RIGHT TO TRACE ILL-GOTTEN GAINS

THE HONOURABLE MR JUSTICE CW PINCUS

Federal Court

Proceeds of Crime Act 1987

This is a statute of remarkable complexity, the analysis of which requires patience. What I propose to do is to attempt broadly to explain aspects of the Act. All I have to say, then, must be qualified by the assertion that I am attempting to do no more than expound the general effect of some provisions without including the finer details. This is an outline sketch.

The principal ways in which the Act may affect a financial institution, a term defined so as to include (of course) a bank, are under s.19 and s.30.

Section 19 allows a court to forfeit property to the Commonwealth if it is "tainted property", which means that it has been used in connection with the commission of an offence or is the proceeds of an offence.

Not any offence will do; there must be, in general, a federal indictable offence, but that covers many of the offences of commercial significance; the only other category covered is foreign drug offences. Under s.19, the court is not obliged to forfeit the property but may consider hardship which might be caused by forfeiture. It appears that this discretion was established or extended during the course of discussion in Parliament - an example of that institution's working as its supporters would wish it to do.

One would not expect that financial institutions would be worried about forfeiture of their own property on account of offences they have committed. They are more likely to be concerned about losing a security interest given by an offending customer. Under s.21, a person who is interested in the property sought to be forfeited may apply before, or, subject to certain conditions, after the forfeiture order is made, for orders to protect his interest. That can be done either by requiring the Commonwealth to transfer the interest to him or making the Commonwealth pay for it. One of the things that must be shown to justify an order, if the applicant got its interest after the offence was

committed, is that the circumstances were "such as not to arouse a reasonable suspicion that the property was at the time of the acquisition tainted property". You will recall that "tainted property" includes the proceeds of an offence; so, to get one of these orders to protect the interest of a financial institution, there must be evidence negativing circumstances giving rise to a reasonable suspicion that the property was the proceeds of crime. This must create practical problems, where one has dealt with what might be called suspect people. If a suddenly-rich customer seems to have no regular occupation and does not appear to be engaged in a business likely to produce large proceeds, it may sometimes be impossible to disprove the existence of circumstances giving rise to reasonable suspicion, within the meaning of this provision.

Putting this more simply, the Act creates a risk that security interests may be lost if acquired from a person thought to be a criminal. To lose a security, it is not necessary to know that the property was obtained from the proceeds of crime, nor even to believe that; reasonable suspicion is enough.

Those who have followed the incipient debate about the current proposals for constitutional amendment may be conscious of the proposal to extend to the States the Commonwealth's lack of power to acquire property, other than on just terms. It might also occur to them that legislation of this sort could be challenged on the basis that it involves taking away from people who have committed no crime property they lawfully acquired. A similar point has been raised as to provisions in the Customs Act. In R v. Smithers (1982) 152 CLR 477, the High Court considered Customs Act provisions of which I say more later, allowing what might be described as freezing orders against property of people said to be connected with drug dealings. The Act was so framed as to catch, amongst others, people who had not actually committed an offence, but the High Court held that those parts of it which were challenged did not provide for the acquisition of property without providing just terms; such a provision would of course have been unconstitutional. In a rather guarded way, the High Court rejected the challenge to the specific provisions there in issue. A stronger case in support of the validity of the P.O.C. Act is Burton v. Honan (1952) 86 CLR 169, in which confiscatory provisions of the Customs Act relating to unlawfully imported property were held to be good, even as to quite innocent people who got title after importation. I do not attempt to predict the likely result of a challenge, on this ground, by what might be described as third parties affected by the Proceeds of Crime Act and content myself by suggesting that such a challenge is likely to occur.

So far I have mentioned one leg of the forfeiture provisions - forfeiting tainted property - and I have pointed out that a financial institution holding a security may be affected by forfeiture orders. Orders having a similar character, but wider effect, are able to be made under s.30. The main difference

between ss.19 and 30 is that s.19 applies in relation to conviction of any indictable offence, whereas s.30 applies only if there is a conviction of a serious offence. The expression "serious offence" is defined in s.7 to mean a serious narcotics offence, an organised fraud offence or a money laundering offence. These provisions are in turn defined in s.7, but the only definition I shall expatiate on is the definition of a money laundering offence, which takes you to s.81. Under that section, money laundering is apparently treated as fairly serious, because a natural person such as a bank manager may if convicted receive a handsome penalty of a $200,000 fine or 20 years imprisonment, or both. The essence of money laundering, in the ordinary sense, is I think transforming property representing the proceeds of crime into something else which looks less like the proceeds of crime. However, you will not be astonished to find that s.81 goes well beyond that concept. Mere possession of the proceeds of crime is enough, but the prosecution must show that the defendant knew or ought reasonably to know that the property was derived or realised directly or indirectly from some form of unlawful activity.

You will appreciate that this is a tougher test for the prosecution than the "reasonable suspicion" test in the forfeiture provision. Nevertheless, it is important to appreciate that, on its face, the section requires no conscious criminality or even conscious impropriety. These daunting penalties may be attracted by proof that the so-called money launderer ought reasonably to have know that the money or other property he got came from some form of unlawful activity.

Again, there must be a practical problem in dealing with suspect people - for example those who, justly or otherwise, have been suggested in the media or in private communications to be racketeers, hoodlums or gangsters. The emotive terms I have just used, however, should not blind one to the fact that any form of unlawful activity involving a federal indictable offence is enough. It does not have to be anything spectacular and may be mere paper-shuffling, i.e. white-collar crime.

To get back to s.30, I have said that this forfeiture provision differs from the earlier one (s.19) in that there must be a conviction of a serious offence, a term I have just discussed. The other difference is that there must have been a restraining order made before an order can be made under s.30, and that is an order under s.43 or s.44. The general idea of these restraining order provisions is that the court can, as in the legislation discussed in R v. Smithers (above), apply to a court for an order freezing property of a person who has been convicted of, or is about to be charged with, an indictable offence. It does not seem to me necessary for banks to be especially interested in the way in which these P.O.C. Act restraining orders are to be obtained, except in two respects.

The first is that the purpose of a restraining order is to freeze the property so that the Commonwealth ultimately can recover, under one of the provisions of the Act, such as the forfeiture provisions or provisions permitting the Commonwealth to recover pecuniary penalties (ss.24-29); security holders will be interested in s.50, which creates a charge in favour of the Commonwealth for the penalty amount and that sub-s.(3) sensibly makes the statutory charge subject to prior charges.

The second aspect of these restraining orders which banks need to be interested in is that persons who might be minded to contravene them are encouraged not to do so by the penalties under s.52, five years gaol for a natural person and $50,000 for a body corporate. A restraining order directs that property is not to be disposed of or otherwise dealt with by any person except as specified in the order. Note that the restraining order may cover specified property or may cover all the defendant's property, the defendant being the person who is or is about to be charged or convicted; it may even cover specified property of a person other than the defendant, but only if there are grounds to think that the property is tainted property, or in the defendant's control.

To get one of these orders, the D.P.P. must eventually serve any person he has reason to believe may have an interest; interim orders may be made ex parte in circumstances of urgency. You would expect that ordinarily notice ought to be given, but experience of similar applications under the Customs Act tends to make one think that interim orders, made without any notice at all, will be common enough, on the theory that if notice is given, the bird may have flown by the time the court's order is served. It seems to me especially important, in these circumstances, to ensure that banks are conscious of their obligations under these restraining orders, the law apparently being that even if not served with the order, they are obliged to comply once they come to know of them and may be criminally liable for not doing so. As one would expect, that liability only arises in relation to a knowing contravention of a restraining order, but a legal adviser would not wish to take any unnecessary risk about the prosecution's ability to prove knowledge.

The Act also makes provision for enforcement in Australia of foreign orders of a similar character, made under the Mutual Assistance in Criminal Matters Act 1987. It is understood that Australia hopes to conclude, this year, nine treaties or arrangements with foreign governments with a view to mutual assistance in the investigation and prevention of crime. The first such treaty was concluded with the Republic of the Philippines last month. I do not know to what extent Australia is a haven for hot money; perhaps not much. However that may be, time does not permit even a brief excursion into the area of foreign orders. There are, however, a couple of other points in the P.O.C. Act to which I would draw practitioners' attention.

One is the provision for a s.73 monitoring order, under which financial institutions may be directed to supply information about transactions of suspected criminals. The order has to specify the class of information which is required to be given and the bank will presumably be quite interested to know what it has to do under such an order, because the maximum penalty for breach of the order is $100,000.

Secondly, I draw your attention to the important provisions of s.82, which creates a general criminal liability for receiving or possessing money or property "that may reasonably be suspected of being proceeds of crime". One is reminded of the laws as to receiving. Typically, statutes creating such offences, e.g. s.188 of the N.S.W. Crimes Act, require the receiver to have known the property to have been stolen. The requirement of knowledge has been watered down somewhat by judicial decision. "Actual belief" or simply "belief" may apparently do: see Fallon (1981) 4 A Crim R 411. But suspicion cannot ground a conviction of receiving in the traditional sense. Section 82 is obviously tougher, in speaking of suspicion rather than knowledge, as the anti-receiving statutes ordinarily do.

The model for s.81 may have been provisions like s.40 of the Summary Offencs Act 1970 (N.S.W.), dealt with in Grant v. The Queen (1980-81) 147 CLR 503. That section made it an offence to have in one's custody a thing "which thing may reasonably be suspected of being stolen or otherwise unlawfully obtained". In that case, Grant had money in a savings bank account which was thought ultimately to have been the indirect proceeds of crime, but the High Court held that no tracing process was permissible; the thing mentioned in the section referred to the same physical object throughout.

An important point to notice is that the prosecution raises a prima facie case, not by proving that the person charged reasonably suspected anything, but by showing "the existence of facts which, in the mind of some individual, give rise to a suspicion", as Sir Samuel Griffith put it in Ball v. Humphries [1903] QSR 250. Ordinarily that someone will, presumably, be a policeman. Then under this section the defendant has to prove "that he or she had no reasonable ground for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity". Note the subtle change between "proceeds of crime" in the provision creating the offence and "some form of unlawful activity" in the exculpatory provision. Further, it does not suffice to prove that the defendant did not in fact suspect that the property came from some form of unlawful activity; he must show that he had no reasonable ground for suspecting it. If, for example, circumstances known to him were such that he plainly should have suspected illegality, it does not seem to be enough to satisfy the court that he did not in fact do so. The offence gets fairly close to attaching criminality to negligence.

The Proceeds of Crime Bill was described in Parliament as constituting "some of the most effective weaponry against major crime ever introduced ..." It may well be that, but it must also be one of the statutes which creates the greatest necessity for banks and other financial institutions to be on their guard against breach. I have tried to demonstrate that there is a recurring theme in provisions of this sort, namely what must appear, to hit the innocent party (to use a brief expression) is that it knew or should have known about the origin of the property. It can be seen that falling foul of this statute may, depending upon the answer to that question and other circumstances, create a serious civil or criminal liability where once there would have been no thought of it. It might be expected that even the launching of a prosecution against a bank for non-compliance with this Act might do serious commercial damage.

Other Legislation

A somewhat gentler approach was adopted when in 1979 the Federal Government inserted s.243A and following provisions in the Customs Act, relating to money from drug importation. The basic idea was somewhat similar, but the provisions were not as drastic as those I have just considered, nor is their reach so wide. Nevertheless, since it appears that quite often money or other property thought to have been unlawfully obtained comes from importation of narcotics, some reference to the Customs Act provisions is necessary. Like the Proceeds of Crime Act, they contemplate a civil suit for a pecuniary penalty and have a provision for freezing of property corresponding to s.43 et seq of the Proceeds of Crime Act. Again, the Act creates a charge (s.243J) securing payment of the penalty, and it is, again, subject to prior charges. You will be heartened to note that the penalty for disposition of property subject to a statutory charge is not so drastic as the comparable provision in the 1987 Act.

Like the 1987 Act, the Customs Act provisions catch foreign property as well as that in Australia, and I have recently heard a case under it relating to a large sum in a bank in Vanuatu. My decision has I think gone on appeal, so I must say little of it. I would remark, however, that officers of the foreign bank were called to give evidence here, and they produced records which received mention in the reasons for judgment. More generally, experience suggests that bank diary notes, which seem to be generally fuller and more detailed than notes made in other areas of business, may be expected to be of considerable importance in litigation about statutory provisions of this sort; that will be so not only as to the rights and liabilities of those charged with what might be called the principal offences, but also as to the position of banks. If, for example, a question arises whether at the time when the money was received, a bank entertained or should have entertained a suspicion of illegality, the content of the bank's records may be critical.

Then, of course, there is State legislation. In Queensland we have the Drugs Misuse Act 1986-87 which, inter alia, imposes a life sentence if an adult supplies a minor with any quantity of 3,4-Methylenedioxy amphetamine or 2-Methyl-3-Morpholino-1, 1-Diphenylpropane Carboxylic acid. So, if you have either of these, or of the equally heinous but less orthographically burdensome coca leaf (see s.6(c) and Second Schedule) don't give it away or sell it - not here, anyway. More to the present purpose, don't receive property obtained, directly or indirectly, from anyone who has done this for money; the penalty, if you knew or even believed he got the property that way, is, again with devastating Queensland simplicity, life (s.7). Mortgages receive a mention in the same section; Parliament imposes the same penalty on people who receive property into which the property obtained from certain offences has been converted, provided they have the appropriate knowledge or belief. One curiosity of the Act is that sub-s.7(2) has the effect that where property obtained from the commission of the offences in question has been "mortgaged for other property" then the person who receives the other property may be guilty of an offence. Presumably what the draftsman intended by "mortgaged for other property" was mortgaged to obtain a loan, whereby other property was purchased; one could not be sure. What one can be sure of is that authors of works on securities such as the renowned Professor Sykes will need to include sections on criminal liability relating to mortgage transactions in future editions.

Then the Drugs Misuse Act has in Part V a set of provisions rather like those in the later Federal statute, the Proceeds of Crime Act. The proceeds of drug offences and property obtained with such proceeds and the like may be forfeited. Under ss.33 and 34, persons interested in the property are entitled to notice and the court may require their interest to be paid out. Under this statute, what the person interested (such as a bank) must prove is that it was not a party to the commission of the offence and also lack of reason to suspect the circumstances giving rise to the forfeiture.

Common Law of Forfeiture

The subject has a rather gruesome history. A felon forfeited all his property to the Crown under the common law, so that not only would he be executed, but his heir would be deprived of the whole of his property, whether or not derived from the proceeds of crime. There was a rule, however, which separated the men from the boys, namely that if you remained mute and would not plead, you could not be convicted. Then your property would not be forfeited. However, if you took that course you were subjected to a judgment which left little to the imagination. After three warnings, the court would direct "that you return from whence you came to a low dungeon in which no light can enter; that you be stripped naked save the cloth about your loins, and laid down, your back upon the ground; and that there be set upon your body a weight of iron as great as you can bear, and greater; and that

you have no sustenance save on the first day three morsels of the coarsest bread, on the second day three drafts of stagnant water from the pool nearest the prison door, on the third day again three morsels of bread as before, and such bread and such water alternatively from day to day, till you be pressed to death; your hands and feet tied to posts and a sharp stone under your back". And those who could stand this long enough saved their property. No doubt consideration was given to reintroducing this pleasant custom, by the draftsmen of the recent rash of legislation having a similar purpose. To the disappointment of legal antiquarians, they have chosen more bureaucratic methods. It is important to note, however, that the statutes have some of the spirit of the old law, in that they carry with them risk of financial loss, or worse, to persons other than the felon.

Before leaving the common law doctrines, I draw to your notice Dugan v. Mirror Newspapers Limited (1979) 142 CLR 583 in which it was held that Darcy Dugan, who had been sentenced to death but had the sentence commuted, was disentitled to sue for defamation, on the ground of his status as a felon; it is pointed out in the reasons that forfeiture of property at common law was not abolished in New South Wales until just over 100 years ago - p.605. But Parliament has since tended, over a period of time, to work back towards the common law position: see for example the statutes discussed in argument in Regina v. Cuthbertson [1981] AC 470.

Tracing under the General Law

This is primarily the creation of equity. "Tracing" in the narrowest sense refers to the use of what is called a tracing order, the classic example of which, so far as a bank is concerned, is Sinclair v. Brougham [1914] AC 398. That concerned, as you may recall, a dispute about the distribution of the funds of a bank between its depositors. The case had not, nor have tracing orders in general, anything necessarily to do with ill-gotten gains, which are the sorts of gains I am supposed to speak about. In Banque Belge v. Hambrouck [1921] 1 KB 321, however, the gains were ill-gotten by Hambrouck, paid into his bank and handed to his mistress, who paid them into her bank. The second bank paid into court, and the mistress had to disgorge on the basis, again, of a tracing order.

More broadly and in a commercial sense, tracing ill-gotten gains, so far as a bank is concerned, involves the courts in making the bank an unwilling contributor to a charitable purpose, namely the relief of persons put upon by one of its customers. It is in that broader sense that I propose to treat the matter.

There are, of course, many ways in which institutions such as banks may be dragged into the wrongdoing of others and forced, in effect, to disgorge others' ill-gotten gains. For example, banks have, from time to time, been held liable, as you are aware, in relation to forged cheques. No single principle covers all such

categories, but one area in which the scope of liability has recently shown an expansive tendency, in a way which affects banks, is that of liability on the basis of constructive trusteeship.

Professor R.P. Austin has recently expressed the view in his essay "Fiduciary Accountability for Business Opportunities" that "equity and commerce will co-exist in an atmosphere of critical hostility unless equity judges reinforce their broad fiduciary incantations, their 'counsels of prudence', with some more specific rules or themes which will make the application of fiduciary principles more predictable to businessmen and their legal advisers" - p.185 of Finn (Ed.) "Equity and Commercial Relationships", 1987. One cannot but agree, although the use of the words "incantations" which, according to the S.O.E.D. means, inter alia, "the use of magical ceremonies or arts; sorcery, enchantment" is less than respectful. One cannot, however, deny that modern treatment of the interlocking notions of fiduciary accountability and constructive trusteeship has sometimes been carried on in what might seem to some to be a miasmic fog of undefined concepts. The outstanding characteristic of endeavour in this area is that while many marks are given for eloquence, top marks go to those who can break down barriers between areas of liability. Noting with interest that there was a comprehensible distinction between a contract, on the one hand, and a trust, on the other, the U.K. courts created a Quistclose trust, the result of a contract to make a loan for a particular purpose. Money so paid into a bank may become subject to a trust, so that the bank in which the money is deposited is not allowed to set it off against money due to it (Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567). I do not by any means say the decision was wrong, although it is convincingly criticised by Meagher Q.C. and my brother Gummow at p.17 of their recent edition of Jacob's Law of Trusts. I merely say that if people who want to exercise trust rights in respect of a bank account so as to postpone the bank, it would not be excessively harsh to require them to call the account a trust at the time of its creation, rather than when the dispute arises.

Then there was another bank account case, Carreras Rothmans Ltd v. Freeman Mathews Treasure Ltd [1985] Ch 207, where this hybrid beast, the trust contract, again displayed its versatility. It created a trust out of payments of a debt made on the basis that the creditor would pay the money into a special bank account, to be used for the sole purpose of paying certain of his creditors. Again, the bank account was not called a trust account by the parties but the court made it into one.

From the point of view of the commercial lawyer, one of the attractive aspects of equity is that its doctrines may produce a just and common sense result, in accordance with comprehensible principle, where adherence to narrower rules (derived, for example, from contract or statute) would not. Where there are no obvious black hats or white hats among the contestants, however,

I beg leave to doubt whether creating these retrospective trusts to favour one group over another is always a sound policy. Some might see the result of cases such as Carreras as less just than that which would have been obtained by adherence to more conventional legal categories. And one must add to the scales the important disadvantage I mentioned above, namely that of uncertainty of operation of the equitable concepts. Working out of priorities between banks and others in the event of insolvency is likely to involve occasional injustice, but rather than resort to doctrines whose boundaries are as hazy as these appear to be, perhaps it is better to let the chips fall where they may, lest one merit the comment Mr Justice Priestley has made about Carreras - "... a new burden has been placed on the weary backs of unsecured creditors ..." (Austin and Vann "The Law of Public Company Finance" p.387).

With the warning, implicit in what I have already said, that if the boundaries of constructive trusts and related fiduciary obligations are clear in their impacts on banks, still I for one cannot discern them, I venture to an account of some of the authorities. After the winding up of International Vending Machines Pty Ltd, its liquidator applied in 1961 to recover a sum said to have been paid in breach of the then s.148 of the Companies Act 1936 (N.S.W.), preventing the making of loans for the purpose of purchasing the company's own shares. I.V.M. had been turned into a wholly owned subsidiary of a public company for tax reasons. That was done by the shareholders of I.V.M. selling to the public company, which paid with moneys lent by I.V.M. Then the original shareholders, having got the purchase money, paid it back to I.V.M. in exchange for discharge of their loan accounts and some redeemable preference shares. The court made them refund the amount lent for the purchase of the shares, less a certain deduction, on the basis of trust-like duties: Steen v. Law [1964] AC 287. That has not in itself anything to do with banks, but the possibility of a bank's getting involved in this sort of circular movement of cheques was obvious; that came to pass in the Selangor case where it was the bank, not the shareholder, which had to refund the money. (Selangor United Rubber Estates Ltd v. Cradock (No. 3) [1968] 1 WLR 1555.) There the money moved in rather a complicated way, but the elements in the successful cause of action against the bank were that, firstly, it came out of the company's bank account, and finished up being used to pay for the purchase of its shares, and, secondly, that the bank had the requisite degree of knowledge. In Steen v. Law the directors who were made liable were the vendors of the shares, and so benefited directly from the unlawful dealing with its property. In the Selangor case, the ill-gotten gains were chased further, to the bank which supplied the money. Rather alarmingly from the point of view of banks, the basis of this holding was that there was a constructive trust because the circumstances were said to indicate that there was a dishonest and fraudulent design, or to put the bank on inquiry whether such a design was being executed - [1968] 1 WLR at 1590.

Some of the most interesting writing on these topics is to be found in the two books of essays recently edited by Dr Paul Finn. Browsers in such works may find some enlightenment, for example, at p.18 of the more recent collection, "Equity in Commercial Relationships", where a learned author points out that "The application of equitable doctrine in this area of the law has not led to any substantial degree of uncertainty, for it has been applied with restraint and discretion. It has not served, as the common expression has it, as a medium for the indulgence of idiosyncratic notions of fairness and justice". Suspecting that the position was not as rosy as the learned author suggested, I looked back at the history of some of the more notable recent cases in the field, decided by the High Court and mentioned by the learned author. In Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd (1974) 132 CLR 373, the question was whether some doubtful dealings created a constructive trust, in a commercial situation. The Court of Appeal, reversing the trial judge, were of the same view on one aspect of this and voted two-one on the other aspect. When the case got to the High Court, there was another reversal, the court splitting three-one. Counting the votes is a little difficult, but roughly speaking the ultimate result - no constructive trust - got four-and-a-half votes, and the other three-and-a-half. The next case I looked at was the Hospital Products litigation in 156 CLR 41. There, on the question of whether a commercial transaction should be held affected by fiduciary duties, the High Court split three-two against a fiduciary relationship, but the Court of Appeal had gone three-love the other way, making it a total vote of five to three in favour of the fiduciary relationship at an appellate level - that not being, of course, the ultimate result. Then in a different sort of constructive trust case, Muchinski v. Dodds 160 CLR 583, the Court of Appeal was I think unanimous, but was reversed three-two in the High Court.

I excuse myself for referring particularly to Muchinski's case, although it concerned family relationships and not commercial ones, because it is there that you find at p.614 the encouraging statement that "equity acts consistently and in accordance with principles" and at p.615: "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of a conceptual foundation of such principles ..." (Deane J.)

It is clear that reasoning in one of these ways, that is by analogy, by deduction and so forth, leaves plenty of room for serious argument. To take the Hospital Products case again as an example, I note that those left in the minority - or rather on a losing side because they were not, considered overall, in a minority - were the present Chief Justice and Mr Justice Deane himself. We are all used, of course, to judges agreeing on the

principles and disagreeing on the result, but when application of the very same principles leads to such widespread disagreement on results, is one not permitted to ask whether the principles might perhaps be a little too uncertain?

In examining the impact of equity upon banks' liabilities, it is a mistake to pay too much attention to authorities concerning banks specifically - i.e. actions against banks. That is so because the principles which govern liability in cases of that sort are, of course, part of a larger pattern of the law. One who wishes to form a notion of the limits of the liability which equity might impose needs to have regard to authorities, particularly recent ones, in areas quite remote from banking. Let me take an example. A recent English decision suggests in what might seem an alarming way the liveliness and present-day relevance of the concept of fiduciary duty. The Greater London Council reduced fares on London's buses and tubes by 25 percent and, by the appropriate means, raised funds to meet the cost. The procedure involved issuing a supplementary precept, as it was called, to London boroughs, one of which objected.

I can see that economists might regard it as imprudent to run public transport at a loss, forcing the ratepayers or taxpayers whether they use public transport or not, to make up the difference. No one would be surprised that non-economists might share the same view, espousing it not on grounds which might appeal to a specialist, but as a matter of mere fairness. What might surprise, however, is that the view just stated has been turned into a legal proposition and that the transport subsidisation measures were thought by Lord Wilberforce to be a breach of a duty of a fiduciary character: Bromley L.B.C. v. Greater London Council [1983] AC 786 at pp.815B, 820D. The Council was held not to have balanced its duties fairly.

The idea that a body having governmental functions - although at a subordinate level - might be held liable for breach of fiduciary duty on the ground that it did not fairly balance its duty towards various segments of the community is surely a startling one. Presumably, if the principle applied by the judge in the Bromley case is valid, it may be able to be used for attacks on governmental action at higher levels, for example, State or Federal Government action. But I mention this possibility only to point up the matter which is relevant to banking law, that the notion of a fiduciary duty appears to be a highly adaptable one which may be used to sue banks in the future in relation to all kinds of activities.

The important point, however, is that a bank may be made liable for moneys wrongly obtained by others in breach of trust, or in breach of a fiduciary obligation.

In what follows I shall, for simplicity, speak of the person principally responsible as "the customer" and postulate that an attempt is being made to recover from the bank, by way of damages or otherwise, in respect of a customer's wrongdoing.

There are three elements in such a liability if it is based on the principle of constructive trusteeship: firstly, the customer's wrong; secondly, the bank's knowledge of it, and thirdly, the bank's participation.

As to the customer's wrong, this branch of the law contemplates either a breach of trust or of fiduciary obligation. An example is the obligation of a director, the breach of which was the foundation of the judgment in the Selangor case. A decision similar in principle was that in Karak Rubber Co. Ltd v. Burdon [1972] 1 WLR 602. There again, bank moneys were used for a takeover, but were fraudulently misapplied. Barclays Bank was successfully sued on the basis that it had "assisted with knowledge in a dishonest and fraudulent design on the part of the trustee". The court reached the conclusion "that a reasonable banker would have been put upon inquiry as to the propriety" of the cheque in question and that "such inquiry would in all probability have revealed the impropriety". It is unnecessary to set out in detail the circumstances which, so the court thought, would have put the bank upon inquiry, but it is important to note that there was no suggestion at the trial that the bank actually knew that the money in question was being misapplied.

Much endeavour has recently been directed to the end of determining whether the degree of knowledge in the Selangor and Karak cases was in truth enough. In the Consul Development case (above), Stephen J. dealt critically with both these cases. If they are right, they seem to impose a heavier duty on banks than most bank managers would regard themselves as having. The tendency of legal advisers has perhaps been to regard any bank involvement in a customer's transaction, so long as it was not seen to be illegal, as permissible so long as the bank's own interests were protected. The idea of making positive inquiries to ensure that, for example, directors were not abusing their fiduciary duties seems to me foreign to the ordinary businessman's concept of a bank's function. Apart from that, surely it is likely to hold up bank business and commerce generally, if taken very seriously.

It is repetitive to say so, I suppose, but apart from the uncertainty as to the degree of knowledge necessary to involve the bank in liability (the second element dealt with above), one must keep in mind that the scope of the first element is also in a state of flux. I spoke of "the customer's wrong" for short, but once it is accepted that that wrong may be a breach of fiduciary obligation, a wide range of malpractice is potentially involved. May I take another recent example. In Chan v. Zacharia (1985) 154 CLR 278, two partners carried on a medical practice in leased premises. After dissolution of the partnership, one of them persuaded the landlord (the partnership lease having expired) to give him a new lease. There was an option to renew in the partnership lease and it was said that the parties were obliged to join in exercising that option (p.183). The partner who had obtained the new lease in his own name was held to be in breach of his fiduciary obligation.

The idea that, there being nothing in the partnership contract positively to require it, a partner might be obliged to join with his co-partner in exercising an option of renewal of a lease and that, if he simply takes a new lease in his own name, he might be acting unlawfully, might surprise many people in commerce; but I use Chan v. Zacharia as an illustration of the wide range of conduct which might be held illegal as a breach of fiduciary duty and result in the creation of a constructive trust. In Calverley v. Green (1984) 56 ALR 483, another trust case, Deane J., at p.501, urged, speaking of a property dispute between relations:

> "Any adjustment of those relationships must however be made by reference to logical necessity and analogy and not by reference to idiosyncratic notions of what is fair and appropriate."

My point is that what seems manifestly fair to one might seem idiosyncratic to another. A good example is to be found in the old case of Roberts v. Hopwood [1925] AC, a case like the London Borough Council decision referred to above. There, a local authority was put right for paying its workers at least two hundred pounds a year. Lord Atkinson, who was himself aged 80 and receiving six thousand pounds per year for his services, said that the council had been "guided by some eccentric principles of socialist philanthropy". The erring members of the local authority had to pay up partly because they had been eccentric in their principles.

One hopes, for the sake of the law, that in the long run there is something more of a certainty in all this than mere difference of view as to what is fair in business or public life. It would be particularly unfortunate if third parties, such as banks, found themselves under threat of liability because they failed to make inquiries about whether their customers were behaving with conspicuous unfairness.