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'Some problems for bankers about accessory liability in Australia'

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1. Introduction – companies of doubtful solvency

1.1 The crisis in global financial markets in 2008 not only led to the collapse of some large financial companies in Australia. It also cast a shadow of uncertainty over the financial position of many other listed and unlisted entities, to such an extent as to raise doubts about their solvency. It is the cases of uncertainty, rather than cases of established insolvency, that will concern me in this paper. My remarks are confined to the Australian law.

1.2 According to s 95A of the Corporations Act 2001 (Cth), a company is insolvent if, and only if, it is able to pay all its debts as and when they become due and payable, and otherwise it is insolvent. In *Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1528, Griffiths CJ said that in applying the statutory words, some consideration must be given to the immediate future, and if it appears that a debtor will not be able to pay a debt which will certainly become due in, say, a month, it cannot be said that the debtor is able to pay its debts as they become due. In *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran* (2004) 54 ACSR 410; [2005] NSWCA 243 at [103], Giles JA observed that 'how far into the future will depend on circumstances including the nature of the company's business and, if it is known, its future liabilities'.

1.3 In *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1; [2008] WASC 239, one of the questions was whether the Bell Group was solvent at the time of the refinancing transaction that occurred in January 1990. The banks claimed, relying on the observations of Griffiths CJ, that the court should look no further than the 'immediate future', that is until the end of February 1990. The liquidator contended that the court should consider the period extending to May 1991, which could be characterised as 'the reasonably immediate future' (at [1127]). Owen J said that each case must be determined according to its peculiar circumstances, and in the circumstances confronting the Bell Group, the relevant period should extend to approximately 12 months (at [1129]). He said that 'the court must be mindful of the fact that a company's circumstances may change for the better, and to conclude hastily

that the company is insolvent can have dire consequences'. But the court will be 'reluctant to look too far into the future because there are so many unknowns and contingencies' (at [1128]).

1.4 The application of the insolvency test involves questions of present fact and future probability concerning the company's assets and liabilities. In times of financial uncertainty, doubts about solvency may arise in many ways: for example, where there is some uncertainty as to the present value of assets because of possible impairment, or the availability of a suitably liquid market in which to realise them, or the adequacy of a provision to doubtful debts, or the prospect that developments will occur that will affect the company's cash outflow.

1.5 In January 2010, the Australian Treasury released a Consultation Paper inviting comment on some proposals to protect company directors from insolvent trading liability during their investigation of the prospects of reconstruction or workout for their company: *Insolvent trading: A safe harbour for reorganisation attempts outside of external administration*. In their *Joint Submission in relation to Insolvent Trading Safe Harbour Options Paper* (2 March 2010, para 2.8), the Law Council of Australia, the Insolvency Practitioners Association of Australia and Turnaround Management Association of Australia gave some illustrations of the kind of uncertainty that can arise. For example, suppose that:

(a) the company is a subsidiary and has a letter of comfort from its parent, that is not legally binding but which the parent has always supported in the past; or

(b) the company has been trading unprofitably and has been able to meet the claims of creditors only through the financial support of its major shareholder, which has always been forthcoming in the past; or

(c) the company has received financial support from its major shareholder in the past, but when the directors ask for a legally binding commitment the shareholder declines to provide it, while indicating that its present intention is to continue to support the company; or

(d) the company is the Australian subsidiary of an overseas company that is subject to a formal insolvency process, and while the Australian company is solvent, its balance sheet discloses a substantial debt owed by it to its insolvent parent, which is payable on demand and could not be met if called up, and the parent's liquidator refuses to give a commitment that it will not call upon that debt, though he has not yet done so; or

(e) the company's facility with its foreign banker will expire on 1 March 2011 and the bank is withdrawing from the Australian market and will not roll over the facility, and the company has approached other banks which have so far refused to refinance, even though the company can demonstrate its ability to service the facility.

1.6 In some cases, drilling down into the detailed facts will provide at least an indicative answer as to the company's probable ability to pay its debts as they fall due. For example, if the company is clearly able to service all its finance facilities and is trading successfully, the fact that it has not yet secured refinancing that will need to be

arranged before 1 March 2011 does not entail, or even provide reasonable grounds to suspect, that the company is insolvent today, even if to date its attempts to secure refinancing have failed. The position will become more difficult, however, as the deadline for refinancing gets closer.

1.7 In the case of some of the other examples, the directors' position depends upon answering a fundamental question for which the law has not yet provided a clear answer: for example, if a company is trading unprofitably and its ability to pay its debts as and when they fall due depends upon continued support from a parent or major shareholder that is not legally obliged to give that support, though to date it has done so, at what point should it be concluded that the company is unable to pay all its debts as and when they become due and payable? Does the position depend upon an assessment of such matters as how badly the company is trading, whether the supporting parent/shareholder has full knowledge of the position, whether the financial position of the parent/shareholder is stable or improving or declining, and so on?

1.8 These are difficult issues for assessment by the directors at any time. The difficulty is magnified because the factual components are likely to change on almost a daily basis. And the kinds of problems that the Joint Submission has identified are magnified by post-GFC circumstances, such as the difficulty of mark-to-market asset valuation when the markets are distinctly wobbly or have collapsed, the difficulty of assessing the impairment of assets whose value depends on the ability of a possibly failing counterparty to perform its obligations, the extent to which formerly contingent liabilities need to be the subject of provisions, and the difficulty of classifying liabilities as current or non-current.

2. Potential liabilities

2.1 The directors of a company are required at all times to act in good faith in the best interests of the company, both at general law and under s181(1)(a) of the Corporations Act. If the company is in doubtful financial circumstances, acting in the best interests of the company may require the directors to take into account the interests of shareholders. Under the pressure of the company's financial circumstances, directors may find it attractive to take steps that will disadvantage creditors or a class of creditors. In doing so, they are at risk of breaching their fundamental duty of good faith to the company. If the duty is properly characterised as a fiduciary duty, those who receive property in consequence of a breach of duty by the directors, and with knowledge of the breach, and those who knowingly assist the directors to breach their duty, may be exposed to liability under the *Barnes v Addy* doctrine .

2.2 Liability may also arise in more passive circumstances. If the company's solvency is doubtful and the directors allow it to continue to trade, they will be at risk of liability for insolvent trading and breach of their general law and statutory duties of care and diligence. Under s 588G(3)(aa) of the Corporations Act, insolvent trading liability is confined to the directors at the time when the company continued to trade while insolvent. The statutory duty of care and diligence applies only to directors or officers of the company. But, significantly for those who deal with the company, including its bankers, 'director' is defined in s 9 to include 'de facto' and 'shadow' directors.

2.3 If the company is listed, its directors and executive officers are also exposed to liability if the market is not properly informed of the company's financial position. Their liability may arise under the continuous disclosure provisions, the misleading and deceptive conduct provisions (in particular, ss 1041H and 1041I of the Corporations Act and ss 12DA and 12GF of the ASIC Act) and (again) for breach of their general law and statutory duties of care and diligence. Liability for breach of the duty of care and diligence is confined to directors and officers, as already noted, but liability for failure to comply with the continuous disclosure requirement extends to any person involved in the contravention (s 674(2A)), and likewise damages for misleading and deceptive conduct may be recovered from any person involved in the contravening conduct.

2.4 A company in doubtful financial circumstances will need to have the support of its bankers, and bank officers are likely to be actively reviewing the bank's exposure closely, perhaps on a daily basis, acting as employees and agents of the banking. The bank's officers may well have a detailed understanding of the company's financial position and they may be called upon to assist the company in restructuring or other transactions. They may therefore expose the bank to one of the forms of accessory liability to which I have referred: under the *Barnes v Addy* doctrine; liability for insolvent trading or breach of the duty of care through de facto or shadow directorship; liability for involvement in the company's failure to comply with continuous disclosure law, where the company is a listed entity; or liability for involvement in the company's misleading or deceptive conduct. These heads of liability for bankers dealing with companies in uncertain financial circumstances are briefing addressed in this paper.

2.5 The theme of my paper is that when the principles of liability for insolvent trading, shadow directorship, misleading and deceptive conduct and continuous disclosure are juxtaposed, some legal themes emerge about the kinds of activities and the level of knowledge that will suffice for liability of a third party (such as a bank) in its dealings with directors of a company in financial difficulty. The principles in these four areas are not the same, but the comparison of each to the others is useful because it enables us to sharpen our perceptions and identify any significant differences in the impact of the law in common situations.

3. Knowing receipt and knowing assistance liability

3.1 I am aware that regular participants in the conferences of the Banking and Financial Services Law Association will have kept a close watch on developments in *Barnes v Addy* liability, which is a matter of substantial significance for bankers. They have been aided by excellent conference papers from time to time, most recently by Justices Paul Finn and Robert Chambers at the Queenstown conference on 25 July 2008. I will therefore not test the patience of the audience by recapitulating the obvious, except to the extent necessary to lay the foundation for what I have to say. Nor will I attempt a comprehensive exposition of the case law.

3.2 Part of my purpose in touching on the subject is to assess the significance, for Australian law, of Owen J's monumental judgment in *The Bell Group Ltd v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1; [2008] WASC 239. That will enable me to draw a comparison between the requirements for liability under the two limbs of

Barnes v Addy, and the requirements for statutory liability for involvement in a contravention of the Corporations Act.

3.3 It is important to reiterate in this context that I am confining my attention to Australian law. There are significant differences between the Australian law after *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, and the law of New Zealand, England and Canada, as Justice Finn noted in 2008.

3.4 The judgment at first instance in *Bell Group* is, of course, on appeal. Nevertheless Owen J's analysis of the law is worth careful consideration. From a scholarly point of view, it will be important to keep in mind the first instance judgment after the Court of Appeal of Western Australia's judgment on appeal, and to consider and compare the judgments in order to assess whether the significant contributions to development of the law made by Owen J have been added to, contradicted or not dealt with on appeal.

3.5 In *Barnes v Addy* (1874) 9 Ch App 244, Lord Selborne LC said (at 251-2):

> '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.'

3.6 I set to one side the liability of a trustee *de son tort*. The two limbs of *Barnes v Addy* liability recognised in the case law are:

(a) where 'agents receive and become chargeable with some part of the trust property' ('knowing receipt' liability);

(b) where agents 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees' ('knowing assistance' liability).

3.7 In the *Bell Group* case Owen J said Lord Selborne's reference to an agent is not confined to agents in the strict sense, and can extend to third parties who have dealings with the trustee on their own behalf rather than as agent (at [4641]).

Knowing receipt

3.8 After closely reviewing the case law, Owen J in *Bell Group* said (at [4748]) that for a third party to be held liable for knowing receipt:

(a) there must be a 'trust';

(b) the trustee must have misapplied 'trust property';

(c) the third party must have received trust property;

(d) at the time of receiving the trust property, the third party must have known of the trust and of the misapplication of the trust property; and

(e) the third party will be taken to have 'known' in the relevant sense if the third party:

   (i) has actual knowledge of the trust and the misapplication of trust property; or

   (ii) has deliberately shut his or her eyes to those things; or

   (iii) has abstained in a calculated way from making such enquiries as an honest and reasonable person would make, about the trust and the application of the trust property; or

   (iv) knows of facts to which an honest and reasonable person would indicate the existence of the trusts and the fact of misapplication.

(a) Trust

3.9 There is an issue in the case law as to whether the first limb of *Barnes v Addy* applies where a third party receives property from a non-trustee fiduciary in breach of duty (the wider view), or only where property is received by the third party from a trustee (the narrower view). In *Rogers v Kabriel* [1999] NSWSC 368, at [173], it was said that the first limb only applies to trust property in a 'strict sense'. However, the preponderance of authority seems to favour the view that the first limb is capable of applying where property is received from a non-fiduciary in breach of trust (see, in particular, *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 459-460; *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405). In *Farah Constructions* (at CLR 141) the High Court assumed, rather than deciding, that the first limb applies not only to persons dealing with trustees, but also to persons dealing with some other types of fiduciaries.

3.10 In *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 553 at 588, the Court of Appeal of New South Wales held that the first limb was applicable to property under the control of directors in their fiduciary capacity, but the narrower view was taken in *Benzlaw and Associates Pty Ltd v Medi-Aid Centre Foundation Ltd* [2007] QSC 233. In the *Bell Group* case, the focus of attention was on a case where a director of a company deals with assets of the company in a way that constitutes a breach of a fiduciary duty that the director owes the company (at [4750]). After reviewing the authorities, Owen J concluded (at [4776]) that 'first limb *Barnes* jurisprudence can extend beyond trust property in the strict sense and may include property to which a fiduciary duty attaches'.

3.11 It seems likely, after *Bell Group*, that the wider view will be followed, unless a different approach is taken at the appellate level (see, further, *Super 1000 v Pacific General Securities* [2008] NSWSC 1222 at [204]).

3.12 In *Bell Group* there were allegations of breach of various duties of company directors, including the statutory and general law duty to act in good faith in the best interests of the company. The general law duty is undoubtedly an equitable duty but the question has been raised whether it is fiduciary in character. The question is one of some continuing controversy: see *Breen v Williams* (1996) 186 CLR 71 at 93 (Dawson and Toohey JJ), 113 (McHugh J) and 137 (Gummow J); *Aequitas Ltd v Sparad No 100 Ltd (formerly Australian European Finance Corp Ltd)* (2001) 19 ACLC 1006 at 1058ff; [2001] NSWSC 14; and note JD Heydon, in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005), p 233).

3.13 Owen J considered the case law extensively (at [4527]-[4582]), and came to the conclusion that the duty is an equitable fiduciary duty. That was an important conclusion because it led to the application of *Barnes v Addy*. But it may be contestable: Gummow J's extra-curial remarks in a book review (of Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010, Hart Publishing Ltd)), may suggest some sympathy with the *Aequitas* view (see (2010) 84 ALJ 273).

(b) Trust property

3.14 In the *Farah Constructions* case, Say-Dee's claim under the first limb failed because of the absence of trust property. Farah Constructions and Say-Dee had formed a real estate joint venture and had together purchased a block of units for redevelopment. The local council refused to approve the redevelopment on the ground that the land area was too small, but indicated that the project might have a better chance of approval if the application included neighbouring properties. After Say-Dee had been informed of the council's decision and invited to purchase the adjoining land, Mr Elias of Farah Constructions arranged for his wife and daughters to acquire some of the adjoining blocks through their own companies. The claim by Say-Dee under the first limb of *Barnes v Addy* against the interests of Mrs Elias and her daughters failed because they had not received any property which was the subject of a fiduciary duty: the adjoining land that they acquired was not trust property, and the information concerning the council's decision was publicly available and not confidential, and even if it had been, the High Court held that was not of a kind to give rise to property rights.

(c) Receipt

3.15 The trust property must come into the possession of the third party for his or her own use and benefit: *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331.

(d) Knowledge

3.16 The idea that that recovery against a third party who receives property in breach of trust or fiduciary duty is based a strict liability to make restitution for unjust

enrichment, not dependant upon the third party's state of knowledge, was rejected by the High Court in *Farah Developments*.

3.17 In *Barnes v Addy* Lord Selborne did not refer to knowledge in connection with the first limb. He spoke about an 'agent' receiving and becoming chargeable with some part of the trust property. The High Court in *Farah Constructions* described the first limb as 'persons who receive property become chargeable if it is established that they have received it with notice of the trust' (at [112]). Therefore, as Owen J pointed out (at [4743]), the question that arises is what (in terms of knowledge) constitutes 'notice of the trust' for these purposes.

3.18 What is it that a third party must 'know' before liability can attach under the first limb? Owen J cited authorities to the effect that the third party must know, at the time of receiving the trust property, that it was trust property, and that it was being misapplied or transferred in breach of trust or fiduciary duty (at [4746]). He referred to the judgment Stephen J in the *Consul Development* case, and said (at [4747]):

> 'It is not necessary for a plaintiff to establish something along these lines: 'The recipient turned his mind to the question whether the proposed transfer of property was a breach of fiduciary duty, decided it was, but opted to go ahead anyway'. Using the language of Stephen J, it may be sufficient (all other elements being satisfied) if 'a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust'.'

(e) Actual, imputed and constructive knowledge

3.19 It is common to refer, when considering the 'knowledge' element in both limbs of *Barnes v Addy*, to the five categories of knowledge enumerated by Peter Gibson J in the *Baden, Delvaux* case [1983] BCLC 325, namely: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (iv) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

3.20 Owen J concluded that the correct position as to the first limb of *Barnes v Addy* was stated by Anderson J in *Hancock Family Memorial Foundation Ltd v Porteous* (1999) 32 ACSR 124 at [79]:

> 'As to recipient liability, there is less certainty about what must be proved to sheet home liability to non-trustee but I adopt, with respect, the reasoning and conclusions of Hansen J in *Koorootang Nominees Pty Limited v Australia & New Zealand Banking Group Limited* ... on the question. In the first place, it is not necessary to establish that a recipient of trust property acted dishonestly or with want of probity. Recipient liability may be established if the defendant had actual or constructive knowledge at the time he received the relevant property that:
>
> (a) it was trust property; and
>
> (b) it was being misapplied.

> The defendant will be taken to have constructive knowledge if it is proved that he wilfully shut his eyes to the obvious; that he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make in the circumstances; and that he knew of circumstances which would indicate the true facts to an honest and reasonable man. If all that is proved is that the defendant had knowledge of circumstances which would put an honest and reasonable man on inquiry, that is not enough: see *Koorootang* (at 85 and 105).'

3.21 That is, as Owen J acknowledged (at [4745]), knowledge for the purposes of the first limb includes the three categories of actual knowledge (items (i), (ii) and (iii)) and the kind of constructive knowledge identified in item (iv), but not the kind of constructive knowledge identified at (v).

Knowing assistance

3.22 There are three elements of liability in second limb of *Barnes v Addy*: a dishonest and fraudulent design; assistance; and knowledge.

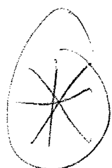
(a) <u>Dishonest and fraudulent design</u>

3.23 There is a marked difference of approach between the English and Australian authorities on this requirement. In England, after *Royal Brunei Airlines Snd Bhd v Tan* [1995] 2 AC 378 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164, this requirement has been interpreted as a requirement that there be dishonesty on the part of the third party accessory, rather than that the trustee or fiduciary be shown to be acting not merely in breach of trust or duty but in dishonest or fraudulent breach (see, especially, Lord Nicholls in *Royal Brunei*, at AC 385). The test of dishonesty is whether, objectively, the third party acted as an honest person would in the circumstances, in light of what he or she actually knew at the time, rather than what a reasonable person would have known. Lord Nicholls distinguished dishonesty from carelessness (at AC 390-1).

3.24 There is an issue in the English cases as to whether the dishonesty test is satisfied in cases where the conduct of a third party is dishonest by the ordinary standards of reasonable and honest people, but the third party has applied different standards and has not realised that his or her conduct was, by those standards, dishonest conduct. Lord Hutton in the *Twinsectra* case appears to suggest that there is no dishonesty unless the third party knows that his or her conduct 'would offend normally accepted standards of honest conduct'. But in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333, the Privy Council held that Lord Hutton had not meant to put forward a subjective requirement of that kind, saying (at 338):

> 'The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally accepted standards of honest conduct. It did not require that he should have had reflections about what those normally accepted standards were.'

3.25 Lord Hoffmann said that the statement (at [20]) that a dishonest state of mind meant 'consciousness that one is transgressing ordinary standards of honest behaviour' was intended to require consciousness of those elements of the transaction which make the third party's conduct transgress ordinary standards of behaviour, and it was not necessary to show that the third party thought about what those standards were.



3.26 In Australia, the *Consul Development* case establishes that the degree of 'dishonesty' required for the third party is merely assistance in the trustee's or fiduciary's dishonest and fraudulent design, with knowledge satisfying one of the first four categories in the *Baden Delvaux* case (see below). In *Farah Constructions* the High Court rejected Lord Nicholl's view that it is the dishonesty of the third party, rather than the trustee or fiduciary, that is relevant. According to the High Court, the question is whether the 'defendant assisted a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary' (CLR 159).

3.27 In *Bell Group* Owen J said (at [4727]) that the conduct of a trustee or fiduciary amounts to a 'dishonest and fraudulent design' if it is 'attended by circumstances that would attract a degree of opprobrium raising it above the level of a simple breach of trust or breach of fiduciary duty'. He expressed the opinion (at [4734]-[4739]) that the requirement of 'dishonest and fraudulent design' on the part of the trustee or fiduciary does not apply under the first limb of *Barnes v Addy*.

(b) Assistance

3.28 Liability under the second limb of *Barnes v Addy* appears to require that the third party, by active conduct or, indirectly, by creating favourable circumstances, does something to facilitate or contribute to the dishonest breach of trust or fiduciary duty. This appears to be an element of liability shared with cases of accessory liability under statute, considered below, where the statute speaks of being 'knowingly concerned in' the contravention.

(c) Knowledge

3.29 The *Consul Development* case is regarded as establishing that, in terms of the five categories of knowledge set out in *Baden Delvaux*, liability will only attach to a third party if knowledge of one of the first four kinds is established. In *Bell Group*, Owen J referred with approval to an explanation of the *Consul Development* case that I offered in *NCR Australia Pty Ltd v Credit Connection Pty* Ltd (in liq) [2004] NSWSC 1 at [168]-[169]:

> '[168] What seems to emerge from these observations is that liability arises when the defendant has assisted in the trustee's dishonest and fraudulent design and
>
> - has actual knowledge of the dishonest and fraudulent design; or
> - has deliberately shut his or her eyes to such a design; or
> - has abstained in a calculated way from making such inquiries as an honest and reasonable person would make, where such

inquiries would have led to discovery of the dishonest and fraudulent design; or

- has actual knowledge of facts which to a reasonable person would suggest a dishonest and fraudulent design.

[169] But there is no liability if the defendant merely knows facts that would have been investigated by a reasonable person acting diligently, thereby discovering the truth, where the defendant has innocently but carelessly failed to make the appropriate investigations.'

4. De facto and shadow directorship

4.1 Liability for breach of the statutory duties of care and diligence (s 180) and good faith (s 181) attaches to 'a director or other officer of a corporation'. Liability for misuse of position or information (ss 182 and 183) attaches to directors, other officers and employees. Insolvent trading liability under s 588G attaches to a director.

4.2 'Director' is defined in s 9 to extend, unless the contrary intention appears, to 'a person who is not validly appointed as a director if:

(i) they act in the position of a director; or

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

4.3 Category (i) is referred to as a 'de facto' director, and category (ii) is referred to as a 'shadow' director. The definition states that category (ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

4.4 There is a rich jurisprudence in Australia and other Commonwealth countries on the concepts of de facto and shadow directorship, well reviewed in the academic literature. No doubt this chapter of the law has been addressed in earlier BFSLA conferences, as it has the potential to impose liability on those who deal closely with companies, including bankers. I will therefore not attempt a general review of the law. I mention the potential liability of de facto and shadow directors because their liability is in a broad sense 'accessory' liability which fits into the theme of this paper, and also because there is a helpful recent exposition of the law to which I will refer.

4.5 In *Buzzle Operations Pty Limited (in liq) v Apple Computer Australia Pty Limited* [2010] NSWSC 233 (30 March 2010) Buzzle acquired the businesses of six retailers of Apple computer products (the '**Apple Resellers**'). The Apple Resellers had each entered into reseller agreements with Apple pursuant to which the reseller purchased stock on credit and Apple had a charge over its assets. As part of the merger, the resellers transferred their business assets including their stock to Buzzle, and each of the principals of the resellers became a director of Buzzle.

4.6 Under these arrangements Apple's support for the businesses was essential, and it became closely involved with the Buzzle business as it sought to work out problems that arose after the merger. At one point an Apple employee had his own office at the reseller. Eventually, however, Buzzle was placed into administration and receivership, and ultimately liquidation.

4.7 The liquidator argued that:

(a) the extent of Apple's involvement made it an officer of Buzzle, so that a charge it had taken could not, under s 267(1), be enforced for six months, and yet Apple had purported to appoint an investigating accountant within that period;

(b) after Buzzle had become insolvent, Apple continued its involvement in circumstances that made it a shadow director liable for insolvent trading under s 588G.

4.8 White J decided that Apple was not an officer of Buzzle. The definition of 'officer' has two limbs; it is either a person who:

> '(i) makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation, or
>
> (ii) ... has the capacity to affect significantly the corporation's financial standing.'

4.9 The liquidator's argument had been that Apple was an officer because it had the capacity to affect the company's financial standing. White J made the point that if this argument was correct, there would be no real limit placed upon the definition, with the result that every Government, Bank, or wealthy corporation or individual, would be at risk of becoming an officer of a company with which they dealt whenever they could be said to have capacity to affect the financial standing of the company.

4.10 After reviewing the legislative history of the definition and putting it into the context of the duties that were imposed on officers, His Honour concluded that a person must be an insider involved in the management of the company's affairs, to fall within the definition:

> '[It] should be taken as referring to a person who, in his or management of the affairs of the corporation, has the capacity to affect significantly the corporation's financial standing. It does not refer to a person who has that capacity as a third party but is not involved in the management of the corporation's affairs.'

4.11 The acquiescence of the directors of Buzzle in Apple's demands did not mean that Apple participated in the company's decision-making:

> 'Mr Hartono deposed that he felt he had absolutely 'no choice but to agree to the terms contained in the Payments Deed'. This does not mean that Apple participated in Buzzle's decision-making. To the contrary, Mr Hartono said he had no choice but to agree to what Apple proposed. For a director of a company to acquiesce in a third party's demands does not mean that the third

party participates in the company's decision-making. Given that officers of a company have a statutory duty to act in the best interests of the company, it would be an impossible position if a third party making demands on a company in its own interests became an officer of the company because its demands were acceded to.'

4.12 Essentially the court applied the same approach to the shadow director argument. Under the definition of 'director', the issue for a person alleged to be a shadow director is whether the appointed directors were at the relevant time accustomed to act, in their capacity as directors of the company, in accordance with the person's instructions or wishes as to how they should act. The directors, when they were conducting their businesses as resellers prior to the merger, felt constrained to meet sales targets to obtain rebates from Apple that they needed in order to achieve realistic margins on sales. But this did not establish that they were accustomed to act in their capacity as directors in accordance with Apple's instructions as to how they should act in that capacity. The pressure to which Apple subjected them was quite separate from their functions as directors of Buzzle.

4.13 White J said:

> 'a person or company is not within the definition ... merely because that party imposes conditions on his or her commercial dealings with the company with which the directors feel obliged to comply. A lender who is entitled to demand repayment of a loan and appoint a receiver can say, for example, that it will stay its hand only if the borrowing company sells certain assets. A supplier or buyer might impose conditions and because of its superior bargaining power, the directors of the company with whom it deals might feel they have no choice but to comply with the conditions imposed. It has been uniformly held that this is not sufficient to make the third party who exercises such powers in his dealings with the company a shadow director, even though the directors of the company are accustomed to comply with his demands.'

And later:

> 'In my view the reason that third parties having commercial dealings with a company who are able to insist on certain terms if their support for the company is to continue, and are successful in procuring the company's compliance with those terms over an extended period, are not thereby to be treated as shadow directors within the definition, is because to insist on such terms as a commercial dealing between the third party and the company is not ipso facto to give an instruction or express a wish as to how the directors are to exercise their powers. Unless something more intrudes, the directors are free and would be expected to exercise their own judgment as to whether it is in the interests of the company to comply with the terms upon which the third party insists, or to reject those terms. If, in the exercise of their own judgment, they habitually comply with the third party's terms, it does not follow that the third party has given instructions or expressed a wish as to how they should exercise their functions as directors.'

4.14 Additionally, the court took the view that there must be a causal connection between the defendant's 'instructions or wishes' and what the directors actually do. The

liquidator sought to rely on steps that were taken by the directors that, according to the evidence, they would have taken in any event. For example, it was alleged that Apple had instructed Buzzle employees to prepare financial reports, and a plan for debtor collections, and to devote resources to that activity. White J decided that these were basic steps for the operation of Buzzle's business, which the directors would have attempted to implement in any event.

4.15 The significance of the case in the present context is that according to White J's judgment, two kinds of 'involvement' by a third party in the business of a company and the management of the business by its directors are to be distinguished from one another. One is a case where the third party has an influence on the directors' management of their company because of the commercial relationship between the third party and the company, and the other is a case where the third party dictates the exercise by the directors of their fiduciary discretions.

4.16 That distinction suggests that a third party such as a bank, dealing with a debtor company, needs to be careful to leave room for the directors to exercise their own judgment in accepting or rejecting any proposals that are put to them. When the third party, relying on its strong commercial position, requires the directors to take certain action, it must be made clear that the requirement is not an attempt to tell the directors how to manage their company, but is simply an expression of the third party's commercial position. If the directors feel they have no choice but to comply, that, too, is a result of commercial reality.

5. Misleading and deceptive conduct

5.1 Before considering statutory civil liability for involvement, it is pertinent briefly to note the structure of the misleading and deceptive conduct provisions of the Corporations Act.

5.2 By s 1041H(1), a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive. Failure to comply with that provision is not an offence but may lead to civil liability under s 4041I. 'Financial product' and 'financial service' are extensively defined in Chapter 7 of the Act. The concept of 'engaging in conduct in relation to a financial product' is explained in s 1041H(2). For example, publishing a notice in relation to a company's shares falls within s 1041H(1).

5.3 By s 1041I(1), a person who suffers loss or damage by conduct of another person that was engaged in contravention of s 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

5.4 The principal exposure of a third party such as a bank in dealing with a company in financial difficulty is that it might come to be involved in the company's misleading and deceptive conduct by, for example, collaborating in the issue of a media release or statement to the ASX. The question to be considered, therefore, is what sort of conduct would constitute involvement, and perhaps more importantly, what level of knowledge needs to be proved for involvement liability.

5.5 There are equivalent provisions in the ASIC Act, ss 12DA and 12GF.

6. Liability for involvement in a contravention of the Corporations Act

6.1 A person who is involved in a contravention of the misleading and deceptive conduct provisions of the Corporations Act, has statutory civil liability, as explained later in this paper. I will not consider potential accessory criminal liability under the Criminal Code.

6.2 Under s 79, a person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

6.3 In this part of my paper I shall consider some leading cases on s 79 or analogous provisions. I shall not attempt any comprehensive review of the case law.

6.4 In *Yorke v Lucas* (1985) 158 CLR 661, Mr and Mrs Yorke purchased a business from Treasureway Stores, whose director was Mahoney. Ross Lucas Pty Limited (the '**Lucas Company**') a licensed land agent, acted for Treasureway in the sale. Lucas was its managing director. Treasureway and Mahoney engaged in misleading and deceptive conduct by falsely representing the average weekly turnover of the business. Lucas supplied the misleading turnover figures to the purchasers. The purchasers sued under ss 52 and 82 of the *Trade Practices Act*. They sought damages against Treasureway, Mahoney and the Lucas Company for misleading and deceptive conduct. They sought damages against Lucas for involvement in the contravention by the Lucas Company.

6.5 The judge at first instance entered judgment against Treasureway, Mahoney and the Lucas Company, but not against Lucas personally. The judge found that Lucas had acted in accordance with instructions and information given to him by Mahoney, and he had obtained Mahoney's written confirmation of the turnover figures on at least three occasions, and had heard Mahoney confirm them orally to Mr Yorke. He was not aware and had no reason to suspect that the information concerning turnover was incorrect. Therefore the judge concluded that he was not involved in the contravention.

6.6 The purchasers appealed against the judgment in favour of Mr Lucas, but they were unsuccessful in the High Court. Their submissions highlighted the incongruity of saying that a corporation such as the Lucas Company has strict liability for misleading conduct, while a person who procures the corporation to engage in that contravening conduct has no liability for involvement if that person is honestly ignorant of the circumstances that make the conduct misleading. They submitted that the anomaly

could be avoided by holding that involvement in a contravention can arise under paragraph (a) of the definition (aiding, abetting etc) or under the second limb of paragraph (c) (being party to the contravention) without knowledge of the essential ingredients of the contravention. The High Court rejected these submissions. It held that, as elements of the definition of involvement in the contravention had been borrowed from the criminal law, those elements should be given the same meaning as they have in the criminal law (at 667 per Mason ACJ, Wilson, Deane and Dawson JJ, and at 673 per Brennan J).

6.7 As to paragraph (a) of the definition of involvement, the High Court applied *Giorgianni v R* (1985) 156 CLR 473. In that case, the appellant was convicted of the statutory offence of culpable driving, under provisions stating that a person who aided, abetted, counselled or procured the commission of the principal offence could be prosecuted as a principal offender. The offence of culpable driving was an offence of strict liability requiring no proof by the prosecutor of any mental state on the part of the accused. Specifically, where the culpable driving was said to consist of driving a vehicle with defective brakes, the principal offence could be established without proving that the accused was aware of the condition of the brakes.

6.8 It was held in *Giorgianni* that where the prosecution was for aiding, abetting etc the commission of the principal offence, the accused must have intentionally participated in the offence and, to have done so, must have had knowledge of the essential matters which went to make up the offence on the occasion in question (that is, it must be shown that the accused knew that the brakes were defective): *Giorgianni*, CLR 481, 506; *Yorke v Lucas*, CLR 667, 676.

6.9 Consequently, incongruous though it may seem to be, Lucas could not be found civilly liable for aiding, abetting etc the contravention by the Lucas company unless it was shown that he had knowledge of the essential matters which went to make up the contravention of s 52 by the company. He was not aware that the turnover figures were incorrect, and that it was misleading to give them to the purchasers. Therefore he did not have knowledge of an essential part of the contravention.

6.10 The High Court in *York v Lucas* also rejected the contention that a person can be 'party to' misleading or deceptive conduct contravening s 52 without knowledge of the essential matters making up the contravention. The court reasoned that the words 'party to' refer to a participant in the nature of an accessory, for whom knowledge must be established (CLR 670, 677).

6.11 In the result, every component of the definition of involvement in a contravention in s75B of the Trade Practices Act (which is equivalent to s 79 of the Corporations Act) requires that there be knowledge of the essential elements of the contravention before accessory liability will arise.

6.12 Compare *York v Lucas* with the knowledge element for liability under the two limbs of *Barnes v Addy*. *York v Lucas* implies that constructive knowledge in the fifth *Baden Delvaux* category is not sufficient for liability.

6.13 The High Court's reasoning in *York v Lucas* leaves open the question whether constructive knowledge in the fourth category would be sufficient for liability. It seems to me probable that if circumstances were presented in which an honest and

reasonable person would make inquiries that would establish the inaccuracy of trading figures, having regard to that person's position, and the third party wilfully or recklessly failed to do so, it would be no defence to an action for involvement for that person to say that he or she did not know that the figures were misleading. Mr Lucas was not liable because he did not know that the figures were misleading and an honest and reasonable person in his position, as a licensed land agent acting for the vendor of a business, would not check the figures. But the position of a banker who passes on misleading trading figures might well be different, especially if the arrangements between banker and customer involve regular supply of the figures to the bank, and the bank might reasonably be expected to update them for the purposes of the sale.

6.14 My conclusion is that civil liability for involvement in misleading or deceptive conduct may be established by proving any of the first four categories of knowledge in *Baden Delvaux*, but not the fifth.

6.15 It appears that it is not necessary to prove that the defendant realised that the facts of which he or she was aware were capable of being characterised in the language of the statute, or that they had the legal consequences which the statue gives to them: *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 78 ALJR 274 at 284 per Gummow, Hayne and Heydon JJ. In *Heydon v NRMA Limited* (2000) 36 ACSR 462, a prospectus was said to be defective because it misleadingly claimed that the shares to be received by mutual members in a demutalisation would be 'free', and the prospectus failed to explain to the members the disadvantages of the proposal. Disagreeing with the full Federal Court (*Fraser v NRMA Holdings Limited* (1995) 55 FCR 452), the Court of Appeal of NSW found that the prospectus had not been misleading. However, their Honours held that, if, contrary to their view, the prospectus had been misleading, the lawyers who advised favourably on it would have been involved in the contravention: at 559-60 per Malcolm AJA and at 600 per McPherson AJA.

6.16 That conclusion seems to align, approximately, with the Privy Council's view in the *Barlow Clowes* case, in contrast with Lord Hutton's view in *Twinsectra*; and also to Owen J's observations in *Bell Group* at [4747], quoted above.

7. Involvement in failure to comply with continuous disclosure requirements

7.1 The considerations explored above, as to involvement in misleading or deceptive conduct, apply mutatis mutandis to involvement in failure to comply with a continuous disclosure requirement, but here there is a form of 'due diligence' defence that needs also to be noted.

7.2 The Listing Rules of the Australian Securities Exchange contain the following:

> *3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*
>
> *3.1A Listing rule 3.1 does not apply to particular information while all of the following are satisfied.*

3.1A.1 A reasonable person would not expect the information to be disclosed.

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential.

3.1A.3 One or more of the following applies.

- *It would be a breach of a law to disclose the information.*
- *The information concerns an incomplete proposal or negotiation.*
- *The information comprises matters of supposition or is insufficiently definite to warrant disclosure.*
- *The information is generated for the internal management purposes of the entity.*
- *The information is a trade secret.*

3.1B If ASX considers that there is or is likely to be a false market in an entity's securities, and asks the entity to give it information to correct or prevent a false market, the entity must give ASX the information needed to correct or prevent the false market.

7.3 'Aware' is defined in Listing Rule 19.12 as follows:

An entity becomes aware of information if a director or executive officer (in the case of a trust, a director or executive officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of that entity.

7.4 Thus the listing rules cast an obligation on the directors and executive officers of a listed entity to give immediate consideration to whether that information should be disclosed to the ASX. In Guidance Note 8, the ASX emphasises (at para 18) the immediacy of the obligation, observing that the entity cannot delay making disclosure pending a formal sign-off or adoption by the board.

7.5 Today one of the main pressure points in the disclosure obligation relates to financial information. Factual information about the entity's financial position will often be material, and unlikely to satisfy any of the elements of LR 3.1A.3, and in most cases a reasonable person would expect the information to be disclosed (LR 3.1A.1). The information is therefore likely to be disclosable. A problem arises when the disclosable information reveals an element of doubt about the entity's solvency, even though the doubt might well be resolved in the future.

7.6 The problem can be illustrated by considering any of the examples of financial uncertainty put forward in the Joint Submission, considered above. For example, the

entity may have a major finance facility that is due to be rolled over in three months' time, and the present financiers are withdrawing from Australia and have indicated that they will not re-commit. If the entity approaches a new financier and is given a firm 'no', it is hard to see how that fact is anything other than disclosable information. It may be, however, that a week or two after such a disclosure is made, another financier agrees to provide finance of equivalent terms to the existing facility, and so the problem has been solved. But in the meantime, the market has been alerted and the share price has probably declined appreciably. It may not quite recover after the new financing arrangements are disclosed, because there may be a lingering suspicion that the unwillingness of the previous financiers to commit to the entity has some undisclosed foundation.

7.7 It has recently been suggested that in circumstances such as these, information may be withheld from the market - presumably on the ground that it is not material - provided that 'the company reasonably considers on reasonable grounds that the negative outcome [in my example, failure to refinance] is unlikely, such as where there are negotiations which are reasonably expected to lead to that outcome being avoided' (Damian Reichel, 'Continuous Disclosure in Volatile Times', (2010) 28 *C&SLJ* 84, at 85). On this approach, the company need not tell the market that its approach for the rollover of its facility has been rejected by its financier, or that its approach for refinancing has been rejected by a prospective financier, provided that in each case there are other negotiations which have, in the company's reasonable opinion, reasonable grounds for success. However, even if that is correct in principle, often the stated proviso will not be satisfied, because, at the point when a refinancing is rejected, it may not be possible for the company to say that there are reasonable prospects of refinancing elsewhere.

7.8 Similar problems arise when an entity falls into a 'technical' breach of financial covenants, especially where the financiers have not indicated their attitude to the breach, and even where they have decided not to act in consequence of the breach. Where the entity has gone into the market with a forecast, there will be pressure on the directors and officers to update the forecast if the financial fortunes of the entity seem to be turning down (GN 8, para 93). Likewise there will be pressure to disclose if an existing financial forecast is out of kilter with the 'consensus' estimate by analysts (GN 8, para 95).

7.9 The stakes are high for the listed entity, its directors and executive officers. If the Listing Rules require an entity to notify ASX of information, and the information:

- is not generally available; and
- is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's quoted securities;

the entity has a statutory obligation to notify ASX of that information in accordance with the Listing Rules (s 674(2)). Failure to comply with that subsection is a criminal offence for the entity, and the subsection is also a financial services civil penalty provision, so that the entity is exposed to a pecuniary penalty suit of ASIC, and a

compensation order at the suit of ASIC or any person who suffers damage in relation to the contravention. There is also the prospect of injunction proceedings under s 1324 and a variety of orders under ss 1324B and 1325.

7.10 It is now common for damages for failure to comply with the continuous disclosure law to be sought in class action litigation. Alternatively ASIC may choose to proceed by issuing an infringement notice under Part 9.4AA.

7.11 Directors and executive officers, and others, are at risk of liability under s 674(2A), according to which a person who is involved in a listed disclosing entity's contravention of s 674(2) contravenes subsection (2A), which is a financial services civil penalty provision. In their case the consequences may include a pecuniary penalty order at the suit of ASIC, a compensation order at the suit of the listed entity or any other person who suffers damage in relation to the contravention, and an order under ss 1324, 1324B or 1325.

7.12 Persons involved in the entity's contravention have the prospect of a defence under the curiously worded s 674(2B), which says:

A person does not contravene subsection (2A) if the person proves that they:

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

7.13 To have the benefit of this defence, the defendant in proceedings brought under s 674(2A) must prove both elements of subsection (2B). That is, it is not enough to prove belief on reasonable grounds that the entity was complying with its obligations. It is also necessary for the defendant to prove that he or she personally took all reasonable steps (if any) to ensure compliance.

7.14 The subsection expressly contemplates that on occasion, no steps need to be taken, but it does not explain when that is so, except by laying down the general reference to such steps as are reasonable to ensure compliance. Presumably regard is to be had to the nature of the position of the defendant: a relatively junior executive officer who becomes aware of information at the same time as his or her superior may perhaps not need to take any steps to ensure compliance, for it is arguably reasonable for that person to rely on the superior to attend to the matter. In some cases it may be that the only step that needs to be taken by a junior officer is to report the information to a senior officer.

7.15 A more serious problem of construction is that there is no timeframe set up by the subsection. The entity's obligation to disclose is triggered by it becoming aware of disclosable information, and once the obligation has arisen, it is a continuing obligation. It is not clear whether the focus of attention in subsection (2B) is only on the events that preceded the company's initial failure to comply (assuming the

defendant was involved initially), or whether it is relevant to consider, as well, any steps that it might have been reasonable for the defendant to take after the initial non-disclosure.

7.16 Bank officers working with a listed entity as client, especially where the client is in some financial doubt or difficulty, may come to be aware of disclosable financial information. They will know that the company is a listed entity subject to the continuous disclosure regime. Therefore, on the application of the *Yorke v Lucas* line of authority, they are potentially exposed to risk of accessory 'involvement' liability. It is not necessary for a plaintiff to prove against a bank that its officer knew the law, in terms of s 674 and the ASX Listing Rules. Consequently the 'knowledge' element of involvement liability may not be too difficult for a plaintiff to prove against a bank.

7.17 The conduct element of involvement liability is another matter. It would be unlikely, except in extraordinary circumstances, for a bank to be found to have aided, abetted, counselled or procured a contravention of the continuous disclosure obligation, or to have induced the contravention, or to have conspired with others to effect the contravention. The risk for a third party such as a bank is in s 79(c). The question is whether the bank has been knowingly 'concerned in, or party to' the contravention.

7.18 In circumstances where a bank officer participates in discussions relating to the disclosure obligation, that ingredient may well be present. Short of that, if a bank officer is 'concerned in', say, restructuring talks in which it becomes apparent that the company's financial position is rather worse than as disclosed to the market, and the restructuring proceeds without market disclosure, there may be a case against the bank that it was knowingly concerned in the failure to disclose even if the issue of disclosure is not discussed. Of course, the outcome will depend on a close analysis of the particular facts.

7.19 As to the defence in s 674(2B), in circumstances such as those just postulated, where a bank officer is involved in discussions about disclosable but undisclosed financial information concerning the bank's corporate customer, there will be a question whether there were any steps that were reasonable for the bank officer to take to ensure that the listed disclosing entity complied with its obligations. The primary obligation to disclose rests on the company rather than its bank, but the issue under s674(2B) is not whether the bank had any legal duty to disclose, but whether there were reasonable steps that might be taken by the bank officer to ensure disclosure. It might be plausibly argued that, for the bank to avail itself of the defence, it would need to show that the bank officer pointed out the disclosure obligation to the senior corporate personnel who were in a position to discharge it.

7.20 Whether or not there were any reasonable steps for the bank officer to take, the bank will not be able to take advantage of the defence unless it can show that it believed on reasonable grounds that the listed disclosing entity was complying. In the postulated circumstances, that will not be the case.

8. Conclusion

8.1 When banks and other financiers are dealing with listed entities in financial difficulty, there is a risk of the bank incurring some form of 'accessory' liability of the kinds discussed in this paper.

8.2 In the *Bell Group* case, Owen J noted that the knowledge requirements in the first and second limbs of *Barnes v Addy* liability have converged, though he expressed some scepticism as to whether that convergence would be enduring (at [4745]).

8.3 It is submitted that there is a substantial measure of convergence in the 'knowledge' elements of liability under the two limbs in *Barnes and Addy*, and in shadow directorship and statutory 'involvement' liability. The consequence is that while there are many shoals for the good ship Banking Business to navigate, at least they are broadly of the same shape.