THE KNOWLEDGE OR ROLE THAT MAKES A PERSON AN ACCESSORY UNDER THE BARNES v ADDY PRINCIPLE•

*By Denis Ong**

What is constructive notice? Should the five types of knowledge propounded in *Baden* v *Societe Generale SA*[1] continue to be applied? Is 'knowing receipt' a mere example of 'knowing assistance'? What is the basis of liability for 'knowing assistance/knowing receipt'? Is liability for 'knowing assistance/knowing receipt' excluded from the Torrens System by the principle of the indefeasibility of a registered title? This paper will attempt to answer these questions.

(i) What is constructive notice?

'The principle'[2] propounded by Lord Selborne LC in *Barnes* v *Addy*[3] has been bedevilled by the assertion that constructive notice *includes*[4] a merely negligent failure to make inquiry, and by the even broader assertion that constructive notice *comprises*[5] such a failure. Neither assertion is tenable. The preponderance of authority has established that constructive notice means wilful blindness, nothing less.

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1 [1993] 1 WLR 509n.

2 *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373 at 385 (per Gibbs J). See also 132 CLR 373 at 396 (per Gibbs J).

3 (1874) LR 9 Ch App 244 at 251-252.

4 See, for example, the observation to that effect made by Stephen J in *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373 at 412. Barwick CJ concurred (at 376-377) with Stephen J's judgment in that case.

5 See, for example, the observation to that effect made by Millett J in *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 292-293.

In *Jones* v *Smith*[6] Sir James Wigram V-C stated:[7]

> I believe I may, without danger, assert that the cases in which *constructive notice* has been established, resolve themselves into two classes: - First, cases in which the party charged has had actual notice that the property in dispute was, in act, charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had *designedly abstained* from inquiry *for the very purpose of avoiding notice.*
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> … If, in short, there is not actual notice that the property is in some way affected, and *no fraudulent turning away* from a knowledge of facts which the *res gestae* would suggest to a prudent mind; if mere want of caution, *as distinguished from fraudulent and wilful blindness,* is all that can be imputed to the purchaser – there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser, without notice. This is clearly Sir Edward Sugden's opinion …; and with that sanction I have no hesitation in saying it is mine also.

This statement of the law by Sir James Wigram V-C in *Jones* v *Smith*[8] was approved by Lindley LJ in *Bailey* v *Barnes*[9], who added:[10]

> …[I]n dealing with real property *as in other matters of business*, regard is had to the usual course of business; and a purchaser who *wilfully departs* from it *in order to avoid* acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his *wilful ignorance* of defects which would have come to his knowledge if he had transacted his business in the ordinary way. …

This statement of Lindley LJ in *Bailey* v *Barnes*[11] was quoted by Stephen J, with approval, in *Consul Development Pty Limited* v *DPC Estates Pty Limited*[12] (hereinafter *Consul*) as an exposition 'of the doctrine of constructive notice'[13] in relation to dealings

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6 (1841) 1 Hare 43 [66 ER 943].
7 Ibid at 55-56, and 948-949 respectively. Emphasis added.
8 Ibid.
9 [1894] 1 Ch 25 at 35.
10 Ibid. Emphasis added.
11 Ibid.
12 (1975) 132 CLR 373 at 412.
13 Ibid.

with real property, although Lindley LJ had expressly indicated that his remarks applied also to 'other matters of business'.[14]

Notwithstanding that Lindley LJ had stated in *Bailey* v *Barnes* that constructive notice denoted '*wilful* ignorance',[15] and notwithstanding that Stephen J in *Consul* had quoted that statement with approval, Stephen J imputed to Lindley LJ the view that '[i]n such a case *negligence* in making inquiries may constitute constructive notice'.[16] In *Consul*, Stephen J specifically (and surprisingly) relied on Lindley LJ's statement that constructive notice denoted '*wilful* ignorance'[17] to support the former's (fundamentally different) view that there is a 'species of constructive notice which serves to expose a party to liability because of *negligence* in failing to make inquiry'.[18]

One of the clearest illustrations of the proposition that constructive notice denotes wilful blindness (as opposed to mere negligence in failing to make inquiry) is the decision of the English Court of Appeal in *Carl Zeiss Stiftung* v *Herbert Smith & Co*[19] (hereinafter *Carl Zeiss*), a decision which was cited with approval by three[20] of the four judges who adjudicated on *Consul* in the High Court. In *Carl Zeiss* there was a main action in which the plaintiff company claimed as against the defendant company that all of the latter's apparent assets were the property of the former. The defendant company disputed the plaintiff company's claim, and successively engaged two firms of solicitors to represent it in the ensuing litigation.

In the course of so representing the defendant company, the two firms of solicitors received sums of money from that company for their fees, costs and disbursements. In a subsequent action, the plaintiff company claimed that the two firms of solicitors had received the payments from the defendant company with *notice* that those payments had been made in breach of trust from assets held in trust by the defendant company for the plaintiff company, so that the solicitors received those payments as constructive trustees for the plaintiff company. The basis of the plaintiff's claim against each firm of solicitors, that they had each received trust property with *notice* that it was transferred to them in breach of trust, clearly appears from the submissions

14 *Bailey v Barnes* [1894] 1 Ch 25 at 35.
15 Ibid. Emphasis added.
16 (1975) 132 CLR 373 at 412. Emphasis added.
17 [1894] 1 Ch 25 at 35. Emphasis added.
18 (1975) 132 CLR 373 at 412. Emphasis added.
19 [1969] 2 Ch 276.
20 (1975) 132 CLR 373 at 398 (per Gibbs J), at 409-410 (per Stephen J), at 376-377 (wherein Barwick CJ expressed his concurrence with the judgment of Stephen J).

made by its counsel,[21] and from paragraph 5[22] of its statement of claim. The plaintiff 'emphasised'[23] that the solicitors had received the disputed payments *honestly*.

Thus, in *Carl Zeiss*, the sole issue for determination by the English Court of Appeal was whether or not the solicitors, when they received the disputed payments, had done so with *notice* that those payments were made in breach of trust. The ratio decidendi in *Carl Zeiss* was that as the plaintiff company had not yet established in the main action that the defendant company held its apparent assets in trust for it, no trust for the plaintiff had been established of which the solicitors could have had notice. The plaintiff's action against the solicitors therefore failed. Danckwerts LJ observed that although the solicitors knew of the plaintiff's claim against the defendant company, 'claims [were] not the same thing as facts'.[24] Sachs LJ pointed out that 'no stranger [could] become a constructive trustee merely because he [was] made aware of a disputed claim the validity of which he [could not] properly assess'.[25] Edmund Davies LJ noted that 'there [had] been no determination that any trust [did] exist'.[26]

Danckwerts LJ eschewed consideration of whether the solicitors would have received the payments with notice that those payments were made in breach of trust if the assumption were made that the plaintiff would ultimately succeed in proving that the defendant company's apparent assets were held in trust for it. However, Sachs LJ[27] and Edmund Davies LJ[28] were prepared to pursue the implications of such an assumption. So, on the assumption that the defendant company held its apparent assets merely as trustee for the plaintiff, did the solicitors receive their payments with *notice* that those payments were made to them in breach of that trust?

Sachs LJ concluded that '*negligent*, if innocent, failure to make inquiry [was] not sufficient to attract constructive trusteeship'.[29] He contrasted a person's negligent but innocent failure to make inquiry with a person 'wilfully shutting his eyes to the obvious',[30] making it clear that the latter conduct would attract constructive

21 [1969] 2 Ch 276 at 280-281 (per Jeremiah Harman QC and Robert Reid).
22 [1969] 2 Ch 276 at 288.
23 [1969] 2 Ch 276 at 280.
24 [1969] 2 Ch 276 at 293.
25 [1969] 2 Ch 276 at 296.
26 [1969] 2 Ch 276 at 302.
27 [1969] 2 Ch 276 at 295.
28 [1969] 2 Ch 276 at 303.
29 [1969] 2 Ch 276 at 298. Emphasis added.
30 Ibid.

trusteeship if 'the obvious'[31] represented a breach of trust. Thus a dishonest, as opposed to an innocent, failure to make inquiry would be necessary and sufficient to attract constructive trusteeship. But the plaintiff had conceded that the solicitors had behaved *honestly*[32] in accepting the payments. So, the solicitors, even on the assumption that the defendant company had made the payments to them in breach of trust, had not *dishonestly* failed to make inquiry. Therefore, given that they had not behaved dishonestly, the solicitors could not have had either actual or constructive notice of the defendant company's breach of trust, even on the assumption that such a breach of trust had occurred.

If the solicitors had dishonestly failed to make inquiry, which did not happen, they would then have been fixed with constructive notice of the defendant company's breach of trust. Such a dishonest failure to make inquiry is conceptually indistinguishable from the 'wilful ignorance'[33] which Lindley LJ had identified as 'constructive notice'[34] in *Bailey* v *Barnes*. So, the conclusion of Sachs LJ in *Carl Zeiss* was that a merely negligent failure to make inquiry could not amount to constructive notice.

In *Carl Zeiss* Edmund Davies LJ observed that a person could not be fixed with notice, actual or constructive, unless that person had displayed a 'want of probity'.[35] This view is inconsistent with the suggestion that a merely negligent failure to make inquiry is a 'species of constructive notice'.[36] In *Carl Zeiss* Edmund Davies LJ stated:[37]

> … The concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court. It is because of such a concept that evidence as to "good faith," "*knowledge*" and "*notice*" plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do. *Not even gross negligence will suffice*. …

31 Ibid.
32 [1969] 2 Ch 276 at 280.
33 [1894] 1 Ch 25 at 35.
34 Ibid.
35 [1969] 2 Ch 276 at 301. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 389, Lord Nicholls declared that a lack of probity was 'synonymous' with dishonesty.
36 *Consul* (1975) 132 CLR 373 at 412 (per Stephen J).
37 [1969] 2 Ch 276 at 301. Emphasis added.

Thus, the proposition that a merely negligent failure to make inquiry is a species of constructive notice was not accepted by Sachs and Edmund Davies LJJ in *Carl Zeiss.* Their conclusion that constructive notice denotes wilful ignorance is amply supported by authority. In *May* v *Chapman*[38] Parke B observed:[39]

> … I agree that "notice and knowledge" means not merely express notice, but knowledge, *or the means of knowledge* to which the party wilfully shuts his eyes. …

Parke B's statement in *May* v *Chapman* was quoted with approval by Lord O'Hagan in *Jones* v *Gordon*[40] who there added that constructive notice described the conduct of a person who refused to make an inquiry which 'an honest man'[41] would have found 'unavoidable',[42] and therefore involved that person 'wilfully shutting his eyes'[43] for the purpose of '*evading* all inquiry'.[44] Lord O'Hagan noted that '[m]ere negligence'[45] did not suffice to fix a person with constructive notice. In *Jones* v *Gordon*[46] Lord Blackburn said that constructive notice could not be attributed to a person who was 'honestly blundering and careless',[47] but that such notice was properly attributable to a person who 'refrained from asking questions'[48] in order to avoid the confirmation of a suspicion.[49] He was of the view that constructive notice imported 'dishonesty'.[50]

In *Williams* v *Williams*[51] Kay J went so far as to declare that even '*very great negligence*'[52] in failing to make inquiry could not amount to constructive notice. He concluded that a person would have constructive notice only if that person 'wilfully shut his eyes, and was *determined* not to inquire'.[53] The decision of Kay J in *Williams* v *Williams*[54] was

38 (1847) 16 M&W 355 [153 ER 1225].
39 Ibid at 361 and 1228, respectively. Emphasis added.
40 (1877) 2 App Cas 616 at 625.
41 Ibid.
42 Ibid.
43 (1877) 2 App Cas 616 at 626.
44 Ibid. Emphasis added.
45 Ibid.
46 (1877) 2 App Cas 616.
47 Ibid at 629.
48 Ibid.
49 Ibid.
50 Ibid.
51 (1881) 17 Ch D 437.
52 Ibid at 446. Emphasis added.
53 (1881) 17 Ch D 437 at 445.
54 (1881) 17 Ch D 437.

cited with approval by all of the three Lords Justices who decided *Carl Zeiss*.[55] *Carl Zeiss* was in turn cited with approval by three of the four members of the High Court in *Consul*.[56]

So, there is abundant authority to support the proposition that 'constructive notice'[57] describes the conduct of a person who 'has *purposely abstained* from making inquiries *for fear he should discover something wrong*',[58] as opposed to even 'very great negligence',[59] the latter conduct not sufficing to constitute constructive notice.[60]

As Edmund Davies LJ remarked in *Carl Zeiss*:[61]

> …[W]ant of probity… is the hall-mark of constructive trusts, *however created*.

(ii) Should the five types of knowledge propounded in *Baden* v *Societe Generale SA*[62] continue to be applied?

In *Baden* v *Societe Generale SA*[63] (hereinafter *Baden*) Peter Gibson J asked:[64]

> What types of knowledge are relevant for the purposes of constructive trusteeship?

He answered:[65]

> … [K]nowledge can comprise any one of five different mental states … : (i) *actual* knowledge; (ii) *wilfully* shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an *honest* and reasonable man would

55 [1969] 2 Ch 276 at 292 (per Danckwerts LJ); at 298 and 299 (per Sachs LJ), and at 301 (per Edmund Davies LJ).

56 (1975) 132 CLR 373 at 398 (per Gibbs J), at 409-410 (per Stephen J). Barwick CJ (at 376-377) concurred with the judgment of Stephen J. The fourth member of the High Court in *Consul*, McTiernan J, made no reference to *Carl Zeiss*.

57 *Bailey v Barnes* [1894] 1 Ch 25 at 35 (per Lindley LJ).

58 Ibid. Emphasis added.

59 *Williams v Williams* (1881) 17 Ch D 437 at 4446 (per Kay J).

60 *Williams v Williams* (1881) 17 Ch D 437 at 445-446 (per Kay J). Kay J's description of constructive notice in *Williams v Williams* was approved by Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264 at 280.

61 [1969] 2 Ch D 276 at 302. Emphasis added.

62 [1993] 1 WLR 509n.

63 Ibid.

64 Ibid at 575.

65 [1993] 1 WLR 509n at 575-576. Emphasis added. Peter Gibson J (at 582) agreed with the five mental states formulated by counsel for the plaintiffs.

> make; (iv) knowledge of circumstances which would indicate the facts to an *honest* and reasonable man; (v) knowledge of circumstances which would put an *honest* and reasonable man on inquiry. …

In *In re Montagu's Settlement Trusts*[66] (hereinafter *Montagu*) Megarry V-C explained the *Baden* mental states as follows:[67]

> …[I]t can be said that these categories of knowledge correspond to two categories of *notice*: Type (i) corresponds to *actual* notice, and types (ii), (iii), (iv) and (v) correspond to constructive notice. …

It may be noticed that *each* of the five mental states delineated by Peter Gibson J in *Baden*, when that mental state is assessed in relation to the subject's participation in another person's breach of fiduciary duty, is necessarily descriptive of only a *dishonest* state of mind.

(i) A person who participates in another person's breach of fiduciary duty with *actual* knowledge of that person's breach of fiduciary duty is necessarily behaving dishonestly towards the person to whom the fiduciary duty is breached.

(ii) A person who participates in another person's breach of fiduciary duty by *wilfully* shutting his or her eyes to that other person's breach of fiduciary duty is necessarily behaving dishonestly towards the person to whom the fiduciary duty is breached.

(iii) A person who participates in another person's breach of fiduciary duty after wilfully and recklessly failing to make such inquiries as an *honest* and reasonable person would make in relation to that other person's possible breach of fiduciary duty is, by definition, behaving dishonestly towards the person to whom the fiduciary duty is breached. If an *honest* person would make such inquiries, then any person, circumstanced identically to the honest person, who does not make such inquiries will be otherwise than *honest*, so that such a person will be, by definition, *dishonest*. An honest and reasonable person is merely a person who is honest by reference to an *objective* standard of honesty. An honest and reasonable person is not, as such, an honest and *careful* person. Peter Gibson J in *Baden* did not posit the cognisance of an honest and *careful* person because such a composite form of cognisance is internally inconsistent, given tht the cognisance of a careful person is more extensive than that of a merely honest person. It would have been internally inconsistent of Peter Gibson J in

66 [1987] Ch 264.

67 Ibid at 277. Emphasis added.

Baden to have compounded these two different degrees of cognisance into a single test of cognisance, and he did not do so. He merely posited the cognisance of an honest person, with the latter to be identified by reference to an objective standard of honesty.

(iv) A person who participates in another person's breach of fiduciary duty with knowledge of circumstances which would indicate to an *honest* and reasonable person that the other person is acting in breach of fiduciary duty is, by definition, behaving *dishonestly* towards the person to whom the fiduciary duty is breached.

(v) A person who participates in another person's breach of fiduciary duty with knowledge of circumstances which would have put an *honest* and reasonable person on inquiry in relation to that other person's possible breach of fiduciary duty, but who nevertheless does *not* make such an inquiry, is, by definition, behaving *dishonestly* towards the person to whom the fiduciary duty is breached.

In *Agip (Africa) Ltd* v *Jackson*[68] (hereinafter *Agip*) Millett J, after adverting to the five mental states described by Peter Gibson J in *Baden*,[69] aptly observed:[70]

> ... The true distinction is between *honesty* and *dishonesty*. ...

Given that each of the five mental states in *Baden* represents only a *dishonest* state of mind it is not immediately obvious why Megarry V-C in *Montagu*[71] described 'types (iv) and (v)'[72] of those mental states as instances of mere '*carelessness*'.[73] When this view of Megarry V-C in *Montagu* is combined with his other view in the same case that 'types (ii), (iii), (iv) and (v) correspond to *constructive notice*'[74] it emerges that Megarry V-C's conclusion in *Montagu* was that two of these four types of constructive notice, namely, 'types (iv) and (v)',[75] denoted mere 'carelessness',[76] whereas two other types of constructive notice, namely, 'types (ii) and (iii)',[77] denoted 'want of probity',[78] namely, dishonesty.

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68 [1990] 1 Ch 265.
69 [1993] 1 WLR 509n at 575-576.
70 [1990] 1 Ch 265 at 293. Emphasis added.
71 [1987] Ch 264.
72 Ibid at 285 (per Megarry V-C).
73 Ibid. Emphasis added.
74 [1987] Ch 264 at 277. Emphasis added.
75 [1987] Ch 264 at 285.
76 Ibid.
77 Ibid.
78 Ibid.

This apparently fundamental distinction between, on the one hand, mental states (ii) and (iii), and, on the other hand, mental states (iv) and (v), was sought to be justified by Megarry V-C in *Montagu*[79] as follows:[80]

> ... The *essential* difference, of course, is that types (ii) and (iii) are governed by the words "wilfully" or "wilfully and recklessly," whereas types (iv) and (v) have *no such adverbs*. Instead, they are cases of *carelessness* or *negligence* being tested by what an *honest* and reasonable man would have realised or *would have inquired about*, even if the person concerned was, for instance, not at all reasonable. ...

Megarry V-C's attempt to treat mental states (ii) and (iii) as instances of dishonesty, and mental states (iv) and (v) as instances of mere negligence, is unpersuasive in two respects. First, if knowledge of certain circumstances would have put an *honest* and reasonable person on inquiry [type (v)], and a person who is identically circumstanced does not make that inquiry, then that person, by refusing to make an inquiry which an *honest* and reasonable person would have made, is, by definition, *dishonest,* and it is conceptually irrelevant to the application of the test of *honesty* whether that person's definitional dishonesty has, or has not, been inspired by a spirit of recalcitrance [type (iii) – 'wilfully and recklessly'[81] failing to make *honest* inquiry]. Furthermore, it is apparent that the words 'wilfully'[82] and 'recklessly'[83] are mutually inconsistent. A person who does something *wilfully* is a person who *intends* the consequences of that which is so done. By contrast, a person who does something *recklessly* is a person who is merely *careless* of the consequences of that which is so done. So, in relation to a particular outcome (for example, the consequences of a refusal to make inquiry), a person cannot behave both 'wilfully *and* recklessly'[84] at the same time.

Secondly, in *Montagu*,[85] Megarry V-C stated that types (iv) and (v) of the *Baden* mental states were 'cases of *carelessness* or *negligence* being *tested* by what an *honest* and reasonable man would have inquired about'.[86] Megarry V-C's explanation is deeply intriguing because he purported to *test* the existence of *negligence* by reference to a

79 [1987] Ch 264.
80 Ibid at 280. Emphasis added.
81 [1987] Ch 264 at 277 (per Megarry V-C).
82 Ibid.
83 Ibid.
84 *Baden* [1993] 1 WLR 509n at 575 (per Peter Gibson J); *Montagu* [1987] Ch 264 at 277 (per Megarry V-C). Emphasis added.
85 [1987] Ch 264.
86 Ibid at 280. Emphasis added.

criterion of *honesty*, so that, paradoxically, a person found to be *dishonest* in conduct is regarded as having behaved merely *negligently*.

Megarry V-C's division of 'constructive notice'[87] into one category of constructive notice based on dishonesty[88] and another category of constructive notice based on negligence,[89] is contrary to the view expressed by Kay J in *Williams* v *Williams*[90] that even 'very great negligence'[91] in relation to the discovery of a state of affairs does not constitute constructive notice of that state of affairs, and is also contrary to the view expressed by Lindley LJ in *Bailey* v *Barnes*[92] that constructive notice denotes 'wilful ignorance'[93] of a state of affairs.

On the flawed assumption that there exists one category[94] of constructive notice that denotes mere negligence in not making inquiry or, even more drastically, that constructive notice *consists of*[95] mere negligence in not making inquiry, constructive notice, but only when it is so regarded, has been held to be insufficient to ground liability for 'knowing assistance',[96] or even for 'knowing receipt',[97] assuming that knowing receipt is not merely one form of knowing assistance.

However, in *Agip*[98] the English Court of Appeal stated, it is suggested correctly, that either actual or constructive notice would suffice to ground liability for '[k]nowing assistance'[99] and for 'knowing receipt'.[100] The English Court of Appeal in *Agip* so stated when it accepted that *each*[101] of the five mental states in *Baden* sufficed to constitute the element of 'knowledge'[102] in knowing assistance and also in knowing

87 *Montagu* [1987] Ch 264 at 277.
88 [1987] Ch 264 at 285.
89 Ibid.
90 (1881) 17 Ch D 437.
91 Ibid at 446.
92 [1894] 1 Ch 25.
93 Ibid at 35.
94 *Montagu* [1987] Ch 264 at 285 (per Megarry V-C).
95 *Agip* [1990] 1 Ch 265 at 292-293 (per Millett J); *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 761 (per Knox J).
96 *Agip* [1990] 1 Ch 265 at 293 (per Millett J).
97 *Montagu* [1987] Ch 264 at 285 (per Megarry V-C); *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 760-761 (per Knox J).
98 *Agip (Africa) Ltd v Jackson* [1991] Ch 547.
99 Ibid at 567 (per Fox LJ, with whose judgment Butler-Sloss and Beldam LJJ agreed).
100 Ibid.
101 Ibid.
102 Ibid.

receipt. In doing so, the English Court of Appeal in *Agip* necessarily rejected the view expressed by Millett J in the lower court that 'constructive notice'[103] was not sufficient to ground liability for 'knowing assistance',[104] although in his view, such notice was sufficient to ground liability for 'knowing receipt'.[105]

It is suggested that constructive notice means 'blind-eye knowledge'[106] (nothing less), and that even a 'seriously negligent'[107] failure to inquire was 'no blind-eye knowledge'.[108] The expression 'a seriously negligent'[109] failure to inquire is conceptually indistinguishable from the expression 'very great negligence'[110] used by Kay J in *Williams* v *Williams*[111] where Kay J made it clear that even negligence of such a high a degree did not amount to constructive notice.[112]

In *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*[113] (hereinafter *Manifest Shipping*) Lord Scott noted:[114]

> ...[B]lind-eye knowledge requires, in my opinion, a *suspicion* that the relevant facts do exist and a *deliberate* decision to *avoid* confirming that they exist. ...

The attribution of this meaning to blind-eye knowledge, made by Lord Scott in *Manifest Shipping*, was approved by Lord Hoffmann in *Twinsectra Ltd* v *Yardley*.[115]

Lord Scott's analysis of '*blind-eye knowledge*'[116] in *Manifest Shipping* is the same as Lord Blackburn's observation on '*notice*'[117] in *Jones* v *Gordon*, and each of these statements is

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103 *Agip* [1990] 1 Ch 265 at 293 (per Millett J).

104 Ibid.

105 *Agip* [1990] 1 Ch 265 at 291 where Millett J accepted the use of that term by Peter Gibson J in *Baden* [1993] 1 WLR 509n at 571.

106 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 at 515 [112] (per Lord Scott, although he did not use the expression 'constructive notice').

107 [2003] 1 AC 469 at 515 [115] (per Lord Scott).

108 Ibid.

109 Ibid.

110 (1881) 17 Ch D 437 at 446.

111 (1881) 17 Ch D 437.

112 (1881) 17 Ch D 437 at 445.

113 [2003] 1 AC 469.

114 Ibid at 517. Emphasis added. In *Manifest Shipping*, at 515, Lord Scott cited with approval the emphatically expressed view of Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616 at 629, that conduct that is '*honestly blundering and careless*' (emphasis added) is not sufficient to affect a person with 'notice' (at 628) that there is 'something wrong' (at 628).

115 [2002] 2 AC 164 at 170 [22].

116 [2003] 1 AC 469 at 517 [116]. Emphasis added.

identical to the notion of 'knowledge *or suspicion*'[118] propounded by Lord Selborne LC in *Barnes* v *Addy*.[119] Furthermore, Lord Selborne's notion of 'knowledge *or suspicion*'[120] exactly encompasses the five mental states described by Peter Gibson J in *Baden*.[121] In particular, Lord Selborne's use of the word '*suspicion*'[122] is indicative of his view that liability as a constructive trustee extends to those who, in the words of Peter Gibson J in *Baden*, '[have] knowledge of circumstances which would put an *honest* and reasonable man on inquiry',[123] given that an honest person who is suspicious of 'an improper ... design'[124] (per Lord Selborne LC in *Barnes* v *Addy*) is the same as an honest and reasonable person who is put on inquiry as to the possibility of an improper design (per Peter Gibson J in *Baden*) because of his or her 'knowledge of circumstances'[125] ('suspicion'[126]).

Given that each of the five types of knowledge described by Peter Gibson J in *Baden*, when it is related to 'an improper ... design',[127] describes a *dishonest* state of mind, is it essential to divide such culpable cognisance into five categories of knowledge? Given that, in deciding whether or not a person has such culpable cognisance, the 'true distinction is between honesty and dishonesty',[128] it is suggested that a single test be used to determine whether or not such culpable cognisance is present: that test should be whether or not an *honest* person in the defendant's position would have had either '*knowledge* or *suspicion*'[129] of an 'improper ... design'.[130] Indeed, in *Barnes* v *Addy*[131] Lord Selborne LC had been at pains to emphasise that no one should be 'made a constructive trustee'[132] 'assuming *honesty of purpose* and the *absence* of *fraud*',[133] and that

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117 (1877) 2 App Cas 616 at 628. Emphasis added. See Lord Blackburn's explanation of constructive notice, at 629, as a concept which embodies 'dishonesty'.
118 (1874) LR 9 Ch App 244 at 252. Emphasis added.
119 (1874) LR 9 Ch App 244.
120 Ibid at 252. Emphasis added.
121 [1993] 1 WLR 509n at 575-576 [250].
122 (1874) LR 9 Ch App 244 at 252. Emphasis added.
123 [1993] 1 WLR 509n at 576 [250].
124 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC).
125 *Baden* [1993] 1 WLR 509n at 576 [250] (per Peter Gibson J).
126 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC).
127 Ibid.
128 *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 293 (per Millett J).
129 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC). Emphasis added.
130 Ibid.
131 (1874) LR 9 Ch App 244.
132 Ibid at 254.
133 Ibid. Emphasis added.

to decide otherwise would be 'an alarming doctrine'[134] which 'we are not going to be the first Judges to lay down'.[135]

Lord Selborne LC's view in *Barnes* v *Addy* was reiterated ninety-four years later by Edmund Davies LJ in *Carl Zeiss* when the latter stated that *'want of probity ...* is the hall-mark of constructive trusts, *however created'*.[136]

In *Royal Brunei Airlines Sdn Bhd* v *Tan*[137] (hereinafter *Royal Brunei*), Lord Nicholls, in delivering the advice of the Privy Council, in the context of liability for 'knowing assistance' ('accessory liability'[138]) said:[139]

> ... [T]he *Baden* scale of knowledge is best forgotten.

The *Baden* scale of knowledge has also been repudiated in the context of liability for 'knowing receipt'. In *Bank of Credit and Commerce International (Overseas) Ltd* v *Akindele*[140] (hereinafter *Akindele*) Nourse LJ, in the English Court of Appeal, said of the *Baden* scale of knowledge:[141]

> ... I have grave doubts about its utility in cases of knowing receipt. ...

Having been repudiated in respect of both 'knowing assistance'[142] and 'knowing receipt',[143] the *Baden* scale of knowledge serves no useful purpose as a test of liability for constructive trusteeship. It should be replaced by a single test of cognisance: the cognisance of the honest person,[144] the latter to be identified by reference to an *objective*[145] standard of honesty.

(iii) Is 'knowing receipt' a mere example of 'knowing assistance'?

In *Barnes* v *Addy*[146] Lord Selborne LC stated a number of legal propositions.

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134 Ibid.
135 Ibid.
136 [1969] 2 Ch 276 at 302. Emphasis added.
137 [1995] 2 AC 378.
138 Ibid at 392.
139 Ibid.
140 [2001] Ch 437.
141 Ibid at 455. Ward and Sedley LJJ concurred with the judgment of Nourse LJ in *Akindele* (at 458).
142 *Royal Brunei* [1995] 2 AC 378 at 392 (per Lord Nicholls).
143 *Akindele* [2001] Ch 437 at 455 (per Nourse LJ).
144 *Royal Brunei* [1995] 2 AC 378 at 389 (per Lord Nicholls).
145 Ibid.
146 (1874) LR 9 Ch App 244.

First, in reference to persons appointed as trustees, he said:[147]

> ... Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. …

Secondly, in reference to constructive trustees, Lord Selborne LC added:[148]

> … 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*. …

Thirdly, again in reference to constructive trustees, he stated:[149]

> ... [S]trangers 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. …

When Lord Selborne LC referred to '*agents* [who] receive and become chargeable with some part of the trust property'[150] he was describing 'the *agents* of *trustees* [acting] within their legal powers'.[151] Thus, Lord Selborne LC regarded as 'constructive trustees'[152] those persons who, in the course of acting as agents for appointed trustees, receive trust property from the appointed trustees acting 'within their legal powers'.[153] Such agents would, for example, include solicitors who receive trust money to complete a purchase of land as agents of the trustee. These agents become 'constructive trustees'[154] by virtue of their *authorised* receipt of trust property, and not by virtue of a receipt of property transferred in *breach of trust*. Conceptually, agents who receive trust money in order to carry out a purpose of the trust are *express*[155] trustees of that money. Lord Selborne LC's classification of such agents as 'constructive trustees'[156] is anomalous.

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147 Ibid at 251.
148 Ibid.
149 (1874) LR 9 Ch App 244 at 251-252. Emphasis added.
150 Ibid. Emphasis added.
151 (1874) LR 9 Ch App 244 at 251. Emphasis added.
152 Ibid.
153 Ibid.
154 Ibid.
155 *Soar v Ashwell* [1893] 2 QB 390 at 394 (per Lord Esher MR), at 397 (per Bowen LJ). See also *Lee v Sankey* (1873) LR 15 Eq 204 at 211 (per Bacon V-C).
156 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251.

Lord Selborne LC also treated as constructive trustees 'those agents'[157] who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees'.[158] In *Consul*[159] Gibbs J, in reference to this category of constructive trusteeship, observed:[160]

> Although in this passage Lord Selborne speaks of dishonesty and fraud it is clear that the principle *extends to* the case 'where a person *received trust property* and dealt with it in a manner inconsistent with trusts of which he was cognizant' : *Soar* v *Ashwell* ; *Lee* v *Sankey* ; and *In re Blundell* ; *Blundell* v *Blundell*. …

Thus, in *Consul*, Gibbs J rejected the proposition that 'knowing assistance' and 'knowing receipt' were two mutually exclusive categories of constructive trusteeship, emphasising, instead, that persons who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees'[161] *included* person who '*received* trust property'[162] and 'dealt with it in a manner inconsistent with trusts of which [they were] *cognizant'*.[163]

Thus, in *Consul*, Gibbs J regarded receipt of trust property by a stranger[164] as something that would not, of itself, preclude the stranger from being made liable for 'knowing assistance'. Gibbs J thereby treated 'knowing receipt' as a mere example of 'knowing assistance', in that liability for 'knowing assistance' is capable of attaching to persons who render such assistance by receiving trust property.

In *Consul*, Gibbs J was of the view that a person's liability for 'knowing assistance' did not depend on whether or not that person had, in rendering such assistance, received trust property, observing:[165]

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157 Ibid

158 (1874) LR 9 Ch App 244 at 252.

159 (1975) 132 CLR 373.

160 Ibid at 396. Emphasis added. Citations omitted.

161 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC). This statement of Lord Selborne LC was quoted with approval by Gibbs J in *Consul* : (1975) 132 CLR 373 at 396.

162 (1975) 132 CLR 373 at 396 (per Gibbs J). Emphasis added. Gibbs J was there quoting with approval the words used by Bowen LJ in *Soar v Ashwell* [1893] 2 QB 390 at 396.

163 Ibid. Emphasis added. Gibbs J was there quoting with approval the words used by Bowen LJ in *Soar v Ashwell* [1893] 2 QB 390 at 396-397.

164 In the context of the principle in *Barnes v Addy*, a stranger is any person who has not been appointed as a trustee.

165 (1975) 132 CLR 373 at 396-373. Emphasis added.

> … [T]he principle [in *Barnes* v *Addy*] *extends to* the case where a stranger has knowingly participated in a breach of fiduciary duty committed by a person who is not a trustee *even though* nothing that might properly be regarded as trust property – even property stamped with a constructive trust – has been received. …

It may be noticed that Gibbs J there stated that liability for knowing assistance might attach to a stranger 'even though',[166] in rendering such assistance, the stranger had not received any trust property. Gibbs J did not there state that such liability was capable of attaching to a stranger *only if*, in rendering such assistance, the stranger had not received any trust property. In short, liability for knowing assistance is not precluded merely because the stranger had rendered such assistance *by* receiving trust property in breach of trust, given that such assistance may be rendered either by such a receipt or by some other means.

In *Consul*, McTiernan J, in examining *Barnes* v *Addy*,[167] did not[168] advert to any distinction between knowing assistance and knowing receipt.

McTiernan and Gibbs JJ were two of the four justices who decided *Consul* in the High Court. Neither of those two justices expressed any support for the proposition that knowing receipt and knowing assistance were mutually exclusive categories of constructive trusteeship. In *Spangaro* v *Corporate Investment Australia Funds Management Ltd*[169] Finkelstein J said:[170]

> In *Consul Development Pty Ltd* v *DPC Estates Pty Ltd* … Gibbs J … [drew] no distinction between "knowing assistance" and "knowing receipt" …

However, in *Consul*, Stephen J,[171] with whose judgment Barwick CJ concurred,[172] stated that there was a distinction between knowing assistance and knowing receipt. Thus the High Court in *Consul* was evenly divided as to whether or not there was a distinction between knowing assistance and knowing receipt. In *Consul*, Stephen J, after concluding that such a distinction existed, stated:[173]

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166 (1975) 132 CLR 373 at 397.
167 (1874) LR 9 Ch App 244.
168 (1975) 132 CLR 373 at 378 and 386.
169 [2003] FCA 1025.
170 Ibid at [59]. Citation omitted.
171 (1975) 132 CLR 373 at 410.
172 (1975) 132 CLR 373 at 376-377.
173 (1975) 132 CLR 373 at 410. Emphasis added.

> It is *not clear to me* why there should exist this distinction between the case where trust property is received and dealt with by the defendant and where it is not …

Stephen J then proffered the following explanation for the distinction that he had found to be unclear:[174]

> … [P]erhaps its origin lies in equitable doctrines of tracing, perhaps in equity's concern for the protection of equitable estates and interests in property which comes into the hands of purchasers for value. …

Stephen J's explanation of the distinction between knowing assistance and knowing receipt suggests that the distinction is of ancient lineage. It is not. This distinction was judicially attributed to the judgment of Lord Selborne LC in *Barnes* v *Addy*,[175] for the first time, in 1971,by Brightman J in *Karak Rubber Co Ltd* v *Burden (No 2)*[176] (hereinafter *Karak*). If Lord Selborne LC had, in *Barnes* v *Addy*,[177] drawn a distinction between knowing assistance and knowing receipt, it seems extraordinary that it should have taken the judiciary ninety-seven years to notice that he had done so. In any event, although Brightman J in *Karak*[178] distinguished between knowing assistance and knowing receipt, he drained that distinction of most of its significance by holding that the element of knowledge in knowing assistance was the same[179] as that in knowing receipt.

It was not until 1973, ninety-nine years after Lord Selborne LC delivered his judgment in *Barnes* v *Addy*, that a judge first suggested that Lord Selborne LC had, in that case, required a test of cognisance for knowing assistance different from that for knowing receipt. That judge was Jacobs P, and the case in which he expressed that view was *DPC Estates Pty Ltd* v *Grey and Consul Development Pty Ltd*[180] (hereinafter *Consul*). In *Consul*, Jacobs P stated:[181]

> … The point of the difference between the person receiving trust property and the person who is made liable, even though he is not actually a recipient of trust property, is that in the first place knowledge, actual or constructive, of the trust is sufficient, but in the second place something more is required, and that

174 Ibid.
175 (1874) LR 9 Ch App 244.
176 [1972] 1 WLR 602 at 639.
177 (1874) LR 9 Ch App 244.
178 [1972] 1 WLR 602 at 639.
179 Ibid.
180 [1974] 1 NSWLR 443.
181 Ibid at 459. Emphasis added.

> something more appears to me to be the actual knowledge of the fraudulent or dishonest design, so that the person concerned can truly be described as a participant in that fraudulent dishonest activity.

This statement of Jacobs P invites a number of observations. First, his insistence that the defendant must have had *actual knowledge* of the relevant design is contrary to Lord Selborne LC's view in *Barnes* v *Addy* that the defendant's 'knowledge *or suspicion*'[182] of the relevant design would suffice to make the defendant liable if the defendant participated in the design with such knowledge *or suspicion*.

Secondly, Jacobs P purported to rely[183] on *Carl Zeiss*[184] in support of the proposition that the test of cognisance for knowing assistance is more stringent than the test of cognisance for knowing receipt. However, *Carl Zeiss* did not draw any distinction between knowing assistance and knowing receipt. *Carl Zeiss* was decided in 1968. The distinction between knowing assistance and knowing receipt was not attributed to Lord Selborne until Brightman J, in *Karak,*[185] did so in 1971.

Thirdly, Jacobs P purported to rely[186] on the judgment of Edmund Davies LJ in *Carl Zeiss*[187] as support for the following proposition formulated by Jacobs P:[188]

> … Only when there is a *want of probity* can it be said that there arises a constructive trust in respect of property or profits which are *not actually trust property*. …

Contrast Jacobs P's interpretation of what Edmund Davies LJ said in *Carl Zeiss*, with what Edmund Davies LJ actually said in *Carl Zeiss*, which was:[189]

> … [W]ant of probity … is the hall-mark of constructive trusts, *however created.*

Fourthly, the view of Jacobs P in *Consul*, that the test of cognisance for knowing assistance is different from the test of cognisance for knowing receipt is opposed to

182 (1874) LR 9 Ch App 244 at 252. Emphasis added.
183 [1974] 1 NSWLR 443 at 459.
184 [1969] 2 Ch 276.
185 [1972] 1 WLR 602 at 639.
186 [1974] 1 NSWLR 443 at 458.
187 [1969] 2 Ch 276 at 302.
188 [1974] 1 NSWLR 443 at 458. Emphasis added.
189 [1969] 2 Ch 276 at 302. Emphasis added.

the position taken by Lord Selborne LC himself in *Barnes* v *Addy*, where the latter said:[190]

> …[T]hose who create trusts do expressly intend, *in the absence of fraud and dishonesty*, to exonerate such agents of *all classes* from the responsibilities which are expressly incumbent … upon the trustees.

Thus, Lord Selborne LC in *Barnes* v *Addy* made it clear that, in respect of *all* the classes of agents of which he spoke, the sole criterion of liability was *fraud and dishonesty*. As opposed to what Jacobs P did in *Consul*, Lord Selborne LC in *Barnes* v *Addy* referred to only *one* inculpating mental state for *all* classes of agents who were made constructive trustees, that all-embracing inculpating mental state being *dishonesty*, and nothing else. Furthermore, Edmund Davies LJ was subsequently to make clear in *Carl Zeiss* (also in opposition to the view expressed by Jacobs P in *Consul*), that 'want of probity … is the hall-mark of constructive trusts, *however created*'.[191]

Is it conceptually possible knowingly to receive property in breach of trust without thereby knowingly assisting in that breach of trust?

Suppose T is an express trustee. T, in breach of trust, transfers the trust property to A who knows that the property is being transferred to him (her) in breach of trust. A, in so receiving the trust property, knowingly receives property transferred in breach of trust. But because no such breach of trust could have occurred if A had not so received the trust property, A, in so receiving the trust property, *unavoidably* knowingly assisted T to act in breach of trust. In such a situation, it is not possible for A to be made liable for knowing receipt *separately* from being made liable for knowing assistance.

A is liable for knowing assistance only. A's knowing receipt was merely the means by which A knowingly assisted T to act in breach of trust. A could have chosen knowingly to assist T to act in breach of trust *without* receiving the trust property from T. A could have knowingly persuaded T to act in breach of trust by transferring the trust property, not to A, but to C. If A had done so, then A would have knowingly assisted T to act in breach of trust *without* also having knowingly received trust property in breach of trust. Thus, knowing assistance may occur in the form of knowing receipt or it may occur in some other form. It would be conceptually inexplicable to require a different degree of inculpating knowledge in the case where A assisted T to act in breach of trust by transferring the trust property to C, from the

190 (1874) LR 9 Ch App 244 at 252. Emphasis added.

191 [1969] 2 Ch 276 at 302 (per Edmund Davies LJ). Emphasis added.

case where A assisted T to act in breach of trust by transferring the trust property to A. Why should A's knowledge of T's breach of trust be required to be proved to have been of a higher degree merely because T's breach of trust took the form of a transfer of the trust property to C, and not to A, namely, where A assisted T to act in breach of trust without doing so by receiving the trust property from T?

Suppose, further, that C received the trust property from T knowing that it was transferred to him (her) in breach of trust, A having knowingly persuaded T to make the transfer. Each of A and C would have thereby respectively assisted T to act in breach of trust. A would have knowingly assisted T to act in breach of trust without, in doing so, receiving the trust property, whereas C would have knowingly assisted T to act in breach of trust by receiving the trust property. Why should the knowledge required to inculpate A in T's breach of trust be required to be of a higher degree than the knowledge required to inculpate C in the *same* breach of trust, merely because C received the trust property, and A did not do so? Yet just such a requirement was made, and for the first time in the history of the *Barnes* v *Addy*[192] principle, by Jacobs P in *Consul*.[193] There Jacobs P would have suggested that C, because C received trust property, would have had knowledge of T's breach of trust if C had 'actual or constructive'[194] knowledge of that breach, whereas A, because A had not received trust property, would have had knowledge of T's breach of trust only if A had 'actual knowledge'[195] of that breach. When *Consul*[196] reached the High Court Stephen J accepted[197] this distinction between the degree of knowledge required to inculpate C (who had received trust property in assisting T to act in breach of trust) and the higher degree of knowledge required to inculpate A (who had not received trust property in assisting T to act in breach of trust), although, in accepting this position, Stephen J stated that it was 'not clear'[198] to him 'why there should exist this distinction'.[199]

The conceptual difficulty inherent in the view that knowing assistance and knowing receipt are mutually exclusive heads of liability (a view that is entrenched in England[200]) was illustrated in *LHK Nominees Pty Ltd* v *Kenworthy*[201] (hereinafter *LHK*

192 (1874) LR 9 Ch App 244.
193 [1974] 1 NSWLR 443 at 459.
194 Ibid.
195 Ibid.
196 (1975) 132 CLR 373.
197 Ibid at 410.
198 Ibid.
199 Ibid.
200 See, for example, *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 291-293 (per Millett J); *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 382 and 386 (per Lord Nicholls in

Nominees). In that case, a corporate trustee had, in breach of trust, transferred land, which had been sold at a gross undervalue, to a purchaser. After the purchaser's death, the trustee sought a declaration that the purchaser had acquired the legal title to the land as a constructive trustee and that, upon his death, his administratrix succeeded to that constructive trusteeship.

What is striking about *LHK Nominees* is the fact that, notwithstanding the receipt of trust property (the land) by the purchaser, the case against the purchaser was based on knowing assistance and, 'further or alternatively',[202] on knowing receipt. Despite the receipt of trust property by the purchaser, the Full Court of the Supreme Court of Western Australia dealt not only with the issue of knowing receipt but also with the issue of knowing assistance, thereby accepting the notion that a defendant may be liable for knowing assistance even if the act of knowing assistance is constituted by an act of knowing receipt.

In this respect, the judgment of Murrray J in *LHK Nominees* is particularly instructive. There Murray J stated:[203]

> … [A] case … may be made for a constructive trust where *trust property* is *acquired* by persons who "*assist with knowledge* in a dishonest and fraudulent design on the part of the trustees".

Murray J thus made it clear that knowing assistance may take the form of a knowing receipt, so that knowing receipt is merely a particular instance of, rather than a separate head of liability from, knowing assistance.

The view that, in *Barnes* v *Addy*,[204] Lord Selborne LC[205] had propounded knowing assistance and knowing receipt as separate heads of liability, was thus expressed by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd* v *Tan* (hereinafter *Royal Brunei*):[206]

> …[T]he first limb of Lord Selborne LC's formulation is concerned with the liability of a person as a *recipient*[207] of trust property or its traceable proceeds. The

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delivering the advice of the Privy Council); *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 194 [104]-[107] (per Lord Millett).

201 (2002) 26 WAR 517.

202 Ibid at 553 [203].

203 (2002) 26 WAR 517 at 549 [185]. Emphasis added.

204 (1874) LR 9 Ch App 244.

205 Ibid at 251-252.

206 [1995] 2 AC 378 at 382.

207 Lord Nicholls's emphasis.

> second limb is concerned with what, for want of a better compendious description, can be called the liability of an *accessory*[208] to a trustee's breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises *even though*[209] no trust property has reached the hands of the accessory. It is *a form of secondary liability*[210] in the sense that it only arises when there has been a *breach of trust*.[211] …

It may be noticed that in *Royal Brunei*, Lord Nicholls stated that liability as an accessory ('knowing assistance'[212]) arises 'even though'[213] no trust property has reached the hands of the accessory. Lord Nicholls did not suggest that knowing assistance arises *only if* no trust property has reached the hands of the accessory. Thus, Lord Nicholls did not explain why an accessory to a breach of trust, whose assistance to the trustee is constituted by the receipt of trust property in breach of trust, is not liable for knowing assistance. Yet Lord Nicholls, because of his view that knowing receipt was 'distinct from'[214] knowing assistance, would necessarily have excluded this particular form of knowing assistance from 'knowing assistance'.[215] But this specific exclusion is difficult to reconcile with the formulation by Lord Nicholls of knowing assistance as 'a form of secondary liability'[216] that 'only arises where there has been a breach of trust',[217] being a formulation that would, in terms, include a person who assists a trustee to act in breach of trust by knowingly receiving property in breach of trust.

The view that knowing receipt is merely one example of knowing assistance (accessorial liability) was accepted by the New South Wales Court of Appeal in *Evans* v *European Bank Ltd*[218] where Spigelman CJ, with whose judgment Handley[219] and Santow[220] JJA concurred, stated:[221]

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208 Lord Nicholls's emphasis.
209 Lord Nicholls's emphasis.
210 Emphasis added.
211 Emphasis added.
212 [1995] 2 AC 378 at 382 (per Lord Nicholls).
213 Ibid.
214 Ibid.
215 Ibid (per Lord Nicholls).
216 Ibid.
217 Ibid.
218 (2004) 61 NSWLR 75.
219 Ibid at 110 [184].
220 Ibid [185].
221 (2004) 61 NSWLR 75 at 106 [160]. Emphasis added.

> In my opinion, it is an essential aspect of *accessorial* liability for *'knowing receipt'* that the act of transfer of the property … must be in breach of a fiduciary obligation. …

Thus did the New South Wales Court of Appeal assume that *knowing receipt* is merely one form of *accessorial* liability.

In summary, it is suggested that when, in *Barnes* v *Addy*,[222] Lord Selborne LC spoke of persons who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees',[223] he was referring to *all* persons who gave such knowing assistance, irrespective of whether such knowing assistance took the form of knowingly receiving property from a trustee who so transferred the property in breach of trust, or whether such knowing assistance took some *other* form. Conceptually, knowing assistance cannot be deprived of that status by the mere circumstance that the giving of such assistance took the form of a receipt of property taken in the knowledge that it was transferred by the trustee in breach of trust. Thus, knowing receipt is a mere illustration of knowing assistance: knowing receipt and knowing assistance are not mutually exclusive heads of liability, with each head of liability embodying a different type of knowledge from the other. Because knowing receipt is a mere example of knowing assistance, the element of knowledge in each of them is necessarily the same as that in the other.

If knowing receipt is merely an example of knowing assistance, and so falls within the category of those who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees',[224] then what did Lord Selborne LC mean, when in *Barnes* v *Addy*[225] he referred to 'those agents'[226] who 'receive and become chargeable with some part of the trust property'?[227] It is suggested that Lord Selborne LC was there referring to agents of trustees who *properly* receive trust property from the trustees in order to carry out some purpose of the trust, and who, in respect of the property so received, are express,[228] rather than, constructive trustees. If such a trustee, having *properly received* the trust property as an *express* trustee, *subsequently* misappropriates it or deals with it 'in a manner inconsistent with'[229] *that* express trust (and therefore in a manner

222 (1874) LR 9 Ch App 244.
223 Ibid at 252.
224 Ibid.
225 (1874) LR 9 Ch App 244.
226 Ibid at 251.
227 (1874) LR 9 Ch App 244 at 251-252.
228 See, for example, *Soar v Ashwell* [1893] 2 QB 390 at 394 (per Lord Esher MR); at 397 (per Bowen LJ).
229 *Soar v Ashwell* [1893] 2 QB 390 at 396-397 (per Bowen LJ).

that is also inconsistent with the *original* express trust), then such a trustee commits a breach of the *express* trust that was created when the property was so received, and by virtue of such receipt, and is accordingly liable for breach of an *express*[230] trust. But the *breach* of such an *express* trust is *subsequent* to the creation of the express trust. Such a breach of trust is fundamentally different from knowing receipt, where the knowing recipient becomes a *constructive* trustee at the moment of, and only by virtue of, an *improper* receipt. *Absent* such an *improper* receipt (ie, a receipt which is the result of a *breach* of trust or other fiduciary duty), there can be no liability for knowing receipt.[231]

(iv) What is the basis of liability for 'knowing assistance/knowing receipt'?

The cognisance of 'an honest, reasonable man'[232] has been used as the criterion of 'knowledge'[233] in knowing assistance[234] as well as in knowing receipt,[235] even on the assumption that the latter is a separate head of liability from the former.

In *Selangor United Rubber Estates Ltd* v *Cradock (No 3)*[236] (hereinafter *Selangor*) Ungoed-Thomas J, without indicating that there was any distinction between knowing assistance and knowing receipt, said:[237]

> The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an *honest*, reasonable man that such a design was being committed *or would put him on inquiry* , which the stranger failed to make, whether it was being committed. ...

In *Selangor*,[238] Ungoed-Thomas J did not draw any distinction between knowing assistance and knowing receipt. Instead, he understood Lord Selborne LC in *Barnes* v *Addy*[239] to have propounded a different dichotomy. In the opinion of Ungoed-Thomas

230 *Soar v Ashwell* [1893] 2 QB 390 at 394 (per Lord Esher MR); at 397 (per Bowen LJ).
231 *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at 106-107 [160] – [163] (per Spigelman CJ, with Handley and Santow JJA concurring).
232 *Selangor United Rubber Estates Ltd v Cradock* (No 3) [1968] 1 WLR 1555 at 1590 (per Ungoed-Thomas J).
233 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC).
234 *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373 at 400 (per Gibbs J); at 413 (per Stephen J).
235 *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 509 (per Vinelott J).
236 [1968] 1 WLR 1555.
237 Ibid at 590. Emphasis added.
238 [1968] 1 WLR 1555.
239 (1874) LR 9 Ch App 244 at 251-252.

J, 'the *first* category'[240] of non-appointed trustees described by Lord Selborne LC in *Barnes* v *Addy* are 'trustees de son tort'[241] *and* persons who 'receive and become chargeable with some part of the trust property'.[242] Non-appointed trustees who fall into *this* category 'do not claim to act in their own right *but for the beneficiaries'*.[243] Thus, Ungoed-Thomas J would have excluded knowing receipt from this category of trusteeship because, in knowing receipt, the trustee does *not* purport to act *for the beneficiaries* of the original trust. If, as appears to have been the case, Ungoed-Thomas J did not regard knowing receipt as falling within 'the *first* category',[244] then he would have regarded knowing receipt as falling within the category of knowing *assistance*, which he called 'the *second* category'.[245] The latter category would then comprise those persons who 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees'.[246]

In *Selangor*, Ungoed-Thomas J held that knowing assistance comprised 'three elements: (1) assistance by the stranger, (2) with knowledge, (3) in a dishonest and fraudulent design on the part of the trustees'.[247]

In *Royal Brunei,*[248] Lord Nicholls, in delivering the advice of the Privy Council, indicated that the third element should be read as 'in a breach of trust or fiduciary obligation',[249] in that it was not essential, in knowing assistance, for the breach of trust or other fiduciary obligation to have been fraudulent. In *Twinsectra Ltd* v *Yardley*[250] Lord Millett agreed with this view.

In *Consul*, Gibbs J said that the third element included 'a breach of trust or a fiduciary duty'.[251] So, it seems that in Australia, as in England, knowing assistance *need not* involve assistance in another person's fraudulent breach of trust or other fiduciary

240 [1968] 1 WLR 1555 at 1580 (per Ungoed-Thomas J). Emphasis added.
241 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251 (per Lord Selborne LC); *Selangor* [1968] 1 WLR 1555 at 1580 (per Ungoed-Thomas J).
242 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 (per Lord Selborne LC); *Selangor* [1968] 1 WLR 1555 at 1580 (per Ungoed-Thomas J).
243 [1968] 1 WLR 1555 at 1579 (per Ungoed-Thomas J). Emphasis added.
244 [1968] 1 WLR 1555 at 1580 (per Ungoed-Thomas J).
245 Ibid. Emphasis added.
246 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC); *Selangor* [1968] 1 WLR 1555 at 1580 (per Ungoed-Thomas J).
247 [1968] 1 WLR 1555 at 1580.
248 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.
249 Ibid at 392.
250 [2002] 2 AC 164 at 195 [109].
251 (1975) 132 CLR 373 at 398.

duty, although it *may* involve assistance in that type of breach. In knowing assistance, it is 'sufficient that the defendant [is] accessory to any breach of trust, *whether fraudulent or not*'.[252]

When in *Selangor*,[253] Ungoed-Thomas J placed knowing assistance in what he referred to as 'the second category',[254] he clearly intended to include in that category liability for knowing receipt. That he so intended is made evident by the fact that the cases that he used to illustrate liability for knowing *assistance* included prominent cases on alleged knowing *receipt*, namely, *Shields* v *Bank of Ireland*,[255] *Gray* v *Johnston*,[256] *In re Blundell*,[257] and *Thomson* v *Clydesdale Bank Limited*.[258]

Ungoed-Thomas J in *Selangor*, by using a prominent knowing receipt case like *In re Blundell*[259] as an example of knowing assistance, made it clear that, in his view, there was no conceptual impediment to regarding assistance, given by way of a knowing receipt of property transferred in breach of trust, as merely one form of knowing assistance. By contrast, Stephen J in *Consul*,[260] whilst positing knowing assistance and knowing receipt as separate heads of liability,[261] cited *In re Blundell*[262] (a case of knowing receipt) as an authority on knowing assistance.[263] Thus, apart from his opinion that knowing assistance and knowing receipt are separate heads of liability,[264] Stephen J's citation in *Consul*,[265] of a knowing receipt case (*In re Blundell*[266]) as a knowing assistance case would logically have invited the inference that he considered knowing receipt as a mere example of knowing assistance. It is not immediately apparent why Stephen J in *Consul*[267] chose to eschew this inference. In *Consul*[268] Gibbs

252 *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 195 [109] (per Lord Millett).
253 [1968] 1 WLR 1555.
254 Ibid at 1580.
255 [1901] 1 IR 222. Cited by Ungoed- Thomas J in *Selangor*[1968] 1 WLR 1555, at 1581 and 1589.
256 (1868) LR 3 HL 1. Cited by Ungoed-Thomas J in *Selangor*[1968] 1 WLR 1555, at 1586.
257 (1888) 40 Ch D 370. Cited by Ungoed-Thomas J in *Selangor*[1968] 1 WLR 1555, at 1587.
258 [1893] AC 282. Cited by Ungoed-Thomas J in *Selangor*[1968] 1 WLR 1555 at 1588-1589.
259 (1888) 40 Ch D 370.
260 (1975) 132 CLR 373.
261 Ibid at 410.
262 (1888) 40 Ch D 370.
263 (1975) 132 CLR 373 at 408-409.
264 (1975) 132 CLR 373 at 410.
265 (1975) 132 CLR 373 at 408-409.
266 (1888) 40 Ch D 370.
267 (1975) 132 CLR 373.
268 Ibid at 396.

J, like Stephen J in that case, cited *In re Blundell*.[269] However, unlike Stephen J, Gibbs J did so in order to show that knowing assistance *'extends to'*[270] knowing receipt.

The Cognisance of the Honest Person

In *Selangor*[271] Ungoed-Thomas J referred to the 'knowledge'[272] of 'an *honest*, reasonable man'.[273] The presence of the element of honesty in the definition of this paradigmatic person suggests that conduct in which this person would not engage is necessarily dishonest, and that such conduct cannot be constituted by mere negligence. The presence of the element of reasonableness in the definition merely indicates that the honest conduct to which the definition refers is to be determined by the reasonable person, thereby establishing an *objective* standard for the test of honesty. So, Ungoed-Thomas J's 'honest, reasonable man'[274] means a reasonably *honest* person, as distinct from a reasonably *careful* person. Not to do what an honest person would do is dishonest. Not to do what a careful person would do is merely careless. 'Carelessness is not dishonesty.'[275] So declared the Privy Council in *Royal Brunei*.[276]

Thus, in *Selangor*,[277] Ungoed-Thomas J formulated the cognisance of the honest person. He did not formulate the cognisance of the careful person. Yet in *Consul* Stephen J[278] (with the concurrence of Barwick CJ[279]) attributed to Ungoed-Thomas J in *Selangor*[280] the espousal of a test of 'negligence'.[281] The explanation for this attribution may lie in the curious circumstance that although Ungoed-Thomas J in *Selangor formulated* a test of *honesty*,[282] he *applied* that test of honesty as if it were a test of *reasonable care*.[283] It appears that, in *Selangor*, Ungoed-Thomas J, in relation to liability for knowing

269 (1888) 40 Ch D 370.
270 (1975) 132 CLR 373 at 396. Emphasis added.
271 [1968] 1 WLR 1555.
272 Ibid at 1590.
273 Ibid. Emphasis added.
274 Ibid.
275 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 389 (per Lord Nicholls in delivering the advice of the Privy Council).
276 [1995] 2 AC 378.
277 [1968] 1 WLR 1555.
278 (1975) 132 CLR 373 at 412.
279 (1975) 132 CLR 373 at 376-377.
280 [1968] 1 WLR 1555 at 1590.
281 (1975) 132 CLR 373 at 412.
282 [1968] 1 WLR 1555 at 1590.
283 [1968] 1 WLR 1555 at 1591.

assistance, *formulated* one test (honesty) but *applied* another test (reasonable care), thereby generating uncertainty as to the principle underlying *Selangor*.

In *Consul*,[284] Gibbs J focused on 'the *formulation* of principle'[285] by Ungoed-Thomas J in *Selangor* and, 'without finally deciding',[286] assumed that this *formulation* was 'correct'.[287] In the same case, Stephen J, by contrast, focused on the *application*[288] by Ungoed-Thomas J of the principle formulated by the latter in *Selangor*, and rejected it. Stephen J in *Consul* stated that Ungoed-Thomas J in *Selangor* had attempted to '*apply* ... that species of constructive notice which seems to expose a party to liability because of *negligence* in failing to make inquiry'.[289]

So, in *Consul*, each of Gibbs J and Stephen J[290] accepted the cognisance of the honest person as the test of knowledge for knowing assistance, Gibbs J by accepting the *formulation*[291] of the honest person test made by Ungoed-Thomas J in *Selangor*,[292] and Stephen J by rejecting the *application*[293] of the careful person test made by Ungoed-Thomas J in *Selangor*.[294] It was because each of Gibbs J and Stephen J in *Consul* accepted the cognisance of the honest person as the test of knowledge for knowing assistance that Gibbs J described the relevant cognisance as that of 'an *honest* and reasonable man',[295] and Stephen J identically described the relevant cognisance as that of 'a reasonable, *honest* man'.[296]

Applying the test of the cognisance of the honest person, each of Gibbs J[297] and Stephen J[298] found that the defendant in *Consul* had not *knowingly* assisted the delinquent fiduciary to act in breach of the latter's duty, with the result that the defendant was not liable to the plaintiff for knowing assistance.

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284 (1975) 132 CLR 373.
285 Ibid at 398. Emphasis added.
286 Ibid.
287 Ibid.
288 (1975) 132 CLR 373 at 412.
289 Ibid. Emphasis added.
290 Barwick CJ concurred with Stephen J: (1975) 132 CLR 373 at 376-377.
291 (1975) 132 CLR 373 at 398.
292 [1968] 1 WLR 1555 at 1590.
293 (1975) 132 CLR 373 at 412.
294 [1968] 1 WLR 1555 at 1591.
295 (1975) 132 CLR 373 at 398 and 400. Emphasis added.
296 (1975) 132 CLR 373 at 413. Emphasis added.
297 (1975) 132 CLR 373 at 400.
298 (1975) 132 CLR 373 at 413-414.

Nevertheless, in *Consul*, Gibbs J and Stephen J were fundamentally unable to agree on whether or not knowing assistance *included* the giving of such assistance by way of a knowing receipt. Gibbs J concluded that knowing assistance included[299] knowing receipt, citing,[300] amongst other cases, *In re Blundell*.[301] By contrast, Stephen J concluded that knowing assistance and knowing receipt were mutually exclusive[302] heads of liability, citing,[303] amongst other cases, *In re Blundell*[304] and *Carl Zeiss Stiftung* v *Herbert Smith & Co (No 2)*.[305] It may be noticed that both *In re Blundell* and *Carl Ziess* were cases of alleged knowing *receipt*, so that it was intriguing that Stephen J, given his view that knowing assistance and knowing receipt were mutually exclusive[306] heads of liability, should have cited these two cases to support his exposition of knowing *assistance*.[307]

The Element of Honesty in the Cognisance of the Honest Person

It is suggested that the High Court in *Consul*[308] accepted that the element of knowledge in knowing assistance was constituted by the cognisance of the honest person. But what constitutes the element of honesty in the cognisance of the honest person?

In *Royal Brunei* Lord Nicholls, in delivering the advice of the Privy Council, said:[309]

> ... Whatever may be the position in some criminal or other contexts (see, for instance, *Reg* v *Ghosh* [1982] QB 1053), in the context of the *accessory liability* principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an *honest* person would in the circumstances. This is an *objective* standard. ... Carelessness is not dishonesty. Thus *for the most part* dishonesty is to be equated with conscious impropriety. ... The standard of what constitutes honest conduct is not subjective. ... If a person *knowingly appropriates*

299 (1975) 132 CLR 373 at 396.
300 Ibid.
301 (1888) 40 Ch D 370.
302 (1975) 132 CLR 373 at 410.
303 (1975) 132 CLR 373 at 408-410.
304 (1888) 40 Ch D 370.
305 [1969] 2 Ch 276.
306 (1975) 132 CLR 373 at 410.
307 (1975) 132 CLR 373 at 408-410.
308 (1975) 132 CLR 373 at 398-400 (per Gibbs J); at 413 (per Stephen J, Barwick CJ concurring at 376-377).
309 [1995] 2 AC 378 at 389. Emphasis added except for *Reg v Ghosh*.

> another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> ... Unless there is a very good and compelling reason, an *honest* person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, *or deliberately not ask questions, lest he learn something he would rather not know*, and then proceed regardless. ...

Thus, in *Royal Brunei*, Lord Nicholls was quite definite that in accessory liability, honesty was measured by an *objective* standard, and that a dishonest failure to pursue inquiries amounted to dishonest conduct in accessory liability, otherwise called knowing assistance.[310]

The element of honesty in knowing assistance was examined by the House of Lords in *Twinsectra Ltd* v *Yardley*[311] (hereinafter *Twinsectra*). In *Twinsectra*, a company called Twinsectra made a loan of £1m to Yardley by way of a Quistclose[312] trust of which Sims (a solicitor) was the trustee. Sims had given a written undertaking to Twinsectra that the 'moneys [would] be utilised solely for the acquisition of property on behalf of [Yardley] and for no other purpose'.[313]

In breach of the Quistclose trust, Sims paid the trust money to Leach (a solicitor in another law firm). Leach, in so receiving the trust money '*knew* of the facts which created the trust *and its breach* but had not been aware that what he was doing would be regarded by *honest* men as being dishonest'.[314] Sims paid the trust money (of which Twinsectra was the sole[315] beneficiary) to Leach on the basis of 'an assurance'[316] given to Sims by Yardley that the latter would use the money solely for the acquisition of property for the latter.

After Leach received the trust money from Sims, Leach 'in turn did not take steps to ensure that it was utilised solely for the acquisition of property on behalf of Mr Yardley'.[317] Leach 'simply paid it out upon Mr Yardley's instructions'.[318] 'The result

310 *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 195 [110] and 202 [134] (per Lord Millett).
311 [2002] 2 AC 164.
312 *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567.
313 [2002] 2 AC 164 at 16 [9].
314 [2002] 2 AC 164 at 174 [35] (per Lord Hutton).
315 *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567.
316 [2002] 2 AC 164 at 168 [10] (per Lord Hoffmann).
317 Ibid.
318 Ibid.

was that [a portion of the trust money] was used by Mr Yardley for purposes *other than* the acquisition of property.'[319]

The loan made by Twinsectra to Yardley was not repaid.[320] Twinsectra 'sued all the parties involved, including Mr Leach'.[321] The claim against Leach was made in respect of that portion of the trust money that had *not*[322] been used to purchase property for Yardley, namely, that portion of the trust money that had been used in breach of the terms of the Quistclose trust that had been created for the sole benefit of Twinsectra.

The basis of the claim against Leach was that the transfer of the trust money made to him by Sims was made in breach of trust, and that Leach 'was liable for *dishonestly assisting* in that breach of trust in accordance with the principles stated by Lord Nicholls of Birkenhead in [*Royal Brunei]*'.[323] By a majority of four[324] law lords to one,[325] the House of Lords decided that the assistance given by Leach to Sims in the latter's breach of trust had not been given *dishonestly*. Both the majority opinion and the minority opinion purported to rely on the advice delivered by Lord Nicholls in *Royal Brunei*.[326]

The majority opinion was most elaborately stated by Lord Hutton, with whose views on knowing assistance (dishonest assistance/accessory liability) Lord Slynn,[327] Lord Steyn[328] and Lord Hoffmann[329] agreed.

Lord Hutton observed that there were three possible standards of dishonesty. There was a 'purely subjective'[330] standard. By this standard, a person will be regarded as dishonest only if 'he transgresses his own standard of honesty, even if that standard is contrary to that of reasonable and *honest* people'.[331] This 'Robin Hood Test'[332] was rejected by Lord Hutton.

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319 Ibid. Emphasis added.
320 [2002] 2 AC 164 at 168 [11] (per Lord Hoffmann).
321 Ibid.
322 Ibid.
323 Ibid. Emphasis added.
324 Lord Slynn, Lord Steyn, Lord Hoffmann and Lord Hutton.
325 Lord Millett.
326 [1995] 2 AC 378.
327 [2002] 2 AC 164 at 167 [6].
328 [2002] 2 AC 164 at 167 [8].
329 [2002] 2 AC 164 at 170 [20].
330 [2002] 2 AC 164 at 172 [27].
331 Ibid. Emphasis added.
332 Ibid.

Secondly, Lord Hutton noted, there was a 'purely objective'[333] standard. By this standard a person acts dishonestly 'if his conduct is dishonest by the ordinary standards of reasonable and *honest* people, even if he does not realise this'.[334] This purely objective standard was also rejected[335] by Lord Hutton.

Thirdly, Lord Hutton identified a 'combined test'.[336] This test 'combines an objective test and a subjective test, and ... requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of the reasonable and *honest* people *and* that he himself *realised* that by those standards his conduct was dishonest'.[337] Lord Hutton, and the other law lords who constituted the majority in *Twinsectra*, approved and applied[338] this combined test.

Applying this combined test, Lord Hutton agreed with the finding of the primary judge that Leach 'did not realise'[339] that he was acting in a way 'which a responsible and *honest* solicitor would regard as dishonest'.[340] Lord Hutton concluded that it was insufficient to fix Leach with liability for knowing assistance merely because 'he *knew* of the facts which created the trust *and its breach*'[341] when he received the transfer of the trust property from Sims (the *Quistclose* trustee of the money). Lord Hutton's conclusion was based on the test ('the combined test'[342]) of dishonesty propounded in *R* v *Ghosh*[343] in relation to 'the law of theft'.[344]

Two observations may be made on the conclusion reached by the majority law lords in *Twinsectra*. First, it is implausible to suggest that Leach, a solicitor, 'did not realise'[345] that receiving property in breach of trust was dishonest. Secondly, Lord Hutton in *Twinsectra* fundamentally misconstrued the principle of liability

333 Ibid.
334 Ibid. Emphasis added.
335 [2002] 2 AC 164 at 174 [35]-[36].
336 [2002] 2 AC 164 at 172 [27] and 180 [50].
337 [2002] 2 AC 164 at 172 [27].
338 [2002] 2 AC 164 at 174 [36] and 180 [50].
339 [2002] 2 AC 164 at 177 [42].
340 Ibid. Emphasis added.
341 [2002] 2 AC 164 at 174 [35]. Emphasis added.
342 [2002] 2 AC 164 at 172 [27] and 180 [50] (per Lord Hutton).
343 [1982] QB 1053 at 1064 (per Lord Lane CJ in delivering the judgment of the English Court of Appeal).
344 [2002] 2 AC 164 at 173 [31] (per Lord Hutton).
345 [2002] 2 AC 164 at 177 [42] (per Lord Hutton).

propounded by Lord Nicholls in *Royal Brunei*. Purporting to adhere to the reasoning of Lord Nicholls in *Royal Brunei*, Lord Hutton in *Twinsectra* stated:[346]

> It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability *and to hold that knowledge is a sufficient ingredient*. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law ... [D]ishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, ...

In his statement, Lord Hutton posits a false dichotomy between 'dishonesty',[347] and 'knowledge'[348] that one's conduct constitutes assistance to a trustee acting in breach of trust. If a person *assists* a trustee to act in breach of a trust, and *knows* that the trustee *is* acting in breach of trust, then the person so assisting the trustee is, according to Lord Nicholls in *Royal Brunei*, acting *dishonestly*. In *Royal Brunei*, Lord Nicholls said:[349]

> ... The defendant accepted that he *knowingly* assisted in that breach of trust. In other words, he caused or permitted his company to apply the money in a way he *knew* was not authorised by the trust of which the company was trustee. Set out in these bald terms, the defendant's conduct was *dishonest*. ...

Far from drawing a distinction between receiving trust property with knowledge that it was being transferred in breach of trust, and dishonest conduct, Lord Nicholls in *Royal Brunei* strove to emphasise that the defendant's conduct was dishonest *because* he had assisted the trustee to act in breach of trust, *knowing* that the trustee's conduct constituted a breach of trust. This description of the defendant in *Royal Brunei*, given by Lord Nicholls in that case, exactly describes the conduct of the defendant Leach in *Twinsectra*. Just as Tan (the defendant) had *knowingly* assisted the trustee in *Royal Brunei* to act in breach of trust (thereby making Tan's conduct dishonest), so also had Leach (the defendant) *knowingly* assisted the trustee in *Twinsectra* to act in breach of trust (thereby making Leach's conduct dishonest). The fact that Leach (the defendant in *Twinsectra*) had *received trust property* transferred to him in breach of trust, whereas Tan (the defendant in *Royal Brunei*) had not done so, could not have made Leach's conduct *honest* in comparison with Tan's conduct, particularly given the circumstance that Leach was a solicitor, and Tan was not. Although Lord Hutton in *Twinsectra* purported to apply 'the principle stated by Lord Nicholls that dishonesty is a

346 [2002] 2 AC 164 at 174 [36]. Emphasis added.
347 *Royal Brunei* [1995] 2 AC 378 at 392 (per Lord Nicholls).
348 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC).
349 [1995] 2 AC 378 at 393. Emphasis added.

necessary ingredient of accessory liability',[350] Lord Hutton, in finding that Leach had not[351] been dishonest, was in fact repudiating that principle, given Lord Hutton's view that Leach '*knew* of the facts which created the trust *and its breach*'[352] when he accepted the trust property from the delinquent trustee.

Finally, it may be observed of the majority reasoning in *Twinsectra* that its purported extension of the test of dishonesty 'in the law of theft'[353] (the test propounded in *R* v *Ghosh*[354]) to the *equitable* concept of dishonesty in the law of knowing assistance, is irreconcilable with the following statement by Lord Nicholls in *Royal Brunei*:[355]

> ... Whatever may be the position in some *criminal* or other contexts (see for instance *Reg* v *Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly ... means simply not acting as an *honest* person would in the circumstances. This is an *objective* standard. ...

In *Twinsectra*, Lord Millett dissented. Referring to *Royal Brunei*, Lord Millett observed:[356]

> ... Since that case it has been clear that *actual knowledge* is necessary [for accessory liability]; ...

Lord Millett added:[357]

> ... It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" ...

It is apparent that Lord Millett gave a very restricted meaning to 'wilful blindness'.[358] Lord Millett excluded from the concept of wilful blindness a dishonest failure *to make*

350 [2002] 2 AC 164 at 174 [36].
351 [2002] 2 AC 164 at 177 [42]-[43].
352 [2002] 2 AC 164 at 174 [35].
353 [2002] 2 AC 164 at 179 [31] (per Lord Hutton).
354 [1982] QB 1053 at 1064 (per Lord Lane CJ in delivering the judgment of the English Court of Appeal).
355 [1995] 2 AC 378 at 389. Emphasis added, except for *Reg v Ghosh*.
356 [2002] 2 AC 164 at 195 [109].
357 [2002] 2 AC 164 at 195 [112].
358 Ibid.

inquiries, namely, a failure to make the inquiries that an *honest* person would have made if such a person had been placed in the defendant's circumstances.

Lord Millett's concept of wilful blindness, as stated by him in *Twinsectra*,[359] is conspicuously narrower than that stated by Lord Nicholls in *Royal Brunei*, where Lord Nicholls had stated:[360]

> ...[A]n honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, *or deliberately not ask questions*, lest he learn something he would rather not know, and then proceed regardless. ...

Thus, in *Royal Brunei*, Lord Nicholls included, as Lord Millett in *Twinsectra*[361] had not included, a *dishonest* failure *to make inquiries* within the concept of wilful blindness. This divergence of views is best explained by Lord Millett's attempt, unsupported by authority, to restrict the element of knowledge in knowing assistance to 'intentional wrongdoing',[362] being an attempt that is not readily reconcilable with the notion of knowledge expounded by Lord Selborne LC in *Barnes* v *Addy*[363] where the latter extended knowledge to include 'suspicion'.[364]

Surprisingly, Lord Millett in *Twinsectra* made the claim that, in *Royal Brunei*, 'Lord Nicholls rejected a dishonest state of mind as an appropriate condition of liability'[365] for knowing assistance. However, in no part of his advice in *Royal Brunei* does Lord Nicholls indicate that a dishonest state of mind in the defendant is irrelevant to the element of knowledge in knowing assistance. On the contrary, in *Royal Brunei*, Lord Nicholls instanced as a dishonest person someone who 'deliberately'[366] did 'not ask questions, lest he learn something he would *rather not know*, and then proceed regardless'.[367] Such a deliberate attempt to avoid learning the truth is a dishonest state of mind. This example of dishonest conduct given by Lord Nicholls in *Royal Brunei* negates Lord Millett's claim[368] in *Twinsectra* that Lord Nicholls had in *Royal Brunei*

359 Ibid.
360 [1995] 2 AC 378 at 389. Emphasis added.
361 [2002] 2 AC 164 at 195 [112].
362 [2002] 2 AC 164 at 195 [113].
363 (1874) LR 9 Ch App 244.
364 Ibid at 252.
365 [2002] 2 AC 164 at 197 [118].
366 [1995] 2 AC 378 at 389.
367 Ibid. Emphasis added.
368 [2002] 2 AC 164 at 197 [118].

rejected a dishonest state of mind as constituting the element of knowledge in knowing assistance. Even without the benefit of what Lord Nicholls had said in *Royal Brunei*, it would be incongruous to describe a person as behaving *dishonestly* when that person had an *honest* state of mind. Yet Lord Millett, in *Twinsectra*, would have countenanced such a description, given the view he expressed in that case that it was possible to characterise a defendant's *conduct* as dishonest *without* also so characterising his or her *state of mind*.[369] In *Twinsectra*, Lord Millett appeared to think that in order for a defendant to have had a dishonest state of mind 'he should actually have *appreciated* that he was acting dishonestly',[370] so that, on the false assumption that this was what a dishonest state of mind denoted, he rejected a dishonest state of mind as a necessary element of liability for knowing assistance.[371]

However, a person can have a dishonest state of mind notwithstanding that the person does not *appreciate* that he or she is acting dishonestly. It was therefore possible for Lord Millett, in *Twinsectra*, to have rejected (which he did[372]) the test of dishonesty in *R* v *Ghosh*[373] (where 'dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people'[374]) without at the same time rejecting (which he also did[375]) a dishonest state of mind as the element of knowledge in knowing assistance. A person has a dishonest state of mind if an *honest* person would regard that state of mind as dishonest. That person will have a dishonest state of mind *even if* he does not *appreciate* that an honest person would *so regard* that state of mind.

In dissent, Lord Millett held that Leach was liable to Twinsectra for having knowingly[376] assisted Sims to act in breach of the latter's undertaking to Twinsectra, with the result that Leach would have had to pay equitable compensation to Twinsectra for the loss thereby caused to the latter.[377]

In *Twinsectra*, Lord Millett criticised the reasoning of Lord Nicholls in *Royal Brunei*. Lord Millett there stated:[378]

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369 [2002] 2 AC 164 at 197 [118].
370 [2002] 2 AC 164 at 198 [121]. Emphasis added.
371 Ibid.
372 [2002] 2 AC 164 at 200-201 [126]-[127].
373 [1982] QB 1053 at 1064 (per Lord Lane CJ in delivering the judgment of the English Court of Appeal).
374 *Twinsectra* [2002] 2 AC 164 at 174 [36] (per Lord Hutton).
375 [2002] 2 AC 164 at 197 [118].
376 [2002] 2 AC 164 at 204 [144].
377 [2002] 2 AC 164 at 200 [127].
378 [2002] 2 AC 164 at 201 [134]. Emphasis added.

> ... I have no difficulty in equating the knowing mishandling of money with dishonest conduct. But the introduction of *dishonesty* is an *unnecessary distraction*, and conducive to error. ...

However, contrary to Lord Millett's view, the introduction of dishonesty is essential to determine what constitutes knowledge in knowing assistance. The element of knowledge in knowing assistance is measured, and measured only, by the cognisance of the honest person, applying 'an objective standard'[379] of honesty. So, far from being 'an unnecessary distraction',[380] dishonesty is both 'a necessary ingredient'[381] and 'a sufficient ingredient'[382] of 'accessory liability'.[383]

Royal Brunei was followed by the Full Court of the Supreme Court of Western Australian in *LHK Nominees Pty Ltd* v *Kenworthy*.[384] *Royal Brunei* was also followed by Finkelstein J in *Compaq Computer Australia Pty Ltd v Merry*.[385]

(v) Is liability for knowing assistance/knowing receipt excluded from the Torrens System by the principle of the Indefeasibility of a registered title?

Situation 1
Suppose that T is the sole trustee of a parcel of Torrens Title land. Suppose that B is the sole beneficiary under this trust. Y is fully aware that T is not entitled to transfer the land to Y, even in exchange for adequate value provided by Y. However, T is merely *negligently* unaware that such a transfer to Y will be in breach of trust. Nevertheless, Y (without making any fraudulent misrepresentation to T) successfully persuades T to execute a transfer of the land to Y. Y gives adequate value for the transfer. Y registers this transfer. Is Y's registered title indefeasible as against B?

Situation 2
Suppose that a variation is made to the facts in Situation 1. Y, instead of successfully persuading T to execute a transfer of the land to Y, successfully persuades T (without making any fraudulent misrepresentation to T) to execute a transfer of the land to Z. Z, in receiving the transfer from T, is fully aware that T is thereby acting in breach of trust. However, T is merely *negligently* unaware of any such breach. Also, Z has made

379 [1995] 2 AC 378 at 389 (per Lord Nicholls).
380 [2002] 2 AC 164 at 201 [134] (per Lord Millett).
381 [1995] 2 AC 378 at 389 (per Lord Nicholls).
382 Ibid.
383 Ibid.
384 (2002) 26 WAR 517 at 540 [135] (per Wallwork J); at 556 [214] (per Anderson and Steytler JJ); at 567 [272] (per Pullin J).
385 (1998) 157 ALR 1 at 21.

no attempt to persuade T to execute a transfer of the land to Z. Z gives adequate value for the transfer. Z registers this transfer. Is Z's registered title indefeasible as against B? Is Y liable to B in any way?

Situation 3

The facts are the same as those in Situation 1, except that Y, instead of being fully aware that T is not entitled to transfer the land to Y, merely *dishonestly* fails to make inquiries as to whether or not T is entitled to transfer the land to Y. Is Y's registered title indefeasible as against B?

Situation 4

The facts are the same as those in Situation 2, except that each of Y and Z, instead of being fully aware that the transfer given by T to Z is made in breach of trust, merely *dishonestly* fails to make inquiries as to whether or not T is entitled to transfer the land to Z. Is Z's registered title indefeasible as against B? Is Y liable to B in any way?

Situation 5

The facts are the same as those in Situation 1, except that Y, instead of being fully aware that T is not entitled to transfer the land to Y, merely *negligently* fails to make inquiries as to whether or not T is entitled to transfer the land to Y. Is Y's registered title indefeasible as against B?

Situation 6

The facts are the same as those in Situation 2, except that each of Y and Z, instead of being fully aware that the transfer given by T to Z is made in breach of trust, merely *negligently* fails to make inquiries as to whether or not T is entitled to transfer the land to Z. Is Z's registered title indefeasible as against B? Is Y liable to B in any way?

Commentary on Situations 1 to 6

Does constructive notice include a merely *negligent* failure to make inquiries, or is constructive notice restricted to a *dishonest* failure to make inquiries?

In describing constructive notice, Lord Lyndhurst LC said in *Jones* v *Smith*:[386]

> I don't think therefore that the present case goes beyond this, that a prudent, cautious and wary person *would have inquired further*. The want of that prudence, caution and wariness is *not sufficient*, according to the decisions and the principles which have hitherto been acted on, *to affect the party with notice*. ... I am of the

386 (1843) 1 Ph 244 at 257 [41 ER 624 at 630]. Emphasis added, except for 'bona fide'.

> opinion that the party having acted *bona fide,* and having *only omitted* that caution which a prudent, wary, and cautious person might and probably would have adapted, is *not to be fixed with notice* of this instrument.

Thus it was the view of Lord Lyndhurst LC in *Jones* v *Smith*[387] that a merely *negligent* failure to make inquiries was not to be equated with constructive notice, so long as the negligent party acted *bona fide*, namely, in good faith.

In *Bailey* v *Barnes*,[388] a case which was cited with approval by Stephen J in *Consul*,[389] Lindley LJ observed:[390]

> ... [T]he cases of *constructive notice* are reduced to two classes: the *first* comprises cases in which a purchaser has *actual notice* of some defect, inquiry into which would *disclose others*; and the *second* comprises cases in which a purchaser has *purposely abstained* from making inquiries *for fear he should discover something wrong*. ...

The second category of *constructive notice* described by Lindley LJ in *Bailey* v *Barnes*[391] is analytically indistinguishable from the extended form of the knowledge required for knowing assistance. In describing this extended form of knowledge in knowing assistance, Lord Nicholls in *Royal Brunei* said:[392]

> ... Nor does an *honest* person ... deliberately *not ask questions*, lest he learn something he would *rather not know,* ...

Thus, the second category of *constructive notice* referred to by Lindley LJ in *Bailey* v *Barnes*[393] exactly describes the extended form of *knowledge* (in knowing assistance) propounded by Lord Nicholls in *Royal Brunei*.[394] So, a person who has constructive notice of another person's breach of trust thereby has knowledge (in the knowing assistance sense of 'knowledge'[395]) of that breach of trust, which means that a person

387 Ibid.
388 [1894] 1 Ch 25.
389 (1975) 132 CLR 373 at 412.
390 [1894] 1 Ch 25 at 35. Emphasis added.
391 Ibid.
392 [1995] 2 AC 378 at 389. Emphasis added.
393 [1894] 1 Ch 25 at 35.
394 [1995] 2 AC 378 at 389.
395 *Barnes v Addy* (1874) LR 9 Ch App 244 at 252 (per Lord Selborne LC).

who assists in a breach of trust, with constructive notice of that breach of trust, thereby assists 'with knowledge'[396] in that breach of trust.

In Australia, the Torrens System legislation provides that, except in the case of fraud, only a registered[397] proprietor is not affected by actual or constructive notice[398] of an unregistered interest affecting the land. Except in the case of Queensland, the legislation[399] *additionally* provides that knowledge of any trust or unregistered interest shall not of itself be imputed as fraud. Because this latter provision is absent from the Torrens legislation in Queensland, the latter legislation, but only if it is read literally, offers the registered proprietor no protection against actual or constructive notice, given that obtaining registration with actual or constructive notice of an earlier inconsistent equitable interest is dishonest, and amounts to equitable fraud.

However, it is suggested that the relevant Queensland legislation should not be read literally, given that one of the main objects of the Torrens legislation is to protect the registered proprietor from actual or constructive notice of inconsistent equitable interests that existed before the registration of the transfer to the proprietor. It has been observed that Sir Robert Torrens was 'bitterly critical of the Court of Equity and its interference with common law titles'.[400] The abolition of notice, actual or constructive, in relation to a person who obtains registration after receiving notice of an inconsistent equitable interest, is a fundamental impairment of the equitable right of the person who was in possession of the equitable interest, and any interpretation of the principle of indefeasibility of title needs to reflect this fundamental statutory impairment of pre-existing equitable interests. In *Barclays Bank Plc* v *O'Brien* Lord Browne-Wilkinson said:[401]

> The doctrine of notice lies at the heart of equity.

The elimination of the doctrine of notice by the principle of indefeasibility of title means that, in the context of that principle, equitable fraud survives only in a

396 Ibid.

397 *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34; *Lapin v Abigail* (1930) 44 CLR 166; *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550.

398 *Land Title Act 1994* (Qld), s184(2)(a), s184(3)(b); *Land Title Act 1925* (ACT), s59; *Real Property Act 1900* (NSW), s43; *Land Title Act 2000* (NT), s188(2)(a); *Real Property Act 1886* (SA), s 72; *Land Titles Act 1980* (Tas), s41; *Transfer of Land Act 1958* (Vic), s43; *Transfer of Land Act 1893* (WA), s134.

399 Ibid.

400 Fox, 'The Story behind the Torrens System' (1950) 23 *Australian Law Journal* 487 at 490.

401 [1994] 1 AC 180 at 195. Lord Templeman, Lord Lowry, Lord Slynn and Lord Woolf concurred with the speech of Lord Browne-Wilkinson.

truncated form. In *Bahr v Nicolay [No 2]*[402] Mason CJ and Dawson J noted that 'an acquisition of title with notice of any trust or unregistered interest'[403] was excluded 'from the statutory concept of fraud',[404] thereby implying that, but for this statutory exclusion, obtaining a registration of title with notice of a pre-existing inconsistent equitable interest would have amounted to equitable fraud.

Thus, the only form of fraud permitted to a registered proprietor of Torrens Title land is actual or constructive notice of any inconsistent equitable interest existing before the proprietor extinguished it by the act of registration, provided the registered proprietor was not also *otherwise fraudulent*.[405]

In Situation 5, Y *negligently* fails to appreciate that T is not entitled to transfer the land to him. Y has no actual notice that T is not so entitled, and, applying *Bailey* v *Barnes,*[406] Y also has no constructive notice of that fact. Y's legal title would have been unassailable even under the general law. Y does not need the statutory protection against notice of T's breach of trust. Y had no such notice before he obtained registration. Y's registered title is indefeasible as against B.

In Situation 6, because neither Y nor Z had actual or constructive notice of T's breach of trust, Z's title is secure from impeachment by B for the same reason that Y's title, in Situation 5, is so secure. Furthermore, in Situation 6, Y has not *knowingly* assisted T to act in breach of trust. Y is not liable to B in any way.

In Situation 3, Y, because he had dishonestly failed to make inquiries as to T's entitlement to transfer the land to him, obtained registration with constructive notice of B's equitable interest in the land. Nevertheless, Y's title is indefeasible as against B because the relevant Torrens legislation protects Y from being affected by such notice.

However, in Situation 3, Y is only so protected because T's breach of trust was *negligent*, as opposed to fraudulent, namely, dishonest. If T's breach of trust in Situation 3 had been *fraudulent*, then Y would have obtained registration with constructive notice that T had acted in fraudulent breach of trust in executing and delivering the transfer to him. Y would then have knowingly assisted in T's fraudulent breach of trust, as opposed to having knowingly assisted in T's non-fraudulent breach of trust (Situation 3). The relevant Torrens legislation would not protect Y from notice

402 (1988) 164 CLR 604.
403 Ibid at 613.
404 Ibid. Emphasis added.
405 *Bahr v Nicolay [No2]* (1988) 164 CLR 604.
406 [1894] 1 Ch 25 at 35.

of an equitable interest sought to be extinguished by a *fraudulent* breach of trust of which Y had constructive notice.[407]

In Situation 4, each of Y and Z had constructive notice of T's breach of trust. Again, as was the case with Y's registered title in Situation 3, Z's registered title under Situation 4 is indefeasible as against B, owing to the fact that T's breach of trust was non-fraudulent. Z's constructive notice of T's merely negligent breach of trust is precluded, by the statutory protection against notice, from being classified as fraud.

However, in Situation 4, Y, like Z, had knowingly assisted T to act in breach of trust. Z's knowing assistance took the form of a knowing receipt, and that knowing receipt was protected by the statutory protection against notice. However, Y is not so protected. If B has suffered loss, by reason of the unimpeachable transfer of the land to Z, then B is entitled to claim equitable compensation[408] from Y.

Nevertheless, as with Y's registered title in Situation 3, Z's registered title in Situation 4 would have been impeachable by B if T's breach of trust had been *fraudulent*, instead of having been merely negligent. In this event, if B suffers any loss, B will be entitled to claim equitable compensation[409] from both Y *and* Z on the ground that each of the latter had *knowingly* assisted in T's *fraudulent* breach of trust.

In Situation 1, Y's registered title is indefeasible as against B because Y's actual notice of T's non-fraudulent breach of trust is prevented, by the statutory protection against actual or constructive notice, from being classified as fraud. Y has knowingly assisted T to act in breach of trust by knowingly receiving the land from T who so transferred it in breach of trust. However, Y's knowing assistance (in the form of a knowing receipt) is given immunity by the statutory protection against actual or constructive notice. It is noted that Y had not made any fraudulent misrepresentation to T.

Again, if T's breach of trust had been *fraudulent*, Y's knowing assistance (in the form of a knowing receipt) to T in the latter's fraudulent breach of trust would, apart from the statutory protection against notice, have made Y *doubly* fraudulent. *First*, Y would have been fraudulent in taking a transfer from T with actual notice that the transfer was being given to him in breach of trust. Against this *first* form of fraud, however,

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407 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 143-146 (per Tadgell JA, with whose judgment Winneke P, at 136, agreed). What Tadgell JA there said is analogous to the situation under discussion. See, in particular, the outcome of the dispute in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16.

408 *Royal Brunei* [1995] 2 AC 378 at 392 (per Lord Nicholls).

409 Ibid.

the statutory protection against notice would have protected Y. *Secondly*, Y would have been fraudulent in that he *participated* in T's *fraudulent* breach of trust. Against this *second*[410] form of fraud, the statutory protection against mere notice offers no protection to Y. So, *if* T's breach of trust in Situation 1 had been *fraudulent*, then Y's registered title would *not* have been indefeasible as against B.

In Situation 2, Z's registered title is indefeasible as against B, for the same reason that Y's registered title, in Situation 1, was indefeasible as against B. However, in Situation 2, Y would have knowingly assisted T to act in breach of trust and, unlike Z, Y's knowing assistance did not take the form of a knowing receipt. Y's knowing assistance is not protected by the statutory protection against notice. If B has suffered loss by reason of Z's acquisition of indefeasible title to the land, B will be entitled to claim equitable compensation[411] from Y.

However, if T's breach of trust in Situation 2 had been *fraudulent*, then Z, like Y in the amended Situation 1, would, apart from the statutory protection against notice, have been *doubly* fraudulent, and again, as in the case of Y, Z's *participation* in T's *fraudulent* breach of trust would be a form of fraud against which the statutory protection against mere notice of unregistered interests offered no protection. Z's registered title, in this event, would be impeachable by B. Furthermore, if the recovery of the land from Z, for some reason, still leaves B with a loss, B will be entitled to claim equitable compensation[412] from both Y *and* Z who will be severally liable therefor.

The statutory protection against notice will give protection against only knowing assistance that takes the form of a knowing receipt, provided that such knowing assistance does not additionally implicate the knowing assister/knowing recipient in some *other* form of fraud. In short, because of this statutory protection against notice, actual or constructive, any form of knowing assistance (including knowing assistance by way of knowing receipt) which does not extend beyond notice (actual or constructive) that a trustee of Torrens Title land is transferring land in an *non-fraudulent* breach of trust does *not* expose the knowing assister/knowing recipient to liability for knowing assistance/knowing receipt, so that the registered title of such a knowing recipient is indefeasible as against the beneficiaries of the trust. This conclusion is consistent with the decision of the Full Court of the Supreme Court of

410 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 143-146 (per Tadgell JA); *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 (as to which, see the actual decision reached by Hansen J).

411 *Royal Brunei* [1995] 2 AC 378 at 392 (per Lord Nicholls).

412 Ibid.

Western Australia in *LHK Nominees Pty Ltd* v *Kenworthy*[413] although it is not consistent with the judgment of Atkinson J in the Queensland Court of Appeal in *Tara Shire Council* v *Garner*.[414]In the latter case, the Queensland Court of Appeal did not, *as such*, resolve any issues of law relating to the principle of Indefeasibility of Torrens Title. There, McMurdo P stated:[415]

> … The complex issues of law involved are best determined in the light of clear factual findings, *not in an interlocutory appeal*.

On the other hand, the statutory protection against notice will *not* protect any form of knowing assistance (including knowing assistance by way of knowing receipt) where the knowing assister/knowing recipient has notice, actual or constructive, that the trustee's transfer of property is made in *fraudulent* breach of trust. Such notice makes the knowing assister/knowing recipient a *participant* in the *fraud* perpetrated by the trustee, and the statutory protection against notice affords no immunity against the equitable consequences of such a fraudulent participation,[416] as opposed to mere notice of an *innocent* (non-fraudulent) breach of trust.

It is true that in *Royal Brunei*[417] Lord Nicholls had emphasised that, in knowing assistance, it was not necessary for the trustee or other fiduciary to have acted dishonestly. However, Lord Nicholls was there not addressing a situation where there was a statutory scheme of protection against notice, actual or constructive. Where there *is* such a statutory scheme of protection against notice, liability for knowing assistance (including knowing assistance by way of knowing receipt) may be imposed on a knowing assister/knowing recipient only if the latter had notice, actual or constructive, that the trustee was *fraudulently* dealing with property in breach of trust.

It is suggested that, in applying the statutory immunity from notice, a distinction should be drawn between notice of a transfer of land made by a trustee acting in an *innocent* (non-fraudulent) breach of trust (with the statutory immunity from notice *applying* to such a case), and, on the other hand, notice of a transfer of land made by a trustee acting in a *fraudulent* breach of trust (with the statutory immunity from notice *not applying* to such a case). Participation in any fraudulent scheme to extinguish

413 (2002) 26 WAR 517.

414 [2003] 1 Qd R 556.

415 Ibid at 562. Emphasis added.

416 The *result* in Koorootang *Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 is consistent with this conclusion.

417 [1995] 2 AC 378 at 392.

existing equitable interests in Torrens Title land is not conduct that attracts the statutory immunity from the effects of mere notice of such interests.

In *LHK Nominees Pty Ltd* v *Kenworthy*[418] a corporate trustee, acting in a *non-fraudulent* breach of trust, sold and transferred land at a gross undervalue to a purchaser who had *notice*[419] of this breach of trust. The Full Court of the Supreme Court of Western Australia held that the knowing assister/knowing recipient was immune from the effects of such notice by reason of the statutory protection against notice.

On the other hand, in *Koorootang Nominees Pty Ltd* v *Australia and New Zealand Banking Group Ltd*[420] the managing director of a corporate trustee forged, inter alia, a memorandum of mortgage in favour of a bank. The bank received the memorandum of mortgage with a 'strong suspicion'[421] (ie constructive notice) that it was a forgery. The bank subsequently registered this forged memorandum of mortgage. In so receiving and registering this forged memorandum of mortgage, the bank had acted 'dishonestly'[422] in that it had constructive notice of the managing director's *fraud*. The bank had thus *participated* in a *fraudulent* scheme to impair the interests of the beneficiaries under the trust, and the statutory protection against notice did not confer immunity on the bank in respect of such a fraudulent participation. Consequently, the bank's registered mortgage was defeasible at the instance of the defrauded trustee.

In *Macquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd*[423] a bank received and registered a forged memorandum of mortgage that had been purportedly executed in its favour by a corporate trustee. The bank had received the memorandum of mortgage with constructive notice[424] that it was a forgery. Thus the bank had constructive notice of the fraud perpetrated by the two persons who had forged the memorandum of mortgage. Nevertheless, the Victorian Court of Appeal held that the bank's registration of the forged memorandum of mortgage had been 'honestly obtained'.[425]

Unfortunately, this conclusion of the Victorian Court of Appeal implies that a *participant* in a fraudulent scheme to impair or extinguish the rights of beneficiaries under a trust of Torrens Title land is, despite such a *fraudulent* participation, protected

418 (2002) 26 WAR 517.
419 Ibid at 554-555. [207]-[211] and at 559 [226] (per Anderson and Steytler JJ).
420 [1998] 3 VR 16.
421 Ibid at 107.
422 Ibid.
423 [1998] 3 VR 133.
424 Ibid at 154 (per Tadgell JA).
425 [1998] 3 VR 133 at 136 (per Winneke P); at 157 (per Tadgell JA).

by the statutory immunity from notice. However, the statutory immunity from notice is not designed to protect participants in such fraudulent schemes, so that the conclusion reached by the Victorian Court of Appeal in *Macquarie Bank* appears to be contrary to principle.

On the other hand, the reasoning which underpinned Ashley AJA's dissent in *Macquarie Bank* propounds too wide a principle. There, Ashley AJA opined that a person who obtained registration with notice (actual or constructive) 'of a breach of trust'[426] (whether that breach of trust was fraudulent *or not*) was *not* protected by the statutory immunity from notice. In short, Ashley AJA would not allow the statutory immunity from notice to operate in *any situation*. It appears that this opinion of Ashley AJA is also difficult to reconcile with the principle underpinning the statutory immunity from notice of pre-existing equitable interests.

426 [1998] 3 VR 133 at 166. See also at 170.