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: 12 July 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

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

2. The appeal, notice of contention and cross-appeal present the following issues:

Barnes v Addy

(a) is *Barnes v Addy* liability confined to instances where the conflict or profit rules that apply to fiduciaries have been breached?

(b) is the first limb of *Barnes v Addy* confined to the receipt of trust property or does it apply to receipt of property to which a fiduciary obligation attaches, particularly company property controlled by directors?

(c) if the first limb applies to company property controlled by directors, does it apply where directors deal with company property for an improper purpose or in breach of the duty to act *bona fide* in the interests of a company as a whole?

(d) on the facts as found, did the directors deal with company property for an improper purpose?

(e) on the facts as found, did the directors breach their duty to act *bona fide* in the interests of the Bell companies by causing those companies to enter into the Transactions?

(f) is it sufficient to support a finding that the directors breached their duty to act *bona fide* in the interests of each of the Bell companies that the Court found that the directors had no, or no reasonable, foundation for the decision to enter into the Transactions; or the directors had no regard to the effect of the Transactions on creditors of each of the Bell companies; or the directors disposed of, or otherwise dealt with, company property for no value and no other commercial benefit?

(g) did the Court of Appeal adopt an interventionist approach in concluding that the directors breached their duties by entering into the Transactions?

(h) on the facts as found and leaving aside the property transferred to the banks by the mortgages, mortgage debentures and share mortgages (which was not in dispute), did the banks receive property from the Bell companies as a result of the Transactions?

(i) what is required by the reference to a "dishonest and fraudulent design" in the second limb of *Barnes v Addy*, and is it possible for that requirement to be satisfied where there is no conscious dishonesty by the fiduciary?

(j) on the facts as found, did the Bell parties establish second limb liability on the part of the banks and was that case within the pleadings?

Compound Interest

(k) where there is a finding of *Barnes v Addy* liability and where the monies that Equity requires to be restored have been used by the third party for its own commercial purposes for a considerable period, does it accord with equitable principles to award interest on a profit-disgorgement basis when requiring that the monies be restored?

(l) did the Court of Appeal properly apply those principles in awarding the Bell parties compound interest at WBIR plus 1% with monthly rests?

Other Grounds for Upholding the Remedies Granted to the Bell parties (Contentions)

(m) if the *Barnes v Addy* claims are not upheld, should relief of the kind granted below be upheld on the basis of the liability of the banks under the statutory claims?

(n) if the *Barnes v Addy* claims are not upheld, should relief of the kind granted below be upheld on the basis of the claim of equitable fraud?

Account of Profits (Cross-Appeal)

(o) are the Bell parties entitled to orders giving them the right to elect, as against each of the banks, for an account of profits, instead of compound interest?

10 **Part III: Judiciary Act**

3. It is certified that the respondents do not consider that notice should be given in compliance with s78B of the *Judiciary Act 1903*.

Part IV: Narrative of Facts

4. The respondents do not dispute the appellants' narrative so far as it goes, except to say that Owen J did not consider whether the statutory insolvency claims would have justified compound interest[1]. However, they say that the narrative is incomplete and there are further material facts[2].

5. As at January 1990, the Bell group had three main sources of borrowings; (a) BGF had borrowed $131.5m from the Australian banks; (b) BGUK had borrowed £60m from a
20 syndicate of banks led by Lloyds Bank; and (c) BGNV, TBGL and BGF had raised $585m from various subordinated bondholders who had participated in five bond issues with most of those funds being raised by BGNV and advanced by "on-loans" to TBGL or BGF ($435m). The debts to the banks were unsecured and the only companies liable to the banks were BGF, BGUK and TBGL[3].

6. There was an issue at trial as to whether the on-loans were subordinated. Owen J held that they were. The decision of the majority in the Court of Appeal to overturn that finding is not challenged in the present appeal. Therefore, at all relevant times, BGNV was a very large ordinary creditor of TBGL and BGF and the bondholders were the only material creditors of BGNV. In practical commercial terms, the bondholders
30 claiming through BGNV were not subordinated creditors.

7. On 26 January 1990, three main facility agreements were entered into with the Australian and Lloyds syndicate banks. They comprised (a) the ABSA, made between BGF and WAN (as borrowers), TBGL (as guarantor) and the Australian banks; (b) the ABFA, between the same parties; and (c) the LSA No 2 between BGF and BGUK (as borrowers), TBGL (as guarantor) and the Lloyds syndicate banks[4] (with an appendix that restated the Lloyds facility, RLFA No 2). The facility agreements did not provide for any further advances by the banks.

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1 See the last sentence of para 8 of the Appellants' Submissions (AS).

2 The facts material to the issues in the appeal are extensive. The facts stated in the Narrative of Facts deal generally with the decisions by the directors of the Bell companies to enter into the Transactions the subject of these proceedings. To aid in comprehension, additional material facts concerning the knowledge of directors, the claim to interest and equitable fraud are stated at the appropriate point in these submissions. A separate chronology of facts, as directed by the Court, is provided with these submissions.

3 [4965].

4 [435].

8. The ABSA and LSA No 2 committed the parties to obtain the execution of various security instruments by other Bell companies with no prior obligation to the banks (which companies owned all significant assets)[5]. All worthwhile assets of the group were mortgaged[6]. There was also a commitment to procure guarantees and the subordination of inter-company indebtedness to the debts owed to the banks[7]. Those security instruments, subordination agreements and guarantees were given. Together with the facility agreements, these instruments constitute the Transactions.

9. As a broad generalisation, cl 17.12 of each of the ABFA and RLFA No 2 entitled the banks to receive the proceeds of any assets sold by Bell companies as pre-payments of the principal amounts owing to the banks[8]. The key aspects of the cl 17.12 regime were:

   (a) with some exceptions[9], all the proceeds from the sale of assets were required to be passed to the banks as a pre-payment of the facilities[10]. This obligation applied unless all banks agreed otherwise;
   (b) consent was given to sell some assets, but with the exception of £5m from proceeds of sale of the assets of a particular company (Bryanston) which were allocated to pay UK company creditors, all proceeds of asset sales were to be dealt with according to the cl 17.12 regime[11];
   (c) proceeds of asset sales distributed to the banks as pre-payment of the facilities could not be re-borrowed[12];
   (d) inter-company debt could only be assigned with the consent of the Security Agent acting for the banks[13]; and
   (e) no other financial indebtedness was permitted without the prior written consent of all the banks[14].

10. The Transactions were entered into as a result of decisions by the directors of TBGL and its subsidiaries (Aspinall, Mitchell and Oates) and the directors of the UK companies (who included Mitchell and Bond). At the time of entry into the Transactions, most of the Bell companies were insolvent[15].

11. The Transactions had far-reaching consequences because of the pledging of all worthwhile assets and the effective ceding of control of asset sale proceeds to one creditor (the banks)[16]. They placed the Bell companies at the mercy of the banks[17]. A restructure was not feasible without a reduction in gross indebtedness[18]. This required access to proceeds of asset sales[19]. It also required the bondholders to take a hit[20]. Yet,

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5 [442]-[444].
6 [423], [435], [461].
7 [488]ff. The subordination deeds both deferred the claims of inter-company creditors behind the banks and enabled the banks to take advantage of any rights of the creditors in the event of a liquidation; [AJ:642]-[AJ:644].
8 [516]. At trial, the proper construction of these provisions was not controversial; [1628]-[1631], [1671]-[1673].
9 TBGL and the BPG Group were permitted to retain $1m from any individual asset sale transaction up to $5m in a six month period; [1671]-[1673]. Proceeds from "small disposals" (not permitted to exceed $100,000 for the group in a six month period) were allowed to be retained; [1612].
10 [834], [1595], [1598].
11 [1606]-[1608].
12 ABFA, cl 6.4, RLFA2, cl 6.5.
13 [1613].
14 ABFA, cl 17.3, RLFA2, cl 17.3.
15 [1899], [1903], [1949]-[1954], [AJ:989].
16 [6055].
17 [6052].
18 [6062].
19 [6055].

the cl 17.12 regime meant that there could be no release of funds from asset sales without the agreement of all the banks, described by Owen J as an "all banks" situation[21]. There was nothing more than a hope and certainly not a reasonable expectation on the part of the directors that they would have access to asset sale proceeds caught by the cl 17.12 regime so that the Bell companies would have the ability to pay their debts[22].

12. In negotiating the Transactions, the banks had insisted upon the Bell companies not having a broader right to retain and use asset sale proceeds[23]. There was no agreement by the banks that they would accede to any request to retain asset sale proceeds[24]. The companies needed $25m to survive until May 1990[25].

13. Further, there was insufficient evidence from which to conclude that at any time before May 1990 (that is, several months after the Transactions) there was anything that could reasonably be regarded as a "plan" to restructure[26].

14. As to the decision by the *Australian directors* to enter into the Transactions, Owen J found that:

    (a) they knew that the financial position of the companies was such that they were of doubtful solvency or they were nearly insolvent[27];
    (b) the individual financial circumstances of each company were not considered at all[28];
    (c) no attention was given to the interests of creditors other than the banks[29], particularly the status of the bonds and the on-loans (which was not investigated)[30] and the problems with the challenged income tax assessments[31];
    (d) the directors, appreciating that there was a need for a restructure, but lacking any plans as to how it may be implemented, committed the companies to Transactions which ceded control of all the assets to the banks leaving them nothing with which to effect a compromise with the bondholders and other creditors[32];

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20 [4334]-[4336], [6062].
21 [6058].
22 [5175]-[5176].
23 [1655]-[1666], [5172].
24 [1673], [1675]-[1680], [1687], [5175]. In the result, the banks did release asset sale proceeds, but only with reluctance. A major factor contributing to the banks' decision to waive their cl 17.12 rights and release some asset sale proceeds was to postpone the liquidation of the Bell companies until after the six month preference period had expired in order to "harden" the securities granted by the Transactions; [6983]-[6990], [7066]. Drummond AJA found there to be a mass of evidence in bank documents to support this conclusion; [AJ:2362]-[AJ:2368]. See also Lee AJA at [AJ:602].
25 [1937]-[1938].
26 [5282], [5361].
27 [6035].
28 [5604]-[5605], [5747], [6040]-[6045]. Owen J had found earlier that there was prejudice to individual companies from the Transactions because some companies who had no indebtedness to the banks secured their assets for that liability; [4319]-[4321].
29 [6051(3)], [6065], [6080]. The directors knew that some of the Bell companies had external creditors; [4965].
30 [6047]. Owen J had earlier analysed the effect of the Transactions on the bondholders and considered that there was prejudice to them; [4332]-[4339]. Those findings were made in the context of the finding that the on-loans were subordinated (now overturned and no longer in issue). Owen J found that if the on-loans were unsubordinated then "it would have been all over bar the shouting"; [6049].
31 [6050]. Owen J had found earlier that the Transactions imposed a real detriment upon the Commissioner as a creditor; [4331].
32 [4314]-[4315], [6052]-[6068], [6082]. Owen J accepted the detailed submissions advanced for the Bell parties as to the prejudicial effects of the Transactions; [4317], [SUBP.005.004].

(e) there was no probable prospect of gain to the Bell companies in entering into the Transactions and a probable prospect of loss[33];

(f) the directors caused companies that did not have a pre-existing indebtedness to the banks to undertake such an obligation[34];

(g) the companies were immediately in default upon entry into the Transactions[35];

(h) the effect of the Transactions was to bring about the insolvency of those companies that were not already insolvent[36];

(i) as Mitchell and Oates were two of three directors, the decision of the directors was guided by their improper purpose of protecting the plans to restructure BCHL (Bond Corporation) by doing a deal with the banks to prevent a collapse of the Bell group impacting the restructure of BCHL[37].

15. The *UK directors* took detailed advice about entering into the Transactions. The advice was to the effect that they needed legally binding letters of comfort from TBGL unlimited in amount to ensure that the commitment of all the assets of the UK companies to meet all the indebtedness of the banks would not result in insolvency[38]. The UK directors sought a letter of comfort from TBGL because TBGL was the only source of funds by which BGUK could meet its obligations to creditors including the Lloyds syndicate banks[39]. There needed to be a realistic possibility that TBGL would not go into liquidation[40]. The UK directors received clear advice that they needed to make an analysis of the financial position of TBGL based on reliable figures[41] and be satisfied that TBGL had the capacity to meet its obligations[42]. This was critical to the issue of solvency[43].

16. The UK directors did not obtain the financial information about TBGL that they needed to make that assessment[44]. They relied on simple assurances from their fellow directors Bond and Mitchell[45], who were motivated by the improper purpose of ensuring the survival of BCHL[46]. They had been specifically cautioned not to accept simple assurances[47], and neither Bond nor Mitchell had any knowledge or information to support the assurances they gave[48]. In those circumstances, the UK directors could not have formed *bona fide* the view that the Transactions were of real or substantial benefit to the UK companies[49]. The same fundamental deficiency infected the separate decision by BIIL to enter into the Transactions[50].

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33 [4322].
34 [4312], [6041].
35 [9214].
36 [6041].
37 [4308]-[4309], [6069]-[6071].
38 [5847].
39 [5076].
40 [5872].
41 [5919].
42 [5902].
43 [5925].
44 [5903].
45 [5907], [5921].
46 [5873]-[5877], [5924], [6098], [6101], [AJ:1048], [AJ:1050]-[AJ:1051], [AJ:1053]-[AJ:1054], [AJ:2096].
47 [5919], [5925].
48 See para 72 below.
49 [5923].
50 [5950].

17. The detailed findings concerning the beliefs of each of the directors at the time of entry into the Transactions are addressed in the respondents' argument below. However, it is convenient to refer to several matters immediately.

18. First, immediately before the Transactions, the directors believed that if any of the Australian banks demanded payment, others would follow and neither BGF (as borrower) nor TBGL (as guarantor) would have been able to meet the demands. A call by the Lloyds syndicate banks would follow, which could not be met by BGUK or TBGL and it was probable that the companies would then be wound up[51].

19. In fact, in the month preceding the Transactions, SCBAL served notices of demand upon BGF and TBGL[52]. Those demands were not met and SCBAL served s364 notices on BGF and TBGL[53]. The notices were subsequently withdrawn, but not before TBGL had committed events of default under the bond issue trust deeds[54]. CBA had also made and withdrawn demands in September 1989, knowing that BGF and TBGL could not repay its facility[55].

20. At trial, the Bell parties claimed that the directors were not confined to a choice between the Transactions and liquidation. They had at their disposal alternatives to liquidation by which there could have been a financial restructure with the participation of interested parties (particularly creditors)[56]. The banks claimed that the directors believed (reasonably) that there was no sensible or practical alternative to the Transactions as a first step in a successful restructuring to avoid a winding up and a fire sale of valuable assets[57].

21. Owen J found that there was a range of other possible transactions that might have been available to the directors to effect a restructure[58]. He rejected the claim that the only two alternatives facing the directors were the Transactions or liquidation[59]. He also found that the Bell companies' assets were already in a fire sale situation because of the widely known financial distress of BCHL[60].

22. Secondly, the banks controlled the documents recording the entry into the Transactions. Minutes of meetings for each of the Bell companies were prepared by the banks to record the authority to enter into the Transactions. They stated that the documents were to be executed on the basis that it was in the best interests of the company and there was a corporate benefit in doing so. Owen J found that the minutes were not a faithful record of what occurred[61].

23. Likewise, the recitals in instruments recording the Transactions were prepared by the banks to "recite our way" into corporate benefit for the Bell companies and to "dress up

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51 [418].
52 [262], [5048]-[5049], [7016]-[7018], [7722], [8904].
53 [262], [7018], [AJ:808]-[AJ:810].
54 [262], [7026], [AJ:808]-[AJ:810].
55 [5041]-[5043], [7442]-[7443].
56 [420].
57 [421].
58 [4306].
59 [4300].
60 [1829]-[1830], [1844], [1853], [1861], [1875]-[1876] (as to the need to value the publishing assets on a forced sale, not a going concern basis) and [AJ:2259], [1796], [1798], [1799] (as to the highly speculative prospect of an increase in value of the BRL shares).
61 [5594].

the recitals"[62]. They were prepared without the necessary financial information to support them[63], and could be of no comfort to the banks in the litigation[64].

24. The drafting of the recitals and the minutes was a "triumph of form over substance". Despite references in those documents to there being a corporate benefit to each company in entering into the Transactions, Owen J found that the directors did not know or appreciate the real import of the corporate benefit test[65].

25. Thirdly, the Courts below found that the banks had the requisite knowledge of matters concerning the conduct of directors by which *Barnes v Addy* liability was established[66]. The appeal grounds make no challenge to the findings of bank knowledge. If the issues raised by the banks on *Barnes v Addy* liability are resolved favourably to the Bell parties, then it will follow that the *Barnes v Addy* claims must be upheld.

26. Fourthly, all members of the Court of Appeal upheld the Bell parties' claims that the Transactions (to the extent that they were dispositions of property) must be set aside as dispositions made with intent to defraud creditors.

27. Lee AJA found that there was direct evidence of an intent to defraud creditors on the part of the Bell companies[67]. Further, there was a firm foundation for a conclusion that a real or actual intent at the time the Bell companies disposed of property to the banks was, by execution of the Transactions, to remove the right of all other creditors to participate in a rateable distribution of the assets of the Bell group[68]. This was an overwhelming case of intent to defraud[69]. Further Lee AJA found that the Transactions were entered into for no value. Drummond AJA agreed with these findings[70]. None of them are challenged.

28. As to a claim by the banks that they acted in good faith, Lee AJA found that the banks were determined to have the Transactions executed to prevent the risk of rateable distribution between the banks' claims and the claims of BGNV in a liquidation of TBGL or BGF and they participated in the hindering, delaying or defeating of other creditors that would be effected by the Transactions[71]. The banks did not act in good faith[72]. Drummond AJA agreed[73].

29. Carr AJA concluded that the conduct of the directors was sufficiently dishonest judged by the standards of ordinary decent people for the Transactions to be set aside[74] and that the banks were privy to the intent of the Bell group to defraud creditors[75].

Part V: Constitutional Provisions, Statutes and Regulations

30. The appellants' statement of applicable statutory references is accepted.

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62 [5672]-[5673], [5709], [5758]-[5760], [6051].
63 [5689].
64 [5762].
65 [5760].
66 [8745], [AJ:2271]-[AJ:2276], [AJ:2416].
67 [AJ:548].
68 [AJ:556].
69 [AJ:557].
70 [AJ:587].
71 [AJ: 2513].
72 [AJ:587].
73 [AJ:2513].
74 [AJ:3178]-[AJ:3179], [AJ:3185]-[AJ:3188].
75 [AJ:3194]-[AJ:3195].

Part VI: Respondents' Argument in Answer

Barnes v Addy liability is not confined to breach of conflict and profit rules

31. The banks submit that there must be a breach of the conflict and profit rules that apply to fiduciaries for there to be *Barnes v Addy* liability[76].

32. Both the obligation of a company director to act *bona fide* in the interests of the company, and the duty not to exercise the powers of directors for improper purposes, are fiduciary duties and this has long been accepted in the case law[77]. Both duties are aspects of the fundamental obligation of loyalty owed by directors as fiduciaries charged with the conduct of the company's business and the control of its property and assets on behalf of shareholders.

33. The principles established by *Barnes v Addy* have never been expressed in terms that confine their application to instances where there have been breaches by trustees of the conflict or profit rules. Nor have they been so expressed in subsequent cases in which the application of the principles has been extended, by analogy, to directors[78].

34. The critical identifying feature of fiduciary relationships is that the fiduciary, in the exercise of a power or discretion, acts in the interests of another person who is thereby vulnerable to abuse by the fiduciary of his or her position[79]. It is this affirmative obligation that characterises the fiduciary relationship. So, the Court in *Pilmer* referred to the distinct character of the fiduciary obligation by reference to the pledge to act in the interests of another[80], not by reference to the conflict and profit rules. See also the language used and analysis in *Maguire v Makaronis*[81] and *Mothew*[82].

35. This Court has recently confirmed that *Barnes v Addy* liability is not confined to instances where there has been a breach of the conflict and profit rules that apply to fiduciaries. In *Bofinger v Kingsway Group Limited*[83], the Court found that breach of the affirmative obligation of a mortgagee to account for surplus monies (which was "fiduciary in character") "would suffice to engage the principles associated with the 'second limb' in *Barnes v Addy*".

36. A number of High Court cases have drawn a distinction between prescriptive and proscriptive duties, but those cases were not concerned with the duties of trustees or company directors. In *Byrnes v Kendall*[84], Heydon and Crennan JJ said that the proposition that the law does not impose positive legal duties on fiduciaries is "a very over-simplified proposition in relation to fiduciaries" and it has no application to a trustee. Nor should it have any application to company directors who dispose of

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[76] AS, para 2.

[77] See, for example, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (***Hospital Products***); *Bishopsgate Investment Management Limited v Maxwell [No. 2]* [1994] 1 All ER 261 at 265; *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557 (***Kalls***) at [152]-[158].

[78] The contention by the appellants that the extension to directors is not correct is dealt with below. The extent to which the analogy may apply to fiduciaries other than directors is not in issue in these proceedings.

[79] *Hospital Products* at 97 (Mason J) applied in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 (***Pilmer***).

[80] (2001) 207 CLR 165 at [70]-[72].

[81] (1997) 188 CLR 449 (***Maguire v Makaronis***) at 464-5, 473-4.

[82] *Bristol and West Building Society v Mothew* [1998] Ch 1 (***Mothew***) at 16ff, cited with apparent approval in *Maguire v Makaronis* at 473, note (103).

[83] (2009) 239 CLR 269 at [49]-[51].

[84] (2011) 243 CLR 253 at [122].

company property for improper purposes or in breach of their duty to act *bona fide* in the interests of the company.

37. The recognition of the proscriptive fiduciary duties is protective of the more fundamental affirmative fiduciary obligation[85]. It would be very odd if the consequences of breach of the protective rules were greater than the consequences for a breach of the fundamental fiduciary obligation. Yet, this is the very outcome for which the appellants contend.

38. The principles in *Barnes v Addy* are part of the means by which Equity ensures that its restorative remedies extend to third parties involved in conduct by fiduciaries that is disloyal to their obligation to act in the interests of nominated others.

39. Thus, in *Youyang Pty Ltd v Minter Ellison*[86], this Court recognised that a breach of trust by misapplication of the monies held on trust could give rise to equitable remedies for breach of fiduciary obligation even though the plaintiff had not put a case of breach by the trustee of the proscriptive fiduciary obligations not to obtain an unauthorised benefit from the relationship and not to be in a position of conflict.

40. This approach is also illustrated by the cases concerned with "fiduciary powers" (which is simply an expression used to describe powers that Equity views as being impressed with an affirmative fiduciary duty to be exercised in the interests of others). So, for example, in *Whitehouse v Carlton Hotel Pty Ltd*[87] the exercise by the directors of their power to allocate shares was found to be invalid because it was done for the purpose of favouring one group of shareholders over another (there being no suggestion of breach of the conflict or profit rules). This is Equity recognising the affirmative aspect of the fiduciary obligation to act in the interests of another (the company).

41. Although, in some cases, this Court has used the term "fiduciary duty" to refer to the proscriptive duties expressed in the conflict and profit rules, it is clear that in other cases it has used the term to refer both to those proscriptive duties and to the duty of loyalty that characterises fiduciary relationships. See, for example, the use of both the term "fiduciary duty" and the term "fiduciary obligation" in *Hospital Products* to describe the affirmative obligation being executed or discharged by the fiduciary[88].

42. This broader usage must be borne in mind in considering *Barnes v Addy* cases. In *Consul*, Gibbs J referred to the fiduciary duty (singular) that is owed by a person in a fiduciary position; at 394-5, 397. Stephen J referred to the existence of a fiduciary relationship between Grey and the Walton Group and a finding that Clowes was not aware "that what Grey was doing involved any breach of Grey's duty to others"; at 405, described later simply as "Grey's breach of duty"; at 405, 407. These references are properly to be viewed as describing the overall fiduciary obligation to act in the interests of others, not to the breach of the conflict or profit rules. In *Michael Wilson & Partners*[89], this Court recognised that, even though there may be no profit made by the

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[85] *Consul Developments Pty Ltd v DPC Estates* (1975) 132 CLR 373 (***Consul***) at 397. See also, *Furs Limited v Tomkies* (1936) 54 CLR 583 at 592 ("dealing in a fiduciary capacity with the affairs of the company" the director has a "duty to safeguard and further the interests of the company" (the affirmative fiduciary obligation) which makes it impossible to allow the conflict of duty and interest (the protective fiduciary duties)); *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at [121]; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (***Harris***) at [404]ff.

[86] (2003) 212 CLR 484 at [40]-[44].

[87] (1987) 162 CLR 285.

[88] *Hospital Products* at 67-8 (Gibbs CJ), 108-9 (Mason J), 145 (Dawson J).

[89] *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 (***Michael Wilson & Partners***).

defaulting fiduciary, there may be *Barnes v Addy* liability for knowingly assisting in the breach of "fiduciary obligations"; at [106]. Again, the reference is to "obligations", not to the proscriptive duties expressed in the profit and conflict rules. A similar approach is evident in the reasoning of Millett LJ in *Mothew*[90].

43. A director who breaches either the duty to act *bona fide* in the interests of the company as a whole or the duty to act for proper purposes engages in conduct that is antithetical to the basic fiduciary obligation of a director. A breach of fiduciary obligation of this kind will give rise to *Barnes v Addy* liability where the third party receives property or participates in such conduct knowing of the breach of the obligation.

10 44. This is not to contend that every fiduciary relationship, including the doctor-patient relationship in *Breen v Williams*[91], imposes a general affirmative duty to act in the interests of the beneficiary of their fiduciary obligations. A broad obligation of that kind was rejected in *Breen v Williams*. However, the fiduciary must remain loyal or true to the obligation to act in the interests of others and must not act for improper purposes. Equity eschews any role in evaluating or scrutinising whether particular conduct by a trustee or other fiduciary is in the best interests of the beneficiary[92], but where there is conduct which is, in effect, an abdication of, or a failure to perform, the affirmative duty of loyalty to the interests of others, then Equity will intervene[93].

45. The decisions in the Courts below did not depend on the equitable duty of a director to
20 exercise reasonable care and skill. That duty may be of a different character than the duties to act *bona fide* and not to act for improper purposes[94]. That is because it is not concerned with any position of disadvantage or vulnerability and a breach of the duty does not, of itself, indicate any disloyalty to, or abuse of, the relationship of trust and confidence that is the hallmark of fiduciary obligations[95]. A lack of care is different in character from an abuse of power or a failure to perform at all the obligation to act in the interests of the party who is the beneficiary of a commitment to exercise a power or discretion in his or her interests alone[96]. The first is defective performance, the second is no performance at all; it is an abdication of the fiduciary obligation. Fiduciary law is concerned with the latter, not the former. Mere incompetence (or doing one's
30 incompetent best) is not a breach of the fiduciary obligation[97]. There must be disloyalty to the obligation to act in the interests of another[98]. Given its character, breach of fiduciary law has special legal consequences[99]. One of those consequences is liability under *Barnes v Addy* principles.

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90 *Mothew* at 16ff.
91 (1996) 186 CLR 71 at 113 and 137-8.
92 *Esso Australia Ltd v Australian Petroleum Agents & Distribution Association* [1999] 3 VR 642 at 652-3; *Karger v Paul* [1984] VR 161 at 165; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [7]; and, in the context of company directors, see *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 (***Harlowe's Nominees***) at 493.
93 *Cock v Smith* (1909) 9 CLR 773 at 798; *National Trustees Co Ltd v Federal Commission of Taxation* (1923) 33 CLR 491 at 503-4; *Lutheran Church of Australia v Farmer's Co-operative Executors* (1970) 121 CLR 628 at 639; 652, *McPhail v Doulton* [1971] AC 424 at 441; *In re Hay's Settlement Trusts* [1982] 1 WLR 202, 209-210; *Turner v Turner* [1984] 1 Ch 100 at 109-110.
94 *Permanent Building Society v Wheeler* (1994) 11 WAR 187 (***Wheeler***) at 235-9, *Farrow Finance Co Ltd (in liq) v Farrow Properties (in Liq)* [1999] 1 VR 584 (***Farrow***) at 621.
95 *Wheeler* at 239, cited with apparent approval as to this point in *Maguire v Makaronis* at 473, note (103).
96 *Mothew* at 18.
97 *Mothew* at 18.
98 *Maguire v Makaronis* at 473.
99 *Mothew* at 16.

First limb of *Barnes v Addy* is not confined to trust property

46. Liability under the first limb of *Barnes v Addy* arises where there has been knowing receipt of property to which a fiduciary obligation attaches[100]. The property of a company is property to which a fiduciary obligation attaches[101].

47. As expressed in *Barnes v Addy,* the inquiry concerns whether a third party has received and become chargeable with trust property. Company property has consistently been equated with trust property[102]. Early cases went so far as to refer to directors as trustees due to the extent of the similarity between the position of a director and a trustee when it came to dealing with property in the interests of another[103]. Later, the term fiduciary came to be used as the term trustee was confined in its usage to persons in whom the legal estate was vested subject to a certain trust, but the same fundamental fiduciary obligations were recognised as applying to both[104]. The strength of the analogy is still recognised[105], though it should not be given "excessive significance"[106].

48. 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. In both cases the property is under the management and control of a person or persons who must exercise powers and discretions concerning the property in the interests of others. A third party who receives property knowing it to be dealt with in breach of trust is in the same position as a third party who receives property knowing that it is being dealt with by directors in breach of their fiduciary obligations. In both cases there is a breach of the same kind of duty of loyalty to serve the interests of others.

49. The application of *Barnes v Addy* principles to company directors dealing with company property has long been recognised or assumed [107] without provoking controversy as to its consequences for commercial dealings. There is no reason to depart from that approach and confine *Barnes v Addy* liability to trust property. Indeed, there is strong support for the view that where there is misapplication of property, the duties of a director (and hence liability) are equivalent to those of a trustee[108].

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[100] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (***Farah***) at [116].

[101] *Grimaldi v Chameleon Mining (No 2)* (2012) 200 FCR 296 (***Grimaldi***) at [254], [275]

[102] *Great Eastern Railway Company v Turner* (1872) LR 8 Ch App 149 (***Great Eastern***) at 152-3; *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 (***Russell***) at 479 (Jessel MR); *Re Lands Allotment Co* [1894] 1 Ch 616 (***Re Lands Allotment***) at 631 (Lindley LJ) and 638 (Kay LJ); *JJ Harrison (Properties) Ltd v Harrison* [2001] All ER 160 at [25]-[26]; *Selangor United Rubber Estates Ltd v Cradock [No 3]* [1968] 1 WLR 1555 (***Selangor***) at 1580-2 ; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (***O'Halloran***) at 277-8 (Spigelman CJ, Priestley and Meagher JJA agreeing).

[103] *Great Eastern* at 152-3; *Re Forest of Dean Coal Mining Company* (1878) 10 Ch D 450-2; *Russell* at 479; *Re Lands Allotment* at 631, 638-9; *Selangor* at 1575-7; Sealy, 'The Director as Trustee' [1967] CamLJ 83.

[104] *Consul* at 394; Gummow, 'Knowing Assistance' (2013) 87 ALJ 311 at 312.

[105] *Mulkana Corporation NL (in liq) v Bank of New South Wales* (1983) 8 ACLR 278 at 283-4; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 277-8; *Kalls* at [156]-[157]; *Grimaldi* at [275].

[106] *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at [37].

[107] For example, *Consul* at 396-7; *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443 at 459-60; *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 (***Robb Evans***) at [160]-[161] (and case there cited); *Hancock Family Memorial Foundation Limited v Porteous* (1999) 151 FLR 191 at [72]; *Selangor* at 1580-2; *Bank of Credit and Commercial International (Overseas) Ltd v Akindele* [2001] Ch 437; *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (***Belmont***) at 405.

[108] *O'Halloran* at 277; see also the other cases referred to in *Kalls* at [152]-[159].

First limb of *Barnes v* Addy concerns misapplication of property in breach of fiduciary obligation

50. It is the misapplication of property in breach of fiduciary obligation that gives rise to first limb *Barnes v Addy* liability (irrespective of whether there is a breach of the proscriptive conflict or profit rules)[109]. The cases in this regard are reviewed in *Kalls*[110]. In a number of other cases, the first limb of *Barnes v Addy* has been applied on the basis that property was received with knowledge of breach by directors of the duty to act in the interests of the company as a whole or the duty to act for proper purposes[111]. In *Kalls*, the Court held that prejudicing the interests of creditors was a breach of directors' duties that attracted *Barnes v Addy* liability[112].

51. The findings in this case that the directors breached their duties to act *bona fide* in the interests of the company as a whole and not for improper purposes are sufficient to establish first limb liability. They demonstrate that the property dealt with by the Transactions was subject to the fiduciary obligation of directors who were known to the banks to be acting in breach of their fiduciary obligation to act in the interests of others. The directors engaged in conduct that was antithetical to the duty of loyalty that characterises a fiduciary relationship. They gave control of all the companies' property to the banks without regard to the interests of the individual companies or their creditors, receiving no valuable benefit in return, and thrusting the solvent companies in the group into insolvency. The banks obtained property with knowledge of that conduct and therefore the property continued to be impressed (or should be treated as being impressed) with the fundamental obligation that it be held and administered in the interests of the individual companies.

The facts concerning directors' beliefs, as found by the Courts below

52. As to the duties of directors, the appellants advance two main points. First, they say the Court below adopted an interventionist approach by "second-guessing" the decisions of the directors. Secondly, they say the directors honestly believed on the basis of their assessment that it was in the best interests of all companies to enter into the Transactions. The first point takes some language used by Drummond AJA out of context and in any event presupposes the correctness of the second point. The second point seeks to go behind the factual findings below. There is no ground of appeal challenging factual findings and special leave was given on the basis of statements to the effect that there were no such challenges. The trial judge's findings of fact on matters relevant to breaches of directors' duties were not overturned on appeal and on their review of the facts and evidence, the majority of the Court of Appeal confirmed the trial judge's findings and made additional findings (see below at para 73ff). It is necessary to start with the facts as found to ensure that any legal points raised properly relate to them.

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[109] *Robb Evans* at [160]-[161].

[110] *Kalls* at [152]-[159].

[111] *Farrow* at [147] (breach of duty to act for proper purposes, although the reasoning indicates that breach of the duty to act in the interests of the company as a whole would also have founded liability; at [135]); *Cassegrain v Cassegrain* (2012) 88 ACSR 358 at [215]-[218], [229]-[254] (breach of duty to act in the best interests of the company); *Relfo Ltd (in liq) v Varsani* [2012] EWHC 2168 (Ch) at [70]-[81] (breach of duties to act in the best interests of the company and for proper purposes); *International Sales & Agencies Limited v Marcus* [1982] 3 All ER 551 at 556-7 (breach of duty by giving away the company's money). Note that on the facts in *Cassegrain* and *Relfo* the directors had a personal interest in the transactions, but this was not the basis for the reasoning as to liability.

[112] *Kalls* at [174]-[175].

53. There are three important matters to be borne in mind in considering the findings made below concerning the beliefs of the directors.

54. First, the trial judge did not make global factual findings as to the beliefs of all the directors. As to the Australian directors, he made separate findings concerning the beliefs and purposes of each of Aspinall, Mitchell and Oates. As to the UK directors, he made separate findings as to the purpose of Bond and Mitchell and the conduct of the other UK directors in relying on unfounded oral assurances from Bond and Mitchell.

55. Secondly, at points in his judgment, the trial judge recites evidence given by Aspinall and Mitchell which must be read subject to findings made elsewhere rejecting or discounting that evidence[113]. The banks rely on recited evidence that was not accepted by the trial judge.

56. Thirdly, as the trial judge properly found, honest or altruistic behaviour will not prevent a finding of improper conduct by directors, if that conduct was carried out for an improper or collateral purpose[114]. The trial judge's finding that the directors were not dishonest or guilty of conscious wrongdoing was not a finding that they acted for proper purposes. The banks' submissions do not recognise this distinction.

The finding by the trial judge of no dishonesty concerned ***subjective*** *dishonesty*

57. The banks claim that it is the directors' honestly held beliefs that are decisive[115]. They begin by relying upon the trial judge's finding that no director was dishonest or guilty of conscious wrongdoing[116]. However, this finding must be read in context. The trial judge used the terms dishonesty and conscious wrongdoing interchangeably to mean engaging in conduct with an appreciation that it is wrong; that is, subjective dishonesty. This usage originated in interlocutory decisions by the trial judge[117].

58. The Bell parties expressly disavowed any allegation of *conscious* wrongdoing on the part of the directors[118]. Throughout the trial, the banks favoured the word dishonesty[119] to describe this concession. However, the trial judge made clear that the disavowal concerned dishonesty in the sense that the directors knew what they were doing was not in the interests of each company and they deliberately went ahead[120]. Elsewhere, his Honour described the concession in terms that "it is not alleged the directors appreciated that the acts in question were dishonest and fraudulent"[121].

59. The trial judge's statement at [6031] that he did not find "that any director was dishonest or guilty of conscious wrongdoing", read in this context, goes no wider than the concession made by the Bell parties. This is made clear by the reference in [6031] to what the "plaintiffs do not allege" and the reference at [6034] to no allegation of conscious wrongdoing. The finding concerns the absence of subjective dishonesty by

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[113] Aspinall and Mitchell along with Whitechurch (a director of BIIL only) were the only directors to give evidence. As to the trial judge's findings as to credibility of Aspinall and Mitchell see below under the heading "No honest belief by the directors as to the necessity of the Transactions".

[114] [4626].

[115] AS, para 51.

[116] AS, para 52 referring to [6031] at fn 74.

[117] *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 5]* [2004] WASC 273 (*Bell No 5*) at [29], [83]. See also *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2001] WASC 315 at [126]-[127], [176].

[118] [937].

[119] [941].

[120] [4815].

[121] [4828].

the directors. It is not a finding that their conduct was not dishonest according to ordinary community standards. The trial judge had already found that dishonesty or conscious wrongdoing was not a necessary element of the breach of a relevant fiduciary duty[122] (again referring to dishonesty with a subjective mental element). His finding reflects this approach.

60. Most importantly, it is not an affirmative finding that the directors had a *bona fide* belief that to enter into the Transactions was in the best interests of each of the companies. The trial judge made no such finding. Rather, he found that the Australian directors acted without the necessary financial information, without considering the position of the individual companies and their creditors, and the majority acted for the improper purpose of advancing the interests of the BCHL group. They did not form the necessary belief that there was benefit in the Transactions for each of the companies. He also found that the UK directors did not act *bona fide* in the interests of the UK companies and that Mitchell and Bond did not act for proper purposes. These findings as to actual beliefs of the directors are addressed below.

No honest belief by the directors as to the necessity of the Transactions

61. The appellants assert (without reference to any finding) that the directors considered it was in the interests of all companies to enter into the Transactions[123] and that the honest belief of the directors as to the necessity of the Transactions and their indispensability to any restructure is not in dispute[124]. Both these statements are contrary to the findings made below.

62. As to *Aspinall*, there were key findings that (a) he had no plan as to how the Transactions would bring about the required restructure[125]; (b) he entered into the Transactions without the critical financial information that was needed[126]; (c) he did not consider the financial circumstances of each company[127]; (d) he focussed on the banks to the exclusion of the other creditors[128]; (e) he did not have an appreciation of the corporate benefit test to be applied to the decision whether to enter into the Transactions[129]; (f) his expectation that the cl 17.12 regime would not restrict the release of sale proceeds by the banks was not supported by the documents or any other evidence[130] and was not a realistic view[131]; (g) he could not have had any realistic expectation that the BRL shares would be able to make any material contribution to a restructure[132]; (h) there was no realistic prospect of the publishing assets being able to service the debt of the companies[133]; and (i) any restructure had to involve a reduction in debt levels (which the Transactions did not provide)[134].

63. As to Aspinall's beliefs concerning the Transactions, there is an important finding at [5066]. Aspinall gave evidence that the resolutions recorded in company minutes that

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[122] [4626].
[123] AS, para 64.
[124] AS, para 69, see also 59, 61, 68, .
[125] [5363]-[5369], [5371(d)].
[126] [5747].
[127] [5600]-[5605].
[128] [6051(2)].
[129] [5482], [5755]-[5764].
[130] [5168].
[131] [5174]-[5176], [5180], [5183].
[132] [5141], [6057].
[133] [6057].
[134] [5284].

the Transactions were in the best interests of each company after taking account of its members' and creditors' interests accurately reflected his view at the time. His Honour expressly found that this evidence was not credible[135]. The trial judge also found that Aspinall's views on restructuring were not in his mind when the companies committed to the Transactions[136]. Those findings must be borne in mind when reading the conclusion at [5371] that the trial judge thought Aspinall held most of the beliefs that he professed to have held. Aspinall's evidence as to his subjective belief that the Transactions were in the interests of the companies was rejected. There was no finding that Aspinall believed the Transactions were in the companies' best interests.

64. Aspinall was found to believe that the first step in any potential restructure "was to secure the medium-term financing facility"[137]. However, this was not a belief that the Transactions were in the interests of the companies. He did not consider whether the Transactions could facilitate a restructure.

65. Further, Aspinall's belief concerning a restructure was no more than an idea with no plan as to how it would be implemented or how the companies would survive in the meantime[138]. The immediate cash needs of the companies in the group were in the order of $25m through to May 1990[139]. Aspinall had ideas, but did not explore how those ideas could be achieved and there was nothing that merited the description "a plan"[140]. Aspinall's evidence that he had the available tools to effect a restructure is recited by the trial judge, but he found that later evidence detracts from this general explanation[141]. The Transactions had far-reaching consequences for future moves because of the ceding of control of asset sale proceeds to the banks[142]. Aspinall's idea of a restructure was not an honest belief that the Transactions were in the best interests of the companies.

66. Aspinall never considered whether, and he simply had no belief that, there was benefit for each of the companies in entering into the Transactions. Further, as the trial judge found, once the Transactions had been effected, the only way there could be a valid and effective restructure was if the banks gave up their security[143]. The Transactions earmarked, with some exceptions, all asset sale proceeds for pre-payment of the sums owing to the banks[144]. The Transactions meant that none of the companies could meet their financial commitments as they fell due. They also meant that the directors were at the mercy of the banks[145]. So, in addition to the separate findings that Aspinall had no plan at all, viewed objectively, any prospect of a restructure was scuttled by the Transactions[146].

67. Turning to Mitchell and Oates, not only is there no finding of any affirmative subjective belief on their part that the Transactions were in the interests of the companies, the findings below negate any such belief.

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[135] [5066].
[136] [5088].
[137] [5367].
[138] [6039].
[139] [1937]-[1938] .
[140] [5361]-[5364], [5499].
[141] [1137], [5163]-[5165], [5175], [5195]-[5198], [5224].
[142] [6055].
[143] [6082].
[144] [6058].
[145] [4309], [AJ:607], [AJ: 2513].
[146] [4308]-[4309].

68. *Mitchell* gave evidence that was found to be of marginal utility because he had no involvement in the day to day operation of the Bell companies[147]. It was also not reliable[148]. He knew so little about the affairs of the companies that this had adverse consequences for the view formed by the trial judge of his performance of his duties as a director[149]. Mitchell's evidence that his plans to restructure the BCHL group included a consideration of the restructure of the Bell group was rejected[150]. Mitchell had nothing more than opportunistic ideas born of desperation in the situation that the BCHL group found itself[151]. He, Oates and Bond were members of the "inner cabal" of BCHL[152]. At the heart of Mitchell's concerns at the time was the restructuring of the BCHL group, hence his peripheral interest in the affairs of the Bell group[153]. He and Oates were both well aware of the problems a collapse of the Bell group would cause for the BCHL group through cross-defaults[154].

69. Mitchell's evidence on the topic of restructure is recited by the trial judge[155], but found to be evidence on which he could not rely[156]. The trial judge gave greater weight to evidence on some matters where Mitchell demonstrated actual knowledge[157], but this excluded matters relating to the Bell companies. The trial judge made repeated findings that Mitchell had no actual knowledge of matters relating to the Bell companies[158]. The banks' separate reliance upon [5452] of the trial judge's reasons in this regard is in error[159]. This is a recital of the evidence given. It is immediately followed by the finding that there is little evidence that Mitchell paid particular attention to the Transactions and the consequences of giving security[160]. Further, the trial judge is here considering the matters stated in company minutes[161]. They were not accepted as a record of what occurred[162].

70. As to Mitchell, the trial judge found (a) he had no knowledge of a long list of critical matters[163] and paid little regard to the affairs of the Bell group[164]; (b) there was little evidence that he paid particular attention to the Transactions and their consequences[165]; (c) his evidence regarding belief in the value of the BRL shares lacked cogency[166]; (d) he caused the companies to enter into the Transactions without regard to the issue of corporate benefit[167]; (e) there was a strong case that he failed to discharge his duties at all[168]; and (f) the motivating factor for his actions was to avoid the impact that a

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147 [5372]-[5373].
148 [5440].
149 [5374], [5390].
150 [5431].
151 [5431], [5499], [5523].
152 [6069].
153 [5441].
154 [5572].
155 [5438].
156 [5440].
157 [5440]-[5441].
158 [5374], [5395], [5396], [5431], [5456], [5453], [5467], [5475], [5603], [5877].
159 AS, para 68, fn 128.
160 [5453].
161 [5450]-[5452].
162 [5591]-[5605].
163 [5475].
164 [5456], [6069].
165 [5453], [6091].
166 [5422].
167 [5474], [5482].
168 [5396], [5476].

collapse of the Bell group would have on the plans to restructure the BCHL group, since a failure in the Bell group would give rise to a potential for cross-default into the facilities which had financed the takeover of the Bell group[169]. Mitchell did not give evidence that he considered the interests of individual Bell companies[170]. The trial judge concluded that Mitchell concentrated his energies on saving the BCHL group rather than on the interests of the Bell companies of which he was a director[171].

71. As to *Oates*, there was no evidence as to his state of mind[172]. He was not called by the banks to give evidence[173]. The trial judge found that he must have been aware of the precarious financial position of the companies, the uncertainty surrounding sources of income to cover cash flow deficits, the need to gain access to asset sale proceeds and the terms of the Transactions that might affect such access[174]. Also, he could not have had any realistic expectation (in January 1990) that the BRL shares would be returned to value in time to assist in meeting the substantial bondholder interest obligations to be met in May and July 1990[175]. Oates' primary concern was the survival of BCHL rather than the interests of individual companies within the Bell group[176]. These findings (and those against Mitchell) were made in circumstances where the trial judge heard and accepted evidence to support them from a number of BCHL officers[177].

72. The appellants do not deal with the UK directors. Ultimately, Bond and Mitchell were found to be focussing on the interests of the survival of Bond companies rather than the separate and distinct interests of the UK companies[178]. The trial judge was not satisfied that Bond had any particular knowledge or understanding of the affairs of the UK companies or the Transactions[179] or that beliefs about solvency were honestly and genuinely held by him[180]. Mitchell had no knowledge of the financial position of the Australian companies entering into the Transactions nor any understanding about the issue of the corporate benefit required[181]. There is no finding of a belief on their part that the Transactions were in the interests of the UK companies. As to the other directors, they made a decision based upon unfounded assurances from Bond and Mitchell, contrary to clear legal advice[182], such that the conduct of Mitchell and Bond was causative of the UK directors' breach[183]. Therefore, the UK directors could not have formed a *bona fide* view that the Transactions were in the best interests of the UK companies[184].

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169 [5570]-[5572], [6070], [6091].
170 [5471].
171 [5477].
172 [5478].
173 [5478].
174 [5485].
175 [1799].
176 [5486]. Also in December 1989 when there was serious pressure on BCHL, Oates told the banks that the Bell group would be willing to grant security immediately; [409], [5699], [6548], [6730].
177 [5488]- [5572], particularly [5499], [5523], [5556], [5572].
178 [5876], [5877], [5924].
179 [5875].
180 [5876].
181 [5877].
182 [5919]-[5923].
183 [6101].
184 [5923].

The Court of Appeal upheld the trial judge's factual findings on the beliefs of the directors

73. On appeal, the Court undertook an extensive examination of the evidence and the trial judge's factual findings. Lee AJA upheld the findings concerning the effect of the Transactions, including that they gave the banks control over any attempt at restructure of Bell group[185]. In those circumstances, he held that there could be no rational belief that such a course of action was in the best interests of the company where account had to be taken of the interests of creditors[186]. Further, the findings that there had been no consideration of creditors' interests by Aspinall were upheld[187]. He found that there was more than adequate evidence to support the findings against Mitchell[188]. He upheld the findings against Oates[189]. Lee AJA also found that the findings that there was a failure to consider at all whether participation in the Transactions was in the best interests of each company individually (and its creditors) meant that the directors could not say that they had a *bona fide* belief that the Transactions were in the best interests of the companies[190].

74. Drummond AJA agreed with Lee AJA that the trial judge's findings relevant to directors' duties were amply supported in the evidence[191]. However, Drummond AJA considered that the trial judge had erred in law by testing the veracity of the directors' beliefs by considering what was objectively reasonable[192]. The trial judge made findings as to both subjective belief and objective reasonableness.

75. Carr AJA was in the minority concerning breach of directors' duties. His Honour's reasoning included the following steps:

    (a) he found that the minutes of company meetings reflected the facts as found by the trial judge[193], when in fact the trial judge found expressly that it was inherently unlikely that the minutes were a faithful record of what occurred[194];
    (b) he said that the trial judge did not find that the directors did not discuss the benefits that would flow from the Transactions[195], when in fact the trial judge found expressly that no financial information was tabled or discussed at the meetings[196] and that Mitchell paid little regard to the affairs of the Bell companies[197];
    (c) even though the trial judge found that the purpose of Mitchell and Oates was Bond-centric, Carr AJA stated that his Honour failed to determine their operative purpose[198];
    (d) he relied upon the view that it was in the interest of the Bell and BCHL groups that the Bell group not go into liquidation[199], when the real question was whether

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185 [AJ:607], [AJ:992].
186 [AJ:993].
187 [AJ:995]-[AJ:1001].
188 [AJ:1002]-[AJ:1004].
189 [AJ:1005]-[AJ:1006].
190 [AJ:1018].
191 [AJ:2079].
192 [AJ:2072].
193 [AJ:2756], [5764].
194 [5594], [5760], [5762]. See also [5737], [5742].
195 [AJ:2756].
196 [5604], [5747].
197 See para 70 above.
198 [AJ:2938], [AJ:2952].
199 [AJ:2952]ff.

the Transactions were of any benefit to the Bell companies (a question answered by the trial judge in the negative);

(e) he found that the evidence of Mitchell recited by the trial judge had not been rejected[200], when the trial judge made repeated findings explaining why he did not accept Mitchell's evidence concerning the Bell companies. His reasons included the fact that Mitchell did not pay attention to its financial affairs[201];

(f) he did not dispute the findings concerning Oates other than to say that reliance upon *Jones v Dunkel* was misplaced (even though the banks filed a witness statement of Oates and said on three occasions that they would call him)[202];

(g) as to the UK directors, he did not disagree with the facts as found, but found legal error in the test applied[203]; and

(h) contrary to the majority, he found the on-loans were subordinated.

76. It follows that none of the trial judge's factual findings supporting the finding of breach of directors' duties were overturned by the Court of Appeal. Rather, those findings were confirmed by the majority in the Court of Appeal.

The Transactions were not the only restructure opportunity

77. The banks assert that the Transactions afforded the "only attainable opportunity to preserve and enhance the value of key assets and to restructure"[204]. The trial judge found expressly that this was not so[205]. There was a range of other possible transactions that might have been available[206]. Indeed, not only were the Transactions not the only alternative, they made other restructure alternatives academic because they ceded control to the banks and rendered most Bell companies insolvent[207].

78. Contrary to the banks' submissions, it was not necessary for the trial judge to identify a specific alternative transaction in order to reach these conclusions. It is enough that he found that there was a range of other possible transactions that might have been available. The Court should not entertain a challenge to this finding which would require a detailed review of all the evidence as to the financial circumstances facing the companies. But for the Transactions, there were companies that were solvent, had valuable assets or businesses, and were not indebted to the banks. The trial judge was an experienced commercial judge familiar with insolvency law and practice. He knew the detail of the financial circumstances affecting each of the many companies in the group and dealt with them in detail in his judgment.

The Transactions were not believed by the directors to be the only alternative to liquidation

79. The issue is not whether the directors believed it was in the interests of the companies to restructure or whether the companies would be wound up if there was no restructure.

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[200] [AJ:2909].

[201] [5372], [5422], [5431], [5432]-[5433] (preceding the recited evidence relied upon by Carr AJA), [5440]-[5441] (immediately following the recited evidence relied upon by Carr AJA), [5445], [5453], [5467], [5471], [5473], [5475].

[202] [AJ:2913].

[203] [AJ:2978].

[204] AS, para 64.

[205] [4300].

[206] [4303]-[4306].

[207] [1952], [4308]-[4309], [4317]-[4318] (with the exception of W&J Investments, Ambassador Nominees and Maradolf).

There was no dispute between the parties in that regard[208]. Rather, the issues in the case concerned the purpose and effect of the Transactions.

80. The banks assert the existence of a finding that the directors believed that unless the Transactions were entered into, the companies would be wound up at the suit of the banks[209]. This proposition is not supported by the references given and is contrary to other findings.

81. The banks first refer to a part of the judgment of the trial judge dealing with a claim in the pleadings that the Bell companies were insolvent (a claim that was disputed by the banks at trial)[210]. The particular issue then being addressed was whether all Bell companies were insolvent due to the threat of cascading demands through the companies. At [1881], the trial judge summarises the effect of certain particulars to the pleadings but, as explained below, it is clear from the whole context that the trial judge was not making any finding to the effect alleged by the banks.

82. The statement of claim alleged that by 26 January 1990, BGF and TBGL were insolvent"[211]. Particulars were given[212].They stated that but for the execution of the Transactions, demands for repayment of debts would have been made of BGF and TBGL and they would have been wound up. The Bell parties made no allegation in those pleadings concerning the beliefs of the directors. By their defence, the banks alleged that the directors believed that unless the Transactions were entered into the banks would cause TBGL and BGF to be wound up[213]. They also alleged that the directors believed that if TBGL or BGF were wound up, then each other company in the group may have been wound up[214]. By their reply the Bell parties put the first allegation in issue and admitted the second allegation[215]. This meant that the cascading demand issue was common ground, but it was equally plain that there was an issue between the parties as to whether the directors believed that unless the Transactions were entered into there would be a liquidation of TBGL or BGF.

83. The reasons of the trial judge at [1881] must be read accordingly. This is especially so given the separate plea by the Bell parties that unless the Bell participants were able to enter into a valid and effective restructure, those companies would have been wound up save for certain exceptions and this was known to the directors[216]. This was why there was an issue to be determined as to whether there was a valid and effective restructure that did not involve the Transactions (see para 77 above). Indeed, it was an issue that was actively disputed by the banks and on which they submitted that the Bell parties bore the onus[217].

84. As to the directors, there is no finding by the trial judge of any belief by any director in the terms asserted in the banks' submissions.

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[208] [420].
[209] AS, para 68.
[210] [1061]ff show that section 9 deals with the cash flow insolvency case. It is a passage that is not referred to at all by the trial judge in making his detailed findings concerning breach of directors' duties.
[211] Amended Eighth Amended Statement of Claim [PLED.008.002.001] (**8ASC**), paras 20A and 26A.
[212] Particulars to the 8ASC paras 20A(s) and 26A(b)(ix) [PLED.009.001.001]
[213] Amended Defence and Counterclaim [PLED.010.001], para 48A(e).
[214] Amended Defence and Counterclaim [PLED.010.001], para 48A(f).
[215] Amended Reply to Amended Defence and Defence to Counterclaim [PLED.012.001], para 122(b).
[216] 8ASC, para 33B, 34(b)(ix), (c)(ii), (d)(ii), 37(a).
[217] [4301].

85. The banks refer to [5018] where the belief of Aspinall relates not to the Transactions, but to the need for a refinancing with the banks. This was not in issue. The finding by the trial judge did not attribute a belief to Aspinall that entry into the Transactions was the only option. The banks then refer to [5370], where Aspinall again refers to refinancing. However, this must be read in the context of Aspinall's evidence that the Transactions were to give time to implement a restructure. He does not say it was his belief that it was the Transactions or liquidation.

86. The banks then claim that the Court of Appeal considered that the only alternative was liquidation[218]. Again, this is not supported by the references given.

87. At [AJ:1087], Lee AJA, by way of summary, says that if the interests of creditors had been considered, then commencement of "an appropriate form of administration was the obvious and only course to follow". However, his Honour's detailed analysis shows that he upheld the findings below concerning the prospect of restructure and the actions of the directors foreclosing other options [219]. Properly construed, the term "administration" encompasses an informal restructure by agreement.

88. At [AJ:2095], Drummond AJA refers to the finding by the trial judge at [1881][220] (dealt with above) without explicit recognition of its context. He then refers to the possibility of a decision to carry on business if the interests of creditors were protected. Implicit in this statement is the possibility of a restructure without the Transactions. His reference to "carrying on business over liquidation" is not a finding that there were only two options, the Transactions or liquidation. The reference to [1881] at [AJ:2260] is similarly limited in scope. Indeed, it is apparent from [AJ:2075] that his Honour accepted Owen J's findings as to the possibility of a valid and effective restructure.

89. Finally, the passages at [AJ:2808]-[AJ:2814] are from Carr AJA in dissent. With respect, his Honour's analysis is flawed because it relies upon evidence of Mitchell that was recited by the trial judge and rejected[221].

The appellants' pleading points are without substance

90. First, the banks say that the Bell parties alleged by their particulars that other lenders would only have advanced monies on the same or substantially the same terms as the Transactions[222]. This allegation was made by the Bell parties as part of the claim that the companies were insolvent. It concerns the capacity of the companies to borrow. It is not an allegation about the terms upon which it was proper for directors, in the discharge of their duties, to agree to provide security to the banks as existing unsecured lenders when the companies were in an insolvency context.

91. Secondly, the banks say that it was common ground that the directors believed and that an honest and intelligent director would have believed that it was possible to restructure the debts of the companies[223]. This is not a pleading about any belief of the directors concerning the Transactions. The case of the Bell parties was that there could have been a valid and effective restructure and the Transactions precluded any such restructure thereafter because they ceded control to the banks.

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[218] AS, para 69, fn 132.
[219] [AJ:951], [AJ:992], [AJ:999].
[220] The other reference given does not support the conclusion that liquidation was the only alternative to the Transactions.
[221] See para 68 above.
[222] AS, para 70. The reference to [1693] is a reference to the particulars of the Bell parties' case on insolvency.
[223] AS, para 61. The reference is to pleadings to support the contention.

The banks ignore the findings concerning matters about which the directors had no belief

92. The trial judge found the directors knew that the financial position of the companies was parlous such that they were of doubtful solvency or nearly insolvent[224]. It did not matter that they did not know that the companies were actually insolvent. Whatever its precise terms, the duty of directors to consider the interests of creditors arises in circumstances short of actual insolvency[225].

93. In that context, the trial judge found that the Australian directors:

    (a) did not give any attention to creditors other than the banks[226];
    (b) did not identify the creditors (external and internal) that the companies had or might have had and what effect the Transactions would have had on creditors of each individual company[227];
    (c) did not make inquiries about the substance of the claims concerning income tax assessments (being a substantial debt)[228]; and
    (d) did not consider the detailed information that would have been necessary for them to decide whether there was a corporate benefit to each company[229].

94. The majority of the Court of Appeal upheld these findings and, in some respects, made stronger findings[230].

95. These findings, which are to the effect that particular matters were not considered or given attention, necessarily carry with them implicit findings that there was no belief on the part of the directors as to these matters. There could be no belief as to matters that were not considered.

96. It was also found by the trial judge that the Australian directors failed to carry through an investigation as to whether the bondholders would be subordinated[231]. Aspinall knew about the subordination issue in December 1989. Aspinall was well aware of the significance of the on-loans [232]. While Aspinall did not think they were unsubordinated[233], this was a view formed without any inquiry in respect of a liability worth hundreds of millions of dollars[234]. Mitchell was found to have maintained that the on-loans were subordinated[235], but agreed that he did not turn his mind to the on-loans[236]. There is no finding concerning Oates.

97. On appeal, the majority examined the evidence on the issue and made stronger findings. Lee AJA found that Aspinall made it clear in cross-examination that his understanding

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[224] [6035(1)].
[225] *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 (***Kinsela***) at 732-3; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler [No 2]* (1994) 51 FCR 425 (***Re New World Alliance***) at 444. See also *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 (***Angas Law Services***) at [67].
[226] [6051(2)].
[227] [6040].
[228] [5161], [6050].
[229] [6045].
[230] [AJ:1000], [AJ:1002], [AJ:1005], [AJ:2473] (creditors), [AJ:976], [AJ:979], [AJ:2085], [AJ:2329] (tax), [AJ:1018], [AJ:2091]-[AJ:2094] (corporate benefit).
[231] [6047].
[232] [7131]-[7134].
[233] [5057], [5060].
[234] [6047]-[6048].
[235] [5385].
[236] [5381], [5382].

of the issue went no further than his belief that the issued bonds were subordinated[237]. Also, Aspinall did not seek or obtain advice as to the status of the on-loans and that conduct was consistent with a purpose of providing security to the banks to advance their interests over other creditors (and inconsistent with his duties as a director)[238]. Drummond AJA agreed and said that the failure to make inquiry was a deliberate decision not to inquire when inquiry was required[239].

The directors dealt with company property for an improper purpose

98. The findings described above lead to the following conclusions. A majority of the Australian directors (Mitchell and Oates) acted for the improper purpose of saving the BCHL group from the consequences of a collapse of the Bell group. Motivated by that purpose, they exercised their powers to cause the companies to enter into the Transactions. The Transactions provided no value and had no possible benefit for the companies. To the contrary, they had probable detriment, particularly for those companies that were not indebted to the banks before entering into the Transactions. All inter-company indebtedness was subordinated to the position of the banks. This caused detriment to the bondholders by subordinating the on-loans and detriment to other creditors of Bell companies, such as the Deputy Commissioner of Taxation (DCT). There was detriment to other creditors by giving the banks security without obtaining anything in return. The Transactions were not the first step in a restructure in the interests of all creditors. Rather, control was ceded to the banks so that their securities could harden and they could undertake an informal administration to apply the proceeds of all asset sales in reduction of their (previously unsecured) debts in priority to all other creditors[240].

99. The UK directors were advised that they had to verify by reference to detailed financial information that the letters of comfort they needed to support the entry into the Transactions were "worth powder and shot"[241]. Instead of doing so, they relied upon mere assurances by Mitchell and Bond who, in turn, had no basis for those assurances and acted for the improper purpose of protecting the interests of the BCHL group rather than evaluating the merits of the Transactions for the UK companies. Mitchell and Bond's participation was causative of the decision to enter into the Transactions and therefore their improper purpose was operative on the decision. The companies got nothing out of the Transactions and took on more liabilities[242].

100. Where a decision by directors is sought to be impugned on the basis of improper purpose, it is necessary to identify the substantial object or moving cause for the decision. On the findings made below, the Transactions were not entered into because of any assessment by the directors that they were in the best interests of the companies. Rather, the "substantial object" or "moving cause" was the protection of the interests of the BCHL group; see the analysis in *Whitehouse v Carlton Hotel Pty Ltd*[243]. This is a matter that must be determined objectively. The directors' subjective beliefs as to the moving cause for their decision are not determinative[244].

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[237] [AJ:997], [AJ:2088].
[238] [AJ:996]-[AJ:999].
[239] [AJ:2087].
[240] [AJ:555], [AJ:583] , [AJ:601]-[AJ:602], [AJ:2513], [AJ:3197].
[241] [6096].
[242] [6101], [AJ:1049]-[AJ:1057], [AJ:2078].
[243] (1987) 162 CLR 285 at 294.
[244] *Topham v Duke of Portland* (1868) 5 Ch App 40 at 59; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (***Howard Smith***) at 832; *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 (***Wayde***) at 469.

101. In a case where the directors' decision is moved by both permissible and impermissible purposes, the "preferable view" as expressed in *Whitehouse v Carlton* is that, in order to impugn the decision, the impermissible purpose must be causative in the sense that, but for its presence, the power would not have been exercised[245]. This kind of issue is only likely to arise if the directors give evidence that they would have exercised their powers in the same way for purposes that the court finds to be proper, albeit there were also improper motivating purposes[246]. The present case is altogether different. There were no competing proper and improper purposes, and there was no evidence that the directors were in fact actuated by proper purposes to any extent.

102. In the case of the UK directors, they were acting on advice that they needed to receive detailed financial information to the effect that TBGL could support the letters of comfort in the sense that there was a realistic prospect that TBGL would not go into liquidation[247]. On the findings below, that information, if given, would have shown the Australian companies to be insolvent. Bond and Mitchell, moved by their improper purpose, gave the empty assurances. On the evidence, without those assurances, the other directors would have followed the clear advice they had received and would not have agreed to the Transactions[248].

103. In the case of the Australian directors, the directors never considered whether entry into the Transactions was in the interests of each of the companies. For reasons stated above they formed no view that entry into the Transactions was in the interests of each of the companies. Moreover, it is abundantly clear on the findings below that Mitchell and Oates never undertook the required task, did not have the financial information needed to do so, and they were solely actuated by an improper purpose.

The directors did not honestly believe that the Transactions were in the best interests of the companies

104. The banks' submissions as to the duties owed by directors are to the effect that the directors did not breach their duties because they *honestly* believed that entry into the Transactions was in the best interests of the companies. A proper review of the findings (see paras 60-72 above) shows that there was no finding of the existence of such a subjectively held belief on the part of the Australian directors or the UK directors. Consequently, there is no issue about "second-guessing" the decisions of the directors. They simply failed to hold the requisite beliefs.

105. In those circumstances, the Courts below concluded that it was not necessary to then consider whether an intelligent and honest person in the position of the directors could (or would) have believed that the Transactions were for the benefit of each of the companies[249]. It is far from clear that there should be any such inquiry where directors have acted for improper purposes or breached their duty to act *bona fide* in the interests of the company as a whole. Fiduciaries are usually held to the consequences of breach of their fiduciary obligations without any investigation into matters of causation. The directors as delinquent fiduciaries should not be heard to say that if they had not

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[245] (1987) 162 CLR 285 at 294. See also, *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 (***Charterbridge***) and *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 (***Equiticorp***) at 147-8.

[246] *Howard Smith* at 834-5, [AJ:2010].

[247] [5872].

[248] The unchallenged findings of the trial judge as to the detailed process followed by the UK directors in taking advice are at [5778]-[5872].

[249] [AJ:1011]-[AJ:1012], [AJ:2079], [4618]; *Charterbridge*; *Farrow; Equiticorp* at 148.

breached their obligations then the Transactions would have been undertaken by them in any event[250]. To the extent that the proper approach depends upon whether a breach of the duty to act in the interests of the company as a whole is a breach of a fiduciary obligation then, for reasons addressed earlier in these submissions, it is such a breach. It follows that, once it is found that the Transactions were entered into in breach of the duty, wrongdoing on the part of the directors is established.

106. Even if the submission in the previous paragraph is not accepted and it is necessary to show that a director properly discharging his or her duties could (or would) not have entered into the Transactions, then the findings establish that to be the case. The Transactions gained nothing for the companies. They ceded control over any restructure to the banks, giving them the right to apply all asset sale proceeds that might have been applied in a restructure to the reduction of their loans. This could not be altered without the agreement of every bank. The Transactions were not in the interests of creditors other than the banks. They made those Bell companies that were solvent immediately insolvent. They subordinated all inter-company indebtedness to the claims by the banks so that some companies lost substantial assets. They deliberately ignored the prospect that the on-loans were not subordinated and included provisions subordinating the on-loans. No reasonable director would have entered into the Transactions[251].

Further, there was no reasonable foundation for any beliefs of the directors

107. If, contrary to all of the above submissions, any director held a subjective belief that the Transactions were in the best interests of each of the companies then, in order for such belief to be held *bona fide*, there had to be reasonable grounds for the belief in the sense that they could provide sufficient foundation for an honest director to hold such a belief. A sincere belief, not rationally or reasonably founded, is not sufficient to properly discharge the obligation of directors.

108. It has long been recognised that it is for directors, and not the courts, to consider what is in the best interests of the company[252]. However, to this principle must be added the provisos that the decision must be exercised in good faith and not for improper or irrelevant purposes[253] and that "there are grounds on which reasonable men could come to the same decision"[254]. It has also long been recognised that subjective *bona fides* cannot be the sole test because otherwise you could have a lunatic director acting "in a manner perfectly *bona fide* yet perfectly irrational"[255]. The belief must be held not only honestly but reasonably[256]. It has been recognised that claims against directors may be advanced by showing their actions were "arbitrary or capricious, or due to some irrelevant consideration"[257]. In other instances, there has been reference to the

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[250] *Maguire v Makaronis* at 474 following a discussion of the application of *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 and its application in Australian courts. See also *Furs Ltd v Tomkies* (1936) 54 CLR 583 (where the director was required to account for the benefits derived from breaching fiduciary duty even if they did not correspond to any loss to the company).

[251] See also [AJ:1011]-[AJ:1012], [AJ:2079].

[252] *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 (***Richard Brady Franks***) at 136.

[253] *Harlowe's Nominees.*

[254] *Shuttleworth v Cox Brothers & Co* [1927] 2 KB 9 at 23 per Scrutton LJ (see also 18, per Banks LJ) applied by Latham CJ in *Richard Brady Franks* at 136 and in *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 481, and by the Privy Council in *Citco Banking Corp NV v Pusser's Ltd* [2007] Bus L R 960 at [24]-[25].

[255] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 671.

[256] *Hirsche v Sims* [1894] AC 654 at 660-1 (Privy Council – Earl of Selbourne) cited in *Richard Brady Franks* at 138 and *Mills v Mills* (1938) 60 CLR 150 at 164-5, 170 and 179.

[257] *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199 at 223.

application of the *Wednesbury* principle to directors so that they cannot simply invoke the incantation "*bona fide* in the best interests of the company"[258].

109. There are separate authorities that emphasise that the lack of a reasonable basis may cause a court to reject evidence given by directors that they believed that a transaction was in the best interests of the company[259].

110. On the facts as found, any views held by a director that the Transactions were in the best interests of the companies lacked any real or rational basis. The Australian directors did not have the financial information they needed to make the decision. They did not inquire into the circumstances concerning the bondholders. They did not identify who the creditors were of each company. They did not have a plan about how there could be a restructure after the Transactions. In fact, the Transactions precluded any restructure. The UK directors were in much the same position. They needed to form a view about the ability of TBGL to meet its obligations under the letter of comfort. Bond and Mitchell lacked the financial information to form that view. The other directors relied on their bare assurances without obtaining detailed information as they had been advised to do.

111. Further, even if it be assumed that liquidation was the only alternative, the trial judge found that there was no benefit to the companies in entering into the Transactions, only detriment[260]. The Transactions did not make the companies solvent[261]; indeed they thrust the only solvent companies into immediate insolvency. They did not avoid a fire sale of assets through liquidation because the assets were already in a fire sale situation[262]. There was no valuable consideration[263]. The time gained was, at best, nebulous[264]. There was no advantage to any creditor other than the banks[265].

112. After an extensive review of the evidence during the course of the appeal, the majority of the Court of Appeal went further and found that the Transactions effected an informal administration or "work-out" of the companies under the supervision of the banks[266]. The extension of time was not an accommodation to enable the Bell group to strengthen its position as a going concern, but for the banks to have a sufficient period to "harden" their securities and strengthen their position as secured creditors[267]. Further, part of the object of the directors in executing the Transactions was to remove any prospect of the claims of BGNV as an unsubordinated creditor competing with the claims of the banks[268].

113. The consequences of the Transactions for some individual companies (and their creditors) were starkly prejudicial. For example, prior to its entry into the Transactions,

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[258] *Re a Company; ex parte Glossop* [1988] 1 WLR 1068 at 1076-7. See also *Wilson v Mendon* [2004] NSWSC 1183 at [110].

[259] *Hindle v John Cotton Ltd* (1919) 56 SC LR 625 at 630-1; *Howard Smith* at 832; *Wayde* at 469-70.

[260] [4309]-[4322].

[261] [4314].

[262] [1829]-[1830], [1844.2], [1853], [1861], [1868], [1875].

[263] [AJ:599]-[AJ:600], [AJ:2513].

[264] [4309], [4314], [6110(2)(b)], [8672]. On their review of the evidence, the majority of the Court of Appeal found that the Transactions provided no real worth or value to the Bell parties; [AJ:599]-[AJ:603], [AJ:2513].

[265] [6065]. The trial judge's finding in this regard would have been much stronger if the on-loans were not subordinated (as was found by the Court of Appeal, a conclusion that is not challenged in this Court); [4286]-[4288].

[266] [AJ:601].

[267] [AJ:602], [AJ:1088].

[268] [AJ:984], see also [9723].

WAN had substantial assets including mastheads and a loan to BGF of $79m. Its two main liabilities were loans of $25m from each of Western Mail and Bell Press. It had an overdraft drawn down by $2m (but no other bank liability) and a number of external creditors[269]. It could, prior to the Transactions, cover its debts by calling on the loan to BGF[270]. It could borrow against its assets. By the Transactions, WAN became liable to the banks for any payments it received from other group companies and it was no longer able to call on the BGF loan. It executed an unlimited guarantee and mortgaged its assets to the banks. Its assets were no longer available to support the repayment of the loans from Western Mail and Bell Group Press.

114. By way of further example, BIIL had no prior liability to the banks. Its assets had been sold and the proceeds "upstreamed" to BCHL as a result of which it became a major creditor of BGUK (which in turn subscribed for preference shares in an Australian Bell subsidiary) and dependent upon them for funds. It subordinated its debt to that of the banks[271]. It received nothing out of the Transactions.

115. The trial judge gives the example of Bell Equity. It incurred new obligations to the banks to secure the existing indebtedness of companies that were insolvent (and known to the directors to be nearly insolvent) . In doing so, it became insolvent. This had flow-on adverse consequences for BGF[272]. The banks seek to submit otherwise[273]. However, if the Transactions had not occurred then Bell Equity would have retained its BRL shares which would have had the same worth in its hands as they had in the hands of the banks. The directors could have pursued a different restructuring option in the interests of Bell Equity by utilising the BRL shares for the benefit of its shareholders and creditors. The banks' claim that the proceeds would not have come into existence but for the Transactions is mere assertion, which is both unfounded and illogical.

The interests of creditors

116. The above analysis does not depend upon there being any duty in relation to creditors other than a duty to have regard to them as part of a consideration of the interests of the company as a whole. This is consistent with the appellants' contention that there is no standard of prescribed conduct towards creditors in such circumstances[274].

117. However, in this section the respondents make a further and separate submission that the proper discharge of the duty to act *bona fide* in the interests of the companies as a whole required more than merely adverting to the interests of creditors. If this is accepted, it reinforces the conclusion that the directors breached their duty.

118. The Bell parties do not contend for a duty of directors enforceable by creditors or a duty owed separately to creditors alone. Clearly, there are no such duties[275]. However, when the company is in an insolvency context there is a question as to the ability of the company to meet its debts and a real prospect that the shareholdings have little or no value. Therefore, the interests of the company as a whole move from being identified with the interests of shareholders towards the interests of creditors. For a solvent company, though it might be said that the interests of the company include those of the

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[269] [1157], [31], [278], [1802], [1899], [1903], [1876, Table 22], [1895]-[1896], [MISP.00026.015], p53-5, [TBGL.02083.022].
[270] [1899].
[271] [493], [2106], [2127], [5808].
[272] [4319]-[4320].
[273] AS, para 78.
[274] AS, para 41.
[275] *Spies v R* (2000) 201 CLR 603 (***Spies***) at 635-7.

creditors, this gives rise to little difficulty because the interests of creditors and shareholders are likely to be aligned. Insolvency or near insolvency will break that alignment so that shareholders may have an interest in the company taking risky decisions to secure some value for themselves[276], whereas creditors may be expected to have an interest in decisions that preserve the available assets to repay creditors.

119. In *Walker v Wimborne*[277], Mason J (Barwick CJ agreeing) stated "the directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors"; at 7. In that case, monies were transferred from one company to another company because it needed the money. There was no benefit to the company transferring the money; at 5. The transfer diminished the assets to which unsecured creditors could have resort and was made in total disregard of the interests of the company and its creditors; at 7. This was found to be a breach of duty.

120. In *Kinsela*[278], Street CJ found that the obligation to consider the interests of creditors arose "when a company is insolvent inasmuch as it is the creditors' money which is at risk, in contrast to the shareholders' proprietary interests". This approach, often followed, has within it a recognition that the performance by directors of their duties will change when the company's circumstances are such that the creditors' money is directly at risk. A decision made in the interests of a solvent company (such as risking funds on mining exploration) will not be in the interests of the company in an insolvency context (where unsuccessful exploration may mean that there are no funds to pay the drilling company). In this way, the interests of creditors intrude[279].

121. Other authorities show that the duty to take account of the interests of creditors applies where a company is insolvent, nearly insolvent or of doubtful solvency[280].

122. The obligation to take account of the interests of creditors is more than an obligation to advert to them or weigh them in the balance against the competing interests of shareholders. Rather, it reflects the fact that whether a decision is properly in the interests of a company changes when it is in an insolvency context because the directors are risking the interests of creditors.

123. This is not to say that the directors of a company in an insolvency context must act so as to treat all creditors equally. The grant of security to one creditor may be necessary in order to gain the funds necessary to restore solvency. However, there must be some advantage for creditors (not the same or equal advantage) such that the decision can be said to be in the interests of creditors as a whole. This is the character of the duty of imperfect obligation owed to creditors that can be enforced by the company (directly or through derivative action) or through a liquidator[281].

124. The Australian directors knew that the companies were of doubtful solvency or nearly insolvent. It follows that they had to take into account the interests of creditors so as to

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[276] Consider in this context the Bond-centric motivation of Bond, Oates and Mitchell.

[277] (1976) 137 CLR 1 (***Walker v Wimborne***).

[278] *Kinsela* at 733.

[279] See the approval of this concept in *Angas Law Services* at [67]. See also, *Re MDA Investment Management Ltd* [2005] BCC 783 at [70] and *Kalls* at [162].

[280] *Re New World Alliance; Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267 at 283-4; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153 at [74]; *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335 at [154].

[281] *Re New World Alliance* at 445 cited with apparent approval in *Spies* at [94]. As to a derivative action, see *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859.

be satisfied that the Transactions were in their overall interests; not consider and advance the interests of the banks alone, to the detriment of all other creditors.

125. The directors did not take the interests of the creditors of each company into account. Mitchell and Oates simply did not consider the financial circumstances at all, including creditors. Aspinall had an idea about restructure, but no plan. He did not consider the critical financial information for each company. This included a failure to consider creditors. He did not pursue the investigation of the subordination of the on-loans which affected the position of the bondholders. No attention was given by the Australian directors to the interests of creditors other than the banks[282]. This, of itself, was a breach of duty[283]. Moreover, the detriment to creditors was such that there was no basis on which the directors could have considered that the Transactions advantaged the interests of creditors as a whole.

The Court of Appeal did not adopt an interventionist approach

126. Contrary to the banks' submissions, Lee AJA did not adopt the same reasoning as Drummond AJA concerning directors' duties. Quite the reverse, Drummond AJA agreed with the reasoning of Lee AJA upholding all the findings of the trial judge[284].

127. With respect, the appellants do a disservice to Drummond AJA in suggesting that he advocated a wholesale interventionist approach to the review of directors' decisions. Drummond AJA referred to the adoption of a more interventionist approach in the context of explaining two significant developments in the law concerning directors' duties. First, after finding that the duty to act *bona fide* in the interests of the company is a subjective one[285], Drummond AJA pointed out, quite correctly, that in an insolvency context directors must now have regard to the interest of creditors[286]. This was not the case at the time of the decision in *Richard Brady Franks*[287], relied upon so heavily by the banks (as to which, see below at para 132ff). Secondly, Drummond AJA pointed out that in assessing whether directors had breached their duties "the court will now, in appropriate circumstances, subject their actions to objective assessment, at least where the question is whether the directors have exercised their powers for proper purposes"[288]. His Honour then concluded that the trial judge had applied an objective test in assessing the purpose for which the directors had acted, and that he was correct to do so[289]. There is no error in these observations. The developments are such that it is accurate to describe them as leading to a more interventionist approach.

128. In any event, these aspects of Drummond AJA's reasoning did not alter his conclusion in agreeing with Lee AJA that the factual findings of the trial judge concerning the conduct and the absence of the necessary beliefs on the part of the directors should be upheld. As stated above, those factual findings lead to the necessary conclusion that both duties were breached by the directors.

129. Lee AJA followed a different path in his reasoning. He found, correctly, that the trial judge had not accepted that Aspinall held a belief that the Transactions were in the

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[282] [6051(2)].
[283] *Walker v Wimborne* at 7.
[284] [AJ:2079], [AJ:2096].
[285] [AJ:1995].
[286] [AJ:2031]-[AJ:2049].
[287] *Richard Brady Franks* at 143.
[288] [AJ:2028].
[289] [AJ:2074].

interests of each company[290]. He upheld the findings as to the paucity of knowledge on the part of Mitchell as to the affairs of the companies and the finding of breach[291]. As to Oates, he confirmed the trial judge's finding that by reason of his Bond-centric purpose Oates had not formed the requisite belief[292]. Therefore, the trial judge's finding of breach of the duty to act in the interests of the companies should be upheld[293]. Lee AJA also confirmed the trial judge's findings as to the UK directors[294]. This involved an entirely orthodox application of principle.

130. The banks also contend that Drummond AJA and Lee AJA concluded that directors of companies in an insolvency context have an obligation not to prejudice creditors, which they render as an obligation to ensure a *pari passu* outcome for all creditors[295]. Neither judge expressed the obligation in those terms. Drummond AJA found that the interests of all creditors were not in all circumstances paramount[296] and if there is a real risk of significant prejudice to creditors, then the action is not in the interests of the company[297]. To say that the Transactions destroyed the right of the DCT to prove *pari passu* with the banks in a winding up[298] is not to say that the duty was to ensure such a *pari passu* outcome. Lee AJA also referred to a failure by directors to discharge their duty if they caused the company to prejudice the interests of its creditors[299].

131. For reasons stated above[300], the Courts below held that the Australian directors breached their duty because they had no regard to the interests of creditors at all. Similarly, the UK directors knew what they had to do given the insolvency context, but acted on empty assurances instead of solid financial information. Therefore, strictly speaking, no issue arises as to the precise nature of the requirement to have regard to the interests of creditors in determining whether there was a breach of duty. However, if the precise nature of the requirement is to be considered, then for the reasons stated above, the approach adopted by Lee AJA and Drummond AJA is correct.

132. The banks rely on *Richard Brady Franks* as being very nearly on all fours with this case[301]. In that case, the directors resolved to issue debentures in order to give security to three directors. There was express power to do so. The trial judge found it affirmatively proved that the directors intended to exercise their powers for the benefit of the company[302]. That is not this case. As explained above, the trial judge found the directors acted for an improper purpose and made no finding that the directors honestly (or reasonably) believed that the Transactions were in the interests of the companies.

133. Further, the assets of Richard Brady Franks Ltd were sufficient to satisfy the claims of all creditors; at 114, 136, 143. The debentures were entered into to deal with a cash flow issue[303]. It was not a case where the company needed to restructure its debts in order to avoid liquidation. Here, the trial judge found that at the time of entry into the

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290 [AJ:1001].
291 [AJ:1002]-[AJ:1003].
292 [AJ:1005].
293 [AJ:1007].
294 [AJ:1047]-[AJ:1068].
295 AS, paras 43 and 45.
296 [AJ:2046].
297 [AJ:2046], [AJ:2095].
298 [AJ:2085].
299 [AJ:952], [AJ:1093].
300 Under the heading "The interests of creditors".
301 AS, para 35.
302 *Richard Brady Franks* at 136, 138, 144.
303 *Richard Brady Franks* at 114, 136, 143 (as to creditors), 126-127 (cash flow).

Transactions the Bell companies' position was one of "insurmountable endemic illiquidity"[304]. Despite that, the directors never undertook the task of determining whether the Transactions were in the interests of each company and its creditors, including whether there could be a restructure with the Transactions.

134. Finally, in *Richard Brady Franks* there was no identified prejudice to creditors arising from the grant of the debentures. In this case, the findings of prejudice were clear and are unchallenged.

In this case, what is property for the purposes of the first limb?

135. The Transactions comprised different types of instruments, namely (a) the main refinancing agreements; (b) the subordination deeds; (c) mortgage debentures; (d) share mortgages; (e) land mortgages; and (f) guarantees and indemnities. The banks recovered substantial sums of money by executing their rights under the instruments in priority to all other creditors.

136. The relief sought against the banks for knowing receipt was on the basis that the banks (a) made gains, being the bank interest, bank fees, legal fees and stamp duty paid under the main refinancing instruments[305]; (b) received $222.3m from the sale of a shareholding that controlled the publishing assets[306]; (c) became registered proprietor of the BRL shares and sold them for $59.8m[307]; and (d) recovered $1m under a mortgage debenture[308]; and thereby received and became chargeable with property of the Bell companies or were liable as a constructive trustee therefor[309].

137. Relevantly for present purposes, the Bell parties sought both an order that the banks account for the $222.3m and the $59.8m[310] (that is, a proprietary remedy on the basis that the assets sold and the money received were the property of the Bell parties) and a declaration that all gains and monies received under the Transactions were held on (remedial) constructive trust[311] (that is, an *in personam* remedy).

138. Importantly, the first limb of *Barnes v Addy* is not a proprietary cause of action confined to the recovery of property transferred to a third party by a trustee or fiduciary. It extends to cases where property has been derived by a third party on his or her own account through dealing with a delinquent trustee or fiduciary with knowledge of the delinquency[312].

139. Reliance by the banks upon *Daly*[313] is misplaced[314]. It is authority for the proposition that loans received pursuant to an agreement made in breach of a fiduciary duty owed to the lender of the monies will not be impressed with a constructive trust (so that equitable title in the monies lent remains with the lender). Rather, any constructive trust

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[304] [1949] If the Transactions had restored solvency then there would be no need to consider a restructure which the directors recognised was still required.
[305] A8ASC, paras 63A to 63C.
[306] A8ASC, paras 65, 65A, 65B.
[307] A8ASC, para 65C, 65D.
[308] A8ASC, paras 65E, 65F.
[309] A8ASC, para 65K.
[310] A8ASC, prayer A(d) and E(b), C(b) and G(b).
[311] A8ASC, para 65H, prayer K.
[312] See the analysis in *Grimaldi* at [254]-[258], [555].
[313] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 (***Daly***).
[314] AS at para 99, fn 170.

imposed in respect of those monies must be remedial and depends upon there first being rescission of the agreement[315].

140. By contrast, in this case, there was no new advance by the banks as part of the Transactions. Even if the principle has broader application, the case by the Bell parties addressed these matters. They sought and were granted orders rescinding each of the Transactions. They thereby became entitled to orders requiring repayment of all the monies received by the banks under the Transactions on the basis of a remedial constructive trust[316]. This can be done following subsequent rescission[317].

141. Further, for the following reasons, by the Transactions themselves the banks received property for the purposes of the first limb of *Barnes v Addy*.

142. In *Farah*, this Court recognised that property for the purposes of the first limb is to be determined by reference to general principles as to what constitutes "standard instances of property"[318].

143. Property is not a thing. It is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. Usually it is treated as a "bundle of rights"[319]. It is seldom useful to refer to the subject matter of the legally endorsed concentration of power as property[320].

144. It follows that to receive property for the purposes of the first limb of *Barnes v Addy* is to receive 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. The absence of a transfer does not mean that there is no receipt of property.

145. Further, in Australia, the benefit of a contract is a chose in action that is assignable. The chose in action includes the powers that may be exercised under the contract to preserve or protect the contractual interest. Though those powers cannot be dealt with separately from the interest that they serve, they are *prima facie* assignable[321].

146. Each of the instruments conferred rights that were assignable. Rights under the main refinancing agreements (especially the rights to receive payment of bank fees, legal fees, stamp duty and interest, as well as the cl 17.12 regime), the guarantees and indemnities and the subordination deeds were all of that character. The banks could have dealt with the suite of instruments by assigning all the rights to a third party who took over their claims against the Bell parties. It was those rights that were property received by (and later exercised by) the banks so as to recover monies in priority to all other creditors.

147. Further, the Transactions formed part of a single dealing between the banks and the Bell companies. The dealing conferred security rights upon the banks. They should be considered as a whole. Just as it is wrong to consider in an atomistic way each of the rights conferred by a contract to determine whether they may be assigned as part of a chose in action[322], so also it is wrong to separate the instruments as if they were

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[315] *Daly* at 377-9.
[316] *Grimaldi* at [254], [273]-[275], [342]-[343].
[317] *Greater Pacific Investments Pty Ltd v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153.
[318] *Farah* at [117]-[118].
[319] *Yanner v Eaton* (1999) 201 CLR 531 at [17].
[320] *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [44].
[321] *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395 at [39]-[43] (***Pacific Brands***).
[322] *Pacific Brands* at [39].

separate and distinct dealings. The trial judge was correct in including the guarantees and indemnities and the subordination deeds within the bundle of rights that was property received by the banks[323]. The Court of Appeal correctly found that he should have included the main refinancing agreements[324]. All the instruments operating together were intended to grant security rights to protect the banks from competing claims by other creditors in an insolvency. It must be remembered that the claim that the Transactions constituted a Scheme was upheld[325] and that finding is not challenged.

148. It does not matter that the form of property received by the banks is of a kind that cannot be held by, or returned to, the Bell companies. There is a receipt of company property for the purposes of the first limb of *Barnes v Addy* for two reasons.

149. First, the property rights created in the hands of the third party diminish the property rights held by the company. In this case, the Transactions diminished the property rights of the Bell companies in at least four ways. They created property rights by way of security over the assets of the companies. Indeed, in the Courts below the banks conceded that the mortgages and charges were dispositions of property[326]. They created assignable rights to receive monies associated with the grant of those securities, namely bank fees, legal fees, stamp duty and interest. They were the means by which secured and assignable rights of guarantee and indemnity in favour of the banks were granted by companies that were not previously indebted to the banks. They subordinated the inter-company claims that may be made by Bell companies against each other to the claims of the banks.

150. Secondly, the property rights created in the hands of the third party are brought into existence by the delinquent act of the fiduciary. The third party is only able to receive the property right because a fiduciary who is administering property solely in the interests of another, has breached the obligation to remain loyal to those interests with the knowledge of, and in order to confer property rights on, the third party.

151. Therefore, each of the Transactions was properly found to be property to which a fiduciary obligation attached that was received by the banks and the monies received under them were appropriately made the subject of a remedial constructive trust. The Transactions were properly set aside as a means of ensuring the banks did not retain the property. If not set aside, the banks would be able to exercise the property rights conferred by the instruments in the insolvency administration and thereby retain the benefit of the property rights which they gained in knowing breach of fiduciary duty.

152. The banks rely upon *Criterion Properties plc v Stratford UK Properties LLC*[327]. In that case it was held that (a) a person who enters into a binding contract acquires contractual rights created by the contract; (b) the word receipt in "knowing receipt" means receipt of assets from another; (c) there may be a "receipt" of assets when the contract is completed and the question whether there is "knowing receipt" may become a relevant question at that stage; and (d) until then there is simply an executory contract[328].

153. That decision should be distinguished. First, as stated in *Farah,* the law in Australia concerns knowing receipt of property and is not confined to receipt of assets. Secondly,

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[323] [8739].
[324] [AJ:1100], [AJ:2158]-[AJ:2519], [AJ:2163]-[AJ:2164].
[325] [4317], [AJ:600]-[601], [AJ:2086].
[326] [AJ:600]-[AJ:601], [AJ:619]-[AJ:631], [AJ:691]-[AJ:693], [AJ:702], [AJ:2488], [AJ:2513], [AJ:2586], [AJ:2158], [AJ:2164], [AJ:3128].
[327] [2004] 1 WLR 1846 (***Criterion***).
[328] *Criterion* at 1855.

there was no consideration of the question whether the rights conferred by the contract were proprietary in character. Thirdly, the rights under the contract were conditional and depended upon an event which had not occurred (namely a change in control of Criterion) whereas the rights conferred upon the banks by the Transactions were unconditional. Fourthly, the Court in *Criterion* found that the contract was beyond power and therefore unenforceable (with the consequence that no property interest could be created by its terms)[329] so the issue in the present case did not arise.

For second limb liability, there can be a dishonest and fraudulent design without conscious wrongdoing by the fiduciary

154. In Australia, accessorial liability for participation in a breach of trust or fiduciary duty that is based upon the state of mind or dishonesty of the participant is dealt with separately from liability under *Barnes v Addy*. Such liability arises under separate equitable principles that apply where a party counsels or procures a breach of trust or fiduciary obligation. The existence of these separate principles was affirmed recently in *Farah*[330].

155. In the United Kingdom, the courts have taken a different path. They have treated the second limb in *Barnes v Addy* as a comprehensive rule of accessorial liability. So, in *Royal Brunei Airlines Sdn Bhd v Tan*[331], and subsequent cases[332], English courts have said that liability in Equity to make good a resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation, irrespective of whether the trustee or fiduciary is acting dishonestly.

156. For a time, the English courts also appeared to apply a standard of dishonesty that required a conscious appreciation that the conduct transgressed ordinary standards of honest behaviour[333]. Now, it is clear that it is irrelevant that the participant involved in the conduct may think they are acting honestly; the requirement for dishonesty can be satisfied by conduct contrary to normally accepted standards of honest conduct[334]. This accords with the general approach that Australian law has adopted to the concept of dishonesty, that is to say, dishonesty is established by knowledge, belief or intent on the part of the defendant that would make the conduct dishonest according to ordinary community standards[335]. Nevertheless, at the time of the conduct of the trial and because of the English authorities that then prevailed, there was an issue as to whether conscious dishonesty was required (which explains the focus on that aspect in the interlocutory stages and at trial).

157. Nonetheless, important differences remain between English and Australian law. In particular, in applying the second limb of *Barnes v Addy*, the English cases require dishonesty on the part of the knowing participant, whereas the Australian cases require knowledge on the part of the participant of a dishonest and fraudulent design by the

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[329] *Grimaldi* at [254].
[330] *Farah* at [161]. See also, *Grimaldi* at [242]-[247] and *Tableau Holdings Pty Ltd v Joyce* [1999] WASCA 49 at [32].
[331] [1995] 2 AC 378.
[332] *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (***Twinsectra***) as explained in *Barlow Clowes Ltd v Eurotrust Ltd* [2006] 1 WLR 1476 (***Barlow Clowes***) at [15]-[17] and *Abu Rahmah v Abacha* [2006] EWCA Civ 1492 at [31].
[333] *Twinsectra* at [20], [35].
[334] *Barlow Clowes* at [10], [15]-[16].
[335] *Marcolongo v Chen* (2011) 242 CLR 546.

fiduciary. The distinction was noted in *Farah*, but its consideration was deferred for a future occasion[336].

158. This Court should not follow the English approach of a single rule that depends upon the dishonesty of the participant. The Australian approach, as stated in *Consul* and *Farah*, is to be preferred because it recognises that participant liability in Equity is not to be confined to a single principle, but may arise for different reasons. It is more principled to recognise the distinct categories of counselling or procuring on the one hand (where it is the conduct of the third party that is the active cause of the wrong) and knowing participation on the other hand (where the third party joins in the wrong of another). In cases of the former kind, it is appropriate to treat the participant as liable under a different principle, not as an accessory but as the "*fons et origo* of the whole of [the] mischief"[337]. In cases of the latter kind, the English approach distracts from a proper consideration of the character of the wrongdoing by the principal actor, knowing participation in which should give rise to liability. As stated in *Michael Wilson & Partners*[338], to speak of the liability as "accessorial" simply recognises that the assistant's liability depends upon breach by another.

159. Further, to confine liability to dishonest participants would be contrary to Equity's focus upon what is unconscionable according to its standards. In Equity, fraud has not meant deceit or fraud in ordinary parlance[339]. The phrase "dishonest and fraudulent design" should be read in the context of Equity's approach to such matters. This is especially so given the manner of expression in Courts of Chancery at the time when the decision in *Barnes v Addy* was delivered[340].

160. By reason of the special meaning attributed to fraud in Chancery parlance, in Equity "a failure to perform one's duty as a director, even if by genuine mistake or ignorance of the law, can be described as 'failing to act honestly'"[341]. Equity looks at the conduct to determine whether it is dishonest, not at the party's state of mind[342].

161. Finally, the Australian approach is to be preferred because it allows the principles of participant liability to develop by reference to particular circumstances that are recognised as being unconscientious.

162. As to what is meant by "dishonest and fraudulent design", Ungoed-Thomas LJ stated in *Selangor* that the phrase was to be understood according to the plain principles of Equity and is "certainly conduct which is morally reprehensible"; at 1591. The phrase indicated an equitable principle rather than a term to be defined and applied as if it appeared in a statute. In *Consul*, Gibbs J quoted those views with apparent approval; at 396. Stephen J (Barwick CJ agreeing) made reference to the requirement for "a fraudulent and dishonest disposition of the trust property", but did not expand upon that concept; at 409. Rather, it was the requirement of knowledge on the part of the participant that was the focus of his Honour's reasoning; at 409-10.

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[336] *Farah* at [161]-[163].
[337] *Midgley v Midgley* [1893] 3 Ch 282 at 301.
[338] *Michael Wilson & Partners* at [106].
[339] *Earl of Aylesford v Morris* (1873) 8 Ch App 484 at 490-1; *Nocton v Lord Ashburton* [1914] AC 932 at 954.
[340] As to which, see *Meagher Gummow & Lehane's Equity Doctrines & Remedies*, 4th ed, 2002 (***Equity Doctrines & Remedies***), p445ff.
[341] *Hall v Poolman* (2007) 215 FLR 243 at [320], per Palmer J in holding that such an approach should not be adopted in applying the exculpatory provisions for directors in companies legislation.
[342] *Twinsectra* at [123].

163. In *Farah*, the Court began by considering the knowledge on the part of the participant that was required by the second limb; at [171]. Starting with the knowledge that applies to dishonesty in the criminal law, the Court then dealt with the five *Baden* categories of knowledge; at [173]-[174]. However, this exposition did not concern the meaning of the requirement for a dishonest and fraudulent design on the part of the fiduciary[343]. Its focus was the participant's knowledge. It was not until [179] that the Court turned its attention to the meaning of the phrase "dishonest and fraudulent design". At that point, the Court made clear that *Consul* establishes that the second limb can include breaches of fiduciary duty as well as breaches of trust. Then, at [181], the Court rejected an argument that the words "dishonest and fraudulent" included all breaches of fiduciary duty by referring to the statement of Gibbs J in *Consul* that the expression was to be understood by reference to equitable principles. The Court did not analyse what was required by those principles, but it certainly did not suggest that the relevant equitable principles required subjective dishonesty.

164. The Court of Appeal was correct in finding that the trial judge[344] erred in requiring proof of conscious dishonesty on the part of the directors in order to advance a claim under the second limb of *Barnes v Addy*[345].

165. In *Farah*, the Court went on to observe that breaches of trust and breaches of fiduciary duty vary greatly in their seriousness; at [184]. This reasoning supports the view that not all breaches of fiduciary duty will amount to a dishonest and fraudulent design. It appears that knowing participation in a mere dereliction of duty would be insufficient to establish second limb liability; at [186]. The reference by the Court, in this context, to the statutory power to excuse a breach of trust or breach of duty by company directors, suggests that some analogy may be drawn between conduct that will not be excused under such provisions and conduct that satisfies the standard of "dishonest and fraudulent design".

166. Whatever the language used to express the standard, it requires an evaluative judgment of the facts in the particular case to determine whether, in the eyes of Equity, it rises to the required level. Contrary to the appellants' submissions, the directors' conduct could not be characterised as doing their honest best. On any view, the breaches of fiduciary duty as alleged and proven in this case were serious, indeed egregious[346], and constituted a dishonest and fraudulent design.

On the facts as found, the banks were properly held to be liable under the second limb

167. First, two of the three Australian directors (Mitchell and Oates) were acting for collateral purposes and not in the interests of the Bell companies at all. As noted above, where the breaches concerned dealings in company property, the existence of an improper purpose, of itself, will be sufficient to give rise to liability on the part of a knowing participant because it shows that there has been a wrongful misapplication of company property.

168. Secondly, Mitchell and Oates did not request or possess the necessary knowledge of the financial affairs of the Bell group to discharge their duties. This was a serious breach of their duties.

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[343] The banks fail to recognise this distinction in their submissions at AS, paras 104-105.
[344] [4722]-[4733], [4813]-[4830], [8732].
[345] [AJ:2126], [AJ:1100].
[346] [AJ:2079].

169. Thirdly, all of the Australian directors participated in the adoption of minutes of meetings and recitals in the Transactions documents that did not reflect the substance of their decision-making. In the case of Aspinall, this was one of the significant exceptions to the overall finding by the trial judge that he was an honest witness.

170. Fourthly, there was no reasonable basis upon which the three Australian directors could have formed the view that the Transactions were the first step in a plan to restructure the Bell group. The issue of such a restructure was not in their minds at the time they committed to the Transactions. Mitchell and Oates simply did not know the position. Aspinall had an unfounded hope that he could restructure, but that view was not genuinely held in the sense that it was not based on any rational or reasonable grounds.

171. Fifthly, the Australian directors did not consider at all the separate interests of each Bell company or the creditors of those companies and, by the Transactions, placed a number of solvent companies into immediate insolvency. The Transactions provided no value and no other benefit to the companies in the Bell group. In entering into the Transactions, the directors focussed on one group of creditors (the banks) to the exclusion of all others.

172. Sixthly, a particular object of the Transactions was to defeat the interests of BGNV as a creditor of TBGL and BGF because of the issue in relation to subordination[347]. The Court of Appeal found that Aspinall deliberately failed to inquire (see para 97 above).

173. Seventhly, Mitchell (together with Bond) gave an unfounded assurance to the UK directors that TBGL could fund the UK companies.

174. Eighthly, the UK directors disregarded clear advice that they needed to verify that there was a proper basis for them to rely on the letters of comfort and not to accept unfounded assurances. In the words of the trial judge this information "was critical to the exercise of directorial responsibility and its absence goes to the very heart of the obligation to act in the best interests of each company in the BGUK group"[348].

175. Finally, the banks do not challenge the finding by the Court of Appeal that the Transactions formed part of a Scheme by which the banks obtained security over the non-debtor companies' assets and advanced their interests by the subordination of all inter-company claims[349]. All this was found to have been done with a real or actual intent to remove the rights of all other creditors to participate in rateable distribution[350]. The Bell companies were found to have been dishonest according to ordinary community standards in entering into the Transactions for the purposes of the statutory claims. That finding is unchallenged. It was the directors who made that decision. It must follow that if the requirement for a dishonest and fraudulent design does not include a requirement for subjective dishonesty, then the required standard has been met in this case given the unchallenged findings of all three Court of Appeal judges.

176. The banks criticise the approach of Drummond AJA. His Honour was correct in concluding that the trial judge imposed too onerous a test[351]. The alternative test suggested by his Honour included conduct that did not involve moral reprehensibility, which he described as "quite a low threshold"[352]. However, his Honour's ultimate

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[347] [AJ:984], [AJ:995]-[AJ:996], [AJ:1018], [AJ:1108], [AJ:2087]-[AJ:2088], [AJ:2315].
[348] [6097].
[349] [AJ:600].
[350] [AJ:548]-[AJ:556].
[351] [AJ:2126].
[352] [AJ:2125], [AJ:2429].

finding as to the facts for this purpose was that "the case cannot be characterised as involving ordinary or minor breaches of fiduciary duty or breaches that could properly be excused"[353]. Lee AJA agreed with Drummond AJA[354].

177. With respect, the views of Carr AJA provide no assistance on this point for two reasons. First, he did not consider the substance of the issue[355]. Secondly, his Honour's short observations are infected by errors as to the factual findings relevant to the conduct of the directors[356]. In this appeal, the relevant factual findings are the unchallenged findings made by the trial judge and by Lee AJA and Drummond AJA.

178. The appellants place reliance upon the observations in *Farah* to the effect that the seriousness of an allegation that certain individuals were liable as knowing participants in a dishonest and fraudulent design meant that it "ought to have been pleaded and particularised, and the assessment required by *Briginshaw v Briginshaw* to be kept in mind"; at [170][357]. Those observations do not detract from the above analysis for the following reasons.

179. First, the reference to the *Briginshaw* standard does not indicate a view that the second limb of *Barnes v Addy* requires an assessment as to whether the conduct was dishonest either according to community standards or consciously dishonest. The application of *Briginshaw* depends simply upon the seriousness of the allegations made. *Briginshaw* itself was a case of adultery, an allegation with serious consequences in 1938, but not one involving dishonesty or fraud. The assessment required is simply that the gravity of the allegations made against a party be borne in mind when deciding whether the evidence is sufficient to prove those allegations[358]. More recent High Court cases affirm this understanding.[359].

180. In *Doyle v Australian Securities and Investments Commission*[360], this Court noted with apparent approval the trial judge's application of the *Briginshaw* approach to allegations that a company director had made improper use of his position as a director to gain directly an advantage for other persons. In *Vines v Australian Securities and Investment Commission*[361], the *Briginshaw* approach was accepted where the allegation was of breach of the statutory duties of care and diligence and there was no allegation against the director of deceit or improper personal gain.

181. Secondly, the principles that require an allegation of dishonesty to be pleaded are not confined to allegations of common law fraud or deceit. They extend to allegations of dishonesty according to the plain principles of a court of Equity (and the rulings on the pleadings by the trial judge were made on that basis)[362].

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353 [AJ:2430].
354 [AJ:1100].
355 [AJ:3059].
356 See paras 75 and 89 above.
357 AS, para 105.
358 (1938) 60 CLR 336 at 362, 343-4, 350, 372. See also, *Rejfek v McElroy* (1965) 112 CLR 517 at 521.
359 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171 (the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove); *G v H* (1994) 181 CLR 387 at 399 (application of the principle depends upon the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding).
360 (2005) 227 CLR 18 at [3].
361 (2007) 73 NSWLR 451 at [587], [784], [808]-[813].
362 *Bell No 5* at [37].

182. Thirdly, to the extent that this Court's observations in *Farah* at [184] suggest that some analogy may be drawn from the statutory jurisdiction to excuse certain types of breaches of fiduciary duty in determining what is "dishonest and fraudulent", the conduct in this case is not of a kind that would be excused. In applying the statutory exculpatory provisions, the court also looks at the reasonableness of the conduct in excusing trustees[363] and the degree of carelessness or imprudence when relieving directors of their liability[364]. It follows that this Court's reference to the possibility of conduct being excused reinforces the view that a dishonest and fraudulent design does not require subjective dishonesty.

10 **The Bell parties did plead a case of second limb liability which included a claim of dishonest and fraudulent design**

183. It was not necessary for the Bell parties to use the word fraud or dishonesty in order to raise a claim under the second limb of *Barnes v Addy* involving a dishonest and fraudulent design on the part of the directors[365]. The second limb of *Barnes v Addy* is not to be treated as if it were a statutory provision. Although the trial judge ruled that the pleading of the Bell parties did not raise a case of "conscious wrongdoing" against the banks or the directors, he made clear in doing so that he was not saying that the pleading did not disclose wrongdoing of the type that would sound according to the plain principles of Equity[366].

20 184. The pleading raised a case of serious wrongdoing by the directors (and knowledge of that wrongdoing on the part of the banks). The structure of 8ASC was as follows:

(a) the directors caused the Bell companies to enter into the Transactions and give effect to a Scheme whereby all significant and worthwhile assets of the Bell participants were made available to the banks for repayment of their debts in priority to other creditors: paras 34(a) and 19A;

(b) the directors did so knowing of the existence of creditors other than the banks who had no probable prospect of benefit and probable prospect of loss from entry into the Transactions: paras 34(b) and 33C;

(c) the directors knew about the insolvency of the companies: paras 34(c) to (d);

30 (d) the directors acted for improper purposes and were in a position of conflict because the survival of BCHL was threatened by the likelihood of winding up of TBGL if there was no restructure: paras 34A to 36P;

(e) the directors owed fiduciary duties to each company which they breached by entering into the Transactions and giving effect to the Scheme: paras 37 to 39D;

(f) the banks knew a great deal about the circumstances in which the directors entered into the Transactions and gave effect to the Scheme: paras 50 to 59U; and

(g) in all the circumstances, the banks were knowing participants in the breach of duty by the directors: paras 65H to 65J.

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[363] *Re Turner* [1897] 1 Ch 536 (***Re Truner***); *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* [1905] AC 373 (***National Trustees Company of Australasia***); *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 (***McLean***); *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149 (***Partirdge***) at 165.

[364] *ASIC v McDonald (No 12)* (2009) 73 ACSR 638 at [22]; *Morley v ASIC (No 2)* (2011) 83 ACSR 620 at [37], [44], [49]-[50].

[365] See the analysis of the authorities by the trial judge in *Bell No 5* at [34]-[35], [42]. The pleading must provide an adequate warning of the factual issues to be raised against a party; *Aequitas Ltd v Sparad No 100 Ltd* (2001) 19 ACLC 1006 at [403].

[366] *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2001] WASC 315 at [124]-[128]; Bell No 5 at [29], [38]-[42], [72].

185. The express reference to a claim based upon knowing participation made plain that the case being advanced was under the second limb in *Barnes v Addy*. The material facts relied upon to support that claim insofar as it concerned the conduct of directors were pleaded in detail. It was a matter for legal argument as to whether those facts as pleaded and proven met the description "dishonest and fraudulent design". There was no need to use those words in order to advance the case. Further, the interlocutory judgments show that the contentious issue related to whether conscious dishonesty was alleged, not whether there was a claim under the second limb.

186. For these reasons, it was clear from the earliest stages of the litigation that the pleading alleged liability under the second limb and the trial was conducted on that basis.

187. Finally, the appellants suggest, by a footnote reference only[367], that there is some aspect of the case concerning bank knowledge that is challenged. The point sought to be raised is not clear, but what is clear is that the grounds of appeal are confined to a contention that a second limb *Barnes v Addy* claim was "not available" in the absence of an allegation or finding of dishonesty on the part of the directors; see para 4(d) of ground 2. There is no ground of appeal concerning findings of bank knowledge. The issue of bank knowledge in these proceedings was extensive. In the Court of Appeal, it occupied 682 grounds of appeal, 471 pages of written submissions and over 8 days of oral argument. Leave to raise any points regarding bank knowledge should not be given.

In *Barnes v Addy* cases where monies are recouped that were used by the wrongdoer in its trade or business, compound interest is awarded at commercial rates and rests to ensure that the wrongdoer does not profit from the use of the monies

188. Equity awards compound interest "when justice so demands, eg, money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary"[368]. Equity does so ancillary to an award of equitable monetary relief[369].

189. The principles to be applied in determining the rate of interest depend upon the nature of the equitable wrong. Specifically, Equity awards compound interest against *Barnes v Addy* knowing recipients to ensure that improper profits are not retained[370]. The purpose of an award of compound interest in such a case is neither to compensate for loss, nor to punish the defendant, but to ensure that no profit remains in the hands of the defendant[371]. So, in the early case of *Docker v Somes*, the rate of interest was fixed by reference to a higher mercantile rate so that difficulties in taking an account of profits did not mean that the real gains made by the wrongdoer were not disgorged[372].

190. In determining an appropriate rate of interest, there are particular principles that are applied where, as here, the monies improperly obtained have been employed by the recipient in a trade or business. The rate (and rests) are not fixed by reference to any calculation or estimate of the particular profit generated from the use of the money by

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[367] AS, fn 179.

[368] *Hungerfords v Walker* (1989) 171 CLR 125 at 148 (***Hungerfords***).

[369] *Piety v Stace* (1799) 4 Ves Jun 620; 31 ER 319 at 622-3, 320; *Docker v Somes* (1834) 2 My & K 656, 39 ER 1095 (***Docker v Somes***) at 670-1, 1100-1; *President of India v La Pintada Campania Navigacion SA* [1985] 1 AC 104, 116 A-B; *Re Turner*; *National Trustees Company of Australasia*; *McLean*; *Partridge* at 165

[370] *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1988) 91 FLR 271 (***Southern Cross***) at 294, 307; *Ninety-Five Pty Ltd (in liq) v Banque Nationale de Paris* [1989] WAR 132; *Grimaldi*. See also, *Docker v Somes* at 665, 1098 and *Belmont* at 419e.

[371] *Docker v Somes* at 665-6, 1098-9; *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 (***Wallersteiner***) at 388D-E, 397G, 398H, 406; *Southern Cross* at 294, 307; *Hagan v Waterhouse* (1991) 34 NSWLR 308 (***Hagan***) at 393E; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (***Warman***) at 557; *Grimaldi* at [550]-[552].

[372] *Docker v Somes* at 665-7, 1098-9.

the recipient from whom the monies are to be recouped. The determination of actual profits earned is a matter for the taking of an account of profits. Rather, the court presumes, in the absence of contrary evidence, that monies deployed for commercial purposes have produced their usual commercial benefit when deployed by the recipient in a trade or business[373]. This reflects the fact that the monies, in effect, have been used as part of the working capital of a business undertaking a trade or commercial activity[374]. The value of such use is represented by prevailing commercial interest rates being "a fair or mean rate of return for money"[375].

191. In some cases, one of the rationales advanced for this approach is that there will be difficulty in undertaking an account of profits[376]. However, that does not mean that the courts are undertaking some short form estimate of the particular profits earned by the recipient. There is no inquiry into actual profits earned in the particular case. Rather, the court is ensuring that the wrongdoer, at least, pays a rate of interest that disgorges a level of presumed profit where the monies have been used in a trade or business. This may be viewed as a crude approximation of the profits likely to have been earned[377]. However, it is not, in any sense, based upon an actual estimate of those particular profits.

192. Other cases refer to the award of compound interest at a mercantile or commercial rate as avoiding the need to enquire into actual profits[378]. Again, this is because it is based upon a presumption that profit has been earned that equates to the prevailing return on money deployed for business purposes; not because it is a measure of actual profits earned by a recipient in a particular case. However, the guiding principle in setting the rate of interest is to ensure that no profit remains in the wrongdoer's hands.

193. It follows that an award of compound interest at mercantile rates does not involve making allowances of the kind considered on taking an account of profits[379].

194. Historically, Equity struck a rate in such cases of 5%, described as a "mercantile" rate, being a margin of 1% above the historic standard trustee earning rate of 4%[380].

195. Modern authorities take a commercial approach[381] to the mercantile rate, "to reflect the reality of the market place as it exists"[382] and apply "commercial rates"[383]. This has

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[373] *Jones v Foxall* (1852) 15 Beav 388, (1852) 51 ER 588; *In re Davis* [1902] 2 Ch 314; *Docker v Somes* at 666, 1099; *Attorney-General v Alford* (1855) 4 De G M & G 843; 43 ER 737 (***A-G v Alford***) at 851-2 (De G M & G), 741 (ER); *Burdick v Garrick* (1870) LR 5 Ch App 233 (***Burdick***) at 241-2; *Wallersteiner* at 388, 397C, 398E-G, 406F-G; *Southern Cross* at 285; *DFC New Zealand Ltd v General Communications Ltd* [1990] 3 NZLR 406 (***General Communications***) at 436; *Tasmanian Seafoods Pty Ltd v MacQueen* (2005) 15 Tas R 1 (FC) (***Tasmanian Seafoods***) at [85]; *Grimaldi* at [550]-[552]; Heydon JD & Leeming MJ, *Jacobs' Law of Trusts in Australia* (2006) (***Jacobs***) at [2209].

[374] *Wallersteiner* at 397F per Buckley LJ.

[375] *Re Tennant* (1942) 65 CLR 473 at 508 (a case which, unlike the present, did not concern a serious breach of duty).

[376] *Docker v Somes* at 673, 1101 (serious difficulty); *Wallersteiner* at 406 (unlikely ever to be known); *Southern Cross* at 285 (impossible); *Grimaldi* at [552] (great difficulties).

[377] *Grimaldi* at [753].

[378] *Docker v Somes* at 665-6, 673, 1098-9, 1101; *Grimaldi* at [551]-[552].

[379] The Bell parties are not aware of any authority where such allowances have been made in reduction of an award of interest ancillary to an order for the return of money or property improperly obtained.

[380] *Burdick* at 241, 243-4; *Re Dawson* [1966] 2 NSWR 211 (***Re Dawson***) at 219; *Wallersteiner* at 399A-B; *Jacobs* at [2208].

[381] *Wallersteiner*; *Southern Cross; Jacobs* at [2208].

[382] *Hagan* at 392D-393C, approved in *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45 (***Alemite Lubrequip***) at 47 (CA); *Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467 (***Morgan***) at 487C-F.

[383] *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [118].

resulted in awards of compound interest: at 1% above the minimum base rate charged by a bank to its most favoured clients for loans over $100,000[384]; at 17%, being a "fair but conservative [rate] having regard to evidence of interest rates being charged by trading banks over the relevant period" [385]; and at RBA cash rate plus 4%[386].

196. A lack of evidence as to actual profits made[387] or as to actual mercantile rates[388] is no obstacle to Equity awarding compound interest.

197. The burden of demonstrating that there are circumstances that would make it just and equitable to award interest at a lower rate than a mercantile rate falls on the defendant and a commercial rate is applied in the absence of evidence that the actual profit was lower[389]. However, in most cases the recipient who is required to return monies or property that has been improperly obtained will have to pay interest at prevailing commercial rates on the basis that he or she could and should have profited at least to that extent and, as a wrongdoer, will not be allowed to call in aid his or her own poor use of funds as a reason for paying a lower rate of interest[390], hence the presumed use for commercial purposes[391].

198. Broadly speaking, the banks raise two matters in challenging the award of interest. First, they say that the Court in ordering the payment of compound interest was awarding equitable compensation for loss suffered by the Bell parties and interest should be determined by reference to what they could have done with the money. Secondly, they raise a number of ways in which it is said that the interest rate chosen fails to make adjustments for matters relating to the actual profit earned by the banks.

The semantic argument about equitable compensation

199. The judges in the Court of Appeal used the description "equitable compensation" to describe the award of interest[392]. However, it is clear that the majority used that term to describe an award of interest at a rate to ensure that the banks did not retain the profit that they had received from the use of the money[393]. This is an approach that accords with long established authority (see para 189 above). Further, the term "equitable compensation" has often been used synonymously with "equitable monetary relief", so as to refer both to relief that is compensatory in the strict sense and relief by way of disgorgement of gains including accounts of profits[394].

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[384] *Southern Cross.*

[385] *General Communications* at 436.

[386] *Thomas v SMP (International) No 6* [2010] NSWSC 1311 (***Thomas v SMP***) at [23] (Pembroke J) (breach of fiduciary duty finding overturned on appeal in *Willett v Thomas* [2012] NSWCA 97 and the compound interest award with it: [70], [215]).

[387] *Docker v Somes* at 673, 1101; *Southern Cross* at 285; *Wallersteiner* at 398E-F, 406F; *Tasmanian Seafoods* at [91].

[388] *Docker v Somes* at 666-7, *Hagan* at 392D, 393C; *Morgan* at 487F-G; *Thomas v SMP* at [23].

[389] *Southern Cross* at 284-6.

[390] *A-G v Alford* at 851 (De G M & G) (estopped from saying he did not receive it); *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 112 (estopped from denying that he received interest at such a rate which he ought to have received).

[391] *Wallersteiner; Southern Cross; Grimaldi.*

[392] [AJ:1217], [AJ:1221]-[AJ:1222], [AJ:1224], [AJ:1231], [AJ:1234], [AJ:1236], and especially [AJ:1259], [AJ:2678].

[393] [AJ:1228], [AJ:1232]-[AJ:1242], [AJ:1259], [AJ:2678].

[394] Eg: *Equity Doctrines & Remedies* at [23-020], the corresponding passage from the 3rd edition having been quoted with evident approval by Heydon JA in *Harris* at [300]; *Re Leeds & Hanley Theatre of Varieties Ltd* [1902] 2 Ch 809 at 833; *Duke Group (in liq) v Pilmer* (1999) 73 SASR 64 at [834], [835]; *Ferrari Investment (Townsville) Pty Ltd (in liq) v Ferrari* (2000) 2 QdR 359 (CA) at 370-372 per Thomas JA; O'Donovan,

200. The fact that the Court of Appeal was not intending to award equitable compensation calculated by reference to the loss suffered by the Bell parties (and properly so) is reinforced by the fact that the majority were overturning the error of the trial judge which had been to set an interest rate by reference to the rate at which the Bell companies could have invested the monies on interest-bearing deposit[395], as a measure of "practical justice"[396]. It is also confirmed by the fact that the Court applied the reasoning in *Wallersteiner* where the Court set the interest rate to ensure, so far as possible, that the defendant retained no profit for which he ought to account[397].

Interest was not awarded "in aid of" an account of profits

10 201. The banks refer to interest awarded "in aid of"[398] an account of profits. The majority's award of compound interest was not *in aid of* an account of profits, but *in lieu of* an account of profits. An award of compound interest in lieu of an account of profits accords with precedent[399]. It is not an attempt to measure the actual profits earned. That is a matter for the taking of an account. A proper award of interest may avoid the need for an account (if the wrongdoer did not profit to an extent that exceeds the prevailing commercial rates for interest) and in that sense it is made *in lieu of* an account.

Errors arising from the false premise that interest is based on an inquiry as to actual profits

202. Many of the banks' submissions are based upon the false premise that the award of interest is, in some way, a calculated estimate of actual profits earned by the banks. It is
20 not. It is based upon the presumed profit gained by a party applying monies for commercial purposes. Therefore, many of the matters raised by the banks are irrelevant to the determination of the rate of interest and rests. In particular:

(a) it was not necessary to inquire whether the banks had in fact earned a particular level of profits from the use of the monies;
(b) it was irrelevant to inquire as to the tax position of the banks;
(c) there is no need to prove that the banks actually received interest by lending the monies to others because the interest rate is established by evidence of the rates of interest paid by those borrowing money for commercial purposes as a measure of the value of the money to the banks as working capital; and
30 (d) allowances for expenses, risk, skill, care or diligence do not arise because the rate of interest is not a *de facto* account of profits.

203. The following submissions are made in the alternative if, contrary to the above submissions, the Court is to have regard to the actual profits of the banks in determining the appropriate rate of interest.

Tax payable by the banks

204. The banks suggest that the process of determining the appropriate interest calculation should have brought to account any tax payable by the banks. This was not argued below. (The only argument as to tax made below related to tax that might have been payable by the Bell parties on the basis of an hypothetical immediate liquidation at the

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Lender Liability (2005) at 245; [9698-9]; *The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 10]* [2009] WASC 107 (***Bell No 10***) at [22]; *Grimaldi* at [750], [753].

395 [9717].

396 [9718].

397 *Wallersteiner* at 397C-398H (Buckley LJ) and 406F (Scarman LJ).

398 AS [119], [121], fn 212, [138].

399 *Docker v Somes* at 673, 1101; *Wallersteiner* at 398E-G, 406F-G; *Southern Cross* at 285; *Grimaldi* at [551-2], [753].

time of entry into the Transactions, a hypothesis rejected at first instance[400], which rejection was not disturbed on appeal[401].) If the banks' new argument had been put below, there would have been issues as to whether any, and if so what, tax was payable and whether any tax that had been paid would be offset by a deduction for amounts payable under the judgment. These matters would depend on many considerations, including the tax jurisdiction applicable to each bank. Australian taxpayers would ordinarily be able to claim a deduction for compensation paid as an outgoing on revenue account[402]. The decided cases do not bring to account tax liabilities in determining a rate of interest to reflect presumed profit. It is not appropriate for this issue to be argued for the first time and in an evidentiary vacuum in this Court. Further, the banks may well be entitled to an off-setting tax deduction or credit for the interest they are required to pay under the judgment[403]. Therefore, it cannot be presumed that the banks will have a net tax liability that should be brought to account.

Notional liquidation

205. The resort to an argument that there should be some adjustment to the award of interest on the basis that the banks are creditors who have proved in the liquidations of the Bell parties is, in reality, an attempt by the banks to revive their set-off defence, rejected by all four judges below[404] and not the subject of this appeal.

206. The banks' argument is also contrary to principle. The rule in *Cherry v Boultbee*[405] is that "where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to so participate unless and until he has fulfilled his duty to contribute"[406]. The rule applies where the fund is the estate of a company in liquidation[407].

207. The majority on appeal, as well as the trial judge, rejected the notional liquidation analysis, which Carr AJA accepted and on which the banks rely[408]. Reliance upon the outcome of a notional liquidation is misconceived. The banks' liability to restore the funds that they improperly took and then used over two decades, with disgorgement interest, is quite different from the proper administration of the liquidations of the Bell companies and the dividends to be distributed to creditors. The banks' rights as creditors in the liquidations are not coincident with their obligations to restore funds to the Bell companies. There is no right of set-off as between the two. The approach taken by Carr AJA would interfere with the statutory process for determining the dividends to be paid, including the powers of the court to alter the amount payable to creditors who funded the costs of the proceedings against the banks[409].

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[400] [4300]-[4307] and *Bell No 10* at [57].

[401] Indeed Drummond AJA appears to have approved it [AJ:2075]-[AJ:2079].

[402] *Avco Financial Services Ltd v Federal Commissioner of Taxation* (1982) 150 CLR 510 at 518; *Coles Myer Finance Limited v Federal Commissioner of Taxation* (1993) 176 CLR 640.

[403] See previous footnote.

[404] [9676], [AJ:1192]-[AJ:1207], [AJ:2675], [AJ:3519]-[AJ:3520].

[405] (1839) 4 My & Cr 442, 41 ER 171.

[406] *Re Peruvian Railway Construction Co Ltd* [1915] 2 Ch 144 (***Peruvian Railway***) at 150.

[407] *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239; *Peruvian Railway* at 151; notwithstanding doubt expressed in *Fused Electrics Pty Ltd v Donald* [1995] 2 Qd R 7 in the context of the creditor's particular entitlement in that case.

[408] Carr AJA at [AJ:3544]-[AJ:3548], Lee AJA at [1229]-[1230], [1248]-[1249], Drummond AJA at [2678].

[409] The trial judge gave compelling reasons for rejecting the banks' notional liquidation arguments in his separate judgment concerning relief, *Bell No 10* at [41]ff.

208. The reasoning of Carr AJA[410] is predicated on his Honour's dissenting acceptance of the banks' subordination defence and an adoption of the trial judge's "back-of-the envelope" calculation, which his Honour advanced only for the purpose of demonstrating the prejudicial effect of the Transactions[411]. The subordination defence was rejected by the majority below and is not the subject of appeal. Further, Carr AJA's approach misuses the trial judge's calculation contrary to his own caution[412].

Expenses, risk, skill, care or diligence

209. As to expenses, there was no evidence of any expenses incurred by the banks in the course of making profits with the use of the Bell parties' money. The onus was on the banks to adduce such evidence if they wished the Court to take it into account[413]. The banks did not contend below that an award of interest (as distinct from an account of profits) should be adjusted for expenses. This ground ought not now be allowed to be raised, especially in the complete absence of relevant evidence.

210. It is commonplace that, as well as interest, banks charge fees to cover expenses. There was evidence and findings that the banks had charged fees[414]. Fees received by the banks from customers to whom they are presumed to have lent the Bell parties' money were not added to the award of compound interest.

211. As to risk, this argument is new. The banks cannot complain of the Court of Appeal's failure to take into account a point that they have never raised before. It ought not be allowed to be raised in the abstract. In any event, there was a complete absence of evidence of any risk undertaken by any of the banks. Further, any such risk stands outside any permissible allowance[415].

212. As to skill, care and diligence, there was no evidence of any skill, care or diligence applied by the banks in earning profits with the Bell parties' money. The onus was on the banks to adduce such evidence if they wished the Court to take it into account[416]. When ordering an account of profits, the allowance is only made in cases where a business is acquired and operated; it is not made in cases, such as the present case, where a specific asset (or money) is ordered to be restored[417]. Also, these matters stand outside the grant of special leave and cannot be considered.

The Court of Appeal correctly determined that WBIR plus 1% at monthly rests was the appropriate rate

213. By the Transactions, the banks took security over all the worthwhile assets of the Bell companies, they enforced those securities, they received the proceeds of sale of the secured assets and for the following 17 years they used the proceeds of sale in their businesses. There is an air of unreality in the banks' claim that there should be an award of simple interest at court rates whilst ignoring their use of the funds and seeking to hold the Bell parties out of an account of profits.

214. Interest was awarded by reference to WBIR (Westpac Business Indicator Rate), a real base lending rate for commercial lending. It was the base rate charged from time to time

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[410] [AJ:3544]-[AJ:3548].
[411] [4287]-[4289].
[412] *Bell No 10* at [43]-[57].
[413] *Warman* at 561-2.
[414] [9432]; orders 5.8 to 5.9; [9506].
[415] *Warman* at 561.
[416] *Warman* at 561-2.
[417] *Warman* at 560-2.

by Westpac on overdrafts exceeding $100,000[418]. It was a rate that was applied to lending to BGF[419]. The evidence was that WBIR was a commercial bank lending rate[420].

215. It is commonplace for banks to add a margin on top of base lending rates. There was evidence at trial of the banks charging margins of 1%, 2% and 0.6%[421] plus an additional default rate of 1% to 4%[422]. Further, this is a matter that the Court would recognise without evidence[423]. It follows that the actual commercial rate for money applied by banks in trade or business in Australia was higher than the base rate reflected in WBIR.

216. The banks could have, but did not, lead evidence as to prevailing commercial interest rates. The parties were required at trial to adduce evidence and make submissions going to relief as well as liability[424], as the banks emphasised in their submissions at trial[425].

217. Simple interest is awarded only where there has been no such presumed profit to the benefit of the defaulting fiduciary, such as where there has been a failure to invest or apply trust funds in breach of duty[426]. There is no basis for the claim by the banks that there should be an award of simple interest at court rates in this case. Such an approach would disregard the fundamental principle in Equity that profits improperly obtained by a defaulting trustee or fiduciary should be recouped[427].

218. It is also commonplace that banks charge interest with monthly rests on commercial lending, overdrafts being a prime example. There was evidence that the banks charged interest monthly[428].

219. The Courts now reflect the reality of the marketplace by ordering compound interest at monthly rests[429]. The days of applying 5% at annual rests as a set mercantile rate are long gone as no longer reflecting commercial reality. Equally, the RBA rate newly proposed by the banks is not a commercial interest rate. This is recognised by the Federal Court interest rate, which is 4% above the RBA rate, even where there is no

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[418] [9717].

[419] ABFA: [TBGL.00001.002] at pp 3, 23 and [TBGL.03071.002].

[420] [WITP:00001.084.T] at paras 7-9; [MISP.00020.070.002]; [MISP:00061.095]; [MISP.00061.096]; [T:11706]-[T:11710]; [9717]; and was agreed [MISP:00067.025]; [MISP:00067.026].

[421] (a) ABFA at p3 (Westpac Overdraft Rate of Interest defined as Westpac Indicator Lending Rate plus 1%); (b) ABFA at p13 ("Margin" defined at 2% pa); (c) ABFA at pp3-4 (Margin – ie 2% – added to Australian bank bill rates and the NAB Benchmark Rate of Interest to arrive at each respective Bank's Rate of Interest); (d) Westpac letter of 30 March 89 re TBGL facility [TBGL.03071.002] at p2 (margin of 0.6% added to WILR); (e) RLFA No 2 [TBGL.03635.004] defined "Margin" as, up to the Operative Date, 0.4% pa and, on and after the Operative Date, 2% pa; (f) RLFA No 2 [TBGL.03635.004] (LIBOR plus the Margin plus, with respect to debt denominated in sterling, additional costs).

[422] (a) ABFA pp23-4 (a further 1% upon default); (b) RLFA No 2 [TBGL.03635.004] (Default Rate was 1% above the applicable rate); (c) Westpac letter of 30 March 89 re TBGL facility [TBGL.03071.002] at p2 (default rate of 4.00% in addition to WILR).

[423] *Thomas v SMP* at [23].

[424] [Tra: 20624:41-44]; [Tra: 10640:37-41].

[425] [SUBD.R15.005] at [5].

[426] *Alemite Lubrequip* at 47; *Wallersteiner* at 397, 406; *A-G v Alford* at 851-2 (De G M & G).

[427] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (***Westdeutsche***) at 701-2; *Wallersteiner* at 397.

[428] (a) ABFA at cl 10.1 and 11.2; (b) RLFA No 2 [TBGL.03635.004] at cl 9.1 and 10.2; (c) Woodings [WITP.00001.054.T] at [175] ("in my experience, banks usually charge interest on overdraft accounts on a monthly basis").

[429] *Independent Trustee Services v Morris* [2010] NSWSC 1218 at [15] enforcing orders of Peter Smith J in *Independent Trustee Services v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) for knowing assistance and knowing receipt; *Grimaldi* at [753].

issue of ensuring that a wrongdoer retains no profit when restoring money that has been misappropriated (and 6% above RBA rate post judgment)[430].

220. The banks made no submission at first instance or on appeal as to the appropriate rests for the calculation of compound interest. The only submission as to rests made by the banks at first instance was in advance of the relief hearing in March 2009 and only with reference to *deposit* rates, not lending rates[431]. While the banks challenged the award of compound interest, there was no appeal against Owen J's findings that monthly rests were appropriate for any calculation of compound interest[432].

221. The award of compound interest was not an award of revenue. It was an award of interest at rates set to capture the banks' presumed profit. Any lower rate would fail to disgorge the profits which the banks are presumed to have made in the absence of evidence led by them to the contrary. The banks seek to treat *Wallersteiner*[433] as a legislative formula, when in fact the decision represents the contextual application of orthodox equitable principle to particular facts.

222. In *Wallersteiner,* the Court acted on the presumption that the funds of the company concerned had been used by Dr Wallersteiner for his own commercial purposes, and profitably[434]. The Court made a contextual judgment as to the appropriate commercial rate of interest and the period of compounding that reflected Dr Wallersteiner's presumed use of the funds that he had applied for his own benefit.

223. Lord Denning MR and Buckley LJ referred to "the official bank rate or minimum lending rate in operation from time to time (at 388H and 399B), which Scarman LJ equated with "commercial rates" (at 406F). It is clear from the context that all judges intended to require compound interest at a commercial bank lending rate and not at a rate that would reflect the cost of funds to a bank. Later Australian authorities have consistently selected a standard commercial rate as the base rate for awarding compound interest[435].

224. The award of interest was not excessive. Its size "results from the passage of the inordinate period of time since the date of the events in respect of which relief is sought"[436]. Moreover, there was evidence from which the Court could conclude that the banks had made very substantial profits with the use of the Bell parties' money[437].

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[430] Federal Court of Australia Practice Note CM16: *Federal Court Rules 2011, rule 39.06.*

[431] As recorded in *Bell No 10* at [20], an argument was made that "The Armstrong affidavit sworn on 30 January 2009 shows that the appropriate rest period is quarterly: paragraph 13" [MISD.00024.011] at [65]. But the Armstrong affidavit was evidence only of deposit rates, not lending rates: [APPA.000.084.002] at para 1676. Also, that evidence was not admitted (save for the limited purpose of illustrating the banks' "windfall" argument): *Bell No 10* at [21].

[432] APPR.000.043, para 1968; APPA.000.097.

[433] *Wallersteiner* at 388, 398 and 406

[434] *Wallersteiner* at 388, 398 and 406.

[435] *Southern Cross*; *Hagan; Morgan Equipment*; *Grimaldi*; *Re Dawson* at 219.

[436] [AJ:1244].

[437] [AJ:1233]; [WITP.00001.054.T] at [160]-[171]; [MISP.00020.067]; [MISP.00020.068]; [MISP.00020.069]; [MISP.00020.071]; [WITP.00001.084.T] at [11]-[14]. This evidence was not challenged in cross-examination.

Part VII: Respondents' Argument on Notice of Contention and Cross Appeal

Relief should be upheld on the basis of the statutory claims

Interest

225. Because of their success on the statutory claims, the Bell parties are entitled to compound interest on the proceeds of the Transactions calculated from the date of avoidance of the respective transactions on a profit-stripping basis, alternatively on a compensatory basis. This arises in Equity, under s565 of the *Corporations Act 2001* (Cth) (*Corporations Act*) and at common law.

226. The date of avoidance of the Transactions was, in the case of s565, the date of the commencement of winding up the relevant company and, in the case of s89 of the *Property Law Act 1969* (WA), the date of the liquidator's election to avoid the Transaction. The Bell parties respectfully adopt Drummond AJA's analysis[438].

227. Equity's ability to come to the aid of the statutory provisions relied upon by the Bell parties is well-established[439].

228. Equity would come to the aid of the statute to award compound interest here because:

(a) the intent and effect of the Transactions was to defraud other creditors of the Bell companies and their entitlement to the proceeds of liquidations of those companies has been deferred for many years;

(b) the banks have known of the avoidance of the Transactions from the date of notification;

(c) the banks lacked good faith when they received the proceeds of the Transactions, in that the banks had notice of the Bell companies' intent to defraud other creditors[440];

(d) for these reasons, it was against conscience for the banks to retain the money and use it in their banking businesses;

(e) despite their knowledge, the banks used the Bell parties' money in their banking businesses for almost 20 years where they have, or ought to be presumed to have, earned compounding returns on it;

(f) if, contrary to the submission below, compound interest is not available at common law, or under s565, then the common law and statutory suite of remedies is inadequate, as the legislature appears to have recognised in enacting s588FF(1)(c) of the *Corporations Act*.

229. In respect of their claims under s565, compound interest is available under that section. The Bell parties respectfully adopt the reasoning of Lee AJA[441], with which Carr AJA agreed[442].

230. Further, this Court should now recognise that the ability of the common law to reverse an unjust enrichment extends to an order for compound interest where simple interest

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[438] [AJ:2522]-[AJ:2535].

[439] *In re Mouat* [1899] 1 Ch 831 at 833, 834; *Williams v Lloyd* (1933) 50 CLR 341 (declaratory relief given at 375, 378); *Brady v Stapleton* (1952) 88 CLR 322 (equitable tracing rules applied at 335-8, 345-6; note that an action for money had and received in respect of other assets was refused at 332-4, an alternative claim for an equitable account having been abandoned at trial at 331); *Official Trustee v Alvaro* (1996) 66 FCR 372, at 426-7; *O'Halloran v O'Halloran* [2002] FCA 1305 at [80] (Allsop J). See also, paras 253-254 below.

[440] [AJ:583-8], [AJ:2513], [AJ:3197].

[441] [AJ:730]-[AJ:744].

[442] [AJ:3231]-[AJ:3232].

would fall short of the amount of the benefit obtained by a defendant[443]. The decision in *Commonwealth v SCI Operations Pty Ltd*[444] should be distinguished on the basis that the provisions of the *Customs Act 1901* (Cth), which provided the entitlement to the refunds the subject of the claim for interest in that case, were inconsistent with any entitlement to interest on such refunds[445].

Other relief – bank fees, legal fees, stamp duty and bank interest

231. Owen J made undisturbed and unchallenged findings that the Bell companies had paid bank fees, legal fees, stamp duty and bank interest. Owen J ordered the repayment of these sums to the Bell parties.

10 232. The Court of Appeal made unchallenged findings that the Transactions were entered into with intent to defraud creditors[446], without valuable consideration[447] and that the banks lacked good faith[448]. These attributes apply to the payments of bank fees, legal fees, stamp duty and bank interest. That is so both by virtue of the payments themselves and also because the payments, flowing directly from the Transactions as they did, formed part of the Scheme[449], the objective of which was to deliver all the worthwhile assets of the Bell companies to the banks, to the prejudice of other external and internal creditors of the companies. Section 565 attacks dispositions being "the accomplishment of a plan by the implementation of a number of separate steps all taken to achieve the planned objective"[450] The payments of the bank fees, the legal fees, the stamp duty and
20 the bank interest each constitute separate steps taken to achieve the planned objective of the Scheme. The orders for repayment of these amounts should be upheld on this basis.

233. Drummond AJA erred in concluding that this argument was unavailable on the pleadings[451] because the relief sought by each of the Australian Bell parties under its statutory claims amounted to a comprehensive avoidance of the suite of Transactions entered into by that Bell party[452].

Other relief – the guarantees and indemnities

234. On the same basis, the setting aside of the guarantees and indemnities, as further separate steps to achieve the planned objective of the Scheme, ought to be upheld.

235. Further, as Lee AJA concluded[453], the guarantees and indemnities constituted
30 dispositions of property[454] in the same way as the share mortgages and mortgage debentures with which they went hand-in-hand did, because they created choses in action and disposed of them to the banks.

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[443] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] 1 AC 561 (***Sempra***).
[444] (1988) 192 CLR 285 (***SCI***).
[445] The ratio of a majority of the Court: Gaudron J [44], McHugh & Gummow JJ [66], [76], and Kirby J [96].
[446] [AJ:546]-[AJ:560], [AJ:2513], [AJ:3185-8].
[447] [AJ:608], [AJ:2513] (Carr AJA contra at [AJ:3203]).
[448] [AJ:583-8], [AJ:2513], [AJ:3197].
[449] [4317], [AJ:600]-[AJ:601], [AJ:2086].
[450] *Caddy v McInnes* (1995) 58 FCR 570, 582; *Official Trustee in Bankruptcy v Baker* [1994] FCA 1243 at 86; *Donnelly v McIntyre* [1999] FCA 450 at [77].
[451] [AJ:2511]-[AJ:2512].
[452] 8ASC, prayers for relief E-H.
[453] [AJ:670].
[454] Consistently with the reasoning in *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [44]; also *Pacific Brands* at [39]-[43].

236. Further, cl 3.7 of the guarantees and indemnities transferred property to the banks by diminishing each guarantor's rights against other Bell participants[455] and was not severable for the reasons given by Lee AJA[456]. Alternatively the setting aside of the guarantees and indemnities should be upheld to the extent of cl 3.7 and cl 10 thereof.

Other relief – non-plaintiff Transactions

237. The Court of Appeal granted injunctive relief to prevent the banks using their rights under the Principal Subordination Deed (PSD) against non-plaintiff Bell participants (currently de-registered[457]) to intercept the flow of funds through the group post judgment. The PSD has been set aside against the relevant Bell parties under the statutory claims[458]. For the reasons given by Lee AJA[459] that relief ought to be upheld in Equity's jurisdiction to come to the aid of the statutory claims (see para 228 above).

Relief should be upheld on the basis of equitable fraud

238. At trial and on appeal claims were made of equitable fraud arising out of an imposition and deceit upon all non-bank creditors, including LDTC, as trustee for the BGNV bondholders[460].

239. The elements of those claims were correctly summarised by Drummond AJA. There must be an agreement that works an *imposition or deceit* on persons not parties to the agreement who must be in such a *relationship* with one or other of the parties that they will be affected by the agreement and the agreement must infringe some head of *public policy* so as to require equitable intervention[461]. With respect, his Honour then erred by finding that the banks and the non-bank creditors of the Bell group did not stand in the necessary relationship to each other and that no head of public policy was infringed[462].

240. Carr AJA agreed with Drummond AJA on the question of public policy[463] and found that there was no deceit because the banks were under no obligation to inform the other creditors of the relevant circumstances and LDTC knew enough about the Transactions to mean that it was not deceived[464]. Lee AJA, in dissent on equitable fraud, found that the claim had been made out[465].

The Transactions were an imposition and deceit on the non-bank creditors

241. The meaning of the phrase "imposition and deceit" is to be understood by reference to the words Lord Hardwicke used to describe the prohibition, namely that persons "shall not transact *mala fide* in respect of other persons" who stand in the necessary relationship to them[466]. There must be bad faith in respect of particular third persons or the public. However, that does not require common law deceit. Lord Hardwicke referred to "actual" fraud as the first kind of equitable fraud, thus distinguishing it from

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[455] per Lee AJA [AJ:675]-[AJ:676], Drummond & Carr AJJA agreeing as to the operation of cl 3.7 at [AJ:2507] and [AJ:3163].
[456] [AJ:675]-[AJ:687].
[457] Save for Bell Bros Holdings, which is in liquidation.
[458] [9202]-[9203], [AJ:662], [AJ:2513], [AJ:3417].
[459] [AJ:1261]-[AJ:1276].
[460] 8ASC, para 65M.
[461] [AJ:2601]; see *Earl of Chesterfield v Janssen* [1751] 2 Ves Sen 156 at 156, 28 ER 100 at 100 (***Chesterfield***) and *Pilmer* at [37].
[462] [AJ:2961].
[463] [AJ:3082], [AJ:3096].
[464] [AJ:3087], [AJ:3092].
[465] [AJ:814].
[466] *Chesterfield* 156 (Ves Sen), 100-101 (ER).

the fourth kind, where it is only necessary that an imposition and deceit be inferred from the nature and circumstances of the transaction.

242. Further, the examples referred to in *Chesterfield* show that deceit does not mean a misrepresentation relied upon by a third party. Rather, the deceit is to be inferred from the character of the transaction: marriage-brokage contracts[467]; private agreements to return part of a dowry to the bride's parent or guardian[468]; the composition cases[469]; and bribes in return for appointment to public office[470]. Other examples include a bond given as a reward for using influence over another's estate[471] and an agreement to marry after the death of a parent[472]. In each of these cases, the parties to the equitable fraud have transacted so as to prejudice third parties (without their consent) or the public. But the cases evince no need for a finding that any person was deceived, much less that any party actively set out to conceal a material aspect of the transaction[473]. Drummond AJA was therefore correct to hold that it is not essential that an agreement be clandestine if it is to come within this kind of fraud[474].

243. The findings that are identified in the particulars to the notice of contention in respect of equitable fraud establish an imposition and deceit here. The Transactions and Scheme were intended to benefit the banks, at the expense of the bondholders and other creditors, by placing the assets of the companies beyond the reach of those creditors and applying those assets to an informal administration, the proceeds of which were to discharge the liabilities to the banks. Prejudice to the bondholders and other creditors was the very point of the Transactions[475]. They were therefore entered into *mala fide* in respect of creditors and were an imposition and deceit on them[476].

The non-bank creditors were affected by the Transactions

244. Lord Hardwicke's statement of the relationship element of the cause of action was simply that the plaintiffs must stand in 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"[477]. While common dealings between creditors of an insolvent debtor will satisfy this requirement[478], it can be satisfied in the absence of any common dealing between the parties to the impugned transaction and the affected third party[479]. Here, the prejudicial

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[467] *Hall v Potter* (1695) Show Parl Cas 76; 1 ER 52; *Cole v Gibson* (1750) 1 Ves Sen 503; 27 ER 1169; *Hermann v Charlesworth* [1905] 2 KB 123 (***Hermann***).

[468] *Gale v Lindo* (1687) 1 Vern 475; 23 ER 601; *Turton v Benson* (1718) 1 P Wms 496; 24 ER 488.

[469] *Spurret v Spiller* (1740) 1 Atk 105; 26 ER 69; *Jackman v Mitchell* (1807) 13 Ves Jun 581; 33 ER 412; *Milner, Ex parte; In re Milner* (1885) 15 QBD 605 (***Milner***); *Paton v Campbell Capital Ltd* (1993) 46 FCR 30 (***Paton***) at 37.

[470] *Law v Law* (1735) 3 P Wms 391; 24 ER 1114; *Morris v M'Cullock* (1763) Amb 432; 27 ER 289.

[471] *Debenham v Ox* (1749) 1 Ves Sen 276; 27 ER 1029.

[472] *Woodhouse v Shepley* (1742) 2 Atk 535; 26 ER 72.

[473] Contrary to the findings of the trial judge, at [4294], [8974] and [9046].

[474] [AJ:2595]-[AJ:2596]; see also *Paton* at 37.

[475] [AJ:547], [AJ:556], [AJ:2513], [AJ:984], [AJ:1088], [AJ:2079].

[476] [AJ:556], [AJ:984], [AJ:996], [AJ:2079], [AJ:2086], [AJ:2513]. Contrast *Re La Rosa and Another; Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 270 at 288 where French J held that the necessary relationship between the transactions and creditors was not present, because there was no suggestion that the transactions were intended to defraud creditors. Carr AJA was wrong at [AJ:3085] to rely on this passage, because the unchallenged findings in the present case are that the Transactions were intended to defraud creditors.

[477] *Chesterfield* at 156 (Ves Sen), 101 (ER); [AJ:2601].

[478] Eg *Milner*; *Paton*.

[479] Of the examples referred to in the footnotes above, only the composition cases have the characteristic of common dealing between the parties to the impugned transactions and the affected third parties.

effect of the Transactions on BGNV (and therefore the bondholders) was palpable and unarguable[480].

Public policy

245. Public policy is not fixed and stable and while judges may be no better able to discern what is for the public good than other members of the community that is no reason for their declining to decide upon it[481]. The public policy offended in this case is the policy in favour of insolvent companies preserving and applying their assets for the benefit of the body of their creditors as a whole. This public policy is well recognised.

246. First, when a company is insolvent or of doubtful solvency the interests of its creditors intrude, as in a practical sense the assets of the company become the assets of the body of creditors, so that the interests of the creditors as a whole become identified with the interests of the company[482].

247. Secondly, the policy is inherent in the provisions of insolvency statutes that provide for the right to recover money from a creditor who has been preferred, or to recover assets that have been put out of the reach of creditors. The purpose of those rights is to benefit the general body of creditors by striking down those payments by a debtor that have the effect of depleting the assets available to the body of creditors[483].

248. Thirdly, the policy is apparent in the developments culminating in the enactment in 1992 of the voluntary administration provisions of Part 5.3A of the *Corporations Act*. The policy is explained in the "Harmer Report" which led to that reform[484].

249. The public policy stated above does not require all creditors to be treated *pari passu*, nor does it preclude the possibility that it may be in the interests of the creditors as a whole for one group of creditors to take security in return for advancing further funds in order to restore solvency or facilitate restructuring. A company that restores solvency by refinancing or recapitalising with new equity or agreeing a restructure also acts in accordance with the policy.

250. It is no objection to the policy that before winding up there is no legal prohibition on an insolvent debtor dealing preferentially with some creditors[485]. In any event, in cases like the present there is more than a mere preference. A particular object of the Transactions was to defeat the interests of BGNV because of the issue in relation to subordination[486]. There is no need for conduct to infringe some other legal prohibition before it can be held to be an equitable fraud.

251. Nor is it an objection that statutory provisions provide for the avoidance of certain transactions if a company is wound up[487] and for voluntary restructuring[488]. As to the

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[480] [AJ:996], [AJ:2086]; the same must go for the other unsubordinated unsecured creditors.

[481] *A v Hayden (No 2)* (1984) 156 CLR 532 at 558-559, citing with approval a passage from the judgment of Jordan CJ in *In re Morris (decd)* (1943) 43 SRNSW 352 at 355-356. See also *Wilkinson v Osborne* (1915) 21 CLR 89 at 97, cited with approval by Wilson and Dawson JJ in *A v Hayden* at 571.

[482] See the authorities canvassed in paras 119-121 above concerning the duties of directors and the interests of creditors.

[483] *Re Yagerphone* [1935] 1 Ch 392 at 396, approved in *NA Kratzmann Pty Ltd v Tucker (No 2)* (1968) 123 CLR 295 at 299-300; *Airservices Australia v Ferrier* (1996) 185 CLR 483 at 509; Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) para 1035.

[484] Australian Law Reform Commission, *General Insolvency Inquiry Report* (1988) Vol 1 [53].

[485] See the contrary finding by Drummond AJA [AJ:2639].

[486] [AJ:984], [AJ:995]-[AJ:996], [AJ:1018], [AJ:1108], [AJ:2087]- [AJ:2088], [AJ:2315].

[487] [AJ:2611].

[488] [AJ:2660].

first of these, it cannot be assumed that the avoidance provisions intend to exclude other remedies, or leave Equity no room in which to operate. There is a presumption to the opposite effect[489] and the submissions below as to Equity assisting the statutory jurisdiction show to the contrary[490]. As to the second, the voluntary administration provisions do not govern dealings before any administration. Further, the principles of equitable fraud apply more broadly than in an insolvency context and are not impliedly overtaken by specific statutory provisions.

The remedial consequences of the equitable fraud

252. Transactions constituting an equitable fraud are liable to rescission and orders will be made for the restoration of any property or benefits which have passed under them[491], including by an account[492]. Accordingly, the orders for rescission of the Transactions and repayment of the proceeds should be upheld on the basis of equitable fraud.

253. In addition, compound interest is payable. It should now be recognised that compound interest will be awarded, on a profit-stripping basis, or alternatively on a compensatory basis, on a restitutionary claim for the recovery of or proceeds of a transaction which is void, including on grounds of public policy[493]. In any event, the circumstances in which Equity will order compound interest are not closed[494] and include cases where money has been obtained and retained by fraud[495] and where the defendant has acquired a benefit and profited through its own wrongful act[496].

254. Unlike *Westdeutsche* and *Sempra,* this is not an ineffective contract case in which there is no wrongdoing. It is fundamental to the public policy underlying equitable fraud that a recipient not retain any part of the benefit obtained[497]. Upholding the existing order that amounts received are held by the banks on constructive trust will ensure proper restoration of the proceeds of the fraud with compound interest or an account of profits.

255. The Transactions constituted a Scheme which prejudiced each of the Bell participants[498]. Orders were sought to set aside each Transaction constituting the Scheme on the basis that it formed part of a single commercial event falling within the

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[489] *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 487; *Balog v Independent Commission Against Corruption (ICAC)* (1990) 169 CLR 625 at 635-636.

[490] *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [75] is authority that the law will not strike down a contract as offending against a rule of public policy that supplements the *Corporations Act*, but that was said in the context of the principle whereby contracts are nullified for disobedience to a statute, not in relation to a policy that is apparent from the sources described above as the basis of a claim under the fourth type of equitable fraud.

[491] *ET Fisher & Co Pty Ltd v English Scottish and Australian Bank Ltd* (1940) 64 CLR 84 (***ET Fisher***) at 91, 103; J McGhee (ed), *Snell's Equity*, 31st ed, 2005, §8-55; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th ed, 2002, §24-020. The principle has been applied in equitable fraud cases concerning: marriage brokage (*Hermann* at 133-5, 138; *Smith v Bruning* (1700) 2 Vern 392); procurement of public office (*M'Cullock*); *Osborne v Williams* (1811) 18 Ves Jun 379; 34 ER 360 (***Osborne***) at 384; and compositions amongst creditors *Mare v Sandford* (1859) 1 Giff 288; 65 ER 923 at 926; *McKewan v Sanderson* (1875) LR 20 Eq 65 (***McKewan***) at 73-74.

[492] *Osborne* at 384.

[493] *Sempra* at [184]-[186] (Lord Walker), [239]-[241] (Lord Mance). Additionally, the reasoning of Lords Hope and Nicholls in relation to common law claims applies equally to equitable claims.

[494] *Hungerfords* at 148.

[495] *Hungerfords* at 148; *SCI* at [74].

[496] *Westdeutsche* at 693 (Lord Goff, dissenting). See also *Sempra* at [116], [132] and [230]-[232].

[497] *ET Fisher*, at 103, *McKewan* at 74.

[498] [4317]-[4319], [AJ:945], [AJ:2079].

fourth kind of equitable fraud[499]. The Transactions were liable to be set aside at the instance of any of the third parties imposed upon[500].

256. The non-plaintiff relief should be sustained for the reasons given by Lee AJA[501] and on the ground that it is necessary to prevent the Scheme from increasing the distribution of the proceeds of the equitable fraud back to the banks at the expense of the non-bank creditors imposed upon by the fraud[502]. This is consistent with the practice of granting relief in equitable fraud cases even though all creditors to a composition are not before the Court[503].

The Court should grant the Bell parties an informed right to elect, as against each of the banks, for an account of profits instead of the award of compound interest

257. The trial judge, in purported exercise of discretion, declined to allow the Bell parties to elect for an account of profits for two reasons. First, because "the purpose that awards of compensation serve can adequately be fulfilled by other and simpler remedies"[504] that will do "practical justice"[505]. Secondly, on public interest grounds, namely to avoid the expenditure of further public resources on issues that would be complex where there was no confidence that their resolution would go smoothly (when the case had already consumed its fair share of this scarce commodity)[506]. The majority of the Court of Appeal adopted the second reason for denying an election for an account of profits[507].

258. Although an account of profits, like other equitable remedies, is discretionary, it is granted and withheld according to settled principles. A party who so elects is entitled to an account of profits subject to such considerations[508]. The reasons expressed by the Courts below for refusing an account of profits are not recognised by the settled principles of Equity.

259. Difficulties that might be encountered in undertaking an account are not a reason for declining an election for an account. Whilst it may be notoriously difficult to isolate some costs for an account and mathematical exactitude is generally impossible, nevertheless the exercise must be undertaken[509]. Those who have caused the misapplication cannot be heard to argue that it should be refused because of the difficulty of undertaking an account[510].

260. The Court can and ought to take a robust approach and do the best it can on the evidence when taking an account[511]. By such means, the Court can avoid placing an unnecessary burden upon the resources of the Court. However, the Court cannot decline to grant a party the equitable remedy of an account on the basis that it is too time-consuming to undertake the adjudication necessary to afford that right.

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499 [9643].
500 *Chesterfield*, at 155; see *Cecil v Plaistow* (1793) 1 Anst 202, 145 ER 844 at 845.
501 [AJ: 1261-1276].
502 [AJ: 1264, 1271-2]. See also [AJ: 122].
503 See for example *Ex parte Milner; in re Milner* (1885) 15 QBD 605 at 614-616; *Dauglish v Tennent* [1866] LR 2 QB 49 at 54.
504 [9707].
505 [9711].
506 [9708]-[9711].
507 [AJ:1221], [AJ:2678].
508 *Warman* at 559-60. See also *Stambulich v Ekamper* [2001] WASCA 283 at [22].
509 *Docker v Somes* at 673, 1101, *Dart Industries Inc v Decor Corporation Pty Ltd* (1992) 179 CLR 101 at 111.
510 *Docker v Somes* at 673, 1101.
511 *Liquideng Farm Supplies Pty Ltd v Liquid Engineering 2003 Pty Ltd* (2009) 175 FCR 26 at [37] and [42].

261. Further, the reason why the trial judge thought the matter would be complex will not arise in this case[512]. The account will not require an apportionment between profits generated by the skill and abilities of the banks (through their employees) and profits that were generated by the monies to be disgorged by the banks. Issues of this kind only arise where the accounting is in respect of the profits from a business undertaking which itself was appropriated in breach of trust or fiduciary duty. Where, as here, the profits are derived from the use of property or money, there is no adjustment for skill and ability[513]. This is not a case where there is to be an accounting in respect of the conduct of the banking enterprise by each of the banks. Rather, they must account for the profits derived from using the Bell parties' money for many years.

262. The reasoning of the Courts below deprived the Bell parties of their right to elect for an account without identifying any settled principle of Equity as to why the remedy should be withheld. The trial judge had no difficulty with the basic proposition that an account of profits could be an available remedy[514]. The two reasons for withholding the remedy were not valid reasons for doing so. It follows that the remedy should have been given.

263. Alternatively, if the *Barnes v Addy* claims are not upheld, then an account of profits should be ordered in aid of the statutory claims[515].

Part VIII: Estimate of Time

264. The respondents estimate that they will require 8 hours to present the respondents' oral argument on all issues in the appeal.

Dated: 12 July 2013

N J Young C G Colvin J D S Barber D J Jackson C Van Proctor

Ashurst Australia

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[512] [9708].

[513] *Warman* at 562.

[514] [9703].

[515] *Blenkinsopp v Blenkinsopp* (1850) 12 Beav 358, 568, 587-8 (1850) 50 ER 1177 at 1185 affirmed on appeal (1852) 1 De GM&G 495, (1852) 42 ER 644; *Official Trustee v Alvaro* (1996) 66 FCR 372 at 426-7. The categories of equitable account in support of common law claims are not closed; *North Eastern Railway Co v Martin* (1848) 2 Ph 758 at 762.