account.[23]

(e) Where it is extremely difficult or impossible to quantify the benefit, the assumption that the recipient has derived some benefit from the receipt of money prematurely is not displaced and this justifies resort to a conventional rate of interest as the measure of the benefit (at [48] & [49] per Lord Hope).

(f) Ordinary commercial rates of interest, at ordinary rests, would be appropriate if those rates were relevant to the enrichee's circumstances (at [49] per Lord Hope).[24]

12. Lord Hope at [50] and Lord Nicholls at [103] assessed the benefit at the rate and other terms at which the UK Government could borrow money in the market during the relevant period. Lord Walker agreed at [154].

13. As to the minority: Lord Mance would have awarded compound interest in equity's auxiliary jurisdiction and remitted the case for assessment (at [240]-[241]); Lord Scott recognised the common law's ability to award compound interest as part of a restitutionary remedy for money paid by mistake, but only where evidence establishes the interest has actually been earned ([149], [151]).

14. The reasoning of the majority in the House of Lords is applicable here. The statutory claims are in substance of a restitutionary character. Once a disposition is avoided, the disponee's obligation is to give the property back, and to restore the benefits gained from the transaction to the trustee or liquidator. That restoration will be imperfectly achieved if it is confined to the property originally transferred (with or without statutory simple interest). This can be readily illustrated. If the disponee has accrued compounding profits or interest from the use of the property, or can be presumed to have done so since avoidance, then at the date of

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[20] *Ferrier v Civil Aviation Authority* (1994) 55 FCR 28 *(Ferrier)*at 93
[21] *Sempra* at [33] per Lord Hope, and, to similar effect at [102] per Lord Nicholls, Lord Walker agreeing at [154].
[22] *Sempra* at [33] per Lord Hope, and, to similar effect at [154] per Lord Walker.
[23] *Sempra* at [48] per Lord Hope.
[24] *Sempra* at [49] per Lord Hope.

restoration the disponee will hold the property, and/or a fund representing compounded profits derived from the property. Whatever is then held should be restored. If the period between avoidance and restoration continues for many years, the imperfection will be gross if the claimant is denied compound interest and may result in the main benefit of the transaction remaining in the disponee's hands.

15. The denial of compound interest does not afford justice by any measure. Indeed, to confine the remedy to simple interest might only encourage a defendant , who is able to use property the subject of an avoided disposition to generate compounding profits or interest, to take steps, to delay judgment and enforcement.

16. The key difference between the Revenue in *Sempra* and the banks here is factual. On the evidence in *Sempra*, it could not be assumed that the Revenue, or the Government of which it was a part, invested the proceeds and received a compound return in the commercial market[25]. As Lord Hope acknowledged, the rate adopted must be appropriate to the enrichee's circumstances[26]. Here, in contrast, the banks did not borrow the proceeds of the Transactions, but obtained them unlawfully and without giving value in exchange. The Courts below accepted that the banks used the proceeds in their businesses. It is irrelevant, and in any event there was no evidence, that but for the Transactions the banks might have borrowed the amount of the proceeds. Therefore, an ordinary commercial bank lending rate of interest, plus a commercial margin, compounded at the monthly rests applying to ordinary overdraft lending, appropriatly reflect the profits the banks are presumed (in the absence of evidence from them as to the actual profits) to have made with the proceeds of the avoided Transactions.

17. *Commonwealth v SCI Operations Pty Ltd*[27] is distinguishable and the observations of McHugh and Gummow JJ, on which the banks rely[28], were *obiter*. Moreover, those observations were made without the benefit of arguments of the kind presented to, and the reasoning of, the House of Lords in *Sempra*.

Equity's Auxiliary Jurisdiction AR [105].

18. The authorities establish the foundation for equity to come to the aid of the statutory claims, including by an award of compound interest. On the facts in *Alvaro*[29], there was no award of compound interest, but the Court did note that on defeasance the property revests in the trustee in bankruptcy, and thereafter the recipient holds the property and "any profits made from the use of that property" on trust for the trustee. There is no reason why equity should avert its eyes from the conclusion that simple interest is inadequate to strip profits from the disponee, where the wrongdoer has applied the property or its proceeds in its business over many years.

19. An account of profits has been granted in statutory avoidance actions[30], which supports the ability of equity to intervene.

Bank fees, legal fees, stamp duty and interest AR [106]-[110].

20. Owen J found that the Main Refinancing Agreements were dispositions of property by virtue of the cl 17.12 regime[31]. He made no decision as to whether that regime might be severable. The banks did not appeal against, or file any notice of contention in the Court of Appeal contesting, Owen J's finding.

21. These payments were made by the Bell companies pursuant to and in performance of the Main Refinancing Agreements, which were dispositions of property. Further, the payments

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[25] *Sempra* at [42].
[26] *Sempra* at [46], [49]. See also Lord Nicholls at [119], Lord Mance at [240].
[27] *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [72]-[76].
[28] AR [103].
[29] *Official Trustee v Alvaro* (1996) 66 FCR 372 at 426-7.
[30] As to which, see RS at fn 515.
[31] [9205-9206].

themselves were clearly dispositions of property that cannot logically be separated from the agreements under which they were made.

22. The Main Refinancing Agreements were also held to form part of an interdependent Scheme, in which every instrument entrenched and protected dispositions of property in favour of the banks. On this point, the banks' only submission is the technical one that not every Transaction forming part of the Scheme was sought to be avoided under the statutory claims. This is no answer to the substance of the matter. The proper analysis does not depend on treating all the Transactions as a single contract but on considering the individual Transactions whilst recognising their interdependent nature. The fact that individual Transactions forming part of the Scheme, such as those entered by BGUK, may fall outside the relief sought for jurisdictional reasons cannot defeat the point.

23. In any event, the banks do not address the point at RS [233] that the entire suite of Transactions entered into by each Australian Bell plaintiff was sought to be set aside.

24. The authorities referred to at AR [109] footnote 219 are concerned with the principle that recovery in respect of insolvent transactions is limited to the amount required to pay all creditors in full. Their relevance is unclear. In any event, the asserted principle that each Transaction must be examined specifically does not prevent recognition, in appropriate cases, of the interdependent effect of a series of Transactions.

Guarantees & indemnities AR [111]-[114].

25. The banks do not explain why interdependent transactions should be treated separately. The guarantees formed part of a Scheme to entrench dispositions of property by providing a mechanism for the banks to recover their proceeds even if mortgage debentures were avoided and proceeds temporarily restored to the Bell parties. The Court is not hamstrung by the parties' election to express their agreement in two separate documents rather than one. The Court should look to the whole and to substance rather than form.

Non-plaintiff transactions AR [115]-[116].

26. Contrary to the banks' submission, Lee AJA's conclusion was consistent with, not at odds with, a wide body of authority. There is no bar to relief because the Court has power to grant an injunction affecting third party rights[32]. As to whether the power ought to be exercised, the leading case on which the banks rely[33] does not assist them[34]. The Court of Appeal's decision was discretionary and the banks have not identified any reviewable error. The nub of the issue, as this Court made clear in *Patrick* at [65], is whether an injunction may cause "hardship or disadvantage" to third persons or the public generally. The majority in the Court of Appeal correctly applied these principles.[35] Their Honours concluded that no conceivable hardship or disadvantage is suffered by any non-party as a result of the injunctions granted and that balancing the interests of third parties against the banks could only result in the grant of relief.

Equitable fraud arising from imposition and deceit

No cross appeal

27. Whether the Transactions were void or voidable as a result of the equitable fraud alleged by the respondents is of no moment in the circumstances of this case. The relief granted by the

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[32] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 (***Patrick***) at [65]; *Cretanor Maritime Co Ltd v Irish Marine Ltd* [1978] 1 WLR 966; *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 322.

[33] *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

[34] The only injunctions set aside for the reason that they affected the rights of third parties were paragraphs 12(a), 12(b), 15, 15A and 15B. Other orders also had effects on third parties but were set aside not for this reason but for other reasons eg paragraphs 3, 12(c) and 14. What concerned the Full Court about the former group of orders was that they "do in a direct and substantial way affect the obligations and rights of the players [and coaches]". The injunctive relief granted below is analogous to the injunctions that the Full Court would have left intact had they not been set aside on other grounds.

[35] Lee AJA at AJ [1269]-[1272]; Drummond AJA [2679]

courts below was that the Transactions were rescinded *ab initio*. The consequences of that relief are the same as those attaching to a declaration that the Transactions were void. The respondents do not seek any variation in the orders made by the Court of Appeal. The banks' objection is a technical and procedural one which has no substance and should not shut the respondents out from their claim.

28. If special leave to cross-appeal is necessary, it should be granted because the equitable fraud claim is an alternative basis to confer what is in substance the same relief as was granted below, and arises out of the same facts as the *Barnes v Addy* claims the banks seek to overturn. In those circumstances, the respondents should not be denied an alternative basis for resisting the banks' attack on the judgment below. It would be unjust and contrary to the interests of the administration of justice for this to occur. The scope of equitable fraud, and whether it is confined to the composition cases as the Banks contend, is a question of general importance.

Misdescription of respondents' case – no need for procurement or common dealing

29. The banks' reply submissions proceed as though the respondents were pursuing a claim of equitable fraud of the sort identified in the composition cases[36]. The passages from Story and Owen J which the banks cite are confined to those cases[37]. While Owen J acknowledged that he had omitted parts of the quote[38], the banks present it as comprehensive. The circumstances in which equity will provide relief to third parties are not closed.[39] Owen J acknowledged that many other situations could amount to the fourth kind of equitable fraud and that the plaintiffs were not pursuing a composition case[40].

30. Thus, the banks' arguments that creditors must have been procured to give up their rights through deception, only apply to a type of case which the respondents are not pursuing. The cases cited in the respondents' reply submissions include many which do not have that element, and in which there was no common dealing between the affected persons and the parties to the equitable fraud[41]. Contrary to AR [122], there is no reference in *La Rosa* to common dealing, and the case is distinguishable because, as French J observed, there was no suggestion of intent to defraud creditors[42].

31. There is nothing in the appellants' pleading point. At trial, the respondents pleaded an imposition and deceit based on the facts which founded the *Barnes v Addy* claim[43]. The claim articulated in the notice of contention is based on findings as to those facts by the trial Judge and the majority in the Court of Appeal. Some of those facts were also relevant to the statutory claims and in that regard there are unchallenged findings.

Misdescription of respondents' case – imposition and deceit

32. The banks pick out isolated passages from the respondents' reply submissions in order to wrongly allege that the respondents are pursuing an extreme case which would make equitable fraud apply to a "vast array of contracts and dealings"[44]. The respondents do not assert that *any* transaction which prejudices third parties without their consent effects an imposition and deceit. The respondents' submission is that the transaction must have been

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[36] AR[118]-[119].
[37] Story and Randall, *Commentaries on Equity Jurisprudence*, 3rd Edition, Sweet and Maxwell (1920) [378]-[379]; [J:4860]; see AR [118].
[38] [4861].
[39] *Re La Rosa; Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270 (*La Rosa*) at 288.
[40] [4861], [4863]. An example is the rule in *Hopkinson v Rolt* (1861) 9 HL Cas 514; 11 ER 829, which is good law in Australia: *Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293; *R&I Bank of Western Australia Ltd v Cash Resources Australia Pty Ltd* (1993) 11 WAR 536; and continues to be applied: *Oversea-Chinese Banking Corp Ltd v Malaysian Kuwaiti Investment Co & Aljade Pty Ltd* [2003] VSC 495. There is no reason why the principle in *Hopkinson v Rolt* should be confined to real property and the instances identified by Lord Hardwicke. It should apply to property generally.
[41] RS [242] fnn 467-472 and 479. The respondents' acknowledgment, referred to at AR fn 240, was that there was no case law confirming a public policy in preventing agreements that delay or compromise the prospect of a valid and effective restructure. The respondents did not acknowledge that there were no non-common dealing cases of equitable fraud.
[42] *La Rosa* at 288.
[43] 8ASC para 65M.
[44] AR [121].

entered into *mala fide* in respect of third parties, in the sense used in *Chesterfield*[45], which in this case occurred because the Courts below held that the very point of the transactions was to benefit the banks at the expense of non-bank creditors[46]. Indeed, the Court of Appeal correctly held that the Transactions were aimed at defeating the rights of BGNV and the bondholders[47].

Participation of Bell respondents in Transactions

33. Since the fourth kind of equitable fraud is founded on public policy, the fact that a plaintiff was party to the impugned transaction does not preclude the transaction from being set aside[48]. In any event, LDTC and the other non-bank creditors of the Bell companies who will ultimately benefit if the equitable fraud claim is upheld were not party to the equitable fraud.

Public policy

34. The proposition at RS [246] accurately reflects a passage in *Kinsela*[49] which was quoted with approval by Gummow and Hayne JJ in *Angas Law Services Pty Ltd (in liq) v Carabelas*[50], and is consistent with the other authorities in this area discussed at RS [116]-[123]. It explains the position of creditors of a company that is insolvent or nearly so, and along with the other sources cited it recognises the public policy on which the equitable fraud claim is based. The respondents make no claim that there is an actionable duty owed to creditors[51]. The disputed proposition does not purport or need to be "a statement of legal or equitable principle"[52].

35. Similarly, the proposition at RS [247] is not asserted to be "a general doctrine of equity"[53]. It is a statement of the policy that is recognised in the cases cited. That policy is also one that underlies the insolvency statutes.

36. As to the Harmer Report, even if there was a rule that the subsequent enactment of legislation somehow circumscribed or subsumed the policies stated in the report, the enactment of Part 5.3A had not occurred at the time of the Transactions. So there is no reason not to give the Harmer Report full weight, as a considered and influential statement of the public policy prevailing at the relevant time[54].

The remedial consequences of the equitable fraud

37. The banks state that the Transactions have already been undone under the statutes[55]. It is the case that the respondents contend that all of the Transactions should be set aside on the basis of the statutory claims[56]. However, the banks challenge these contentions[57] (and the relief based upon *Barnes v Addy* liability). Nevertheless, the implicit recognition in the submission by the banks that the equitable fraud claim provides a separate basis upon which the respondents, if successful, would be entitled to orders undoing the Transactions is correct.

38. If the equitable fraud claim is upheld, and the *Barnes v Addy* claims are not, then the respondents are entitled to relief avoiding the Transactions (alternatively, declaring them to be void) and providing for recovery of payments made to the banks under the Transactions.

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[45] *Earl of Chesterfield v Janssen* 2 Ves Sen at 156; 28 ER 82 at 100-101 and see RS [241].
[46] RS [243].
[47] Lee AJA at [AJ:556], [AJ:559], [AJ:984], [AJ:995], [AJ:1018]; Drummond AJA at [AJ:2091] and [AJ:2391]
[48] *Debenham v Ox* (1749) 1 Ves Sen 276 at 277; 27 ER 1029 at 1030; *Mare v Sandford* (1859) 1 Giff 288 at 295; 65 ER 923 at 926. Cases in which the plaintiff was party to the equitable fraud (or was the personal representative of such a party) include: *Gale v Lindo* (1687) 1 Vern 475; 23 ER 601; *Hall v Potter* (1695) Shower 76; 1 ER 52; *Law v Law* (1735) 3 P Wms 391; 24 ER 1114; *Woodhouse v Shepley* (1742) 2 Atk 535; 26 ER 721; *Jackman v Mitchell* (1807) 13 Ves Jun 581; 33 ER 412; *Davis v Holding* (1836) 1 M & W 159; 150 E.R. 388; and *Hermann v Charlesworth* [1905] 2 KB 123.
[49] *Kinsela v Russell Kinsela Pty Ltd (In liq)* (1986) 4 NSWLR 722,730.
[50] (2005) 226 CLR 507 at [67].
[51] See RS [118].
[52] Cf AR [126]
[53] Cf AR [126].
[54] See AR [126] and RS [248].
[55] AR, [128]
[57] AR, [106] to [116]

The avoidance (or voidness) takes effect from the outset. Therefore, the equitable fraud claim, if upheld, supports the declaratory and monetary relief granted below.

39. Further, there is no reason why the rate of interest to apply to the monies recovered under the equitable fraud claim should differ from the disgorgement rate of interest awarded on the basis of the *Barnes v Addy* claims. Nor is there any reason why the banks should be permitted to retain profits earned as a result of an equitable fraud, any more than they should retain profits earned as a result of knowing receipt or knowing assistance in the *Barnes v Addy* context[58]. And where the imposition on the third party creditors has the effect of preventing what would otherwise have been a flow of funds to them from one of the parties to the fraud, and upholding the claim will restore that flow, it would be against conscience and public policy for the banks to retain profits earned over a 20 year period from the proceeds of their equitable fraud.

Account of profits AR [129]-[138]

40. Special leave has been granted in respect of the award of compound interest, in lieu of an account of profits. The natural and just corollary is that special leave should also be granted in respect of the Court of Appeal's refusal of an account profits. More specifically, special leave should be given on the respondents' cross-appeal for the following reasons.

41. First, the reasoning by the trial judge in refusing to order an account of profits had two aspects, the first of which was that the purpose served by an account could be adequately fulfilled by other simpler remedies, particularly ancillary monetary relief and an award of compound interest[59]. This approach was also referred to by the majority of the Court of Appeal[60]. The banks now challenge the award of compound interest. In doing so, they challenge one of the reasons for refusing the award of an account of profits. In that respect, the issues are inextricably linked and there would be an injustice in allowing the banks to challenge the interest award without allowing consideration of the consequences for the decision to refuse an account of profits.

42. Secondly, the trial judge relied on public policy grounds of limiting the expenditure of public resources as the second of two reasons for refusing an account of profits[61]. This was upheld by majority in the Court of Appeal[62]. Such matters were irrelevant to the discretion to be exercised. Contrary to the banks' submissions[63], this contention does not raise a *House v King* challenge to a discretionary decision. The issue raised is whether, in equity, such matters are irrelevant to the exercise of the discretion to order an account of profits[64]. This is a point of principle. The respondents are not aware of an authority, nor do the banks identify one, where an account of profits was refused in order to avoid the expenditure of public resources.

43. Thirdly, the proper bounds of the discretion to refuse an account of profits and to make an award of compound interest in lieu is a question of general importance. The issue is confined, does not require a review of the facts and will not increase in any material respect the time required for the hearing of the appeal.

44. Fourthly, in granting special leave to the banks, the fact that the respondents would be asserting an entitlement to an account of profits was noted by the Court[65].

Not a Proxy for Actual Profits

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[58] See *ET Fisher & Co Pty Ltd v English Scottish and Australian Bank Ltd* (1940) 64 CLR 84, 103; *McKewan v Sanderson* (1875) LR 20 Eq 65, 74.
[59] [9707], [9711]
[60] [AJ:1220]-[AJ:1222], [AJ:2678]
[61] [9708]-[9710]
[62] [AJ:1221], [AJ:2678]
[63] AR, [130]
[64] RS, [258]
[65] T19

45. The banks now assert that 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[66]. The respondents do not accept that an interest award is a proxy for an account of profits in the sense that it involves an attempt to measure or reflect the actual profits earned[67]. Rather, an interest award in equity (where claims of the kind in this case are upheld) is based upon a level of presumed profits.

Practical difficulties not the issue

46. The decision below does not rest on the practical difficulties in taking an account. Rather, the concern relied upon is the use of public resources. There is no established or recognised principle of equity that would allow a court to exercise its discretion as to relief by reference to such a consideration. The banks cite no authority to support such a proposition. They do not answer the points at RS, [259-60]. Their reliance on *Aon*[68] is misplaced. Considerations as to the proper and efficient use of court resources may lead the Court to adopt particular procedures in taking the account, but procedural principles cannot be called in aid as a basis for refusing substantive relief.

47. The banks submit that a court may decline to award an account of profits because of practical difficulties[69]. The true principle is that difficulties are a reason for ordering the alternative of interest on a disgorgement basis not a reason for refusing to allow a claimant to elect if it wishes to do so. A discretion to decline the right to elect for an account by reason of difficulties would mean that difficulties could be called in aid by the wrongdoer to avoid scrutiny as to the level of profits actually made. Any such discretion would be fundamentally inconsistent with the rationale for recognising *Barnes v Addy* liability where there have been dealings with fiduciaries acting in breach of their fiduciary obligations and requiring disgorgement of profits.

48. As to the cases relied upon by the banks[70], *Fortuity v Barcza*[71] is wrongly decided. It is a first instance decision in which no authority is cited and no analysis undertaken to conclude that the difficulties involved an account do not justify an order giving the party the right to elect. In *Dalysmith*[72], Young J simply makes an *obiter* reference to Dean, The Law of Trade Secrets[73]. Dean asserts the unqualified proposition that the court has a general discretion as to whether there should be an account of profits or damages. It is a proposition that is contrary to the subsequent decision of this Court in *Warman*[74] which made clear that a party who so elects is entitled to an account of profits subject only to questions as to whether the remedy should be withheld according to settled principles[75]. In *Dalysmith* a right to elect was given[76]. The decision in *Two Lands Services Pty Ltd v Cave*[77] simply quotes the *obiter* passage from *Dalysmith.* In that case also, the court granted an election for an account.

49. Finally, the respondents do not accept that there would be difficulties in undertaking an account because the court may make appropriate orders to confine the procedure[78].

The making of the claim to an account

50. As to the banks' reliance AR [135] on the fact that the claim for an account was added by amendment,, there is no appeal against the decision to allow the amendment.

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[66] AR, [134]. This stands in some tension with the banks' submission in chief concerning compound interest.
[67] RS, [191], [201], [202]
[68] *Aon Risk Services Australia Limited c Australian National University* (2009) 239 CLR 175
[69] RS, [131]
[70] AR, fn 267
[71] (1995) 32 IPR 517 at 532
[72] *Dalysmith Corporation (Aust) Pty Ltd v Cray Personnel Pty Ltd, NSWSC, 14 April 1997*
[73] His honour refers to p330, but the reference appears to be to the passage at the foot of p331.
[74] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (Warman)
[75] *Warman* at 559-60
[76] *Dalysmith Corporation (Aust) Pty Ltd v Cray Personnel Pty Ltd [No 2]* [1997] NSWSC 411
[77] [2000] NSWSC 14
[78] RS, [260]

An informed election

51. It is for the court to consider the extent of information to which a party is entitled in order to make an informed election[79]. The court has the power to confine any discovery to that which is properly required in order to make an informed election. The limited discovery that the respondents seek was set out in their submissions below[80].

52. As the respondents' claim for a right to elect has been refused until now, there has not been an election to take interest instead of an account by entering judgment in the terms ordered below. Further, the established practice is that election is made after liability is determined. The respondents were denied the usual opportunity to make an election.

10 *Allowances*

53. This is not a case where the property that has been appropriated is a business opportunity. The banks received monies and applied them in their business. The banks do not deal with the principal submission at RS [261].

Official Trustee v Alvaro

54. Even though not ordered in that case, the reasoning in *Alvaro*[81] shows that an account of profits is available in equity's auxiliary jurisdiction to come to the aid of the statute. This is because on defeasance the property, or the proceeds then held, re-vests in the trustee in bankruptcy, and thereafter the recipient holds it on trust for the trustee.

General

20 55. The banks' submissions raise issues that go beyond the grounds of appeal, such as the attempts to challenge findings concerning improper purpose and the nature and effect of the Transactions. The respondents object to the course the banks have taken.

Dated: 15 August 2013

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[79] See for example, *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 70 FCR 436, 451

[80] APPR.000.032 at p 320-1, para 100: "(a) the annual reports and financial accounts for each appellant for each reporting period; (b) documents recording information concerning the company tax rate applied to the appellants' earnings; (c) details of dividends paid during the period; (d) details of capital raisings during the period showing their dilutive effect; and (e) documents recording the prudential requirements governing each of the appellants".

[81] *Official Trustee v Alvaro* (1996) 66 FCR 372 at 426-7