SUPREME COURT OF QUEENSLAND

CITATION:	*Quince v Varga & Anor* [2008] QCA 376
PARTIES:	**NERIDA LYNNE QUINCE** (plaintiff/respondent) v **CAROL ANITA VARGA** (first defendant/first appellant) **CLINTON GUY McLAUGHLAN** (second defendant/second appellant)
FILE NO/S:	Appeal No 3936 of 2008 SC No 6454 of 2007 SC No 4608 of 2007 SC No 5739 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2008
JUDGES:	Holmes JA, Mackenzie AJA and Douglas J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – PARTICULAR CASES – where the respondent advanced $445,000 to an undischarged bankrupt to invest for a particular purpose – where the undischarged bankrupt deposited the funds in a family trust before spending the funds on himself and the appellants – whether the transaction was one where the undischarged bankrupt entered into a fiduciary relationship with the respondent and became a trustee of the funds received EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS-INDEPENDENT OF INTENTION – PARTICULAR CASES – where the first and second appellants were respectively the principal and trustee of the family trust into which the

undischarged bankrupt deposited the respondent's funds – whether the appellants had received trust property with notice of breaches of fiduciary duty by the undischarged bankrupt – whether appellants should be liable to the respondent under the first limb of the rule in *Barnes v Addy* – whether the appellants had knowingly assisted breaches of fiduciary duty by the undischarged bankrupt – whether the appellants should be liable to the respondent under the second limb of the rule in *Barnes v Addy*

EQUITY - GENERAL PRINCIPLES - EQUITABLE CHARGES AND LIENS - GENERALLY - where monies held on trust for the respondent were dissipated - where the first appellant agreed to provide her house as security to the extent of the $445,000 advanced by the respondent - whether it is appropriate to recognise an equitable charge or lien over the first appellant's land sufficient to support a caveat

Agip (Africa) Ltd v Jackson [1990] Ch 265, applied
Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq) (1978) 141 CLR 335, applied
Baden v Société Générale Pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 WLR 509, applied
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, applied
Barlow Clowes Ltd v Eurotrust Ltd [2006] 1 WLR 1476, followed
Barnes v Addy (1874) 9 L.R. Ch. App. 244, applied
Benzlaw & Associates Pty Ltd v Medi-Aid Centre Foundation Ltd [2007] QSC 233, considered
Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371, distinguished
El Ajou v Dollar Land Holdings VLC & Anor [1994] 2 All ER 685, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, applied
Foley v Hill (1848) 2 HLC 28, cited
In Re City of Melbourne Bank Ltd; ex parte City of Prahran (1895) 21 VLR 563, cited
Palette Shoes Pty Ltd (in liq) v Krohn (1937) 58 CLR 1, cited
Quince v Varga & Anor [2008] QSC 61, approved
Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491, applied
Spangaro v Corporate Investment Australia Funds Management Ltd & Ors (2003) 47 ACSR 285, considered
Springfield Acres Ltd (in Liquidation) v Abacus (Hong Kong) Ltd [1994] 3 NZLR 502, followed
Stephenson Nominees Pty Ltd v Official Receiver (1987) 16 FCR 536, applied

Toovey v Milne (1819) 2 B. & Ald. 683; 106 ER 514, cited
Trustor AB v Smallbone & Others (No 2) [2001] 3 All ER 987, cited
Twinsectra Ltd v Yardley [2002] 2 AC 164, applied
Water Board v Moustakas (1988) 180 CLR 491, cited
Westpac Banking Corporation v Savin [1985] 2 NZLR 41, cited

COUNSEL: L D Bowden for the appellants
P J Baston for the respondent

SOLICITORS: Nicholas Radich Lawyers for the appellants
Karen King & Associates for the respondent

[1] **HOLMES JA**: In this appeal I have had the considerable advantage of reading the judgment of Douglas J. I agree, for the reasons he has given, that the funds advanced by Ms Quince to Mr McLaughlan were trust funds. So far as the first limb of *Barnes v Addy*[1] is concerned, I consider, like Douglas J, that the learned trial judge's findings as to knowledge on the part of Mrs Varga and Clinton McLaughlin are supported by the evidence. The greater difficulty lies in the question of "receipt".

[2] I agree with Douglas J's view that receipt in this context extends to the traceable proceeds of trust property. His Honour's analysis is consistent with Lord Hoffmann's characterisation in *El Ajou v Dollar Land Holdings plc & Anor*[2] of the requisite level of receipt: "the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff"[3] and with the view of the learned authors of *Lewin on Trusts*:

> "The equitable tracing rules may be utilised for the purposes of establishing a receipt by a defendant in connection with knowing receipt, and so it suffices if the value of trust property transferred in breach of trust is traced and the traceable proceeds then followed into the hands of the defendant." [4] (citations omitted)

In Mrs Varga's case, those traceable proceeds were limited to the payments and purchases identified in Douglas J's judgment, amounting to a total value of $93,771.15.

[3] In the case of Clinton McLaughlan, there is a different issue: whether his receipt as trustee of the funds paid into the CHT bank account constitutes receipt by him for *Barnes v Addy* purposes. Douglas J has referred to Finkelstein J's statement in *Spangaro v Corporate Investment Australia Funds Management Ltd & Ors*[5], that "'receipt' is taken to mean receipt in the recipient's own name or for the recipient's

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1 (1874) L.R. 9 Ch. App. 244.
2 [1994] 2 All ER 685.
3 At 700.
4 Mowbray J, et al, *Lewin on Trusts* 18th ed, (London: Sweet & Maxwell), 2008, 1754 – 1755 [42 – 42].
5 (2003) 47 ACSR 285 at 303.

own benefit". In *Trustor AB v Smallbone & Others (No 2)*[6], Morritt V-C expanded on that form of words:

> "It is … necessary that the receipt by the defendant should be for his own benefit or in his own right in the sense of setting up a title of his own to the property so received",

a proposition for which he cited the judgment of Sir Clifford Richmond in *Westpac Banking Corporation v Savin*[7]. In that judgment, his Honour said,

> "So it can be argued that an agent who receives trust funds from the trustee will be within the first category [i.e. the first limb of the rule in *Barnes v Addy*] only if he is setting up a title of his own to the funds which he has received and is not acting as a mere depository or …merely as a channel through which money is passed to other persons.".

[4] Here, I think, Clinton McLaughlan was doing more than acting as a mere depository or channel; the funds vested in him as trustee, and their disbursement from the CHT account was his responsibility. In *Springfield Acres Ltd (In Liquidation) v Abacus (Hong Kong) Ltd*[8],a decision of a single judge of the New Zealand High Court, the arrangements involved bore some resemblance to those in the present case. In order to avoid an anticipated judgment, Springfield transferred its assets to an overseas registered company and from thence to the first defendant Abacus, which was the trustee of a family trust, the beneficiaries being the family members of Springfield's director and major shareholder. Abacus advanced and was returned the funds by another entity and ultimately distributed them to the beneficiaries of the trust. It was argued that a defendant who took the trust property only in its capacity as a trustee, not for its own benefit, could not be liable on the knowing receipt basis. Henry J rejected that submission. He described Abacus' actions in relation to the funds as exercising the right of control over them; the fact that it had fiduciary obligations to others in accounting for its use of the funds was, he said, "beside the point". Similar considerations apply, in my view, to the position of Clinton McLaughlin. He was correctly held liable under the "knowing receipt" limb.

[5] I agree also with Douglas J's conclusions as to the liability of both defendants under the "knowing assistance" limb of *Barnes v Addy* and with his Honour's reasons for finding that there was a proper basis for maintenance of the caveat. It follows that I concur with the proposed order, that the appeal should be dismissed with costs.

[6] **MACKENZIE AJA**: I have had the advantage of reading, in draft form, the reasons of Douglas J and the additional reasons of Holmes JA. For the reasons given by them, I agree with the orders proposed.

[7] **DOUGLAS J**: The principal issues in this appeal are whether the appellants knowingly assisted alleged breaches of fiduciary duty by Francis McLaughlan, their husband and father respectively, or received money misappropriated by him with notice of those breaches.

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6 [2001] 1 WLR 1177 at 1184.
7 [1985] 2 NZLR 41 at 69.
8 [1994] 3 NZLR 502.

[8] Mr McLaughlan was an undischarged bankrupt and had been convicted previously of several armed robbery offences. He received $445,000 from the respondent, Nerida Quince, to invest for her and misappropriated it, spending it largely on himself and his family, after funnelling it through a family trust fund controlled by the appellants. The appellants, mother and son, were respectively the principal and the trustee of the family trust, called the Clinton Hudson Trust ("the CHT"). The son's name was Clinton McLaughlan. The female appellant, Carol Varga, also known as Carol McLaughlan, held the family home at Sanctuary Cove in her name alone, subject to a substantial mortgage. A caveat on that land in favour of the respondent was left on the land by the learned trial judge, apparently in support of an equitable lien or charge.

[9] Other issues that need to be canvassed include whether the pleadings properly disclosed a case for relief in equity based on both limbs of the rule in *Barnes v Addy*[9] or whether the case was conducted on the basis that such relief should have been treated as available. As part of that debate it will be necessary to consider whether the transaction sued on was one where Mr McLaughlan entered into a fiduciary relationship with Ms Quince and became a trustee of the funds received from her.

Background

[10] The respondent, Nerida Quince, was in a relationship with a man called Bruce McTaggart who had advanced money to Mr McLaughlan, to lend on security to Victorian borrowers of short term funds at 7 per cent per month interest, of which Mr McTaggart was supposed to receive 5 per cent and Mr McLaughlan 2 per cent as a commission for his role in setting up the transaction.

[11] Ms Quince wanted to take part in a similar arrangement and, borrowing on the security of her home, between 8 January 2007 and 30 January 2007 gave cheques totalling $415,000 made out to a company owned by Mr McTaggart, Northern Territory Airline Services Pty Ltd ("NTAS"), to forward to Mr McLaughlan. On 27 March 2007 she made out a further cheque for $30,000 payable directly to the CHT. Mr McTaggart transferred the funds paid to his company immediately at Mr McLaughlan's direction by cheque payable to the CHT bank account so that between 8 January 2007 and 27 March 2007 $445,000 had been paid on behalf of Ms Quince into the CHT bank account.

[12] Her Honour, the learned trial judge, accepted Ms Quince's version of events concerning the circumstances surrounding the payment of the $445,000 to Mr McLaughlan. Those factual findings were not challenged although the conclusions to be drawn from them were. Her Honour said:

> "[19] …she was ultimately induced to make the payments of $445,000 on the basis of representations that were specifically made to her by McLaughlan that through his contacts, he could organise for her money to be lent out to borrowers in Melbourne at high interest rates for short periods. She was promised that both principal and interest was repayable on demand, that she would be paid five per cent interest per month on the money provided by her, and that security to the

[9] (1874) L.R. 9 Ch. App. 244.

extent of twice the money provided by her would be sought before monies were loaned. She was also told that McLaughlan and his wife guaranteed repayment of all monies and that the property at Sanctuary Cove was promised by McLaughlan and Varga as security for the principal amount and the outstanding interest. Whilst she had been promised a written agreement prepared by McLauglan's lawyers in Melbourne, she was informed this had been delayed due to the Christmas holidays and Quince believed him. She knew that McLaughlan received a two per cent commission for his role in the transaction.

[20] There are three specific occasions that are identified as occasions when the representations were made by McLaughlan. The first was a charity ball at the Hyatt Sanctuary Cove in December 2006, the second was a meeting at the Red Rock Café, in January 2007 and the third was at the Mexicasa Restaurant in early 2007. On two of these occasions Varga was present. The promises of guarantees were made by McLaughlan when Quince and McTaggart were his guests at the charity ball on 16 December 2006. The investment was mentioned in Varga's presence and when Quince indicated it all seemed too good to be true McLaughlan replied it was all '...aboveboard and legal.' When she had then asked how she could get her money back and what guarantees she would have McLaughlan stated that '...they only lent money on the basis of security twice the borrowing and '…[t]hat Carol and he would not allow me to lose any money and would sell their home to guarantee the loan.' Varga was present when McLaughlan made these statements but it is clear he was doing all the talking and he made it quite clear that the investment was not only 'safe' but that 'they guaranteed' it.

[21] The investment was then discussed further with McLaughlan at a meeting at the Red Rock Café in early January 2007, prior to Quince forwarding the cheque on 8 January. The promises were repeated to Quince and she pressed for a written agreement and the need for the paperwork to be done. McLaughlan told her '…if anything happened he would not let me lose my house, he would sell his house first.' She was also told that she could get her money back '...at any stage within 30 days.' She was also told not to mention the investment with anyone because the interest would be paid in cash.

[22] Once the first cheques were forwarded and there was no written agreement Quince became very concerned and would mention the need for a written agreement to McLaughlan on every occasion they met and would specifically ask McLaughlan if he had '…done the documents with the lawyer' but he was '…always so evasive about it'. She and

> McTaggart had a further conversation with McLaughlan at a dinner he was having with his family at the Mexicasa Restaurant in either January or February 2007, when they also discussed Varga's birthday gift of a $90,000 Audi TT motor vehicle. Varga was also present during this conversation when Quince specifically requested the signed agreement which McLaughlan kept putting off.
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> [23] Quince received the interest payments as set out above in cash on six separate occasions. On five of those occasions McTaggart conveyed the money to her indicating they were from McLaughlan and on one occasion on 12 March 2007 the interest was given directly to her by McLaughlan. No written agreement was ever signed." (footnotes omitted)

[13] Her Honour specifically rejected evidence from Mr McLaughlan about a different sequence of events.[10] Her reasons for doing so appear to be particularly persuasive.

[14] Interest was paid on the funds during February, March and April but not in May. On 23 May 2007 Ms Quince demanded repayment of her principal and interest unsuccessfully. Her funds had been withdrawn from the CHT bank account by June 2007 and the account was closed. The money was not used for the purpose described by Mr McLaughlan but for him and the appellants, it seems, on the whole, for living expenses and loan repayments.[11]

[15] Her Honour was not satisfied that there was any specific agreement directly between Ms Quince and the appellants requiring them to repay her the money paid to the CHT in addition to any such obligation in Mr McLaughlan. That case pleaded by the respondent failed. Her Honour accepted, however, that Ms Varga, the first appellant, knew in general terms that Mr McLaughlan had obtained funds from Ms Quince and had endorsed her husband's verbal "guarantees" made at the charity ball and later at the restaurant.[12]

[16] The appellants had few sources of funds apart from Mr McLaughlan. He was not in regular employment, spent most of his days playing golf, had some interest in a consultancy business related to a development proposal but no income from it then. Ms Varga did not work and Clinton McLaughlan, the son, who was then a student, earned pocket money in a car washing business. Ms Varga also knew that any significant sums earned by Mr McLaughlan, above $45,000 per annum, would have gone to his trustee in bankruptcy.[13] Her Honour found, again on reliable evidence, that Ms Varga knew of her husband's bankruptcy, that the family had no obvious means of support, that she also knew the nature of the CHT of which she was the principal and that Mr McLaughlan was withdrawing money from its account at will.[14] She was being given cash from that account and spent large sums of money rapidly in the first half of 2007. She also knew, on her Honour's findings, that the funds in the CHT account had been obtained from Ms Quince and were not earned from the consultancy business said to have been engaged in by Mr McLaughlan.

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10 See *Quince v Varga & Anor* [2008] QSC 61 at [24]-[44].
11 *Quince v Varga* [2008] QSC 61 at [51]-[59].
12 *Quince v Varga* [2008] QSC 61 at [68].
13 *Quince v Varga* [2008] QSC 61 at [70].
14 *Quince v Varga* [2008] QSC 61 at [69]-[86].

[17] Clinton McLaughlan's position was comparable. He was an international business student who had studied accountancy and had an understanding of bookkeeping principles. He was fully aware of the setting up of the CHT and was told of his responsibilities as a trustee. He knew that large amounts coming into the CHT came from NTAS which he also knew was Mr McTaggart's business. He knew that the plaintiff had paid one cheque directly to the CHT. He had banked the cheques into the account. Her Honour's assessment of the state of his knowledge was as follows:

> [104] In summary then I consider that in relation to the CHT and McLaughlan, Clinton's knowledge was as follows:
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> (a) He was a business student and had studied accountancy subjects and had done bookkeeping at secondary school;
> (b) He knew of McLaughlan's criminal history;
> (c) He knew of McLaughlan's bankruptcy;
> (d) He knew that any income earned by McLaughlan in excess of a stated figure had to go to the trustee in bankruptcy;
> (e) He had been trustee of the CHT since June 2004 and knew of his duties as trustee;
> (f) He knew that McLaughlan was not employed and there was no income from the consultancy at Agnes Waters;
> (g) He knew that Ferries and Howe had been repaid $117,000 plus 70,000 shares in January 2007;
> (h) He knew large amounts of money were coming into the CHT at McLaughlan's direction. He knew three cheques had come in from NTAS on 9, 16 and 30 January totalling $415.000 without any supporting documentation;
> (i) He knew the CHT had received a cheque from Quince personally for $30,000 on 27 March 2007 without any supporting documentation;
> (j) He knew that no shares had been transferred from the AWR Trust other than those transferred to Ferries and Howe;
> (k) He knew large amounts of money were coming out of the CHT at McLaughlan's direction;
> (l) He knew the family's expenses were all paid from money that came through the CHT;
> (m) He allowed McLaughlan to withdraw large amounts in cash with a Keycard from the CHT without substantiation as to the purpose of the withdrawal; and
> (n) He wrote cash cheques at McLaughlan's request without keeping any contemporary documentation as to its purpose.
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> [105] As Trustee of the CHT, Clinton received funds of $445,000 into the CHT bank account. I consider that he knew, or ought to have known, that the funds were not a loan from

> McLaughlan and that the CHT had no entitlement to those funds. He also allowed another party to determine how those funds were to be expended. It is also clear that he has not kept proper records of the nature of the expenditure from the CHT."

The pleadings

[18] The original statement of claim alleged that the plaintiff was induced to lend the money to the appellants by their own misrepresentations and that, the money not having been repaid, they were indebted to her. That analysis was rejected by the learned trial judge in her reasons consistently with the nature of the evidence led about the transactions. The trial was well underway, in its third day, and objection had been taken to some of the plaintiff's counsel's cross-examination by reference to the case pleaded. Her Honour then referred counsel to the principle in *Barnes v Addy* which, she pointed out, had not been pleaded, but may have been relevant to the line of cross-examination counsel was pursuing.[15] Her Honour, having described the pleadings as a major problem, and where counsel for the plaintiff surprisingly tried to persuade her that she could enter judgment on the basis of any cause of action that the case revealed in spite of the state of the pleadings, required the plaintiff to re-plead.

[19] The pleading then delivered alleged facts that Mr Bowden, for the appellants, validly criticised for their lack of clarity but conceded alerted him to the likelihood that a claim had been mounted against his clients as knowing recipients of property entrusted to Mr McLaughlan, under the first limb of the rule in *Barnes v Addy*. He was not put on notice by the pleading, he contended, however, that a case was also mounted against the appellants under the second limb, that they had assisted "with knowledge in a dishonest and fraudulent design"[16] on the part of Mr McLaughlan.

[20] The final pleading in para 4(h)[17] does allege that Clinton McLaughlan permitted his father to deposit money into the CHT bank account and then apply it to the appellants' use without reference to them but that hardly amounts to a plea of knowing assistance in Mr McLaughlan's particular fraudulent design that was argued in the final submissions. It may, however, be seen as a pleading of facts material to a case of knowing assistance. His role in banking the funds and his knowledge of how they were spent were canvassed fully in the evidence in a cross-examination that justified her Honour's assessment of his state of knowledge.[18]

[21] The case of knowing assistance found by her Honour against Ms Varga was that she stood by "when McLaughlan made the promises to Quince that her money was secure and that they 'guaranteed it'. She then stood by when she knew large amounts were coming into the CHT and were expended on the family. As principal of the CHT with power to remove the trustee, she had then stood by when McLaughlan used the CHT as his own and directed the expenditure of the funds."[19] Those factual issues were also addressed fully in the evidence before her Honour

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15 See AR 99-100.
16 *Barnes v Addy* (1874) L.R. 9 Ch. App 244 at 251-252.
17 AR 684.
18 AR 229-256.
19 *Quince v Varga* [2008] QSC 61 at [155].

even if the pleading did not specifically address them and she was cross-examined about them.[20]

[22] The relief sought in the pleading covered some forms of equitable relief including the imposition of constructive trusts and equitable liens over Ms Varga's property and the assets of the CHT but did not seek equitable compensation or damages, which seems likely to be the best characterisation of the judgment given by her Honour, apparently in reliance on r. 156 of the *Uniform Civil Procedure Rules* 1999 which allows general relief to be given other than that specified in the pleadings. Her Honour had found that the defendants were liable as constructive trustees in respect of the moneys advanced that had been dissipated.

[23] Liability under the second limb of the rule was debated in the written submissions at the trial. Mr Bowden took the point in supplementary written submissions before the trial judge that the pleading did not allege knowing assistance but still addressed submissions on that issue. There was also a debate about that issue in the oral submissions before the trial judge. Mr Bowden did not point us to any evidence that he may have called had he been forewarned earlier that liability under the second limb of the rule was in issue and was not anxious that the matter be sent back for a retrial.[21]

[24] In the circumstances, where the issue was the subject of argument at the trial and no further evidence was likely to have been led, it seems appropriate to treat the case as one where the issue can validly be decided in spite of the seriously inadequate state of the pleadings.[22]

Was Mr Francis McLaughlan a fiduciary or trustee?

[25] The appellants argue that Mr McLaughlan was not a fiduciary but simply someone to whom money was lent, money that he was at liberty to deal with as he wished, subject only to the liability to repay it. Her Honour's factual findings in para [19] of her reasons extracted earlier put paid to the conclusion that the transaction was simply a loan. In my view it was an investment subject to conditions that it would be lent to borrowers in Melbourne at high interest rates for short periods, on security, repayable on demand, where interest was to be paid to her at 5 per cent each month and Mr McLaughlan was to receive in addition a 2 per cent commission.

[26] Mr Bowden contended that the transaction did not meet certain criteria relevant to determine whether a fiduciary relationship existed, namely, whether the money was required to be kept separate, whether the transaction was a commercial transaction and whether proper accounts were to be kept.[23]

[27] The reality is that the relationships of debtor and creditor or of fiduciary or trustee and beneficiary are not mutually exclusive.[24] Mr Bowden submitted that the argument below focussed particularly on whether Mr McLaughlan was a fiduciary

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20 See, e.g., AR 68-74, 77-78, 80-86, 134-136, 139-140.

21 See pp. 16-18, 35-36 of the transcript of the argument before this Court.

22 *Water Board v Moustakas* (1988) 180 CLR 491, 497-498.

23 He relied in particular on the discussion in P.D. Finn, *Fiduciary Obligations* (LBC, 1977) at pp. 101-110.

24 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 501-502 per Gummow J.

rather than a trustee, but where the fiduciary relationship includes the entrusting of Ms Quince's funds to him, it seems to me as Ms Quince's agent, for the purposes I have described, then the proper analysis is that he has become a trustee of those funds as well as a fiduciary. There is no relevant difference between a fiduciary agent and a trustee in these circumstances.[25]

[28] Although there is no evidence that the moneys provided to Mr McLaughlan were to be kept in a separate bank account in Ms Quince's name, for example, pending their application for the purposes agreed on, the agreement that they be lent on security, attracting a particular rate of interest from which commission would be deducted by Mr McLaughlan suggests that it was intended that the money remain in Ms Quince's beneficial ownership giving her an equitable interest in that property.[26] Her language in asking how she would get her money back and what guarantees she would have,[27] and Mr McLaughlan's assurances in response, also indicate that she relied on him, reposed her confidence in him and suggest it was intended that she retain the beneficial ownership of the money. Such factors take the transactions out of the category of an arrangement of a purely commercial kind.

[29] Muir J, as his Honour then was, discussed the creation of a fiduciary relationship recently in these terms:[28]

> "[84] … the most obvious factors suggestive of a fiduciary relationship are: the existence of mutual trust and confidence; reliance by one party on the other or reliance by the parties on each other and the obligation of one party to act in the interests of the other in the exercise of a power or discretion.
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> [85] In *Hospital Products*, Gibbs CJ observed:
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> 'In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused: *Tate v. Williamson* (1866) LR 2 Ch App 55, at p 61, *Coleman v. Myers*, [1977] 2 N.Z.L.R., at p. 325.'
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> [86] Dawson J placed emphasis on the role of reliance in establishing a fiduciary relationship. He said:
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> 'In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. See *Lloyds Bank v. Bundy* [1975] 1 Q.B., at p. 341. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not

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25 *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 186, [76] per Lord Millett.

26 See *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1, 30; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 501-502.

27 AR 32 ll. 6-7.

28 *Benzlaw & Associates Pty Ltd v Medi-Aid Centre Foundation Ltd* [2007] QSC 233 at [84]-[88].

> because of a wrong assessment of character or reliability. That is to say, the relationship must be of a kind which of its nature requires one party to place reliance upon the other; it is not sufficient that he in fact does so in the particular circumstances.'

[87] Dawson J had earlier stated the following broad proposition:

> 'There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other. See *Tate v. Williamson* (1866) 2 Ch App 55, at pp 60-61.'

[88] Mason J, after observing that: 'The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence …' explained:

> 'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of'' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.
> It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. See generally: Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal 1*, at pp.4-8.'
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> The above passage was referred to with implicit approval by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Ltd (in liq)*." (footnotes omitted)

[30] The findings readily allow the conclusion that Ms Quince was reposing her trust and confidence in Mr McLaughlan and relying on him to act in her interests.

[31] It was argued that this transaction can be likened to the deposit of money with a bank on the basis that there be an agreed return. It is true that a bank is not normally a trustee of funds deposited with it.[29] These facts are different from those constituted by the normal relationship of banker and customer, however, and even a bank may constitute itself a trustee of a particular sum for a particular customer. An example is when it accepts instructions to appropriate a sum to a specific purpose, creating a fiduciary relationship of agent and principal between it and its customer.[30]

[32] There is also some useful general discussion by Dr Finn, as his Honour then was, in his work on fiduciary obligations, on the circumstances in which an agent may become a trustee of funds received from a principal:[31]

> "225. The most compelling indicator for or against a trusteeship of an agent's receipts is the nature of the account agreed to be kept by the agent with his principal. If, after each individual transaction or group of related transaction he effects for his principal, he is to pay over the proceeds in his hands – minus any commission payable – then he will ordinarily be a trustee …"

[33] The transactions here envisaged just such an obligation to pay over the proceeds of the investments minus the commission after the loans, a group of related transactions, were required to be repaid. Again Dr Finn said:[32]

> "233. The usual loan agreement will, ordinarily, give rise to a debtor-creditor relationship and no more. But the terms of a loan can be such as to carry with them a trusteeship for the borrower. If the agreement specifies the purpose to which the borrower is to put the moneys advanced and if, in addition, it stipulates what is to be done with the money (1) until it is applied to that purpose, or (2) in the event of the purpose becoming impossible of fulfilment, then the borrower may be both debtor and fiduciary - and fiduciary notwithstanding that the purpose of the loan is to benefit him.
>
> 234. At the root of many loan agreements is the clear contemplation that the loan money will be used for a specific purpose. That may be to effect a particular purchase or to discharge a liability. But the contemplation - or for that matter, the specification - of a purpose will not of itself produce an initial trusteeship of the loan moneys until they are applied to that purpose. **The borrower will only be turned fiduciary if the courts can further conclude that he is only intended to benefit at all from the advance if and when the money is used to fulfil that purpose** - as where, for example, money is advanced to a besieged debtor solely for the purpose of paying off a designated creditor." (emphasis added.)

[34] One of the authorities referred to in support of the last proposition is *Toovey v Milne*[33] where Abbott CJ treated a payment to a bankrupt by his brother-in-law of

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29 *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002.

30 See *In re City of Melbourne Bank Ltd; Ex parte City of Prahran* (1895) 21 VLR 563, 570; cf. *In re City of Melbourne Bank Ltd (Ferguson's Case)* (1897) 23 VLR 78, 86.

31 P. D. Finn, F*iduciary Obligations* (LBC, 1977) at p. 106. See also Priestley JA writing extra-judicially in P. D. Finn (ed.), *Equity and Commercial Relationships* (LBC, 1987) at pp. 231-232.

32 P. D. Finn, F*iduciary Obligations* (LBC, 1977) at p. 109.

33 (1819) 2 B. & Ald. 683; 106 ER 514.

money for the purpose of settling with his creditors, where that purpose failed, as money advanced for a special purpose and therefore clothed with a specific trust so that no property in it passed to the assignee of the bankrupt.[34] That decision was applied in *Barclays Bank Ltd v Quistclose Investments Ltd*[35] which itself was analysed by Gibbs ACJ in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq)*[36] in these terms;

> "That case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust."

[35] That analysis seems to me to apply to this situation. The money was advanced by Ms Quince to Mr McLaughlan with the intention that it should not become part of his assets but should be applied by him to the making of the loans he promised and where he was only to benefit if it were used in that fashion.

[36] The situation is different from the facts in *Daly v Sydney Stock Exchange Ltd.*[37] There an investor sought the advice of a firm of stockbrokers about shares in which he might invest. An employee, unaware of the firm's parlous financial position, advised the investor that it was not a good time to buy shares and that he should place the money on deposit with the firm until the time was right to buy. The investor did so and when the firm ceased trading and could not repay the loan he applied to recover compensation from a statutory fidelity fund. It was found that, although, a fiduciary relationship existed between the investor and the firm and the firm had breached its duty by failing to disclose its financial position to the investor, the moneys deposited were merely a loan and not the subject of a constructive trust in favour of the investor and had not been received by the firm as a trustee. The distinction between those facts and the present case is made, in fact, by Gibbs CJ where his Honour said:[38]

> "It is true that in some cases where money is lent, legal and equitable rights and remedies may co-exist; in particular, where a loan is made for a designated purpose the lender acquires a right to see that the money is applied for that purpose and, if the purpose cannot be carried out, the borrower may hold the money on trust for the lender if there is an agreement, express or implied, to that effect: *Quistclose Investments Ltd. v. Rolls Razor Ltd*. However, the loan in the present case was not made for any specified purpose and there was no agreement, express or implied, that the moneys lent should not form part of the borrower's general assets."

[37] This case is more akin to the facts in *Twinsectra Ltd v Yardley*[39] where the money was held on a solicitor's undertaking that made it clear that the lender's money was

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34 Abbott CJ at 684; 515.
35 [1970] AC 567.
36 (1978) 141 CLR 335, 353
37 (1986) 160 CLR 371.
38 (1986) 160 CLR 371, 379-380(footnote omitted). See also Brennan J at 390.
39 [2002] 2 AC 164, 168-169, [12]-[13].

not to be at the free disposal of the borrower but should have been used to acquire property on the borrower's behalf. Lord Hoffmann said that the effect of the undertaking was to provide that the money should remain the lender's until it was applied for the acquisition of property in accordance with the undertaking with the effect that the money was held in trust for the lender subject to a power to lend it in accordance with the undertaking. Lord Millett characterised the effect of the undertaking as creating a *Quistclose* trust in saying at the start of a detailed analysis that "it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce."[40] He also dismissed arguments contending that the intention to establish a trust had not been established and that the alleged trust's objects were uncertain.

[38] Their Lordships approaches may be distinguished, however, although Lord Hutton agreed with both, on the basis that Lord Hoffmann took the view that an express trust had been created whereas Lord Millett treated it as a resulting trust.[41] Lord Millett concluded, similarly to Lord Hoffmann, however, that the borrower took no beneficial interest in the money, which remained throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions.[42] The potential difference in classification of the transaction in this case as an express or a resulting trust based on those differing approaches, where in each case the lender is the beneficiary, does not seem to create a practical problem here. It seems to me that Ms Quince continued to hold a beneficial interest in the fund even if, on the resulting trust analysis, it became returnable to her only after Mr McLaughlan failed to apply it to the agreed purpose.[43] No occasion arises here to examine whether she lost some or all of her beneficial interest in the money at some stage during these events.[44]

[39] Gummow J in *Re Australian Elizabethan Theatre Trust*[45] treated the arrangement there as one where an express trust had been created to give the lender security for its advance. His Honour also cautioned against treating the references by Lord Wilberforce in *Quistclose* and by Gibbs ACJ in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq)* to "purpose" as characterising an express trust which did not have to satisfy the ordinary requirements for any private trust.[46] His Honour went on to say:[47]

> "The question as to the existence of any express trust will always have to be answered by reference to intention. An example of that

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40 [2002] 2 AC at 184-193, [68]-[103].

41 [2002] 2 AC at 192-193, [100]. See also the discussion in *Carlton v Goodman* [2002] 2 FLR 259 at 266-267, 267-273; [2002] EWCA Civ 545 at [23]-[26], [29]-[43], *Drakeford v Bromhead* [2003] NSWSC 296, [39], *Shalson v Russo* [2005] Ch. 281, 324-325, [128]-[130] and Lord Millett's aside in *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 at 171 [41]. There is also a useful discussion by Sean Stevens, *Quistclose Trusts in Lending – Trust or Security Interest* (2005) 23 CSLJ 325-334 where the author analyses such transactions as ones capable of creating an equitable charge.

42 [2002] 2 AC at 192-193, [100].

43 See, also Lord Browne-Wilkinson's discussion of the second type of resulting trust in *Westdeutsche Bank v Islington LBC* [1996] AC 669, 706-709.

44 Cf. *Westdeutsche Bank v Islington LBC* [1996] AC 669 at 706; *DKLR Holding Co. (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 459-460 and Sean Stevens, op. cit., pp. 327-328.

45 (1991) 30 FCR 491

46 (1991) 30 FCR 491 at 502.

47 (1991) 30 FCR 491 at 502-503.

> basic proposition at work in this Court is the decision of Lockhart J in *Re Wall; Ex parte Official Receiver v Kemmi's* (1979) 25 ALR 615 at 624-625. Ordinarily, the relevant intention is that of the alleged settlor, but where the subject matter of the trust is contractual rights against the settlor, conferred by the settlor upon the alleged trustee, the objective (or "purpose") of the transaction being to benefit third parties, it may be appropriate to look to the mutual intention of settlor and trustee. This is consistent with the approach by Deane J to a similar question in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 149, but cf per Mason CJ, Wilson J (at 121). At all events, and as I have said, in *Quistclose* (at 580), Lord Wilberforce looked to 'the mutual intention' of Quistclose and Rolls Razor and to 'the essence' of their bargain.
>
> The relevant intention is to be inferred from the language employed by the parties in question and to that end the court may look also to the nature of the transaction and the relevant circumstances attending the relationship between them: see *Walker v Corboy* (1990) 19 NSWLR 382; Scott, *The Law of Trusts* (4th ed, 1987), §25.2. There is no need for particular caution in drawing the inference that a trust was intended: see *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618-619. However, it also is important to appreciate both the flexibility of the institution of the express trust and the range of equitable institutions which fall short of but have some of the characteristics of a trust.
>
> In *Quistclose*, the debate was whether that material disclosed a trust with the terms I have described or merely a loan; no other result was suggested. But the facts in such cases are susceptible of infinite variation and the trust is a supple instrument. Hence the suggestion by Professor Finn that if the facts disclosed no contractual obligation by the borrower to the lender to pay the creditors, there could hardly be present a concurrent intention to create a trust in their favour; **rather, the borrower would hold the moneys borrowed as trustee of an express trust for the lender**, subject to a mandate for the lender to use the fund to pay the creditors. **On that footing, there would be but one trust, created to give the lender security for its rescue operation of the financially unhealthy borrower**, but not to render the creditors beneficiaries under any trust." (emphasis added)

[40] Therefore, the arrangement between Ms Quince and Mr McLaughlan can be regarded as one where the money advanced by her remained her property in equity, pursuant to an express trust. Alternatively, the circumstances of the advance of the money for the purpose of being lent, subject to the conditions described in the conversations between her and Mr McLaughlan, made him her fiduciary agent and trustee of her funds when he agreed to take on those responsibilities, evidenced also by his negotiation of the payment to himself of a 2 per cent commission from the interest to be earned on the secured loans made through him. When the purpose of the payment failed, through his failure to apply the money as instructed, on the resulting trust analysis, it became returnable to Ms Quince as her property, which it had continued to be. Although the case was conducted on the basis that Mr

McLaughlan was a fiduciary rather than a fiduciary and a trustee that seems to make no practical difference in these circumstances. The pleadings relevantly alleged that the money received by Mr McLauchlan remained the plaintiff's property.[48]

The appellants' liability under the first limb of the rule in *Barnes v Addy*

[41] The test adopted by her Honour as to the degree of knowledge required to meet the first limb of the rule in *Barnes v Addy* was that the first four of the categories described in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*[49] applied. That is consistent with earlier authority in Queensland.[50] Those categories have been summarised as:[51]

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

[42] The High Court has recently pointed out in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[52] however, that Lord Selborne LC did not use the expression "knowing receipt" in *Barnes v Addy* but said that "strangers are not to be made constructive trustees merely because they act as the agent for trustees in transactions within their legal powers… unless those agents receive and become chargeable with some part of the trust property…".[53] In that context, the High Court went on to say that "[p]ersons who receive trust property become chargeable if it is established that they received it with notice of the trust."[54] From what their Honours said later it seems clear that they regarded the first three of those categories as examples of actual knowledge as understood both at common law and in equity and the last two as instances of constructive knowledge.[55]

[43] Before the decision in *Farah Constructions* the view had been taken that the "whole topic of the liabilities of third parties involved in breach of fiduciary duty has become bedevilled by an obsessive refinement of distinctions between degrees of knowledge and notice" and that the weight of authority is that actual or constructive knowledge is sufficient for liability to be established under the first limb.[56] Here, in any event, her Honour's findings are consistent with the view that the appellants had actual rather than constructive knowledge so there is no need for me to consider whether constructive notice would have been enough to make the appellants liable.

[44] Her Honour's conclusions on the appellants' state of knowledge were as follows:

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48 AR 685-686.

49 [1993] 1 WLR 509, 575-576, 582.

50 See *Doneley v Doneley* [1998] 1 Qd R 602, 612.

51 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 163 [174].

52 (2007) 230 CLR 89, 140-141 [112].

53 *Barnes v Addy* (1874) L.R. 9 Ch. App. 244 at 251.

54 (2007) 230 CLR 89, 141, [112].

55 (2007) 230 CLR 89, 163, [174].

56 See *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 410 and the discussion in J. D. Heydon and M. J. Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed., 2006) at p. 284-286, [1335] especially in fn. 213. See also the extensive analysis by Owen J of both limbs of the rule in *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [931]-[934], [4627]-[4749].

> "[143] The conduct of Varga and Clinton is such that they must have known that the monies sitting in the account of the CHT were not the property of the CHT and I consider that they must have known that those monies were, in fact, owned by someone else. There is no other explanation – McLaughlan was an unemployed bankrupt who spent most of his days playing golf. He had no known source of income and any monies that he earned needed to be declared to his trustee in bankruptcy.
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> [144] As previously stated, I consider that Varga must have known that the sums of money going into the CHT did not belong to the CHT and further, she must have known that these funds were then being put into her account or spent directly on her or the family's living expenses. I consider that both defendants must have known that those funds were not available for distribution. To use the terminology of *Consul*, I do not consider that the actions of Varga and Clinton are 'innocent' and, at the very least, they wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make. I consider that they have indeed 'wilfully shut their eyes to the obvious'."

[45] Those findings must be read with her previous findings of fact to which I have already referred.[57] Her Honour also went on to say:

> "[152] …He (Mr McLaughlan) organised for money to go in and then he drew it out at will. Both Varga and Clinton knew McLaughlan could not retain income in excess of $45,000. Both Varga and Clinton received and spent funds that had come to them at McLaughlan's direction. Both Varga and Clinton knew McLaughlan had no right to the funds. They both knew that he could not direct that these funds could come to them even if he had earned them legitimately. The most telling action by Varga and Clinton, however, is that they were part of an arrangement whereby $445,000 was dissipated in 12 weeks."

Ms Varga's situation

[46] The criticism of her Honour's conclusion on this was that, before the advances were made, all that Ms Varga knew was that the investment had been mentioned in her presence at a charity ball and that Mr McLaughlan said that he and Ms Varga would not allow Ms Quince to lose any money and would sell their home to guarantee the loan. It was submitted that the circumstances were not such as to support a finding that Ms Varga was aware of the dishonest and fraudulent design on the part of Mr McLaughlan. However, those findings do support the conclusion that she knew the money was to be invested and must have rapidly become aware of his dishonesty because of how he spent the money. The spending included payments into her account and for the purchase of a car for her not long after the money was advanced by Ms Quince.

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[57] The relevant findings by her Honour are at [2008] QSC 61 at [68] and [86].

[47] In any event the other evidence relevant to the advance of the money relied on by her Honour, readily support her Honour's conclusion that the funds that went to her did so in circumstances where she received them with notice of the trust. Her Honour relied not only on her presence at the charity ball but also later at a restaurant to establish that Ms Varga knew that Mr McLaughlan had obtained funds from Ms Quince for investment. She also concluded on the evidence that Ms Varga knew Ms Quince's money had been paid into the CHT and that large amounts were coming out of that account at her husband's direction for the family's expenses. There were no other sources of such sums of money known to Ms Varga than the funds from Ms Quince. That was sufficient to establish actual knowledge on the basis, as her Honour found, of the second and third categories in *Baden* and in reliance on the passages to which she referred in *Consul Developments Pty Ltd v DPC Estates Pty Ltd*.[58] Given her Honour's advantage in having seen and assessed the witnesses, and because her conclusions are far from "glaringly improbable" or "contrary to compelling inferences" in the case I would not overturn her findings on those issues.[59]

Receipt by Ms Varga

[48] The amount found by her Honour to have been received by Ms Varga was $129,355.83. That figure included a number of amounts for payments said to have been made directly to her. There were other sums paid on her behalf such as mortgage payments on the house, money paid to help pay for a car for her, school fees, electrical goods, repairs to air conditioning and Energex bills, a third share of the family living expenses, body corporate fees and a third share of legal fees. Her Honour adopted a "broad brush" approach because of the inadequate details of payments provided by the appellants and the lack of a significant number of source documents relating to the expenditure of the $445,000. Her Honour's dissection of the amounts was as follows:[60]

> "[134] I consider that paragraph 51 of these reasons sets out some of the payments that are able to be considered as having been actually received by Varga or for her benefit. This figure includes $10,000 paid in relation to the mortgage to either SCB Mortgage Solutions or All State Home Loans, the amount of $47,500 for the car, plus another $31,000 paid directly into her account. This totals $88,500.
>
> [135] In addition, I consider that Varga would have been liable to pay the school fees and, therefore, the payment of those fees was for her benefit. This totals $2,820.90. To this figure should be added all the electrical goods purchased for the house, which comes to $12,893. There are then repairs to the air-conditioning in the house which she owns at $2,378.15, as well as the Energex bill of $678.45.
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> [136] The total family living expenses are also calculated in Exhibit 2 and are set out in Appendix A to these reasons. I consider that the youngest son's contribution to the family living expenses would be minimal and that, as there were three adults living in the home,

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58 (1975) 132 CLR 373.

59 See *Fox v Percy* (2003) 214 CLR 118, 125-129, [25]-[31]. The House of Lords took a similar approach in *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

60 *Quince v Varga* [2008] QSC 61 at [134]-[138].

> Varga's share of the total family living expenses would be in the order of one third of this total, which is a figure of $15, 402.06.
>
> [137] The body corporate is also Varga's liability and totals $1,383.27.
>
> [138] There are legal fees totalling $16,000 paid during the period and I consider a notional one third should be considered to have been paid on Varga's behalf, which is a figure of $5,300."

[49] In the circumstances it seems to me to be reasonable to treat those payments, apart from the ones made directly to her, as ones made for her benefit. The question is whether they were received by her. There is little authority on the point.

[50] In *Spangaro v Corporate Investment Australia Funds Management Ltd*[61] Finkelstein J said, without reference to authority: "'Receipt' is taken to mean receipt in the recipient's own name or for the recipient's own benefit." A similar approach is taken in Glover, *Equity, Restitution & Fraud*,[62] again without reference to authority.

[51] Some of the discussion in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[63] suggests the need for caution in taking such an approach. When addressing a submission that a third party who has directly received a financial benefit as a result of a breach of trust or fiduciary duty should be accountable for the benefit, their Honours said that the proposal was a modification of the first limb of the rule in *Barnes v Addy* and would be a radical change, abandoning the requirement for receipt of property and calling for very careful examination of the possible consequences. Their Honours may have been concerned to avoid a restitutionary or "unjust enrichment" analysis of liability under the first limb of the rule. The learned authors of *Jacobs' Law of Trusts in Australia* say, for example:[64]

> "Some think that liability under the first limb of *Barnes v Addy* does not depend on acquisition of property with notice, but merely on unjust enrichment. These views have been expressed in cases, the decision of which did not call for their expression. These cases exhibit a violent approach to authority, and have already been subjected to convincing criticism." (footnotes omitted)

[52] A more principled approach may be that expressed by Millett J in *Agip (Africa) Ltd v Jackson*[65] where his Lordship said that: "… there is a receipt of trust property … when a company's funds are misapplied by any person whose fiduciary position gave him control of them or enabled him to misapply them." From that passage it is argued in Thomas and Hudson, *The Law of Trusts*,[66] that anyone who has control of trust property or who takes it into his possession such that it could be misapplied will have received that property, the key feature establishing liability being the receipt of the property with knowledge that there has been some breach of trust.

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61 (2003) 47 ACSR 285 at 303, [56].

62 (LexisNexis Butterworths, 2004) p. 468, para. [8.27].

63 (2007) 230 CLR 89, 145 [121].

64 J. D. Heydon and M. J. Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed., 2006) at p. 289, [1337]. No doubt these views reflect the concerns expressed by Lord Goff in *Westdeutsche Bank v Islington LBC* [1996] AC 669 at 685 about the potential for the development of the law of restitution to distort the principles underlying some equitable institutions.

65 [1990] Ch 265, 290.

66 (OUP, 2004) at pp. 989-990 para. 30.56. The reference there to [1990] Ch 265, 286 is incorrect.

That is also consistent with the expression of the first limb of the rule in *Barnes v Addy* that the recipient must have received and become chargeable with some part of the trust property. The ability to trace trust assets into the possession of the person would be relevant to that analysis. That seems to me to be the appropriate rule to apply and I am reinforced in that view by the authorities referred to by Holmes JA in her reasons on this point which I have had the advantage of reading after circulating these reasons in draft form.

[53] Applying that approach to the evidence here, I conclude that it has only been shown that Ms Varga has received $93,771.15, consisting of $31,000 paid directly into her account, $47,500 for the car which was a present to her, $12,893 for the electrical goods purchased for her house and $2,378.15 for the repairs to the air-conditioning in her house. Because of my conclusions about the second limb of the rule in *Barnes v Addy*, however, this has no effect on the order made by her Honour.

Clinton McLaughlan's situation

[54] The evidence against Clinton McLaughlan was that, as trustee, of the CHT he received all the moneys into the trust fund which he controlled. Her Honour's findings were that the evidence was sufficient to put him on notice that the CHT itself had no entitlement to the funds through the other activities of Mr McLaughlan. He knew that three of the cheques had come in from NTAS and one from Ms Quince personally without supporting documentation or information to support any conclusion that the money was a loan to Mr McLaughlan. Her Honour was satisfied that the conclusion he should have reached was that the CHT had no entitlement to those funds, taking into account Mr McLaughlan's bankruptcy. She also considered there was a reasonable case to make the money was deposited to the account in circumstances where he was wilfully shutting his eyes to the obvious; it was not money owed to or the property of the CHT. He facilitated payments out of the CHT by signing cheques and permitting his father to use a key card. So he knew that large amounts came out of the only significant funds in the account at Mr McLaughlan's direction to pay the family expenses and as cash withdrawals. That evidence was enough to allow her Honour to conclude that he had notice equivalent to the second and third categories described in *Baden* of the receipt of trust property into the CHT account. I do not believe that the circumstances have been shown to justify any departure from that factual finding by her Honour. I also agree with Holmes JA's conclusion in her reasons that Clinton McLaughlan was doing more than acting as a mere depository or channel.

Knowing assistance

[55] The second limb of the rule in *Barnes v Addy* makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary.[67] The requirement for knowledge under this limb was discussed by the High Court in these terms:[68]

> "[174] Against this background, it has been customary to analyse the requirement of knowledge in the second limb of *Barnes v Addy* by reference to the five categories agreed between counsel in *Baden v Société Générale pour Favoriser le Dévelopment du Commerce et de l'Industrie en France SA*:

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67 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd (*2007) 230 CLR 89, 159, [160].

68 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd (*2007) 230 CLR 89, 163-164, [174]-[177].

> '(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.'
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> In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele (BCCI)*, Nourse LJ observed that the first three categories have generally been taken to involve 'actual knowledge', as understood both at common law and in equity, and the last two as instances of 'constructive knowledge' as developed in equity, particularly in disputes respecting old system conveyancing. After noting that in *Royal Brunei* the Privy Council had discounted the utility of the *Baden* categorisation, Nourse LJ in *BCCI* went on to express his own view that the categorisation was often helpful in identifying the different states of knowledge for the purposes of a knowing assistance case.
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> [175] Although *Baden* post-dated the decision in *Consul*, the five categories found in *Baden* assist in an analysis of that for which *Consul* provides authoritative guidance on the question of knowledge for the second limb of *Barnes v Addy*.
>
> [176] Thus, support in *Consul* can be found for categories (i), (ii) and (iii). Further, *Consul* also indicates that category (iv) suffices. However, in *Consul*, Stephen J held that knowledge of circumstances which would put an honest and reasonable man on inquiry, later identified as the fifth category in *Baden*, would not suffice. Gibbs J left open the possibility that constructive notice of this description would suffice. Barwick CJ agreed with Stephen J.
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> [177] The result is that *Consul* supports the proposition that circumstances falling within any of the first four categories of *Baden* are sufficient to answer the requirement of knowledge in the second limb of *Barnes v Addy*, but does not travel fully into the field of constructive notice by accepting the fifth category. In this way, there is accommodated, through acceptance of the fourth category, the proposition that the morally obtuse cannot escape by failure to recognise an impropriety that would have been apparent to an ordinary person applying the standards of such persons." (footnotes omitted)

[56] Her Honour's findings about this issue were as follows:[69]

> "[150] On the basis of the findings I have made earlier, I consider that there certainly was a dishonest design on the part of McLaughlan. On the facts, he clearly persuaded Quince to part with a sizeable sum of money for a particular purpose, but he then diverted those funds for his own purposes. It is

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69 [2008] QSC 61 at [150]-[152]

> clear from the decisions that there has to be some form of moral responsibility and I consider that has been established in the present case.
>
> [151] Has there then been assistance by Varga and Clinton? This aspect has not been comprehensively addressed in any of the cases, but it is generally taken to mean any action by the stranger taken with the intention of furthering the trustee or fiduciary's fraudulent and dishonest purpose. In the present case, the family were all living together and all had a part to play in what was effectively an arrangement to get Quince's funds into the CHT and disbursed for family expenses in a very short space of time.
>
> [152] The dishonest design in relation to Quince was part of a larger arrangement that the family was aware of whereby the house they lived in was in Varga's maiden name and where a trust was set up which McLaughlan controlled. He organised for money to go in and then he drew it out at will. Both Varga and Clinton knew McLaughlan could not retain income in excess of $45,000. Both Varga and Clinton received and spent funds that had come to them at McLaughlan's direction. Both Varga and Clinton knew McLaughlan had no right to the funds. They both knew that he could not direct that these funds could come to them even if he had earned them legitimately. The most telling action by Varga and Clinton, however, is that they were part of an arrangement whereby $445,000 was dissipated in 12 weeks."

[57] The latter two paragraphs in particular were criticised on the basis that they contain an inference that the appellants had a preconceived plan to defraud Ms Quince and that had not been suggested to them in evidence. Ms Varga was cross-examined about the purchase of the family home in her name in the context of her husband's financial history and the use of the trust to pay expenses.[70] Both appellants were also cross-examined about the speed of the dissipation of Ms Quince's money and other aspects of how the moneys were used. It was not put to them, however, that they knew in advance what Mr McLaughlan proposed to do and agreed to assist him in advance.

[58] It seems to me, however, that her Honour was focussing on the dishonest purpose of the trustee or fiduciary when one reads those paragraphs together. She was characterising the conduct of the appellants as assisting that purpose because of their knowledge of the source of the funds and Mr McLaughlan's lack of any right to use them for the payments being made out of the CHT. I do not read her conclusions as ones based necessarily on the view that this was a conspiracy hatched in advance among all of them before the money was obtained from Ms Quince.

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[70] AR 131 ll. 40-60.

[59] Her Honour also made findings that Ms Varga stood by when Mr McLaughlan made the promises to Ms Quince that the money was secure and that they "guaranteed it" and also stood by when she knew large amounts were coming into the CHT and being expended on the family. She pointed out that as principal of the CHT with power to remove her son as trustee, where he controlled Mr McLaughlan's access to the CHT account, she had then stood by when Mr McLaughlan treated the CHT as his own and directed the expenditure of the funds from it. She made similar findings against Clinton McLaughlan.[71]

[60] Ms Varga and her son had been involved in the establishment of the CHT as a vehicle into which Mr McLaughlan could pay funds that could be used for the family's household expenses and she knew that Ms Quince's money had been paid into its account. She was also aware of the limitations on him as a bankrupt. With her son as the trustee, used to acting at his father's behest, the structure was in place to permit money to be diverted to the family's use. That Mr McLaughlan rapidly diverted Ms Quince's money to himself and his family was clear and her Honour's findings that she and her son must have known that Ms Quince's funds were the only source of available funds meant that they had at least turned a blind eye to his fraud. Their involvement with the establishment and operation of the CHT and their standing by while he used the money to those ends when they could have stopped him is consistent with the conclusion that they knowingly assisted him in breaching his trust and the duties he owed Ms Quince. That assistance continued until the funds were exhausted.

[61] The result and the reasoning in the rather similar case, *Barlow Clowes Ltd v Eurotrust Ltd*[72], supports the conclusions reached by her Honour. In that decision, Lord Hoffmann expressed the view that it was not necessary that the person assisting the breach of trust should have concluded that the disposals were of moneys held in trust. It was sufficient that he or she should have entertained a clear suspicion that this was the case. His Lordship went on to say that it was quite unreal to suppose that the assister there needed to know all the details to which the intermediate appellate court had referred before he had grounds to suspect that the relevant trustees were misappropriating their investors' money. It was clear on the facts of that case that they could not have been entitled to make free with it as they pleased, as was the case here with Mr McLachlan in respect of the money in the CHT. His Lordship went on to say:[73]

> "Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means … And it was not necessary to know the 'precise involvement' of Mr Cramer in the group's affairs in order to suspect that neither he nor anyone else had the right to use Barlow Clowes money for speculative investments of their own."

[62] For those reasons her Honour's conclusion that the appellants had knowingly assisted Mr McLaughlan's breaches of trust were justifiable and should stand.

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71 [2008] QSC 61 at [155]-[156].

72 [2006] 1 WLR 1476 at 1483-4, [28].

73 [2006] 1 WLR 1476 at 1484, [28]; referring to *Twinsectra Ltd v Yardley*[2002] 2 AC 164 at 170, [19] (Lord Hoffmann) and at 202, [135] (Lord Millett).

Equitable charge or lien

[63] It is difficult to ascertain from the reasons why it is that her Honour found that Ms Quince had an interest in Ms Varga's property sufficient to ground a caveat causing her to refuse to remove the caveat that had been lodged.[74] The money that was dissipated was not traceable to any interest in the house although some of it was used in mortgage repayments. The caveat, however, claimed an equitable charge or lien in the land by virtue of an agreement made in or about January 2007 between Ms Quince and Ms Varga to provide the land as security by way of mortgage or charge to the extent of the $445,000 advanced.[75]

[64] Presumably that was based on the promise by Mr McLaughlan in Ms Varga's presence that they "would sell their home to guarantee the loan."[76] That promise, given in consideration for the payment over of $445,000 and the promise of the 2 per cent commission payable to Mr McLaughlan amounted to an agreement sufficient to create a charge that equity would recognise; the land had been made liable for the discharge of the debt.[77] The creation of an equitable charge or lien is also a suitable remedy to apply in aid of the analysis adopted by her Honour in respect of the dissipated assets in the CHT. She treated the appellants as constructive trustees of those funds based on her analysis of the applicability of the rule in *Barnes v Addy* to their conduct.[78]

[65] In that context it is instructive to refer to the extended discussion of the use of the equitable lien or charge in aid of the restitutionary use of the constructive trust by Gummow J[79] in *Stephenson Nominees Pty Ltd v Official Receiver*.[80] His Honour said, in particular:[81]

> "However, and this has to be borne in mind in the present case, a constructive trust may be imposed upon a particular asset or assets not because pre-existing property of the plaintiff has been followed in equity into those assets but because, quite independently of such considerations, it is, within accepted principle, unconscionable for the defendant to assert a beneficial title thereto to the denial of the plaintiff. The constructive trust found in the present case at first instance was of this latter description.
>
> The company cannot trace its funds, in particular those furnished for reinvestment on the abortive Pooraka mortgage, into the $60,000 received from the bankrupt by Mr and Mrs Roberts. The constructive trust was not in favour of the company and was not in aid of any tracing of the funds of the company. The opposite is the case. The constructive trust in question is one imposed upon the company and in favour of the bankrupt and the Official Receiver as his successor. Further, it is not asserted, as matters presently stand, that the Official Receiver claims the constructive trust in his favour in support of any tracing right enjoyed by any other client of the bankrupt to follow its

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74 See [2008] QSC 61 at [173].
75 AR 336-337.
76 [2008] QSC 61 at [20].
77 Cf. *Parker v Glenninda Pty Ltd,* [1998] Q ConvR 54-499; [1997] QCA 412..
78 [2008] QSC 61 at [115]-[122].
79 Dissenting but not in respect of this legal analysis.
80 (1987) 16 FCR 536, 552-556.
81 (1987) 16 FCR at 552-554.

moneys into the $60,000 that reached Mr and Mrs Roberts. In that setting, no equities appear to favour any particular third party which bind Stephenson Nominees Pty Ltd through a tracing remedy.

The question then arises as to the footing, if any, upon which the Official Receiver may rely for a constructive trust imposed upon the company and in his favour as successor to the bankrupt. In approaching the issue, it must be borne in mind (as was not disputed on the appeal) both that the bankrupt was fiduciary to the company in respect of the dealings with Mr and Mrs Roberts and that the bankrupt fell short of honouring the confidence reposed in him by the company as his client: *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377, 384-386.

On the face of it, if the company, Stephenson Nominees Pty Ltd, is entitled in its own right to receive moneys pursuant to the obligations by Mr and Mrs Roberts to pay principal and interest which are expressed in the mortgage, the result is an unjust enrichment of Stephenson Nominees Pty Ltd in the sense that it cannot show that it was the source of the $60,000 received by Mr and Mrs Roberts. However, the bankrupt, as its agent, was bound to account to it for the total sum $75,000 which he was directed to invest on loan to Mr and Mrs Roberts. Thus, as between the bankrupt and Stephenson Nominees Pty Ltd, it would not be appropriate to speak of unjust enrichment of Stephenson Nominees Pty Ltd when it received from Mr and Mrs Roberts moneys expressed to represent that which the bankrupt as agent of the company had purported on its behalf to invest on loan to Mr and Mrs Roberts.

In any event, as the law stands in Australia, (a) there is no general principle requiring restitution in cases of unjust enrichment of the defendant at the expense of the plaintiff, and (b) even if there were, it would not necessarily follow that the constructive trust was the appropriate remedy to express that right to restitution. This follows from *Muschinski v Dodds* (supra), particularly from what was said by Deane J (with the concurrence of Mason J (as he then was)) at 614-618; see also the warning by Gibbs CJ (with the concurrence of Wilson J and Dawson J) against too readily confounding ownership (that is, by dint of constructive trust) with obligation (for example, in account, a personal remedy) in *Daly v Sydney Stock Exchange Ltd* (supra) at 379-380.

Care is called for against over-emphasising the role of the constructive trust in this area. Whilst the constructive trust may readily in many cases be seen as a restitutionary remedy for an unjust enrichment at the expense of the plaintiff, this by no means always will be the case. The constructive trust may be imposed as a cautionary or deterrent remedy even where there has been no unjust enrichment at the expense of the plaintiff. For example, leading cases have made it plain that it is no answer to the application to company directors of the rule forbidding fiduciaries placing their interest in conflict with their duty, that the profits they have made are of a kind the company itself could not have obtained or that no loss to the company is caused by their gain: *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134(n).

Relief by way of constructive trust may be available in these cases even though the profit or benefit obtained by the fiduciary was not one the obtaining of which was an incident of his duty to the plaintiff: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 107-109. In such situations the constructive trust operates not to restore to the company that of which it was deprived by the conduct complained of, but to enforce observance of the fiduciary duty not to prefer personal interest to duty to the plaintiff. As Professor Birks has observed, it is difficult, in the situations revealed in these and other cases, to treat a constructive trust remedy as necessarily operating to prevent unjust enrichment at the expense of the plaintiff: Birks, *An Introduction to the Law of Restitution* (1985), pp 88-89.

Nor, even if it be established that in Australian law, unlike English law as expounded by Lord Diplock in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104, there is a general doctrine of unjust enrichment, it by no means will follow that the constructive trust with its proprietary character will always or necessarily be the appropriate remedy. It would, for example, be quite wrong to assume that in the United States the law of restitution is concerned principally with proprietary remedies in the nature of a constructive trust. 'Restitution' is used as a term identifying a range of remedies linked by a perceived common character. Australian decisions such as *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, and *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, although based immediately in quasi-contract apparently would be classed in the United States as cases of restitution, although no constructive trust was involved. The leading American treatise on the subject, Professor G E Palmer's four volume work, *The Law of Restitution* (1978) contains the following (par 1.3 at p16):

> 'The recognition of constructive trust as a remedy aimed at preventing unjust enrichment has been accompanied by a growing recognition of its connection with quasi contract, a legal remedy with the same general aim ... . It is important to recognise the connection between the two remedies; but as long as distinctions between law and equity persist, it needs to be recognised that "quasi contract" and "constructive trust" are not interchangeable terms ... .
>
> It is a striking fact none the less that judges often seem to find it easier to reach and rectify an unjust enrichment by describing the recipient of the enrichment by describing the recipient of the enrichment as a constructive trustee, even though the judgment entered is one for money and can be obtained at law, in quasi contract. The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit, and the other terms associated with quasi contract have never quite succeeded in duplicating.'

Deane J spoke to like effect in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 255-257: see also Palmer, op cit, 1982 Supplement to Vol 1, p 6; *Scott on Trusts* (3rd ed), par 462 and 1983 Supp, par 666; and S Stoljar, "Unjust Enrichment and Unjust

> Sacrifice" (1987) 50 MLR 603 at 604-605, 609-610. In the standard United States student text by R N Leavell, J C Love and G S Nelson, *Cases and Materials on Equitable Remedies and Restitution* (3rd ed, 1980), the subject of restitution is introduced by describing it (at p 495) as 'an abstraction that describes a variety of remedies' including such legal remedies as quasi-contract and such equitable remedies as constructive trust, equitable lien and accounting.
>
> Further, as I have earlier indicated, it will be apparent that the security given by an equitable lien or charge affords a proprietary remedy; it would be wrong to treat the constructive trust as the only proprietary remedy in this field: *Hewett v Court* (1983) 149 CLR 639 at 645-646, 650, 662-669; *Calverley v Green* (supra) at 263; *Muschinski v Dodds* (supra) at 598; *Morris v Morris* [1982] 1 NSWLR 61 at 64; *Re Hallett's Estate* (1880) 13 Ch D 696 at 709, 717. The equitable lien is not confined in its operation to cases where the parties are in contractual relations (as with vendor and purchaser). It has been described as an equitable remedy, created by the court, regardless of the intent of the parties, as a remedial device to protect a party against some inequitable loss: H L McClintock, *Handbook on the Equity* (2nd ed), 1948, par 118; see also J N Pomeroy, *A Treatise on Equity Jurisprudence*, par 1238-1241; Note "Equitable Liens" (1931) 31 Col L Rev 1335. The lien may attach to incorporeal as well as corporeal property: *Dansk Rekylriffel Syndikat Aktieselskab v Snell* [1908] 2 Ch 127."

[66] On that analysis it was appropriate for her Honour to refuse to remove the caveat as it was lodged in support of a valid claim to an equitable charge or lien based on Ms Varga's own agreement to sell the house to guarantee the loan and in support of her liability as a constructive trustee.

Conclusion

[67] It is regrettable that the issues in this case were not properly defined in the pleadings by the respondent in spite of the learned trial judge's comments as to their deficiencies and requirement that they be re-pleaded. Nevertheless, the case was litigated in circumstances where the appellants were sufficiently on notice as to the relevant issues to allow them to lead the evidence available to them touching on those issues. That evidence supported her Honour's conclusion that the appellants were constructive trustees of the money paid through Mr McLaughlan into the CHT and liable to compensate Ms Quince for the dissipation of that money. In the circumstances it was also appropriate to recognise an equitable charge existed over Ms Varga's land sufficient to support the caveat.

[68] I would dismiss the appeal with costs.