Knowing Assistance and Knowing Receipt: Divergences between England and Australia[1]

RW White[2]

1 *Barnes v Addy* (1874) LR 9 CH App 244 was decided 150 years ago. It was an *ex tempore* decision, which is unsurprising given the weakness of the plaintiffs' claim.

2 By the time the case came to the Court of Appeal in Chancery, the relevant parties were neither Barnes nor Addy. They were solicitors who had acted for Mr Addy and Mr Barnes; Messrs Duffield and Preston.

3 The suit arose from the will of William Addy, who died on 15 December 1835 leaving a widow and four children. William Addy left his estate to his trustees directing that his estate be sold and that the proceeds, after an annuity to his widow, be held on trust for his children equally, subject to settlements. He had a son and three daughters. The dispute arose in respect of the share of one of the daughters, Ann. Her share had been settled upon her for life (and after her death for her children).

4 William appointed three executors and trustees, one of whom was his nephew, JW Addy. They were empowered to appoint new trustees but not to diminish the number of trustees.

5 In 1837, Ann married Barnes. By 1857, JW Addy was the sole trustee of the will.

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[1] This paper was delivered to students of the University of Technology, Sydney on 17 September 2024 and is a revised version of an earlier paper delivered to students of the Legal Profession Admission Board's course taught by the Law Extension Committee.

[2] A judge of appeal of the Supreme Court of New South Wales. I acknowledge and thank my tipstaff, Mr Ben Hines, for his research for this paper.

6 Barnes and JW Addy were not on good terms. After some litigation between them, Addy called on his solicitor, Mr Duffield, and told him that he had made up his mind to retire in favour of Barnes. Duffield advised him not to do so and pointed out to him that there was a risk of misapplication of the trust fund if it were put in the power of a sole trustee. Addy told Duffield that he did not consider there was any real risk as he did not doubt that Barnes would consult the interests of his wife and children and execute the trusts in their favour.

7 Duffield saw Addy's previous solicitor (a Mr Parker) and sent him a draft deed for the appointment of a new trustee of the will so far as regarded the share of Mrs Barnes and her children. Parker declined to act. Addy was still determined to retire in favour of Barnes to get rid of the expense and annoyance of acting as trustee for the Barnes family. Barnes then engaged Mr Preston, to act for his wife and told him that the whole matter had been fully discussed and arranged between the parties concerned, and that his wife had had fully explained to her and fully understood the whole business, and had authorised him to instruct Preston to act on her behalf as well as his.

8 Preston received drafts of the deeds for the appointment of Barnes as a sole trustee of his wife's share of the estate in the place of Addy. He wrote to Mrs Barnes and obtained her assurance that she was fully aware of the proposed arrangement and wished that it be carried out. Thereupon Preston approved of the deeds, which were duly executed.

9 Barnes, having obtained control of his wife's share of the settlement, used it to pay his debts. He later became bankrupt.

10 The complaint was brought by Mrs Barnes' children. Its gist was that Duffield, the solicitor acting for Addy (the retiring trustee) and Preston, the solicitor for Barnes, had allowed Addy to retire in favour of a single trustee (Barnes) which gave Barnes the power to misappropriate his wife's share of the estate, which had been settled by the deceased upon her for life and, after her death, for her children.

11 Barnes' wife's consent to her husband's being appointed as sole trustee was no protection of the interests of her children (the deceased's grandchildren).

12 The retiring trustee, Addy, died, but his estate was found to be liable to replace the fund which had been lost by reason of his appointing Barnes as a sole trustee of Mrs Barnes' share of the estate. Duffield had advised Addy against that appointment but had drawn the relevant deeds when his advice had been rejected.

13 The only issue in the Court of Appeal of Chancery was the claim against the solicitors. It was argued that there was a breach of trust by Addy's transferring the fund to Barnes, independently of Barnes' subsequent breach of trust in misappropriating it to his own use. It was said that Duffield, although he did not know of Barnes' intended misappropriation of the fund, assisted him to commit the breach of trust and was liable for the consequences of his conduct. It was said that Preston was alive to the danger of transferring the fund to Barnes and ought to have declined to undertake the business rather than assist in a perpetration of a breach of trust.

14 The claim in equity against the solicitors was weak even in the nineteenth century. Sir William James said:

> "I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think…that those cases should be extended" (at 255-256).

15 In his *ex tempore* judgment, and without reference to authority, Lord Selborne LC said:

> "Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent

> conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

16 The latter part of this statement comprises the well-known two limbs of accessorial liability. The first is where agents of trustees "receive and become chargeable with some part of the trust property" (knowing receipt) and the second where the agents "assist with knowledge in a dishonest and fraudulent design on the part of the trustees" (knowing assistance).

17 The fact that the principle was addressed only to "agents" of trustees was due to the facts of *Barnes v Addy*. The passage has been applied more widely to third parties who receive trust property or property of a principal (such as a company) misapplied by a fiduciary (such as a director) with knowledge that the transfer is made in breach of fiduciary duty, or to a third party, whether an agent or not, who knowingly assists in a fiduciary's fraudulent and dishonest design (*Belmont Finance Corporation Ltd v Williams Furniture Ltd (No. 2)* [1980] 1 All ER 393; *Kalls Enterprises Pty Ltd (In Liq) v Baloglow & Anor* [2007] NSWCA 191; (2007) 63 ACSR 557 at [153]-[159] and cases cited; *Super 1000 v Pacific General Securities* [2008] NSWSC 1222 at [203]-[204]).

18 It is remarkable that the *ex tempore* judgment given without reference to authority should have become canonical. But there it is.

Knowing assistance

19 I will address the second limb (knowing assistance) first. This is because the divergence between English and Australian law on this issue first became clear after the delivery of the decisions of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22.

20 As the High Court said in *Farah Constructions v Say-Dee*, it had become customary to analyse the requirement of knowledge in the second limb of *Barnes v Addy* by reference to the five categories formulated by counsel in *Baden v Société Générale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 at 575-576, 582; [1994] All ER 161 at 235, 242, 243, which discriminated between:

> "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."

21 In *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; [1975] HCA 8, Barwick CJ, Stephen J and Gibbs J accepted that knowledge of a fraudulent breach of trust would be established if the defendant knew of facts which would, to a reasonable man, tell of fraud or breach of trust or if the defendant refrained from inquiry for fear of learning of the fraud or breach of trust (per Barwick CJ at 376, Stephen J at 412, Gibbs J at 399).

22 In *Royal Brunei Airlines v Tan*, the Privy Council rejected the notion that an accessory could only be liable for knowing assistance in a breach of trust or fiduciary duty if the trustee's or fiduciary's breach were fraudulent.

23 Lord Nicholls, giving the advice of the Privy Council, observed that Lord Selborne's formulation of the principle was given where the new sole trustee in *Barnes v Addy* (Barnes) was engaged in a dishonest and fraudulent design because he intended to misapply the trust fund as soon as it reached his hands, but the solicitors did not know of or suspect Barnes' fraudulent design (at 386).

24 This was true but not wholly to the point. Barnes was not yet a trustee when the solicitors were engaged. The breach of trust was by JW Addy in retiring in favour of Barnes without having appointed two additional trustees, putting the inheritance of Barnes' children at risk if Barnes were to breach the trust. There was no suggestion that JW Addy was dishonest. Lord Selborne's point was that JW Addy's breach of trust which the solicitors assisted was not fraudulent.

25 Lord Nicholls took the case of an honest trustee and a dishonest third party who persuaded the trustee to apply trust property in a way which the trustee honestly believed was permissible, but which the third party knew was a clear breach of trust. In such a circumstance, the third party should be liable, even though the trustee's breach was not dishonest (at 384).

26 There is no doubt about that principle. In *Farah Constructions v Say-Dee*, the High Court observed (at [161]) that Lord Selborne's statement was not exhaustive of the circumstances in which a third party who has not received trust property and who has not acted as a *trustee de son tort* may nevertheless be accountable as a constructive trustee, and referred to earlier authorities that established that a third party might be treated as a participant in a breach of trust where the third party had knowingly induced or immediately procured breaches of duty by a trustee where the trustee had no improper purpose (see examples cited at fn 237). Two of the examples cited concerned solicitors. In *Fyler v Fyler* (1841) 3 Beav 548; 49 ER 216, the bill alleged that a firm of solicitors knowingly prevailed on their client, who was a trustee for minor children, to lend £6,000 of trust money to a property developer to procure payment of a debt owed by the developer to the firm and to discharge other debts for which they were also liable. Security was taken over a leasehold estate in Park Lane but on terms that when it was sold the debt did not have to be repaid if like security was obtained in substitution. The loan was a breach of trust. The Master of the Rolls held that, had the facts been established, the solicitors would have been liable to replenish the trust. The claim failed on the facts. In particular, it was not proved that the solicitors knew what the trustees' power of investment was. Nor was it proved that the solicitors profited from the advance made to the developer.

27 In *Alleyne v Darcy* (1854) 4 I Ch R 199, the allegations were similar, but were made out. An attorney, Mr Darcy acted for a Mrs Alleyne, who was the executrix and trustee of her late husband's will by which property was left on trust for their son. Darcy persuaded her to lend £400 of trust funds to another client of his without adequate security so that costs due by the other client to him could be paid. He retained more than a fourth of the loan proceeds. He knew, or as an

attorney he was bound to know that a loan of trust funds on personal security was a breach of trust. He was found liable to make good the money.

28 The third case cited was *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840 where a testatrix left property for the children of one Willian Knibb. At that time this meant the legitimate children of William Knibb. He provided the trustees with a forged marriage certificate that showed he was married in 1826, whereas he was not married until 1836 and all the children were illegitimate. The children were required to pay into court the funds they had received with interest. William Knibb was required to make up any shortfall. If there were still a shortfall the trustees had to restore that shortfall.

29 In *Royal Brunei Airlines v Tan,* the Privy Council said that the position should be the same if, instead if *procuring* the breach, the third party had dishonestly *assisted* the breach (at 384).

30 In *Royal Brunei Airlines v Tan*, the Privy Council went on to say that the third party would be liable as an accessory to the breach of trust or fiduciary duty if the third party were dishonest in the sense that he or she (or it) did not act as an honest person would act if placed in those circumstances (at 390). This was an objective test of dishonesty. The Privy Council said (at 392):

> "*The accessory liability principle*
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> Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. 'Knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* [1993] 1 W.L.R. 509 scale of knowledge is best forgotten."

31 *Royal Brunei Airlines v Tan* has been subsequently endorsed in the United Kingdom.

32 It was not endorsed by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* which said (at [164]) that it was

> "…unnecessary to decide now how far Royal Brunei, and subsequent decisions in the House of Lords and Privy Council (*Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd (In liq) v Eurotrust International Ltd* [2006] 1 P & CR DG16; [2006] 1 All ER 333; [2006] 1 Lloyd's Rep 225) have modified the second limb of *Barnes v Addy* or, rather, restated the form of liability operating antecedently to and independently of *Barnes v Addy*, and if so, whether these changes should be adopted in Australia."

33 The High Court also said (at [163]):

> "Thirdly, whilst the different formulations of principle may lead to the same result in particular circumstances, there is a distinction between rendering liable a defendant participating with knowledge in a dishonest and fraudulent design, and rendering liable a defendant who dishonestly procures or assists in a breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design. The decision in *Royal Brunei* has been referred to in this Court several times (*Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at 165; *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [4]; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 174 [3]) but not in terms foreclosing further consideration of the subject in this Court, in particular, further consideration of the apparent necessity to displace the acceptance in *Consul Development Pty Ltd v DPC Estates Pty Ltd* of the formulation of the second limb of *Barnes v Addy* were Royal Brunei to be adopted in this country. Until such an occasion arises in this Court, Australian courts should continue to observe the distinction mentioned above and, in particular, apply the formulation in the second limb of *Barnes v Addy*."

34 Faithful to that adjuration, the NSW Court of Appeal has held that, for the second limb of *Barnes v Addy* to be engaged, the defaulting trustee or fiduciary must have engaged in behaviour that was fraudulent and dishonest (*Hasler v Singtel Optus* (2014) 87 NSWLR 609 at [122]-[124]; [2014] NSWCA 266).

35 Another decision of the NSW Court of Appeal, *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151; [2023] NSWCA 294, illustrates the difference between the English and Australian position. There, two companies (called the Ashington companies) earned fees as the trustee and manager of two unlisted unit trusts which invested in property developments. The majority of unit holders in the trusts were the trustees of large superannuation funds. In 2009 (following the GFC) some of the facilities were in default, including a facility entered into to enable Ashington to complete the purchase of land at Stonington in Victoria. The terms of the security and the actions threatened by the mortgagee made it essential for Ashington to refinance the debt. Ashington

employed a Ms Garrett and a Mr Renauf, who had experience in capital raisings for distressed companies. One of the defendants was an insolvency firm, then known as PPB, which had been retained to act for the superannuation funds who were beneficiaries of the unit trusts.

36 One of the parties approached by Garrett and Renauf was prepared to provide refinance, but only on condition that the Ashington companies be removed as trustee and manager, and that a new company take over that role in which it would have a substantial financial interest. Garrett and Renauf secretly negotiated for themselves to take up positions in the proposed new company. PPB was aware of this and was aware that Garrett and Renauf had not disclosed their intentions to Mr Anderson, who was the managing director of and a shareholder in the Ashington companies. PPB provided assistance to Garrett and Renauf's plan and recommended it to the unit holders for whom it acted, who were disgruntled with Ashington's and Mr Anderson's performance.

37 The Court of Appeal held that Garrett and Renauf owed fiduciary obligations to the Ashington companies in respect of their task of seeking a replacement lender and were in breach of that duty by negotiating a deal which would see Ashington replaced by a new trustee from which they would financially benefit. The breach was fraudulent and dishonest. PPB assisted their scheme with knowledge which, to an honest and reasonable person in PPB's position, would indicate that they were acting in breach of their fiduciary duty owed to Ashington. PPB, along with others, was held liable to pay equitable compensation. It is unlikely that PPB's conduct could be described as dishonest.

38 Dishonesty on the part of PPB was not alleged. It was acting in what it considered to be the interests of its clients.

39 On the same facts, I doubt that PPB would have been liable under English law.

Knowing Receipt

40 In *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] CH 437, the Court of Appeal of England and Wales held, in a case of knowing receipt, that it was not necessary to establish that the recipient of money paid by a fiduciary in breach of his fiduciary duty was dishonest, but it was necessary to establish the recipient had such knowledge that the moneys received were traceable to a breach of trust or of fiduciary duty to make it unconscionable for him to retain the benefit of the receipt.

41 In *Grimaldi v Chameleon Mining NL & Anor (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6, the Full Court of the Federal Court (Finn, Stone and Perram JJ) held that knowledge within any of the categories (i)-(iv) in *Baden* sufficed to impose liability for knowing receipt (at [267]-[270]). This has been followed in Australia.

42 In *Frazer v Walker* [1967] 1 AC 569, the Privy Council said that indefeasibility under s 42 of the *Real Property Act 1900* (NSW) does not bar *in personam* claims recognised at law or in equity. In *Farah*, the High Court held that only certain *in personam* claims are recognised as an exception to indefeasibility. This did not include claims for knowing receipt of Torrens title land with knowledge (not amounting to fraud within the meaning of s 42) under the first limb of *Barnes v Addy*. Whether that would also be the position in the case of Torrens title land acquired by an accessory liable under the second limb of *Barnes v Addy* was not decided. This issue was discussed (obiter) in *Turner v O'Bryan-Turner* [2022] NSWCA 23 at [113]-[121].

43 Returning to the first limb, what was not resolved in *Farah* was whether personal remedies (equitable compensation or an account of profits) would be available against an accessory who had knowledge that property was being transferred to him or her by a trustee or other fiduciary in breach of fiduciary duty, even though (in the absence of fraud) s 42 barred a proprietary remedy.

44 This question was raised but not decided in *Super 1000 Pty Ltd v Pacific General Securities Ltd* at [213]-[237]. I concluded, with disquiet, that, following *Farah*, no proprietary remedy was available against the company, Super 1000,

which acquired a registered mortgage as a result of its director's breach of his fiduciary duty owed to the mortgagor of which he was also a director (which mortgage was not liable to be rescinded). In essence the director obtained for his company (Super 1000) security where he was in a position of conflict between his interest and duty.

45 I invited further submissions on the question whether the accessory was liable to a personal remedy. After that, the proceedings were settled.

46 In *Super 1000*, I said that the liability of a constructive trustee under either limb of *Barnes v Addy* is a personal liability, although the available remedies may include proprietary remedies. I said that a person liable under the first limb of *Barnes v Addy* may be liable to pay equitable compensation or account for profits, even if he or she no longer holds the property and, depending upon the circumstances, the beneficiary may be entitled to trace the property and assert a beneficial interest in it or its traceable proceeds, or may be entitled to a charge over other property to which it can be traced (at [213]-[214]).

47 In *Grimaldi*, the Full Court of the Federal Court said:

> "[263] When one turns to 'knowing receipt' a more complex picture emerges. It is necessary to refer initially to English law. Prior to the abandonment of the Baden categories in England, first in relation to 'knowing assistance' in *Royal Brunei Airlines*, and then in relation to 'knowing receipt' in *BCCI (Operations)*, there were two distinct lines of cases on recipient liability. One expressed the view that cases typically falling within categories (iv) and (v) would not suffice for liability: see eg *Re Montagu's Settlement Trusts* at 285; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 509; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 758-761. What has been called the third party's 'want of probity' needed to be shown. The other line, which Millett J's observations in *Agip (Africa) Ltd v Jackson* at 292-293 typify, founded the knowing receipt liability on protection of 'rights of priority in relation to property'. Hence would accommodate constructive notice, ie categories (iv) and (v), as a basis for liability: see also *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41.
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> [266] In *Consul* Stephen J was prepared to countenance category (iv), but not category (v), notice in a knowing assistance claim: at 412. However, his Honour had earlier observed that the distinction between the two liabilities had been said to be based on the acceptance of constructive notice (a reference,

seemingly, to traditional or category (v) constructive notice)) for receipt but not for assistance. Of this he commented that:

> 'It is not clear to me why there should exist this distinction between the case where trust property is received and dealt with by the defendant and where it is not; perhaps its origin lies in equitable doctrines of tracing, perhaps in equity's concern for the protection of equitable estates and interests in property which comes into the hands of purchasers for value.'

[267] We share the doubt expressed here. We do not consider that a property protection rationale for recipient liability (beyond a proprietary claim to a subsisting equitable interest in property, or its proceeds, in the third party's hands) of itself provides a sufficient justification for imposing a personal liability to account. That liability arises as a matter of conscience not of property. As with assistance liability, recipient liability should be seen as fault based and as making the same knowledge/notice demands as in assistance cases. We need not pursue this particular matter further because the weight of authority in this country appears now to draw no distinction between the two types of liability in this respect: but see generally, *Dietrich and Ridge*, above."

48 In *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81, Leeming JA, with the agreement of the other members of the Court said (at [44]):

> "… claims based on title are quite different from claims under the first limb of *Barnes v Addy*. The latter turn upon conscience, rather than property." (citing *Grimaldi*)

49 In *McFee v Reilly* [2018] NSWCA 322, Leeming JA (McColl and Payne JJA agreeing), after referring to *Grimaldi*, said:

> "[108] The personal liability to account to the person to whom a fiduciary obligation was owed exists even if the property has ceased to exist, or has been transferred to a third party, or (as in the present case) is incapable of being held on constructive trust by dint of statute. Thus, although statute prevents a court ordering that the sisters hold Boronga as constructive trustees, they are still liable to account to the estate for the value of the property. I did not understand their counsel to submit to the contrary."

50 I reached the same conclusion in *Turner v O'Bryan-Turner* (with the concurrence of Meagher and McCallum JJA) (at [137]) but concluded that the transferees did not have the requisite knowledge that their mother's transfer of property to them in purported execution of a power of attorney was in breach of her fiduciary duty.

51 Amongst the authorities considered in *Super 1000*, *Grimaldi* and *Turner*, were Sir Robert Megarry's judgment in *Re Montagu's Settlement Trusts* [1987] Ch 264 and the judgment of Hoffman LJ in *El Ajou v Dollar Land Holdings plc* (1994) 2 All ER 685 at 700.

52 *Re Montagu's Settlement* concerned a claim by the 11th Duke of Marlborough against the estate of the 10th Duke. By a settlement in 1923 the future 10th Duke assigned to trustees certain chattels to which he was then entitled in remainder. The settlement provided that after the death of the 9th Duke the trustees were to make a selection of chattels considered to be suitable for inclusion in the settlement (to be passed on as heirlooms to the next Duke) with the residue to be held for the 10th Duke absolutely. The selected chattels would pass with the settled hereditaments. The trustees did not make a selection. The chattels were all released to the 10th Duke who took as a volunteer. Sir Robert Megarry said (at 272) that after an inquiry as to what chattels should be treated as selected chattels his estate would be liable for any chattels not disposed of or the traceable proceeds to any that had gone. This would be a tracing exercise. But the 10th Duke's estate was not to be treated as a constructive trustee of any of the chattels and liable to account under the first limb of *Barnes v Addy*.

53 This was because the 10th Duke lacked knowledge that the trustees had acted in breach of trust in allowing him to take whatever chattels he wanted. His Lordship said that the doctrine of tracing and the imposition of a constructive trust by reason of knowing receipt of trust property were distinct doctrines governed by different rules (at 285).

54 In *El Ajou v Dollar Land Holdings plc*, Hoffman LJ said (at 700), in relation to the requirements of liability for knowing receipt:

> "for this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty. Secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty". (at 700)

55 In *Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424, the United Kingdom Supreme Court considered in dicta the nature of the remedies to which such a claim might entitle the claimant. In that case, the Court was to some extent divided as to the availability of personal remedies in a claim for knowing receipt, particularly in cases where any proprietary rights or remedies had ceased to be available of the claimant.

56 Lord Sumption in *Akers* held that even in situations where, as in that case, the beneficiary may have lost any equitable proprietary rights or remedies then the beneficiary would still retain any personal rights against the trustee, whose amenability to personal remedies would not be affected (at [83]). This was because there was an independence between the personal and proprietary rights and remedies of the beneficiary, with neither contingent on the availability of the other.

57 However, Lord Mance (with whom Lord Neuberger, Lord Collins, and Lord Toulson agreed) held that the extinguishment of an equitable interest under the lex situs provided a defence to the transferee against any claim by the beneficiary (at [20]).

58 This question would come to be addressed in more detail by the Supreme Court. In *Byers v Saudi National Bank* [2023] UKSC 51; [2024] 2 WLR 237, the United Kingdom Supreme Court took a different view from that taken in this State in upholding the conclusion of the Court of Appeal ([2022] EWCA Civ 43; [2022] 4 WLR 22) that a defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant.

59 All of their Lordships agreed that “a claim in knowing receipt cannot succeed once the claimant’s proprietary equitable interest in the property in question has been extinguished or overridden” (at [1]).

60 In doing so, their Lordships explicitly noted the tensions within *Akers*, and held in essence that the approach outlined by Lord Mance was preferable to that of Lord Sumption.

61 This line of reasoning had also been approved by the English Court of Appeal during the *Byers* litigation. There, the Court made reference to the decision of Millett J in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, where it had been held (at 988-989) that:

> "The English law of restitution makes a fundamental distinction between the unjust enrichment of the defendant which is occasioned by depriving the plaintiff of his property and enrichment which results from a wrong done to the plaintiff by the defendant. In the first category of case the plaintiff's restitutionary claim is said to have a proprietary base. The enrichment of the defendant is at the direct expense of the plaintiff and is matched by a corresponding diminution of his assets. The plaintiff brings the claim in order to recover his own property and must succeed, if at all, by virtue of his own title. In the latter class of case his claim arises from a breach of fiduciary or other obligation on the part of the defendant. The distinction is that drawn by equity between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from a person into whose hands it has come and a claim by a plaintiff in respect of a breach of fiduciary obligation owed to him. In the former case he relies upon his continuing equitable interest in the property under an express or resulting trust; in the latter upon an equity between the parties which may in appropriate circumstances give rise to a constructive trust. The distinction, which is crucial, may have been lost sight of in the language of some of the more recent decisions on knowing receipt.
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> Macmillan's claim is of the former kind. In respect of the Berlitz shares there was no relationship of any kind between Macmillan and any of the defendants. There is no equity between them. In the absence of such an equity, any liability of the defendants to restore the shares or their proceeds to Macmillan or to pay compensation for their failure to do so must be based upon Macmillan's continuing equitable ownership of the shares. In the language of restitution, Macmillan's claim must rest upon "an undestroyed proprietary base." Such a claim cannot succeed against a party who has under the applicable law acquired a title to the shares which is superior to that of Macmillan."

62 In *Macmillan Inc v Bishopsgate Investment Trust* no reference was made to *Barnes v Addy* nor to *Re Montagu's Settlement Trusts*. This was because no issue in relation to the first limb of *Barnes v Addy* arose in that case. Macmillan was the beneficial owner of shares in Belitz. The legal owner (a company controlled by the late Robert Maxwell) transferred the shares as security for loans taken by Maxwell's private companies.

63 There were questions as to whether the law of New York or England applied. Under the law of New York the question did not depend upon whether the transferee of the shares had constructive notice of Macmillan's interest. The test was "… actual knowledge of suspicion and deliberate abstention from

inquiry less the truth be discovered, not reason to know or cause to suspect" (987). None of the transferees of the shares had such knowledge (at 1011, 1012, 1013).

64 In *Byers v Saudi National Bank* Lord Briggs said (at [75]):

> "There is a striking similarity between the facts of *Macmillan* and this case. In both cases a trustee for the claimant company misapplied foreign situated shares beneficially owned by the claimant by transactions abroad which, under the applicable foreign law, had the effect of giving the recipients clear title, or at least superior title, to the shares, over any equitable beneficial interest of the claimant. That was in the *Macmillan* case sufficient to defeat both the proprietary claims to the return of the shares and personal claims for compensation in equity for breach of constructive trust by the recipients. In terms of ratio the key outcome in *Macmillan* was that foreign law governing the relevant share transactions was effective to defeat a purely equitable claim against defendants amenable to the jurisdiction of the English court, by overriding the equitable interest which had until then subsisted in the shares in favour of the claimant."

65 So far as appears from the reported reasons of Millett J, no claim against the transferees of the shares was made or could have been made under the first limb of *Barnes v Addy* for a personal remedy for equitable compensation.

66 As noted above (at [43]), in *Grimaldi* the Full Court of the Federal Court preferred the line of authority exemplified by *Re Montagu's Settlement Trusts* that recipient liability under the first limb of *Barnes v Addy* was fault based and was not based on the protection of rights of priority of interests in property.

67 In *Byers* itself, a Mr Al-Sanea held shares in five Saudi Arabian companies on trust for Saad Investments Co Ltd ("SICL"). The trusts were governed by the law of the Cayman Islands, which was materially identical to English law.

68 Mr Al-Sanea transferred the shares to a Saudi Arabian financial institution called the Samba Financial Group to discharge debts that Mr Al-Sanea owed to Samba. This was a breach of trust. Samba knew that Mr Al-Sanea held the shares on trust for SICL. The Supreme Court said (at [14]) that a reasonable bank in Samba's position would have appreciated (or alternatively, would have made enquiries which would have revealed the probability that) the transfer was

a breach of trust and it failed recklessly to make such enquiries that an honest and reasonable bank would have made.

69 Under Saudi law (which did not recognise the institution of trust) on registration of the transfer, Samba acquired a title clear of SICL's interest.

70 The UK Supreme Court treated the claim against a knowing recipient of property which, to the recipient's knowledge, had been trust property, but was no longer trust property, as a proprietary claim rather than a personal claim.

71 The same analysis had been made in *Davies v Ford* [2023] EWCA Civ 167 at [74].

72 Lord Briggs addressed *Re Montagu's Settlement Trusts* at [63]-[65]. He quoted Megarry VC at pp 278 and 285:

> "Third, there seems to me to be a fundamental difference between the questions that arise in respect of the doctrine of purchaser without notice and constructive trusts. As I said in my previous judgment, ante, pp 272H—273B:
>
> > 'The former is concerned with the question whether a person takes property subject to or free from some equity. The latter is concerned with whether or not a person is to have imposed upon him the personal burdens and obligations of trusteeship. I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.'
>
> …
>
> Summarising his conclusions at p 285, the Vice-Chancellor set out eight principles. The first two deserve quoting:
>
> > '(1) The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights.'"

73 But Lord Briggs said (at [65]):

> "But they come nowhere near to stating that the underlying requirement of a continuing equitable interest in the claimant which is of the essence of a proprietary claim is somehow dispensed with as a condition for the more burdensome personal liability in knowing receipt, viewed as at the time of receipt. That question simply did not arise in the Montagu case."

74 Lord Briggs said of Hoffman LJ's statement in *El Ajou* and its reference to tracing that it contemplated that the claimant must be able to assert a continuing equitable interest in the subject property at the time of its receipt by the defendant.

75 It was put by the liquidators in *Byers* that this position was inconsistent with cases involving companies which brought claims in knowing receipt in respect of company property transferred by a director in breach of fiduciary duty, where the companies had the legal title to their property and not merely an equitable interest.

76 This argument was rejected by the Supreme Court in *Byers*. Lord Briggs instead held that such cases could be explained by the fact that when a director caused the company's legal title to be transferred to a third party under an unauthorised transaction, the company would acquire an equitable interest in that property under a constructive trust.

77 Such an approach therefore provided the requisite continuing equitable interest (at [49], [60]-[61]). His Lordship said:

> "[49] Secondly, a significant group of cases (which I shall call the corporate cases) dealt with knowing receipt liability in the absence of any pre-existing traditional trust or, therefore breach of trust, or any pre-existing equitable interest. But they proceeded on the basis that a division between the former legal title and beneficial interest of the claimant company occurred at the moment of the breach of fiduciary duty by the directors in misappropriating the relevant company property, so that knowing receipt liability could be determined as if there had been both a trust of the property and a continuing beneficial interest in it, which the company continued to enjoy.
>
> …
>
> [60] … Mr Green submitted that equity applied the knowing receipt doctrine by treating corporate property as subject to a trust by analogy. Later he firmed up his analysis by submitting that a trust, with a concomitant splitting of legal title from the company's continuing beneficial interest in the misapplied property

> occurred at the moment of the transfer which constituted the misapplication. Legal title passed to the transferee, but the equitable beneficial interest remained with the company. Therefore the company retained the equitable interest sufficient to support a proprietary claim to the property or its traceable proceeds, and a knowing receipt personal claim against any recipient who had received the property with notice of the misapplication, subject to any overriding of its equitable interest in the meantime.
>
> [61] I consider that Mr Greens final submission on this issue is correct. It best fits with all the dicta summarised above. First, the analysis in *In re Lands Allotment* speaks of the trust arising when the misapplication of company property takes place. The same analysis is also supported by Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290D—F. Secondly Ungoed-Thomas J is at pains to emphasise that this is a real trust and not just a breach of fiduciary duty treated like a breach of trust merely by analogy. Thirdly and decisively Buckley LJ implicitly recognises a continuing equitable interest remaining in the company after the transfer because of his acknowledgment that the companys knowing receipt claim may be defeated by a recipient with a better equity. That would of course include equitys darling, and that is I think what Buckley LJ had in mind."

78 To an Australian lawyer at least, this is surprising, if not remarkable. A legal owner of property does not have two estates: one legal and one equitable. In Australia it is understood that where the legal owner holds property on trust the beneficiary's interest is imposed on the legal title, not carved out from it. To say the least, it is difficult to conceive how, at the moment of transfer, the legal owner could hold its property on a constructive trust for itself before its property was transferred so as to retain the beneficial interest.

79 To say that the "decisive" point is that a knowing receipt claim may be defeated by a recipient with a better equity assumes the issue to be determined. If the recipient's liability under the first limb of *Barnes v Addy* is a personal liability which attracts personal remedies because it is conscience based, the fact that the proprietary remedies may or may not be available is not to the point.

80 Lord Burrows saw no difficulty in applying *Barnes v Addy* by analogy (at [180]-[188]).

81 It is only if the first limb is confined to the tracing of existing equitable interests that this issue arises. Once it is accepted that the two limbs of *Barnes v Addy* extend not only to defaulting trustees, but to defaulting fiduciaries such as directors who wrongly transfer company property (in breach of their fiduciary

duty), the issue disappears (eg *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Russell v Wakefield Water Works Co* (1875) LR 20 Eq 474; *Grimaldi*). But the extension shows that the first limb is not confined to the tracing of equitable interests. If it were there would be no reason not to apply equitable doctrines of constructive notice, rather than a requirement of knowledge (*Grimaldi* at [267]).

82 In his 2024 Allen Hope Southey Memorial Public Lecture, titled "Knowing Receipt, Fiduciary Duties and Equitable Interests in Property",[3] Professor Charles Mitchell noted that the approach taken in *Byers* did not solve the questions created by other forms of case where there was no proprietary right held by a party able to bring a claim in knowing receipt.

83 For example, the Attorney-General may be required to pursue claims for knowing receipt where the trustee of a charitable trust transfers trust property in breach of trust (*AG v Kell* (1840) 2 Beav 575; 48 ER 1305; *AG v Compton* (1842) 62 ER 951). The trust being for charitable purposes there would be no beneficiary entitled to an equitable interest in the property transferred. The same may be seen in the case of legatees under a will prior to completion of administration of the estate, who hold no equitable interest in the estate property.

84 No issue arose in *Byers* concerning the intended effect of the Saudi law on SICL's personal remedies from the extinguishment of SICL's beneficial interest on registration of the share transfers (see Lord Burrows at [156]).

85 Where the extinguishment occurs in Australia by reason of the indefeasibility provisions of the *Real Property Act* one might think that the question would be largely understood as one of statutory construction in the context of the principle in *Frazer v Walker* preserving *in personam* claims.

[3] Professor Charles Mitchell, 'Knowing Receipt, Fiduciary Duties and Equitable Interests in Property' (YouTube, 15 April 2024) <https://www.youtube.com/watch?v=MgPWBFgo4KU>.

86 *Byers* is inconsistent with the approach taken to date in Australia and in particular with the decision of the Full Court of the Federal Court in *Grimaldi*, with Justice Leeming's judgments in *McFee v Reilly* and *Fistar*, and with my consideration of the issue in *Super 1000* and *Turner v O'Bryan-Turner*.

87 A consideration of the issues can be found in a paper given by Justice Black "*Some comments as to issues arising from Byers v Saudi National Bank*" on the Supreme Court website under the heading "Speeches by current judicial officers".[4]

88 It is to be hoped that the High Court will venture again into this issue of private law. Perhaps consistently with *Farah*, it might consider that, at least in relation to the first limb of *Barnes v Addy*, the liability imposed upon a recipient of property transferred in breach of fiduciary duty is property based rather than fault based as the UK Supreme Court has held in *Byers v Saudi National Bank.* If it considers that the liability of an accessory under either limb of *Barnes v Addy* is a personal liability based on fault and is not dependent on the tracing of proprietary interests, there may be scope for the High Court to reconsider the rationale for its approval in *Farah* of the decision of the Full Court of the Supreme Court of Western Australia in *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517; [2002] WASCA 291.

89 *LHK Nominees* held that *in personam* exceptions to indefeasibility did not extend to knowing receipt claims under the first limb of *Barnes v Addy*. Prior to this decision in 1998, it appears that the assumption had been the opposite.

90 In *Super 1000* I outlined the case as follows:

> "[225] … The property in question was owned by the appellant company, LHK Nominees, as trustee of a trust, the beneficiaries of which were Mr Kenworthy's sons of a former marriage. They were also the directors of the trustee. … Mr Kenworthy was in effective control of the trustee at all material… Mr Kenworthy instructed his sons to execute a transfer of the property to him and they did so… The land was transferred to Mr Kenworthy at a gross undervalue…Mr Kenworthy told his sons that the property was being transferred into his name

[4] https://supremecourt.nsw.gov.au/content/dam/dcj/ctsd/supreme-court/documents/Publications/Speeches/2024-speeches/Black_20240229.pdf

> because, as a pensioner, he could obtain a discount on rates. He promised to transfer the land back to the trustee… At the time of Mr Kenworthy's death, the property was registered in his name.
>
> [226] It was not alleged that Mr Kenworthy himself owed a fiduciary duty to the beneficiaries of the trust or the trustee company…
>
> [227] None of their Honours held that Mr Kenworthy was guilty of fraud for the purpose of… the equivalents of ss 42(1) and 43(1) of the Real Property Act 1900 (NSW)…
>
> [228] On these findings, it was a strong case for Mr Kenworthy's being found to be liable as a constructive trustee under the first limb of *Barnes v Addy*, knowing, as he did, of the breach of fiduciary duty owed by the trustee company and its directors (his sons) in agreeing to transfer the property to him for what he knew was an undervalue. The fact that he promised to retransfer the land would suggest a further personal claim available to the trustee. However, the majority held that the claim under the first limb of *Barnes v Addy* was not available because the transfer was registered. … because the registration of title was not dishonestly obtained, it was not possible, consistently with the received principle of indefeasibility, to treat the holder of the registered title to property that was subject to a trust as having received trust property."

91 I would go on to express some difficulty with the implications of this decision, and the High Court's subsequent approval of its principles.

92 If *LHK Nominees* retains its status of approval from the High Court, then it follows that no *proprietary* remedies are available against an accessory liable under the first limb of *Barnes v Addy* who receives Torrens title land. That said, nothing in *LHK Nominees*, nor *Farah*, dealt with the question of whether *personal* remedies against a third party who became liable as a constructive trustee in a claim for knowing receipt were excluded by the registration process of the *Real Property Act*.

93 It remains open for the High Court to answer this question, and, more generally, to revisit *Farah*.