KNOWING RECEIPT

AN AUSTRALIAN COMMENTARY

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INTRODUCTION

In preparing this commentary, I refreshed my recollection of the papers delivered on this same topic at the 1992 Banking Law Association conference, where Justice Thomas and John Lehane presented papers and Francis Neate provided a commentary. John Lehane raised in his paper a number of questions relating to this area of law, and Francis Neate commenced his commentary in the following way:

> *"My answers to John Lehane's questions are, of course, that I have not the faintest idea what the answers are....I am not therefore going to talk to you about the law at all, because I have not the faintest idea what it is. Neither of the two previous speakers has succeeded in telling you either."*[1]

I think what Francis Neate was saying was that neither he nor the previous two speakers could predict with confidence, in the light of the then state of the case law, what approach a court would take to identifying the test for "constructive trust" liability in a *Barnes v Addy* context. Certainly, the case law was described at the 1992 conference as being *"in chaotic disarray, and attempts to clarify the essential principles by reference to past authorities are destined to disappoint the investigator."*[2]

Since the 1992 conference there has been an explosion in the case law in the United Kingdom and New Zealand in this area. We are today indebted to Professor Rickett for his stimulating paper on knowing receipt, or the "first limb" of *Barnes v Addy*, and we at least now have the very great benefit of having the complex case law in this area given considerable clarity, and distilled in his paper into what he has identified as three competing conceptual approaches to liability.

In this paper, I wish to make a small contribution to the debate as to what the law relating to "knowing receipt" should be, by suggesting that principle ought exclude one of the three competing approaches to the tests for liability identified by Professor Rickett, namely the dishonesty based approach favoured by some recent English authorities. I then wish to explore whether, in an Australian context, there is now any greater coherence

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1 Neate, Francis "Constructive Trusts" in Banking Law and Practice, 9th Annual Conference, 30 April and 1 May 1992, Gold Coast, Queensland at 262

2 The Honourable Mr Justice E.W. Thomas, "Constructive Trusts - A Constructive Look at Constructive Trusts: With Particular Attention to the Position of Bank", ibid at 223

in the authorities than was the case when this area of law was examined at the 1992 conference. Finally, I wish to tailor my observations specifically to a banking context and make some observations which are pertinent to a banker or her legal adviser faced with a knowing receipt issue.

DISHONESTY BASED WRONGDOING

In the search for clarity in this complex and difficult area of law, it would in one sense be attractive for there to be commonality in the test for liability in both the first and second limbs of *Barnes v Addy*. As Professor Rickett has observed in his paper, it appears now to be reasonably well-established that the test for liability in the knowing assistance (or second limb of *Barnes v Addy*) category is based on the dishonesty, or "want of probity", of the defendant in rendering assistance to the fiduciary in committing its breach of trust or fiduciary duty. If the test to be applied in a knowing receipt case was the same (that is, that some dishonesty associated with the receipt by the defendant of the property must be established), the law in this area would certainly be much clearer and simpler.

Banks are, of course, a major target in the knowing receipt cases. From a banker's perspective, a test for liability based on dishonesty would be quite advantageous. Provided a bank did not transgress what a judge might consider to be honest conduct, it would be immune from the claims of plaintiffs mistreated by those owing fiduciary obligations to them. The test for liability would be relatively simple in its application and would avoid many of the difficulties associated with determining what constitutes "knowledge" or "notice".

However, despite these advantages, and with due deference to those judges and commentators who have taken this approach, or urged that such an approach be taken, principle suggests that it is appropriate to distinguish between the two separate limbs of *Barnes v Addy* and apply different tests for liability in both categories. This is because there is a different underlying basis in each category for the protection of a court of equity. In the case of a third party that simply participates in a breach of fiduciary duty, equitable intervention is based on the need to deter impropriety. The foundation for liability will be the third party's deliberate act in assisting, either directly or indirectly, an equitable wrong. It is essentially an equitable tort. On the other hand, the case of a third party who receives "trust property" for its own benefit is conceptually in a quite different category. Here, there is a competition between two parties, each of which has a claim to the benefit of the property. The court of equity is faced with the difficult task of determining which of them has the better title to the trust property. As the party that loses this contest will end up empty-handed, equity should exact a more demanding standard of conduct on the

part of the recipient of the trust property who seeks to resist the claim of the innocent beneficiary who is the victim of the breach of fiduciary duty.

The drawing of such a distinction has been accepted in a number of cases and in academic writing by a number of authors. Sir PeterMillett makes this point in the following terms:

> *"That [the liability of the recipient and of the accessory] do differ in at least one respect is plain as a matter of authority: the liability of the accessory is limited to the case where the breach of trust in question was fraudulent and dishonest; the liability of the recipient is not so limited. In truth, however, the distinction is fundamental; there is no similarity between the two categories. The accessory is a person who either never received the property at all, or who received it in circumstances where his receipt was irrelevant. His liability cannot be receipt-based. It is necessarily fault-based, and is imposed on him not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud."*[3]

If the above distinction is accepted (and it is suggested that it should be), it follows that liability based on dishonesty is totally inappropriate in a knowing receipt context, and that the choice that remains for a court to determine is between the property based approach and the restitution based approach identified in Professor Rickett's paper.

KNOWING RECEIPT - THE AUSTRALIAN POSITION

The above sub-heading is perhaps misleading if it is taken as suggesting that there is in fact an "Australian position". Indeed, the explosion of cases in New Zealand and the United Kingdom is in marked contrast to the position in Australia where there are only a handful of recent cases that have addressed the issue of knowing receipt liability, and where in only one case has there been an attempt to analyse in any comprehensive way the principles underpinning the basis for liability.

The issue for consideration essentially is whether an Australian court, when faced with a "knowing receipt" case against a bank, will adopt what appears to be the favoured English approach of requiring proof of dishonesty on the part of the bank, or instead will find liability established by mere "objective knowledge". In this latter regard, "objective knowledge" should be considered in two separate contexts as a distinction here is drawn in the cases. They are:

(a) **Failure to infer** - this encompasses a person who knows all the facts relevant to a given matter but who fails to appreciate their factual or legal significance. For

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3 Millett, P.J. "Tracing the Process of Fraud" (1991) 107LQR 71 at 83

example, a person may know all the relevant facts which constitute a breach of fiduciary duty, but may fail to appreciate, or infer, that the conduct actually constitutes a breach of fiduciary duty. (The decision of the English Court of Appeal in *Belmont No. 2*[4] suggests that a third party may even be fixed with knowledge of this type in circumstances where the third party was held not to have inferred impropriety, having relied on legal advice as to the legal consequences of the challenged conduct.) This knowledge will be referred to in this paper as "failure to infer" knowledge.

(b) **Failure to enquire** - this category of knowledge imputes knowledge of a matter to a person if that person would have discovered it had he made some enquiry which he ought reasonably to have made. The court will have reference to the enquiries which an honest and reasonable man in the position of the defendant would have made in the circumstances - the ordinary business practices which are employed in respect of such dealings are generally taken as a yard stick in determining the enquiries which he ought reasonable to have made. In this paper, such knowledge will be referred to as "careless failure to enquire".

An examination of the law of knowing receipt in Australia must start with two cases which, though preceding the plethora of recent cases and academic writings, are relevant because they are appellate decisions. The first is the High Court of Australia's decision in *Consul Developments*[5]. This case is generally regarded as a second limb case, but nevertheless appears relevant to "knowing receipt liability" in view of the judgments of Stephen J (with whom Barwick CJ agreed) and Gibbs J. In dealing with the issue as to whether a failure to infer is sufficient for the imposition of liability in a knowing assistance case, Stephen J stated that this "may well" be so[6], whilst Gibbs J, although disclaiming any intention to express a concluded view on this question, was clearly in favour of imposing liability in such circumstances[7]. Such an approach by three Justices of the High Court in a knowing assistance case is significant, given that liability is now generally accepted as being narrower in that context than in a knowing receipt context.

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4 *Belmont Finance Corporation Limited v Williams Furniture Limited (No. 2)* [1980] 1 All ER 393

5 *Consul Development Pty Limited v DPC Estates Pty Limited* (1974-1975) 132 CLR 373

6 Ibid, at 412

7 Ibid, at 398

In *Stephens Travel Service International Pty Limited v Qantas Airways Limited* (1988) 13 NSWLR 331, the New South Wales Court of Appeal considered the circumstances of a travel agency which had applied monies received by it for airline tickets into an overdraft account with its bank. The monies so applied by the travel agency had been received by it as agent for Qantas and, as a matter of law, those monies were trust monies. It was held that the bank had knowledge of the contractual arrangements between the travel agency and Qantas, and had knowledge that some of the monies received pursuant to the contractual arrangement were being paid into the overdraft. Significantly, it was accepted by the court that the bank did not appreciate that, as a legal consequence of the terms of the agreement of which it had notice, the monies received were trust monies. The payment of the trust monies into the overdraft was a breach of trust. It was held by the New South Wales Court of Appeal that as the bank had knowledge of each of the facts that constituted the breach of trust and as it had received the trust funds for its own benefit, it was liable to account as a constructive trustee. "Failure to infer" was sufficient to attract liability. The argument that some "want of probity" was required before the bank could be held liable was specifically rejected by the court.

Similarly, in *Ninety-Five Pty Limited v Banque Nationale de Paris* [1988] WAR 132, Smith J of the Supreme Court of Western Australia reviewed the then existing case law on knowing receipt, and rejected the requirement for dishonesty or want of probity to be established in a knowing receipt case. His Honour said, at 173-174, that liability in such cases depends *"not on dishonesty but on notice - which may be constructive notice - that is to say liability can arise where the recipient does not know but ought to know"*.

Returning to the New South Wales Court of Appeal, Kirby P in *Equiticorp Finance Limited (In Liquidation) v Bank of New Zealand* (1993) 32 NSWLR 50 undertook a review of the case law in the context of both limbs of *Barnes v Addy*. His Honour similarly rejected any requirement for dishonesty in a knowing receipt case, holding that such an approach *"fails to share risks equitably. And it provides inadequate stimulus to commercial morality of the kind referred to in Northside (at 165). Obtuseness is no excuse for or exemption from involvement in a breach of fiduciary duty, especially where it is rewarded with the receipt of funds the subject of the breach"*[8]. Kirby P (whose judgment was in dissent, but whose judgment was the only one to address knowing receipt issues) expressed the view that liability under the first limb will extend to "failure to infer" knowledge but not to "careless failure to enquire".

The final Australian case to which I wish to refer is the very complete and structured analysis of knowing receipt liability of Justice Hansen of the Supreme Court of Victoria in

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8 *Equiticorp Finance* at 105

Koorootang Nominees Pty Limited v Australia and New Zealand Banking Group Limited[9]. After a very thorough examination of the relevant authorities and, in particular, the principles that underpin the authorities, His Honour expressed the following conclusion:

> *"As I have stated, I favour the view that the liability of a recipient of trust property is restitution based. If so, there is a strong argument that liability is strict but subject to defences of bona fide purchaser and change of position."*[10]

His Honour then proceeded to determine the case on a more traditional property based analysis, as the case had not been argued by reference to restitutionary principles. In this context, His Honour held that dishonesty was not a necessary element and that a "failure to infer" would attract liability. As was the view of Kirby P, His Honour expressed the opinion that knowledge in category five of Peter Gibson J's analysis in *Baden* (ie careless failure to enquire) was not sufficient, at least where the facts are indicative of mere carelessness and not dishonesty. On the facts before His Honour, the liability of the bank was based on the finding that its manager *"was, at the very least, guilty of commercially unacceptable conduct which cannot be explained as "honest confusion". I am satisfied that the bank acted with a want of probity."* [11]

To the extent one is able to draw conclusions from the state of the Australian authorities on "knowing receipt" liability, the following conclusions appear to be open:

(a) The requirement in a number of the recent English cases that there be dishonesty in order for liability to be attracted has not found favour in the Australian authorities;

(b) Liability clearly extends to a beneficial recipient with actual knowledge, or who has dishonestly abstained from enquiry;

(c) Liability would appear to extend to a defendant that has knowledge of circumstances which would indicate a breach of fiduciary duty and a beneficial receipt of trust funds to an honest and reasonable person, even though the person has failed to infer the breach;

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9 *Koorootang Nominees Pty Limited v Australia & New Zealand Banking Group Limited* [1998] 3 VR 16

10 Ibid, at 105

11 Ibid, at 107

(d) There is case law that supports the view that objective knowledge, in the sense of knowledge of circumstances which would put an honest and reasonable man on enquiry, and an honest failure to make such enquiries, is not sufficient to attract knowing receipt liability, at least where the failure to enquire is based on mere carelessness.

The Australian position would therefore appear to differ both from the approach favoured in the recent English authorities, and to the extent identified in (c) above, the New Zealand position identified in Professor Rickett's paper.

As to which of the alternative conceptual approaches identified in Professor Rickett's paper might be adopted in an Australian context, the observation might be made that Australian courts have over the last 10 years redefined a number of legal principles by reference to restitutionary principles and notions of unjust enrichment, and this may be indicative of how an Australian appellate court might address knowing receipt liability should the issue fall for determination in the future.

SOME RELEVANT ISSUES FOR BANKERS

I wish to turn my attention now to several specific issues that might be considered relevant to a banker (or the banker's legal adviser) faced with a knowing receipt issue.

Ambit of "trust property "

Barnes v Addy refers to receipt by the third party of "trust property". The width of this concept of "trust property" is relevant in a banking context. Does it apply to a situation where a bank receives a cheque not from a trustee, but from a company where the payment has been made by the directors in breach of their fiduciary duties owed to the company? Further, is the principle to be confined to "property" - where the subject of a trust or not - or does it extend, for example, to situations where third parties have obtained a benefit in consequence of the breach by a director of his fiduciary duties owed to a company?

The answer to both the above questions appears to be 'yes', although in the latter case it might be questioned whether liability is imposed by reference to "knowing receipt" or "knowing assistance" principles. In *Belmont Finance Corporation v Williams Furniture Limited (No.2)* [1980] 1 All ER 392 Buckley L J (with whom Goff and Waller L J J) agreed, stated, at 405:

> *"A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust...so, if the directors of a company in breach of their fiduciary duties misapply the funds of the company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds."*

Buckley L J then adopted with approval the following passage from *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 479:

> *"In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee."*

In *Consul Developments* Justice Gibbs considered that recourse to *Barnes v Addy* principles was available even though nothing that might properly be regarded as trust property was involved. His Honour concluded:

> *"A person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed* ***for any benefit he has received as a result of such participation."***[12]

The "benefit" received by the third party need not necessarily be property. In *Rolled Steel Limited v British Steel Corporation* [1985] 2 LR 908 Slade L J set aside a guarantee on several bases, including that the recipient of the guarantee had obtained it with knowledge of the fact that it was granted in consequence of a breach by the directors of their fiduciary duties owed to the company. A similar view was taken in the context of a bank obtaining securities in relation to trust property in the Supreme Court of Queensland by De Jersey J in *Doneley v Doneley.*[13]

Clearly, the obtaining of securities by a bank from a company, and the receipt of payment in the context of a reduction of exposure to that customer may give rise to the application of knowing receipt liability to the bank concerned.

Commercial transactions and objective knowledge

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12 Op cit note 5 at 397

13 *Doneley v Doneley* [1998] 1 Qd R 602

When considering "constructive knowledge" and being "put on enquiry", an issue of relevance to a bank is whether such concepts ought to have any relevant application in the commercial context in which banks operate. It is one thing to require honest conduct on the part of a bank, but, should there ever be a duty to enquire in commercial transactions in the absence of dishonesty? There are a number of cases where this or similar issues have been considered by the courts.

Judicial warnings against the extension of constructive notice into ordinary commercial transactions are numerous. It is sufficient, for present purposes, to cite the following passage from a judgment warning of the perils of such an approach:

> *"As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough dealing with lands and estates with which the court is familiar, but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines and the protest is founded on perfectly good sense. ... In commercial transactions, possession is everything and there is not time to investigate title, and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralysing the trade of the country."*: Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at 545.

Australian authorities have considered the issue as being less threatening to the conduct of commercial business:

> *"It is important to bear in mind that the fact that a particular case involves an "ordinary commercial transaction" does not mean the different principles are applied in considering whether certain legal consequences flow from the conduct of the participants in that transaction. Such a proposition is plainly not correct. Rather, the application of equitable principles and remedies must take into account the context in which they are sought to be invoked, and if that context is a commercial one then the ordinary expectations of honest and reasonable business people become at once relevant."*: Hanson J in *Koorootang*, at 123

> *"Remedies of equity, flexibly applied in a modern commercial context, must be adapted to commercial realities. Thus, for example, relief which is appropriate to dealing with breaches of traditional family settlements may require adjustments in a commercial context, if it is not to be unduly heavy handed. That does not mean there are automatically lesser standards in a commercial setting, necessarily rendering equitable relief inappropriate. Rather it recognises there may be wholly different circumstances and expectations. Such an adaptation of equitable relief removes much of the objection to equity's intrusion into commercial dealings, so long to as that intrusion remains principled rather than unpredictable."*: Santow J in *Woodson (Sales) Pty Limited v Woodson (Australia) Pty Limited* (1996) 7 VPR 14, 685 at 14,709.

Accordingly, when a business transaction is entered into in the ordinary course of business, there would be less scope for a party to be held as having "objective knowledge". The difficulty would seem to be in drawing the line between transactions which take place in the ordinary course of business on the one hand, and those which do not. It is in the latter case that a party may be at risk of having knowledge imputed to it. Guidance in being able to draw this line is provided by Richardson J in *Westpac v Savin*[14], at 53:

> *"Clearly courts would not readily import a duty to enquire in the case of commercial transactions where they must be conscious of the seriously inhibiting effects of a wide application of the doctrine. Nevertheless there must be cases where there is no justification on the known facts for allowing a commercial man who has received funds paid to him in breach of trust to plead the shelter of the exigencies of commercial life. In this regard there is a further consideration affecting the receipt of funds in discharge of indebtedness where, for example, a customer's account with a bank is overdrawn. Where the creditor is pressing for payment and thus both stands to benefit from the payment and designs and stipulates for that benefit, it will be less easy for the creditor to contend that the regular pressures of commercial life must be taken to have ruled out any need for enquiry."*

Indeed, many examples of a party to a commercial transaction being held to have objective knowledge have been in banker-customer cases. A customer of a bank whose account has been under close scrutiny by the bank and who, in response to pressure from the bank, makes a payment in reduction of its overdraft (for example, *Westpac v Savin*) or provides security (for example, *Rolled Steel* and *Doneley*) is entering into a transaction that is perhaps not in the ordinary course of business. In such circumstances, the banker is at risk of having imputed to him constructive knowledge of the fact that the funds or security which have been received were provided in breach of trust. In addition, objective knowledge may be imputed in circumstances where *"the transaction was one of so unusual and extraordinary a character that it became their duty to enquire and investigate as to the rights of this company to enter into such a transaction." Gray v Lewis* (1969) LR 8 Eq 526 at 543 per Malins VC.

The cases in which objective knowledge will be held to exist in a commercial transaction are likely to be few. There are several cases that have provided some assistance in a specific banking context. Steyn J in *Barclays Bank Plc v Quincecare Limited* (1988) 1 FTLR507 looked at this issue in the context of a bank receiving a transfer order:

> *"The critical question is; what lesser standard of knowledge on the part of the bank will oblige the bank to make enquiries as to the legitimacy of the order? In judging where the line*

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14 *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41

is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on the banker, which hampers the effective transacting of banking business unnecessarily. On the other hand the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose all the impractical standards on bankers. In my judgment, the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order, if and for as long as the banker is "put on enquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that an order is an attempt to misappropriate the funds of the company...and, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard."

In *Equity - The Road Ahead* (1995) 9 TLI 35 at 40, Sir Peter Millett examined the issue in the following terms:

"The basis of commercial dealings is trust, not distrust. Bankers and traders are not detectives. Unless and until they are alerted to the possibility of wrong doing, they proceed and are entitled to proceed on the assumption that they are dealing with honest men. They are not put on enquiry unless they are made aware of facts which make it obvious that the transaction may well be improper, and make it imperative to seek an explanation before proceeding."

Clearly, in a banking context, the above considerations must be considered in light of any countervailing duty that a bank has, for example, a duty to pay or dishonour a cheque promptly. In the *Barclays Bank* case referred to above, such a duty was referred to as being a primary duty although, clearly, the existence of this duty will not excuse dishonest conduct.

Being "put on notice" and failing to enquire

If a court holds that the defendant has been put on enquiry and has failed to make those enquiries, does it necessarily follow that the third party is liable? The issue raised here is essentially one of causation. In other words, is it open to examine whether the defendant's failure to make enquiries was of no consequence for the reason that had the defendant made the enquiries which ought to have been made, would the defendant nevertheless not have found out the true position.

In the *Baden*[15] decision, Peter Gibson J held that the plaintiff must prove that the enquiry would have disclosed the truth in order to establish the causal connection between the

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15 *Baden Delvaux & Lecuit v Societe Generale par Favouriser le Developpement* [1992] 4 All ER 161

failure to make the enquiry and the loss. This approach was, however, rejected by Millett J in *Agip*[16] (although it must be borne in mind that this was a knowing assistance case):

> *"He is liable only if he acts with knowledge; and this must be judged in the light of all the circumstances known to him and in the explanation actually given to him. But it is not, in my view, to be judged by considering the hypothetical explanations which might have been given to him if he had sought them. If it were otherwise, his liability would depend on whether the fraudster would have been sufficiently inventive to be able to supply plausible explanations if asked for one.....such considerations are or ought to be irrelevant.....in my judgment, the fact that a false but credible explanation would or might have been given is no defence to a party put on enquiry who makes none."*

It is considered that the approach taken by Millett J should only be applicable in a knowing assistance case where the failure to enquire is essentially evidence of the defendant's dishonesty. However, in the *Koorootang Case*, Justice Hansen took a similarly strict approach in a knowing receipt case by endorsing the following passage from the judgment of Ungoed-Thomas J in *Selangor United Rubber Estates Limited v Cradock* [1968] 2 ALL ER 1073 at 1118:

> *"If enquiry ought to be made, and no enquiry is made, then the weight of authority establishes, in my view, that it is to be assumed that a true answer would be given; and, if no enquiry is made, that negligence is established."*

Indeed, the approach taken by Hanson J in *Koorootang*[17] to the enquiries that his Honour thought would have been made by "an honest and reasonable banker" is illustrative:

> *"[The stated circumstances] cried out for a further enquiry. If nothing else, Jock Jefferies should have been asked how the contrasting information could be reconciled. Even if Jock Jefferies had said "although Koorootang used to hold all these assets on trust, now it owns them outright", an honest and reasonable banker would not have taken that bland assertion at face value, but would have instead at least have asked "well, how did that come about?". More probably, such a banker would have said "show me proof of how that came about.""*

In a knowing receipt case, it would seem to be harsh to impose liability on a party based on a failure to enquire in circumstances where had the defendant made the enquiry, nothing material would have been drawn to its attention. Nevertheless, the weight of authority presently favours this approach.

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16 *Agip (Africa) Limited v Jackson* [1990] Ch 265 at 295-296

17 Op cit note 9 at 106

In light of the standard that appears to have been applied by Hanson J as to *"an honest and reasonable banker"*, one might think for a fleeting moment that it would be best not to call your banker as a witness in the case. However, it is suggested that such an approach may well be counter productive and may result in the trial judge taking a similar approach to the one taken by Fox LJ in *Agip*[18] where the accountant defendants had not given evidence:

> *"It is, of course, possible that [the accountants] were honest men and that there are facts which we do not know which would demonstrate that. But, if so, they could have attended the trial and explained their position in the witness box. They did not do so, one can only infer that they were not prepared to submit their activities to critical examination."*

CONCLUSION

In bringing to a close my Australian commentary on "knowing receipt", I am tempted to conclude with a quote from the same source as in my introduction - Francis Neate's paper to the 1992 Banking Law conference. It is fair to say that Francis' commentary on Mr Justice Thomas' paper was critical of His Honour's approach to the law in this area. Francis Neate said:

> *"Mr Justice Thomas is an extraordinarily lucky man - because he is a judge. I am not talking about having secure employment in times of inflation or depression or anything like that: the point is that he can disregard authority and he has just talked to us for 45 minutes saying that is exactly what he has done. We, on the other hand, are forced to advise our clients and we have to pay them very large sums of money indeed if we do disregard authority. But when we are faced with someone like Mr Justice Thomas who tells us in advance that he is going to disregard authority, what on earth do we do next?"*[19]

The issue for Australian lawyers in 1999 is in my view not so much a concern that a judge may disregard the law, but rather which approach to the law will a judge take? Even if one discounts the dishonesty based approach favoured by some recent English authorities, should one adopt the "compromise position" apparently favoured in the New Zealand authorities, or the restitutionary approach favoured by Justice Hansen in the Supreme Court of Victoria. In either case, when will a failure to enquire be fatal? The sooner these questions receive judicial attention at an appellate level in Australia, the better.

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18 *Agip (Africa) Limited v Jackson* [1991] Ch 547 at 568

19 Op cit note 1 at 26