This document will have certain things mentioned a number of times and the spelling and grammar have not been checked nor is it in any particular order so read it over a number of times to get it in your head.
It can be used for a bankruptcy or a mortgage or even a car loan.

The trustee has failed in his duty by not bringing material evidence to the court being the security and the interest as proof of claim from the creditor who has claimed beneficial interest in the interest on the security by fraudulently coercing us into a contract to make us the debtor when in actual fact we are the creditor. Securities are certificates and bonds and banks only purchase securities they do not lend anything but then claim to be the creditor, the problem with that is that the bank does not have a person of significant control or Beneficial owner with a minimum of 25% shares (for insurance) in the company under the corporations act 2001 and the FATF which is a legal requirement in every country thereby leaving nobody to make a claim. In actual fact the beneficial owner of all of the banks is her majesty's treasury (the crown), the only bank not included is the BIS, bank of international settlements which is owned solely by the vatican and everyone including the queen has to pay a fee to use it.

On the 27 June 2021 Basel 3 was brought into force for all banks to comply with and that means that they must have assets in gold and silver to back the derivatives that they hold (secured or unsecured bonds, certificates, mortgages, car loans etc) which must be complied with by 1 Jan 2022 if they don't have the gold or silver in their vault by then the Vatican will be shutting them down to stop the fraud and corruption that is currently running rampant, this process has already started and considering the deutche bank holds more than 50 trillion in derivatives, they are attached to everybody and there isn't enough gold or silver in the world to cover it at today's prices they will either disappear or the value of gold or silver will skyrocket to cover it.

If you are going into court to argue any mortgage or loan of any kind you will lose if you mention bankers book evidence act or promissory notes as you are arguing the wrong asset, you are arguing something that is not real, money is not real but a security is a certificate of credit a bond which is very real, it comes to life the minute you sign it, that is the difference it has gold attached to it if you have seen one up close, gold leaf and that's why they allocate them to baskets so they can be traded, nine times usually but more than that recently. So if you come into court under the bills of exchange you do not have any standing, not when it comes to equity (equity is security) and you will lose.

We have a well worded **dsar** under the **rules of law** in every jurisdiction on the planet and it is to do with the SDRs **(special drawing rights)** which is what it has been done under. The disposal of surplus and the original security financial instrument because at the moment we have never seen it, we signed something but did not see what it was attached to, was it a bond or was it a certificate? two slightly different things but with totally different values and one of them is in gold. There is a good chance that every single secured mortgage is backed by that gold otherwise they would never be able to be traded but you will never get them to admit to it. When you signed that security you signed something that was already allocated you just allocated it to you. The bank are now the ones who are minus, they are giving you this that is why they have 2 ledgers, the hidden one and the visible one.

The bank then makes a contract with you for power of attorney but only on the interest, never on the principal because the principal is not theirs it belongs to the queen (crown) as she technically owns all the banks through the treasury.

By failing to bring forth the evidence of this fraudulent contract the lawyers have now conspired to defraud me with the trustee but not only that they have now conspired against the court.

We can now prove these facts as we have the material evidence starting with a DSAR (data subject access request) back in 2018 and all the DSARs since then and here is the evidence that there is no proof of claim.

We can show without a shadow of a doubt that the trustee is not fit for purpose and we want him charged immediately.

The legal's come under the corporations act, The person of significant control or beneficial owner is all about the liability and as all parties involved are not the PSC or BO how can they bring anything to a court, they are all colluding with each other to defraud us of our interest which is concealment, conspiring and is criminal under all of the criminal codes.

The trustee must have clean hands, good faith and have a full accord of the accounts to back it and he hasn't got it which is concealment and he has conspired with the bank and the lawyers to take control of the assets of this bankruptcy without the material facts to the claim which is criminal, we would like this matter transferred to a crown court.

Under the privacy act and the data protection act they need to show lawfulness to a court as to why they are touching our data, how can they show lawfulness when the person making the claim should not be there as he is not the PSC/BO.

We require that the court remove the trustee as he has suppressed and concealed material evidence by fraud by way of collusion and conspired with the bank and the lawyers and now he is lying to the court he is not fit for purpose and we want criminal charges brought against him he needs to be revoked now, we also want criminal charges brought against all parties involved here today as you can see by all the evidence they are all involved in this criminal behaviour.

The trustee should know whether the one making the claim is a viable company, is validated and has a PSC or BO for liability and then the lawyers should have the same credentials otherwise he is delinquent in his duties.

The thing that the bank and lawyers are coming for is the interest (the insurance) from the security, legally that is all they can claim as we are the secured creditor and we gave the bank the security as a deposit, (a secured entry on the books) we were then coerced into a contract.

How they get around it is they let you default on the interest, they claim against the interest of the insurance that you signed up for. The lawyers then get the insurance side of it and the bank falls back to the equity side of the security which is the land title deed/Property.

The bank can never take you to court for the security because you are the secured creditor they are coming after your insurance policy.

When we go to the bank we sign two things, the agreement which is the Note (security) and the contract (compound interest which is the insured side of the security not the security itself two separate things)

The bank can never take out insurance on the security because you are the secured creditor so they do a separate contract which has terms and conditions which gives them power of attorney for all claims against you if you default on any of these insurances.

You signed a security, how can you be the debtor of the security? You can't, but you can be the debtor on the insurance side of it, the liability, because that's a contract, that's a separate thing between you and the bank. The bank has conned you into thinking it has given you something and you are paying down a mortgage. On top of that there is the insurance (compound interest). Now as part of that interest there are a lot of insurances with terms and conditions (the fine print) which covers absolutely everything. They don't care about the security they are coming after the beneficial interest because you have signed a contract and gave them power of attorney over the terms and conditions of the interest.

We ignore any correspondence from the bank as we can't do anything till the lawyers get involved then we send a DSAR which is pertaining to the claim itself where they are saying that they have an

interest, which would be the deed of assignment or deed of novation and PSC or BO with 25% shares. That now brings in pre action protocols, we now have the bank and the lawyers covered and we are going after the lawyers if they ever decide to take this to court and we are going to have a draft order for the return of the surplus, principal and the interest plus damages, court costs and criminal charges against them.

Deforciare; To withhold lands or tenements from right owner.

It's a land grab and we can show it as they never gave us anything in the first place it has always been ours they just tricked us into a contract waited for us to default and then come after the beneficial interest and because nobody knows the rules to this, they don't understand the construct they are losing their homes. We have been coerced into a contract by a fraud making the original contract null and void because there was no transparency, full disclosure, openness on the table right from the beginning. There is the reason we stopped paying into this as we could see all the fraud being committed and could no longer be a part of it as we could get 7 years in prison for colluding in fraud, so as a good citizen we are bringing it to the attention of the people who are able to put a stop to it.

Only the person of significant control or Beneficial owner can put a claim against you on a beneficial interest, he is claiming he has given you something, well he has, a contract on the interest and we signed terms and conditions to it. This is where the deed of assignment and deed of novation come in, it is a legal requirement. By law you have to be there to sign it, we were there with the bank originally but not with the lawyers when the deed of nov/assignment were done there should be three signatures on it, yours, the bank and the lawyers which brings in the privacy act and the data protection to a security.

The bank does not have a PSC or BO so cannot put a claim in so that kills the security but we still have to deal with the interest (contract) which they have now sold to the hedge fund which is the lawyers, we now need to chase the lawyers to see if they have a PSC or BO, we know they are claiming it for the bank but they are really claiming it for themselves as they have bought the debt of the interest.

So now we have to search everyone involved in the matter to see if any of them have a PSC or BO starting with the bank, the originator, from there we can pull out the trustee's oath, he is claiming to be doing this with fairness, transparency, openness and due diligence as a trustee and they must be squeaky clean, how can he claim to be clean when we can prove that the person with significance interest of that claim has no valid claim, would that not be classed as collusion, concealment, conspiracy to commit fraud.

Now let's talk about pre action protocols, by sending your DSAR to the bank and the lawyers under the privacy act and the data protection act asking for the security and beneficial interest to come forward you have now started your pre action protocols and they can never say they didn't know. The important thing now is to bring out the collusion and fraud as we can now prove without a shadow of a doubt that whoever is claiming that interest of the security of the interested party has lied on paper, we need to know who are all involved because it looks like they have all colluded on this including the trustee. So now under the UCPR, the pre action protocols under the rulings have been breached on every level and we know why it has been breached because we can now show fraud. The next question is, how far does this criminal fraud go because we are now asking for this matter to be transferred to a criminal court for criminal charges to be brought against the bank, the lawyers and the trustee who has colluded with all of them as he has failed to bring forward the fact that there is no claimant with a beneficial interest.

Under the rulings of trustee law the trustee has to do a complete audit on you and everybody against you which will be the bank and the lawyers so how has he missed that there is no PSC or BO to make a claim? So all we can surmise is that he has colluded with the bank and the lawyers and is now attempting to hoodwink the court as the court has given him the title of trustee which puts the judge

into question of involvement. We are here today to get you to rectify that and put in an immediate annulment and an investigation and then we would like to transfer it to a crown court.

We are now going to show this to the judge and others above him including the police and the mps', we are going to show them what you are doing because you are not just doing this to me, we have the feeling you are doing this to everybody that has a mortgage and you are not coming for the security you are coming after the beneficial interest. They have no claim to that as we have just proven, how can they put a claim on if they can't under the companies act, a legal requirement, somebody has to have liability to this and they have no liability to this but they can take all the benefits, I don't think so!

We would like criminal charges brought against the bank, the lawyers and the trustee for aiding and abetting, colluding and conspiring fraud, here is the evidence.

These people are conspiring to actively steal our equity don't take it lightly it is a criminal offence and it needs to be treated as such.

We have never refused to pay anything here we stopped paying because we heard rumours that this was all done on a ponzi scheme and we now have the evidence to back it, this is a serious problem and we need to find out how far this goes, does it go right up to the judge and they are all in it together?

We are not going to let this go as we are talking about our home, our life, our family equity and it is inside a trust which is a separate issue which brings in a different jurisdiction.

Somebody has put in a fraudulent claim claiming they have a beneficial interest in the interest of my security, we have asked them to show it and they can't which now brings in the corporations act and others.

Then there is the matter of the security, now as we are the secured party creditor they can never bring the security forward as it shows that it is ours. The security is the argument but the interest is what they are claiming. The beneficial interest is the key to all of this.

An office has just put a claim against us so we are pulling them from that office, show me that claim, prove you are that office and you have that authority because if you are lying we are coming for you.

IMPORTANT PLEASE READ:

We have not failed to do anything here we have just deferred payments until certain legal requirements by law has come forward so we are not aiding and abetting some form of tax evasion, fraud, criminality which is a seven year prison sentence for the crime, we are law abiding citizens.

We have asked the questions and they are legally bound by their offices, obliged under the **statutory acts to comply,** why haven't they complied? Well we know the answer it's because of everything we have just talked about.

We now do a draft order for the court claiming, Payment of the security and the interest to be paid back in full, we require all court costs to be paid by the defence and would also like criminal charges brought against X, Y and Z for collusion, aiding and abetting, fraud, tax evasion and a full investigation to happen immediately, also the matter needs to be struck out for no validity.

If you wanted to open up a company we would be persons opening it but one of us would have to have a minimum share for liability as it is a legal requirement, so there can be many directors but only one can be PSC or BO for liability claims and they must have a minimum of 25% shares and have that information registered on the ASIC register, and of course only persons can open a company not men or women. Without that PSC or BO they can't make that claim and have no valid argument in a court of law. What they are claiming is that they gave you something so they have a beneficial interest in the interest of our security and it is the interest they are after because you signed a contract with the bank, but hold on WHO in the bank did you sign the contract with because legally speaking it has to be someone with significant control with a minimum 25% shares, a legal requirement for all liabilities to and from the company and someone has to take responsibility and liability for it, if someone is harmed. If they turn around and say that they don't need it because everybody has lots of small shares then they have a problem as the law says they must.

so…here is what happens!!!!!

The banks says to the lawyers "

"we can't take him to court because we have no PSC or BO legally speaking, under the rules of law we cannot say that one of us is solely responsible for giving him a loan as we would be committing fraud, we have got a contract with him though which is the interest (beneficial interest) so you buy the interest and you say you are working on our behalf" (hold on isn't that collusion, they have actually conspired to do this, they have planned coercion and fraud) so let's get together and work out how we are going to do this. The lawyers say this is simple we will say we are working on your behalf so we can claim client privilege we don't need to discuss anything or disclose anything under the data protection act which is technically correct, but technically when it comes to a security with interest that is not correct because they are dealing in stocks, bonds, certificates and the like which brings in the rules of transparency, fairness, openness and full disclosure all of these things come in to play.

So the lawyers say well we are doing it now so we have now got a claim of an interest from the claiming party, they are now going to get another lawyer involved who is going to witness a firsthand knowledge on an affidavit of truth claiming they have a personal interest of everything and this is all above board, authenticated and real, but how can it be because you have no evidence that somebody has made a claim, who has made the claim? The bank! No **the bank can't make a claim somebody has to own the bank to take the liability, usually the CEO is a director he or she is the one solely responsible for the bank and we have him here, this is his name…….. But if you search**

the register on companies' house or ASIC or SEC he should be the PSC/BO for liability so he or she should be the one chasing us. Now that brings in the company act or corporations act 2001, as a director or CEO of a corporation he has got to give full transparency and know what everyone else below him is doing, so now he has colluded in this.

So the bank is never going to chase you for the mortgage because you are the creditor, they can only chase you for something you signed up to. You signed a separate agreement with the bank with terms and conditions of an interest (compound interest) and they tricked us by saying it is for the loan and the compound interest but technically it isn't, it is just the interest legally speaking because we are the secured creditor by definition and the bank knows that but they have now colluded and coerced me into a contract which is null and void. So basically anything from that day did not have transparency, openness, full disclosure or duty of candour from any party they did not explain to you what you were getting in to, not only that they have done the worst thing they can do in a corporate sense there is no one with liability here yet they are claiming a liability.

SO…TO RECAP…AND GET THIS NOW

So to recap, we went to the bank for a loan and the bank gave us the loan, they have now said you owe the bank because they gave you something, well technically they did, they gave us a contract but no consideration. so when the lawyers come to take it they will say the client (bank) has got a personal interest in this (beneficial interest) it's the interest they are coming for is the bit we need to understand which is technically, legally correct because we did sign a separate contract with the bank,

we signed 2 things that day, one for the agreement, promissory note/security and one for the contract for the money coming out of the bank account which has separate terms and conditions of insurance which would be the liability, that is what

they will always present to a courtroom because that is a legal requirement and they have not lied to anyone, but what they have failed to tell the court is that it was never their security in the first place, they are not allowed to say they own it as we signed it, it's ours. Do you see how big a con this really is?

As a fundamental rule of law He who makes the claim has to verify the claim, the lawyers are saying my client is taking you to court because you owe money on a mortgage or a bank loan on a security and interest and the interest will be in there in some paragraph either before or after the security, it is always there you will not miss it, it is a legal requirement and that is what they are coming for that is their legal argument. What they don't have is the PSC or BO, Who has claimed the claim? That is their downfall, all we have to do is call out the individual for the bank, well that would be the CEO would it not? He is the senior director for that company, he should take sole responsibility for all the actions for all of the employees claiming this on a claim only he and he alone can make that claim, so why is he not the PSC or BO with a minimum of 25% shares as directed by company house it's a legal requirement or is there some sort of fraud and collusion going on here.

To see how to find the PSC or BO for a corporation the link attached will take you to a video on youtube which is attached to a website called expertinalllegalmatters where Steve shows you how to do it. https://www.youtube.com/watch?v=LAibnvdoA-g&t=9s

All of this came into play in 2016 and is worldwide under article 263 of the TFEU (*Treaty on the Functioning of the European Union)* because it is to do with tax evasion and fraud and criminality pertaining to money laundering. Over 300 countries signed in to it and it can be found in Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

The bank can never take you to court for the security that's why they will never show it in court and they will always get a lawyer involved, the lawyers are the ones who have bought the liability side of it, the debt, the compound interest which we have promised to pay on top of something for 30 years which is a contract that we signed up for which has;

- **Power of attorney**
- **Terms and conditions**
- **All the insurances which cover everything including the house**

They are claiming to have given you something, a security but they can never give you a security, they only purchase securities and they are dead in the water until it is signed by the secured creditor which is you. So they can't claim it, they are not allowed to, your name and signature is on it not theirs. So what they do is they say you will find the money in your bank and you need to sign terms and conditions to get payments out of your bank, that is the contract, that is the PSC/BO on the insurance side of it on the liability and it is there for 30 years. Now you are paying 2 things down when legally speaking you should only be paying one thing down, the interest not the principle, the principle is already yours they are the ones hedging up the liability not you, you signed it, you are the creditor so they are liable to you.

How do they get around it? They get a private conveyance with the bank a PSC of the liability of the interest, you are paying the compound interest, the liability that is the only contract you have with them, with any lending facility not the actual agreement which is the security, so the terms and conditions are not in the agreement which they should be from the start.
Let's look at this logically there are two things we signed on that day, Firstly we signed an agreement, now did that agreement have terms and conditions attached, No it didn't! Why didn't it? Because you gave it to the bank the minute you deposited it (signed it) you are the depositor, you gave the bank something it was just for an amount on a security which is a bond or a certificate depending on how it is traded, you don't know that yet because you don't date it you always leave it blank, then what they do is they say you need to sign this now for you to pay the secured interest and the interest on this. Now as you are paying the principal and the interest you need to sign this contract with the bank, hold on! Shouldn't all the terms and conditions be on the agreement we just signed? Why are they not on the one agreement? Well they aren't. In this new contract are the terms and conditions, power of attorney being one of them, they are claiming power of attorney and that they can come for you anytime you fail to keep up the payments of the interest not the mortgage because they gave you the compound interest and you signed for it.
Now as they have power of attorney with the beneficial interest to the claim, they then can take you to court legally. The agreement is the secured credit they just put it down because under the FLD on special drawing rights they have got an interested party because a security has been signed, they are not saying who the secured person is they are implying that it is them, it is legalese they have never once said they own that security so legally they have never broken any law. What they do have which is valid under law is the interest, the PSC that actually agreed to all this for the bank and you agreed with the bank to pay down the compound interest, the liability 38.18.

7 The application, therefore, by Westpac is of a kind the Australian origins of which may be traced to a judgment given by Needham J in *Re Tulloch Ltd and The Companies Act* (1978) 3 ACLR 808 concerning the operation of provisions cognate to s 133 of the Bankruptcy Act found in the then *Companies Act 1961* (NSW). More particularly, Westpac's application is made pursuant to s 133(9) of the Bankruptcy Act which provides:

133(9) The Court may, on application by a person either claiming an interest in, or being under a liability not discharged by this Act in respect of, disclaimed property, and after hearing such persons as it thinks fit, make an order, on such terms as the Court considers just and equitable, for the vesting of the property in, or delivery of the property to, a person entitled to it or a person in whom, or to whom, it seems to the Court to be just and equitable that it should be vested or delivered, or a trustee for that person.

8 A helpful collection of pertinent authority is to be found in a recently delivered judgment of Derrington J in *Commonwealth Bank of Australia v State of Queensland, in the matter of Hewton* [2021] FCA 22, at [15]. Suffice it to say, the prevailing view is that subject to the operation of s 133(9) of the Bankruptcy Act, the effect of the disclaimer is to cause the interest in the property to vest in the Crown in right of Victoria but not to destroy an interest such as that held by Westpac under its registered mortgage. The Court is empowered under s 133(9) of the Bankruptcy Act, as the authorities summarised by Derrington J reveal, to make an order the effect of which is to permit a

mortgagee such as Westpac to realise its security but, in recognition of the interest that disclaimer creates in the Crown, with the proviso that any surplus be paid into this Court. In the ordinary course of events and subject to any other interest which survived bankruptcy being proved. One might expect that any such surplus would on application by the State be paid to the State.

SDRs cannot be held by private entities or individuals.

https://www.cdpp.gov.au/victims-and-witnesses/commonly-used-terms

In higher courts, the prosecution may be referred to as 'the Crown'. This is because prosecutors that work for the CDPP are representing the Queen in her role as the head of the Commonwealth.

This is not the mortgage that is another thing all together.

To the Juristic Person known as Stephen Dickens acting in the de facto office ,,,,,,,,,Company and Address... as ??? Officer, to be identified as the natural person, identifiable living individual know as Stephen Dickens who has the full legal/lawful obligation and personal liability to cause no harm to any brothers and sisters of the One world trust REF: Unam Sanctam 1302, take note we are all beneficiaries any harm caused will be reported to the Roman Curia ref; Motu Proprio 2013

To all the people that have touched my personal information now they have to answer to a judge and show lawfulness and legal's to this, the person that touches this must have a data protection policy in place and must have a data controller, data processor, be licensed and have certification in place showing competence, fairness, openness and transparency, it is a legal requirement.

Now if none of these things including the certificate come forward that shows incompetence and is a criminal offence under the act, now that doesn't include section 173 of the DPA 2018 for data blocking etc, once you have asked the question they are legally obliged under public task to answer, if they fail to answer you have them by the balls how hard you squeeze is up to you. You then need to make a claim against them in a criminal court against them and the claim would be against the CEO of the corporation and any employee who has their name on the paperwork that has been sent to you.

All we want is to be left alone and the only way that that will happen is showing them that it is going to cost them so much that it is not worth it.

Lord Lyon is in charge of all corporations and all persons worldwide it is all a presumption, how can the dead talk to the living? They bridge this by the corporation aggregate to the corporation sole via the LLP so there must be a deed of assignment it is a legal requirement under section 32.12, 32.14 CP Rules full disclosure of all data, then there is 81.11 and 82.18 someone bringing documents in to court and lying on a statement of truth to a judge.

We are calling you all out one at a time, we don't care who you are if you touch our data you are in trouble and you will have to explain yourself to a criminal judge, it is quite simple your honour, all these people touched my data we hope you all have your data protection policy in place? Have you got your PII (personal indemnity policy) in place? Have you got your PSC or BO with 25% shares of the claim of the beneficial interest of the claim?

We put in a DSAR/Information request under the GDPR and Privacy act pertaining to the particulars of the case and at this moment your honour that claim has not been justified by the claimant, he has failed to come forward with all these things we have asked for like, the original security, the person of significant control, the deed of assignment shall we go on? Which now brings in pre action protocol, pre action your honour so how can there be a case we haven't got past pre action? So I would like you to order the claimant to comply with an order to bring forward all the information requested. Here is my draft order.

Your honour there is an alleged claim here but at the moment the particulars of that claim have not come forward, where is the evidence? At the moment this is just a notice I have yet to see any evidence of this claim. **The judge may then say well didn't you take out a loan?** That's not the argument here today your honour this is about a security it has nothing to do with loans or mortgages that's a contract we will get to that later, we are not going to touch that yet we were coerced by the bank manager that was fraud right from the start, we are on about a security and someone has to be liable for this and that will have to be the person making the claim. Under the companies act under ASIC and all the new provisions throughout the world under the FTAF which Australia is under as of 2016 the BO/PSC must have a minimum 25% shares for liability, that natural person is making that claim, who is it? The legal's to it, if it is a security which would be a bond or a certificate then the natural person that is holding this or transferring it through a SPV aka a bank must have a PSC/BO for liability in case it goes wrong or somebody is harmed, there has to be somebody to sue and at the moment they are not answering me your honour which is legal requirement under the companies act, the financial markets act and the securities act shall we go on? Your honour we are trying to give some leeway here we have done our due diligence and we haven't even brought in the UCPR, full disclosure prior to pre action protocols, I have not had any so where is the fairness here today, there is no fairness, openness or transparency from the alleged claimant and I am going to call him alleged because at the moment this is just a notice, there is no proof of anything.

The biggest thing to back us up is the execution of deeds and documents, service of documents to us under the UCPR (sections 210-233 Qld) which they are bound by, which means they have to get them all to us and at this stage we haven't had them. We have put in a DSAR/Information request under the Privacy act and the service of documents I have required for proof of claim to the particulars of the claim have yet to come forward.

Don't forget this has NOTHING TO DO WITH MORTGAGES, LOAN, EQUITY THIS IS ALL ABOUT SECURITIES it is important to get that in your head, do not move from that. They trap you by saying you have a contract with the bank which is a separate issue but you were coerced and bullied into a contract when there was no need to be, it is all planned from the start by the bank and the lawyers, show me evidence that proves that I am wrong.

They make the claim it is our job to rebut it, then we can move forward with our own claim because if they can't produce the evidence for their claim are they going to be able to produce it for yours? No so you have already won. Play the system the way it is supposed to be played it is just a game it is not real we are making it real. It's just paper coming from the past into the future, when they do paperwork they do it from the past and it comes flowing through to the present, how can that be real? Can they time travel? Someone has to do a

firsthand witness statement to the offence, the one making the claim must own at least 25% shares of a beneficial interest of the entity making the claim.

Example 1a: A clear beneficial owner

Ash Pty Ltd wants to open an account with Birch Bank. Because Birch Bank is a reporting entity who would be providing a designated service to Ash Pty Ltd, it must now identify Ash's beneficial owner(s).

Ash Pty Ltd provides certified copies of its most recent ASIC annual statement, including amendments, which shows Ash's holding company, office holders, company share structure and members with Mr Green owning 60%, CEO Ms Plum owning 20% and Ms Silver owning 20%.

Based on this information, Birch Bank identifies Mr Green as a beneficial owner because he owns more than 25% of the issued share capital in Ash Pty Ltd.

Example 1b: Ownership not concentrated with one individual

Ash Pty Ltd wants to open an account with Birch Bank. Because Birch Bank is a reporting entity who would be providing a designated service to Ash Pty Ltd, it must now identify Ash's beneficial owner(s).

Ash Pty Ltd provides certified copies of its most recent ASIC annual statement, including amendments, which shows Ash's holding company, office holders, company share structure and members, with CEO Ms Plum owning 20% and another four shareholders each owning 20%.

Because Ash's ownership is not concentrated with one individual holding more than 25% of its share capital, and no other individual owning or controlling 25% of its shares through voting rights or other means, then Birch Bank would identify Ms Plum as the beneficial owner. This is because as CEO she controls the company by making daily decisions about its financial and operating policies.

In some cases, it may be appropriate to identify beneficial owners considering both ownership and control, for example with higher risk customers, or if there are concerns about ownership information.

Since 2007 the Anti-Money Laundering and Counter-Terrorism Financing Act (2006) (AML/CTF) has mandated obligations on reporting entities which provide a designated service. Designated services are provided by banks, nonbank financial services, remittance (money transfer) services, bullion dealers and gambling businesses.

To meet these obligations, over 14,000 Australian organisations need to conduct enhanced customer due diligence, transaction monitoring, threshold and suspicious matter reporting, record keeping, correspondent banking controls and the implementation of an AML/CTF program. From 1 January 2016 these obligations were tightened to additionally require:

- Identification and verification of individuals and companies using independent, reliable data
- Collection and verification of beneficial ownership and control
- Implementation of PEP & Sanctions Screening for customers and beneficial owners
- Implementation of ongoing risk-based AML management and Customer Due Diligence processes.

Compliance with the AML legislation can be costly; non-compliance can be even more costly.

From September 2016 the legislation was further amended to allow reporting entities to collect information about their customers from providers like Equifax, rather than collecting all information directly from their customers.

What Birch Bank must do

Birch Bank must verify the identity of both the company and the beneficial owner.

- Ash Pty Ltd in line with the customer identification procedures for a company.
- Beneficial owner Mr Green in example 1a and beneficial owner Ms Plum in example 1b in line with the customer identification procedures for individuals.

Now you can't take the council to court and you can't take the bank to court but you can take the individual to court. Only a corporation can take a corporation to court.

Who made the claim, the liability falls on the individual, who signed the paper? The CEO normally carries the liability he is the one that gives the employees authority to sign the paperwork so it falls on the CEOs' head and we are calling him out.

A corporation is a dead entity it can't own anything that's a legal doctrine, can it pick up a piece of paper and take it to court? Ask the bank to come in to court, hold on where is the building I can't see it, well it has representation, no that's representation, that's a contract, where is the bank? Legally there should be a PSC or BO from that bank. Now are there any documents anywhere that says the banks are just corporations and can't own anything? Well technically there isn't because if there was the shit would hit the fan rather quickly and everyone would be saying hold on we are not going to have anything to do with this because it is not in your beneficial interest, but to prove it show me the person of significant control or Beneficial owner, but if there is no PSC or BO tell me who is coming forward to claim that, it is only on paper, it isn't real, anybody can say anything on paper but they still have to prove it, so, prove it.

They claim that the Crown owns 70% of all land, prove it! You could go down to any property the council says is theirs, cut the locks off, put your own locks on and claim it as your own. All you need to do is a stat declaration that you are claiming this back for the people because it is the peoples land and that is how you would start the process, there is a legal doctrine you have to do but as people are generally lazy it doesn't happen. In the old days people would put a proclamation on a paper which is a notice to tell you what they are about to do and if you didn't like it you could then put paperwork in and stop it until there was a town meeting on the matter, people would turn up listen to the opinions of the parties and then vote on it.

Now they still have a vote but you are not invited to that vote but they have already put it on a lamppost or a fence or something like that, the point of the matter is the minute they do that you need to put a stat dec in which is an objection to what they are doing legally through the court system because legally they go through court now and because there is a stat dec they know there is a man or woman has come forward to put a claim against what the council have done, they have a choice to take this to court but only the PSC can claim they own that land, how do you own that land? You oversee that land you don't own anything, you work on

behalf of the church, that is your job to oversee what the church asked you to do as the church can't oversee everything, originally.

You can't own anything the council are not allowed to own anything, nobody is, why? Because the crown own 70% of it, is that not a conflict of interest? So what do we do when the council put a charge against our property on the land registry? Well I am glad you asked, we then put in a complaint to the CEO saying we have just become aware that you have just put a charge in the land registry saying you own some land, we are now putting a stat dec in saying you don't own the land it belongs to the people and the sovereigns, bring forward the PSC or BO who claims to have the interest in that. Thank you very much.

A legal doctrine under their rule system.

87 False certificates 1914 Crimes act

Any person who, being authorized or required by a law of the Commonwealth to give any certificate touching any matter by virtue whereof the rights of any person may be harmfully affected, gives a certificate which is, to his or her knowledge, false in any material particular, commits an offence.

Penalty: Imprisonment for 2 years.

Bankruptcy act 1966

77C Power of Official Receiver to obtain information and evidence

(1) The Official Receiver may, by written notice given to a person, require the person to do one or more of the following:

(a) give the Official Receiver information the Official Receiver requires for the purposes of the performance of the functions of the Official Receiver or a trustee under this Act;

(b) attend before the Official Receiver, or an officer authorised in writing by the Official Receiver to exercise powers under this paragraph, and do one or both of the following:

(i) give evidence relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act;

(ii) produce all books in the person's possession relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act;

(c) produce all books in the person's possession relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act.

It does not matter whether or not the person is a bankrupt or is employed in or in connection with a Department, or an authority, of the Commonwealth or of a State or Territory.

(2) The Official Receiver or authorised officer may require the information or evidence to be given on oath, and either orally or in writing, and for that purpose may administer an oath.

Part VI——Administration of property

Division 1——Proof of debts

Debts provable in bankruptcy

82 D(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

(3B) A debt is not provable in a bankruptcy in so far as the debt consists of interest accruing, in respect of a period commencing on or after the date of the bankruptcy, on a debt that is provable in the bankruptcy.

83 Debt not to be considered proved until admitted For the purposes of this Act, a creditor shall be taken not to have proved a debt until a proof of debt lodged by him or her in respect of that debt has been admitted.

84 Manner of proving debts.
(1) Subject to this Division, a creditor who desires to prove a debt in a bankruptcy shall lodge, or cause to be lodged, with the trustee a proof of debt in accordance with this section.
(2) A proof of debt:
(a) shall set out particulars of the debt;
(b) shall be in accordance with the approved form;
(c) shall specify the vouchers, if any, by which the debt can be substantiated; and
(d) shall state whether or not the creditor is a secured creditor.
(3) Where the trustee is of the opinion that it is desirable that all the matters, or some of the matters, contained in a proof of debt lodged with him or her by a creditor should be verified by statutory declaration, the trustee may serve on the creditor a written notice informing the creditor that he or she is of that opinion and that, unless the creditor lodges with the trustee a statutory declaration verifying the matters contained in the proof of the debt or such of those matters as the trustee specifies in the notice, the trustee will administer the estate as if the proof of debt had not been lodged.

(4) A statutory declaration verifying matters in a proof of debt lodged by a creditor may be made by:

(a) the creditor; or

(b) a person whose own knowledge includes the facts set out in the statutory declaration and the proof of debt, and who is authorised by the creditor to make the declaration.

(5) Where the trustee serves a notice on a creditor under subsection (3) in respect of a proof of debt, the proof of debt shall, for the purposes of this Act (other than section 263), be deemed not to have been lodged with the trustee unless and until the creditor has lodged with the trustee a statutory declaration verifying the matters in the proof of debt or such of those matters as are specified in the notice, as the case requires.

(6) A proof of debt under this section, or a statutory declaration referred to in subsection (3), sent to the trustee by post as certified mail (postage being prepaid) shall be deemed to have been lodged with the trustee and shall be deemed to have been so lodged at the time at which it would have been delivered in the ordinary course of post unless it is shown that the trustee did not receive it at that time.

86 Mutual credit and set-off

(1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy:

(a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;

(b) the sum due from the one party shall be set off against any sum due from the other party; and

(c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the person who has become a bankrupt or at the time of receiving credit from that person, he or she had notice of an available act of bankruptcy committed by that person.

87 Deduction of discounts

In proving a debt, a creditor shall make an allowance for all discounts for which an allowance would have been made if the debtor had not become a bankrupt.

90 Proof of debt by secured creditor

(1) A secured creditor is entitled to prove the whole or a part of his or her secured debt in the debtor's bankruptcy in accordance with the succeeding provisions of this Division, and not otherwise.

(2) A secured creditor who surrenders his or her security to the trustee for the benefit of creditors generally may prove for the whole of his or her debt.

(3) A secured creditor who realizes his or her security may prove for any balance due to him or her after deducting the net amount realized, unless the trustee is not satisfied that the realization has been effected in good faith and in a proper manner.

(4) A secured creditor who has not realized or surrendered his or her security may:

(a) estimate its value; and

(b) prove for the balance due to him or her after deducting the value so estimated.

(5) A secured creditor to whom subsection (4) applies shall state particulars of his or her security, and the value at which he or she estimates it, in his or her proof of debt.

91 Redemption of security by trustee etc

(1) Where a secured creditor has lodged a proof of debt in respect of the balance due after deducting the estimated value of his or her security, the trustee may at any time redeem the security on payment to the creditor of the value at which it has been estimated by the creditor.

97 Production of bills of exchange and promissory notes

Where a creditor seeks to prove a debt in respect of a bill of exchange, promissory note or other negotiable instrument or security on which the bankrupt is liable, the proof of debt shall not, subject to any order of the Court to the contrary, be admitted, unless the bill, note, instrument or security is produced to the trustee.

107 Creditor not to receive more than the amount of his or her debt and interest

Subject to the operation of the provisions of section 91, a creditor is not entitled to receive, in respect of a provable debt, more than the amount of the debt and any interest payable to him or her under this Act.

(iii) the balance of money held by the trustee in relation to the estate; and
(b) at least once every 25 business days, reconcile the balance relating to each estate held in the account with the corresponding record maintained under paragraph (a).

65-40 Handling securities
Securities must be deposited with administration account bank
(1) The trustee of a regulated debtor's estate must deposit in a bank:
(a) the bills of exchange; and
(b) the promissory notes; and
(c) any other negotiable instrument or security; payable to the regulated debtor or the trustee as soon as practicable after they are received by the trustee.
Exception
(2) If the Court gives a direction that is inconsistent with subsection (1), that subsection does not apply to the extent of the inconsistency.
Offence
(3) A person commits an offence of strict liability if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person fails to comply with the requirement.

Delivery of securities

(4) The bills, notes or other instrument or security must be delivered out on the signed request of the trustee.
Penalty: 5 penalty units.
Note 1: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).
Note 2: See also section 277B (about infringement notices).

Division 6—Composition or arrangement with creditors

73 Composition or arrangement
(1) Where a bankrupt desires to make a proposal to his or her creditors for:
(a) a composition in satisfaction of his or her debts; or
(b) a scheme of arrangement of his or her affairs;
he or she may lodge with the trustee a proposal in writing signed by him or her setting out the terms of the proposed composition or scheme of arrangement and particulars of any sureties or securities forming part of the proposal.
(1A) The trustee must, within 2 business days after receiving the proposal, give a copy of the proposal to the Official Receiver.
Penalty: 5 penalty units.
Note: See also section 277B (about infringement notices).
(1C) Subsection (1A) is an offence of strict liability.
Note: For strict liability, see section 6.1 of the *Criminal Code*.

Criminal code 1995

480.2 Dishonesty

(1) For the purposes of this Part, dishonest means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

480.4 Dishonestly obtaining or dealing in personal financial information

A person commits an offence if the person:

(a) dishonestly obtains, or deals in, personal financial information; and

(b) obtains, or deals in, that information without the consent of the person to whom the information relates.

Penalty: Imprisonment for 5 years.

480.5 Possession or control of thing with intent to dishonestly obtain or deal in personal financial information

(1) A person commits an offence if:

(a) the person has possession or control of anything; and

(b) the person has that possession or control with the intention that the thing be used:

(i) by the person; or

(ii) by another person;

to commit an offence against section 480.4 (dishonestly obtaining or dealing in personal financial information) or to facilitate the commission of that offence.

Penalty: Imprisonment for 3 years.

Part 10.9——Accounting records Division 490—False dealing with accounting documents

490.1 Intentional false dealing with accounting documents

(1) A person commits an offence if:

(a) the person:

(i) makes, alters, destroys or conceals an accounting document; or

(ii) fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter; and

(b) the person intended the making, alteration, destruction or concealment of the document (or the failure to make or alter the document) to facilitate, conceal or disguise the occurrence of one or more of the following:

(i) the person receiving a benefit that is not legitimately due to the person;

(ii) the person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit;

(iii) another person receiving a benefit that is not legitimately due to the other person;

(iv) another person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit (who may be the first-mentioned person);

(v) loss to another person that is not legitimately incurred by the other person; and

(c) one or more of the circumstances referred to in subsection (2) applies.

(4) An offence against this section committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

(5) An offence against this section committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

(a) 100,000 penalty units;

490.2 Reckless false dealing with accounting documents

(1) A person commits an offence if:

(a) the person:

(i) makes, alters, destroys or conceals an accounting document; or

(ii) fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter; and

(b) the person is reckless as to whether the making, alteration, destruction or concealment of the document (or the failure to make or alter the document) facilitates, conceals or disguises the occurrence of one or more of the following:

(i) the person receiving a benefit that is not legitimately due to the person;

(ii) the person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit;

(iii) another person receiving a benefit that is not legitimately due to the other person;

(iv) another person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit (who may be the first-mentioned person);

(v) loss to another person that is not legitimately incurred by the other person; and

(c) one or more of the circumstances referred to in subsection 490.1(2) applies.

(2) Absolute liability applies to paragraph (1)(c).

Note:

For absolute liability, see section 6.2.

Penalty for individual

(3) An offence against this section committed by an individual is punishable on conviction by imprisonment for not more than 5 years, a fine not more than 5,000 penalty units, or both.

We would note and refer to Sections 81, 82 and 83A of the Crimes Act 1958 Where Section 81 provides for obtaining property by deception. (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum). (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain. Where Section 82 provides for obtaining financial advantage by deception. (1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum). Where Section 83A provides for falsification of documents. (1) A person must not make a false document with the intention that he or she, or another person, shall use it to induce another person to accept it as genuine, and by reason of so accepting it to do or not to do some act to that other person's, or to another person's prejudice. Penalty: Level 5 imprisonment (10 years maximum). (2) A person must not use a document which is, and which he or she knows to be, false, with the intention of inducing another person to accept it as genuine, and by reason of so accepting it to do or not to do some act to that other person's, or to another person's prejudice. Penalty: Level 5 imprisonment (10 years maximum).

Lastly, at the very time that the Australia Acts came into law in Australia to prevent the UK Government from interfering in Australian matters (see also Sue v Hill HCA 30 of 1999), the Letters Patent relating to the Governors of South Australia, Tasmania, Victoria, Queensland and Western Australia was signed off by none other than Sir Anthony Derek Maxwell Oulton, KCB, QC, MA, Ph.D., Permanent Secretary, Lord Chancellors Office, UK Parliament!

Division 2—Creditors' petitions

43 Jurisdiction to make sequestration orders

(1) Subject to this Act, where:

(a) a debtor has committed an act of bankruptcy; and

(b) at the time when the act of bankruptcy was committed, the debtor:

(i) was personally present or ordinarily resident in Australia;

(ii) had a dwelling-house or place of business in Australia;

(iii) was carrying on business in Australia, either personally or by means of an agent or manager; or

(iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

Corporations regulations 2001

5D.1.03 Meaning of mortgage-backed security

(1) A mortgage-backed security is:

(a) an interest in a trust that entitles the holder of, or beneficial owner under, the interest to:

(i) the whole, or any part, of the rights or entitlements of a mortgagee and any other rights or entitlements in respect of a mortgage or pool of mortgages; or

(ii) any amount payable by the mortgagor or mortgagors under a mortgage or mortgages (whether or not the amount is payable to the holder of, or beneficial owner under, the interest on the same terms as under the mortgage or mortgages); or

(iii) payments that are derived mainly from the income or receipts of a mortgage or pool of mortgages; and that may, in addition, entitle the holder, or beneficial owner, to a transfer or assignment of the mortgage or mortgages; or

(b) a debt security (whether or not in writing) the payments under which by the person who issues or makes the debt security are derived mainly from the income or receipts of a mortgage or pool of mortgages; or

(c) any of the following:

(i) an interest in a trust:

(A) creating a right or interest (whether described as a unit, bond or otherwise) for a beneficiary; or

(B) conferring a right or interest (whether described as a unit, bond or otherwise) on a beneficiary; or

(C) consisting of a right or interest (whether described as a unit, bond or otherwise) of a beneficiary; in a scheme under which any profit or income in which the beneficiaries share arises from the acquisition, holding, management or disposal of a mortgage, pool of mortgages or the income or receipts of a mortgage or pool of mortgages;

(ii) any instrument that evidences a right or interest mentioned in subparagraph (i);

(iii) a security (whether or not in writing) the payments under which by the person who issues or makes the security are derived mainly from the income or receipts of a mortgage or pool of mortgages;

(iv) an interest in a trust or a debt security (whether or not in writing);

(v) an instrument or property that creates an interest in, or charge over an interest in, a trust;

(vi) a debt security (whether or not in writing);

(vii) any other property to which paragraph (a) or (b) or subparagraph (i),

(ii) or (iii) applies.

(2) However, a mortgage-backed security does not include an instrument or property consisting of any of the following:

(a) a mortgage;

(b) the transfer of a mortgage;

(c) a declaration of trust.

beneficial owner: Anti money Laund rules 2007

(1) of a person who is a reporting entity, means an individual who owns or controls (directly or indirectly) the reporting entity;

(2) of a person who is a customer of a reporting entity, means an individual who ultimately owns or controls (directly or indirectly) the customer;

(3) In this definition: control includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights, and includes exercising control through the capacity to determine decisions about financial and operating policies; and

(4) In this definition: owns means ownership (either directly or indirectly) of 25% or more of a person.

602A Substantial interest concept. Vol 3 corp act 2001

(1) A reference in this Chapter to a substantial interest in a company, listed body (other than a notified foreign passport fund) or listed registered scheme is not to be read as being limited to an interest that is constituted by one or more of the following:

(a) a relevant interest in securities in the company, body or scheme;

(b) a legal or equitable interest in securities in the company, body or scheme;

(c) a power or right in relation to:

(i) the company, body or scheme; or

(ii) securities in the company, body or scheme.

(2) A person does not have a substantial interest in the company, body or scheme for the purposes of this Chapter merely because the person has an interest in, or a relationship with, the company, body or scheme of a kind prescribed by the regulations for the purposes of this subsection.

(3) The regulations may provide that an interest of a particular kind is an interest that may constitute a substantial interest in a company, listed body (other than a notified foreign passport fund) or listed registered scheme for the purposes of this Chapter.

AUS - Birth Cert endorsement Personal Property Securities Act 2009 Chapter 2, Part 2.2, Section 18 and at the bottom Notice: Notices - registered secured parties - Section 287, Part 8.5, Chapter 8, Australia Personal Property Securities Act 2009

In regards to trustees in bankruptcy.

The High Court also considered the scope of liability for knowing participation under the second limb of *Barnes v Addy.* The High Court resolved the controversy that had existed since *Consul Development* in relation to the necessary state of knowledge for second limb liability. The Court found that12 "Baden 4" knowledge is sufficient to attract liability.

By Baden 4 knowledge, the Court was referring to Mr Justice Peter Gibson's decision in Baden v *Societe Generale*.13 In that case, his Honour set out 5 categories of knowledge:

(a) Actual knowledge;

(b) Wilfully shutting one's eyes to the obvious;

(c) Wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make;

(d) Knowledge of circumstances which would indicate the facts to an honest and reasonable man; and

(e) Knowledge of circumstances which would put an honest and reasonable man on inquiry.

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.

Thus, in the context of *Barnes v Addy* liability, a real question arises as to which of the duties owed by a director are fiduciary and which are not.

A basic list of directors' duties may read as follows:

(a) Duty to act with reasonable care and diligence.

(b) Duty to act bona fide in the best interests of the company as a whole.

(c) Duty to act for proper purposes.

(d) Avoidance of conflicts of interest.

(e) Avoidance of unauthorised profits.

The first three of these duties are expressed in the positive - a positive duty to do something, whereas the last two are expressed in the negative - things that a fiduciary must avoid.

In *Bell,* the Banks argued that the only duties that are fiduciary are the proscriptive duties, namely, the duties governing what a director cannot do. If that is correct, it would mean that the only fiduciary duties are the duty to avoid conflicts of interest and the duty to avoid making unauthorised profits.

Critical to the Banks' argument was the following statement by Justices Gaudron and McHugh in *Breen v Williams* (1996) 186 CLR 71 at 113:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose any positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

The second relates to proving dishonesty against the trustee or director. *Bell* is authority for the proposition that there is no need to establish conscious dishonesty (see above). It is sufficient if a person in the director's shoes should have known he was breaching his fiduciary duties. Thus, establishing what facts were known by the director and asking the Court to draw inferences about the director's state of knowledge from those facts will be critical.

The third practical consideration is a pleading point and relates to establishing that the trustee or director engaged in a *"dishonest and fraudulent design"*. If Justice Drummond's analysis (discussed above) finds support elsewhere, to prove this it may be necessary to establish whether or not the director was acting honestly, reasonably and should be excused. A question then arises as to who bears the onus in establishing this allegation. Is it an element of a cause of action under the second limb of *Barnes v Addy?* If so, it seems that it would be for the plaintiff to plead and prove that the director was not acting honestly or reasonably and should not be excused.

Barnes v Addy remains a potential source of liability for directors, advisers and bankers. In particular, where a breach of trust or fiduciary duty has occurred, it provides a means of pursuing such persons where they have received property or participated in the breach. However, despite dating from 1874, with numerous decisions in the intervening years, the precise limits of liability remains uncertain.

In *Bell*, the WA Court of Appeal had to grapple with at least three of those uncertainties, first what state of knowledge is sufficient for a claim in knowing receipt; second, what amounts to a dishonest and fraudulent design; and third, which directors' duties are fiduciary in nature.

1. A version of this paper was published in the August 2013 edition of the Company and Securities Law Journal: see *Equitable Remedies for participation in a breach of directors' fiduciary duties: the mega litigation in Bell v Westpac; Butler;* (2013) 31 C&SLJ 307. The paper is being re-published in Hearsay with the kind permission of Thomson Reuters, who hold the copyright.

Memorandum from Carmel Butler

CONSUMER AND TAX PAYER

"|Let us be clear that the reason for today's injection is the lack of openness and honesty by the banks on the amount of bad debts that they have on their books|"

JOHN McFALL MP[105]

1. The banks have stated their case. They say: the banking crisis ensued from bad borrowers to bad debts to toxic assets to taxpayer support. The banks with their powerful lobby, powerful public relations and easy access to the media have framed the public debate. Consumers on the other hand do not have such powerful infrastructure to effectively rebut the bankers' defamatory accusations. This written evidence challenges the bankers' version and endeavours to dispel the bankers' myths. The chain of events is rooted in lenders' abuse of unfettered power to impose unsustainable interest and charges on consumers combined with their determination to avoid contributing to the public purse.

2. The evidence contained in this memorandum is focused on two fundamental issues. Firstly, the consumer issues that arise in the context of Special Purpose Vehicles ("SPVs") that are incorporated as securitisation companies who issued the infamous "toxic-assets"; and secondly, the taxpayer heist at the hand of the SPV securitisations companies. The evidence will illuminate the hitherto hidden truth that the tax payer is supporting the profits of foreign owned companies incorporated in tax havens and their private investors.

BRIEF INTRODUCTION

3. I am British Citizen resident in the UK and a qualified lawyer admitted to practice in New York, U.S.A. I have an LLB Laws from the London School of Economics and a JD (Juris Doctor) from Columbia University, New York. I practiced securities law at Sidley Austin LLP New York office from September 2006 to December 2007. Whilst at Sidley Austin I worked on various Structured Finance transactions such as mortgage securitisations, CDOs and various derivatives. I am also a consumer of a mortgage product that has been securitised. Consequently, as both an ex-practitioner of securitisations and a consumer subjected to a securitisation, the intention is to focus on consumer issues that arise from mortgage securitisations, its central causal role in the banking crisis and its detrimental effect on the economy and public purse.

SUMMARY OVERVIEW

4. Six key submissions are evidenced in this memorandum:

— Passing on the Interest Rate Cuts (see paras. 5 to 13). Banks do not pass on the interest rate cuts to borrowers because they do not have that power. That power is vested in the SPV securitisation companies.

— Openness and Honesty (see paras. 14 to 37). The Government has saved banks from the allegedly bad debts on their books. But banks are unable to say the extent of the bad debt problem. This is because, in truth, there are no bad debts of any significance. Two sleights-of-hand are discussed under the headings "the legal ruse" and "the auditor ruse". Enlightenment of the combined effect of these manoeuvres explains how the allegedly bad debts appear on the bankers books.

— The FSA Regulatory Role (paras. 38 to 43). The Practitioners Panel have called for rigorous enforcement of the FSA's MCOB rules. Consumers would concur with this principle.

— The Fallacy of Financial Advice (see paras. 44 to 52). The source of this issue is the mortgage originators' failure to disclose material facts on the products sold to consumers. The lenders' concealments render independent financial advice a nullity and an academic exercise.

— The Rule of Law—Repossession or Dispossession? (paras. 53 to 78). The Financial Services Practitioner Panel calls for the faithful application of the rule of law with respect to the performance of contractual obligations. There is no difficulty in concurrence with this principle. Accordingly, the Treasury Committee are invited to consider the SPV securitisation companies performance of its contractual obligations and the effect of their abrogation from such obligations on the functioning of the mortgage market.

— The Perfect Storm (paras. 79 to 88). The cause of the banking crisis is widely mooted as the abrupt closure of the wholesale money markets in August 2007 but the public debate on why the market seized is conspicuously absent. It is submitted that new tax laws were the catalyst instilling fear which caused the flight. The money-men fled from securitisation companies on the real prospect of their being called upon to contribute to the Treasury. The liquidity had to be filled. The tax-paying public was rallied to fill the gap and to suffer the economic fall-out. Paragraphs 83 to 86 recommends: a potentially effective solution in which the Government can revive the housing market and economy without the need for the banker's acquiescence to the hitherto unheeded pleas for the bankers to commence lending.

— Conclusion (paras. 89 to 91). Confusion through concealment creates complexity. Transparency is the antidote. Once illuminate, securitisation is simple. Follow the asset and follow the cash which reveals that the supreme beneficiaries of the crisis are the banks, the SPVs and their investors.

— Recommendations: The Committee is invited to consider the recommendations at paragraphs: 37, 43, 52, 79 and especially the recommendation at paragraphs. 85 to 88.

PASSING ON THE INTEREST RATE CUTS

5. The Committee has rightly been concerned to elicit a reason for banks failure to pass on the Bank of England interest rate cuts to borrowers and yet, do pass on the interest rate cuts to the savers[106]. The answer to the question is simple. The banks have passed the interest rate cuts to the savers because the banks have the power to set the interest rate for the savers. Conversely, the banks do not have the power to pass the interest rate cuts to the borrower.

6. This is because, the banks have sold the mortgage contracts to the SPVs and it is the SPVs alone, that have the contractual power to determine the borrowers interest rates. Consequently, it is the SPVs that decide whether or not to pass on the interest rate cuts. It is the SPVs that have decided not to pass on the interest rate cuts.

7. This fact is evidenced by the various and respective Prospectuses that the SPVs file at the UK Listing Authority. In general, the bank that originates the loans will make a True Sale[107] of the

mortgages to the SPV which means the contractual power to set the borrower's interest rate is vested in the SPV.

8. **Following the bank's True Sale of the mortgages, the bank's contractual relationship with the borrower is extinguished. The SPV, as assignee, becomes the party that is in privity of contract with the borrower. However, neither the bank nor the SPV inform the borrower of the SPV's ownership of the mortgage contract. [108] The SPV will remain concealed. The borrower is unlikely to discover the SPV's ownership of their mortgage contract because, following the sale to the SPV, the bank and the SPV enter into a contract wherein, the bank agrees to administrate the mortgages on behalf of the SPV and in return, the SPV remunerates the bank for its administrative services. Consequently, whilst the bank has extinguished all its right and title to the consumer's mortgage contract, the bank's connection to the consumer's mortgage is through its administration agreement with the SPV only. Following these legal manoeuvres: (i) the consumer and the SPV are in privity of contract under the mortgages; (ii) the bank and the SPV are in privity of contract through their administration agreement; and (iii) the world will remain ignorant of these events because, the bank continues to service the loans as if nothing has happened.**

9. Therefore, the bank's only interest in the loans following its True Sale of the mortgages is that of a mere administrator and servicer of the loans. It is the SPV that is the bank's client from whom the bank earns its servicing fees and from whom it receives its instructions. Consequently, the bank's loyalty is to SPV client only. The power to set the borrowers interest rates is a contractual power contained in the mortgage contract: a fortiori when the contract is sold to the SPV, the contractual power to set the borrowers interest rates is vested in the SPV and not the bank. Therein is the reason why the banks have not passed-on the interest rates cuts. It is simply because: they cannot. They must, in accordance with their administration agreement with the SPV, implement the interest rate policy of their client, the SPV.

10. Evidence of these submissions is best demonstrated by example. In the case of Northern Rock, the SPV has given Northern Rock the authority to set the interest rates. However, Northern Rock has undertaken to set the interest rate at a level that not only covers Northern Rock's administration costs, it is contractually obliged to set the rate at a level sufficient to support the entirety of all the administration costs, expenses and profits of each of the numerous entities involved in the securitisation structure[109]. This means that Northern Rock must set the interest rate at a level that will ensure the SPV suffers no revenue shortfall. In the event that Northern Rock fails to set the rate at a level sufficient to satisfy the SPVs required revenue, then the mortgage trustee may "notify the administrator that the standard variable rate and the other discretionary rates or margins for the mortgage loans|should be increased|the administrator will take all steps which are necessary|to effect such increases in those rates or margins."[110] Consequently, Northern Rock may only exercise the interest rate pursuant to the SPV's authority to do so under the terms of its administration agreement, and in any event must set the rate at levels to the satisfaction of its SPV client. In other words, Northern Rock does not have the autonomous power to set the rates independent of its SPV client. Accordingly, it is the SPV that controls the interest rate setting power.

11. Whilst Northern Rock has been used as the example, the Treasury Committee is reminded that this circumstance is not unique to Northern Rock. It is standard to most SPVs. In conclusion, it is

recommended that the Committee encompass within its inquiry consideration of the role of the SPV in the banking crisis and the relationship between the banks and the SPVs.

12. Finally, if the Government is determined that the interest rate cuts are passed on to the borrowers, it must ask the SPVs.

13. In conclusion, this means that the correct answer to the Committee's question No. 170[111]: ". . . Are the banks just pocketing a few bob for themselves here?": the full and correct answer is—No, it is the SPVs that are pocketing a few bob for themselves.

OPENESS AND HONESTY

14. There are no bad debts on the banks books. And if there is any bad debt, the amount is de minimis. A primary purpose of a securitisation is: to remove the credit risk from the bank's books. The bank, under a `true sale' will sell all its rights and title in the mortgages to the SPV and the SPV will in return pay the bank cash for the mortgage assets. **This plain truth has remained elusive because under the terms of the true sale contract, the bank and the SPVs have unlawfully agreed to keep the transaction concealed from the borrower and, from H.M. Land Registry. Thus giving the false appearance to the world that the banks still own the mortgages.**

15. Two sleights-of hand are at play in this manoeuvre. One is the legal ruse, the other the auditor ruse. This is not to suggest that the professions have conspired, they are each compartmentalised and each are generally unaware of the combined effect.

THE LEGAL RUSE

16. First, the legal ruse. The law provides mortgagees with a statutory power to transfer a legal charge.[112] It is under these statutory provisions that the banks exercise their right to assign the mortgages to the SPVs. In a contract of sale that provides for a disposition[113] of an interest in land, the legal title will be conveyed immediately from the seller to the buyer[114] on the completion date. There can be no doubt that on completion, the buyer has acquired the legal title, but there will inevitably be a "registration gap" between the conveyance date on which the buyer acquired the legal title and the date on which his legal title is registered at H.M. Land Registry. During this registration gap, the law provides that the buyer's title: "does not operate at law until the relevant registration requirements are met".[115]

17. This is where the legal ruse comes into play. It is this "registration gap" that the SPV unlawfully exploits in order to conceal its ownership and control of the mortgages. Under the Land Registration Act 2002 ("LRA 2002"), the transferee[116] of a registered charge is required to register at H.M. Land Registry, its ownership of the mortgage that it purchased.[117] Therefore, it is a legal requirement that the SPV register its proprietorship of the mortgage at H.M. Land Registry. Whilst the law implicitly permits the registration gap as a matter of pragmatism, the law also implicitly mandates that the registration requirements are to be observed expeditiously. Nonetheless, in contumacious disregard for its legal duty to comply with the registration requirements of the LRA 2002, the contract of sale expressly provides that the SPV will not register the transfer at H.M. Land Registry indeed, the contract provides that notice of the transfer is to be concealed from the borrowers and H.M. Land Registry and a fortiori concealed from the world[118].

18. The suppression and concealment of this information from H.M. Land Registry is a criminal offence[119], and in furtherance of this offence[120], the SPV's legal title to the mortgages is also concealed from the county courts and the Government. The Banks remain registered as the proprietor of the mortgages and accordingly all interested parties are deceived by this concealment with one exception. The SPV does inform its investors that the bank sold its legal title to the SPV (to whom, the right to register the legal title to the mortgages is important). Consequently, the bank appears to be the legal owner, but it is not.

19. For example, in the case of Northern Rock as the seller of mortgages, the prospectus states: "under the mortgage sale agreement dated March 26, 2001 entered into between the seller, the mortgages trustee, the security trustee and Funding, the seller assigned the initial mortgage portfolio together with all related security to the mortgages trustee|"[121]. Additionally, under the terms of Northern Rock's mortgage sale agreement, it is, "entitled under the terms of the mortgage sale agreement to assign new mortgage loans and their related security to the mortgages trustee". [122] (bold emphasis added).

20. Northern Rock may remain falsely registered as the putative `legal owner' but in truth, Northern Rock is merely the administrator of the mortgage loans. Again the Prospectus states: "The seller acts as administrator of the mortgage portfolio under the terms of the administration agreement, pursuant to which it has agreed to continue to perform administrative functions in respect of the mortgage loans on behalf of the mortgages trustee and the beneficiaries, including collecting payments under the mortgage loans and taking steps to recover arrears."[123] (Bold emphasis added).

21. The legal reality is that: (i) Northern Rock sold its legal title to the SPV, in this case, to Granite Finance Trustees Limited[124] and therefore, Granite is the legal owner; (ii) Northern Rock is the administrator of the mortgages and falsely holds itself out as the legal owner of the mortgages; (iii) Granite Finance Trustees Limited should be, but is not, registered as the owner of the mortgage; and (iv) all these facts remain concealed because Granite and Northern Rock have unlawfully contracted to suppress this information from H.M. Land Registry.

22. Notwithstanding that the SPV conceals its legal title from H.M. Land Registry, the SPV will, nonetheless, avail itself of, and exercise, all the statutory and contractual legal powers that the legal owner enjoys. For example, the SPV will exercise the legal owner's statutory power to create a legal charge [125] on the borrower's mortgages. The SPV will file at Companies House a Form 395 "Particulars of a Mortgage or Charge" within the statutory 21 days, to register the Legal Charge that the SPV created against the mortgage loans in favour of the SPV's trustee, as security for the payment of money due to its investors and creditors.[126]

23. The SPV's exercise of the legal owner's contractual and statutory legal powers leaves no doubt that SPV is: the legal owner of the mortgages. Nonetheless, the banks and the SPV unlawfully exploit the "registration gap" in a smoke and mirrors tactic to cause confusion and conceal the SPV's legal title. The SPV is the legal owner. The banks are the administrators.

THE AUDITOR RUSE

24. The Treasury Committee has endeavoured to discover the amount of bad debts on the banks' books. An answer to that question has hitherto evaded an adequate response. As discussed above, the bank has sold the mortgages and thereby transferred the credit risk to the SPVs which means, that the banks do not have these (allegedly) "bad" debts on their books.[127] Therefore, to provide the Committee with the full answer, the question must be re-framed as: having sold legal title to the debts, how do these allegedly "bad" debts appear back on their balance sheets?

25. Likewise as discussed above, the SPVs legal title to the mortgages is also concealed from the auditors. The auditors know that the bank originated and owned the mortgage loans and therefore, the mortgage loans are initially and correctly `recognised' as an asset on the bank's books. However, when the bank securitises that asset, the bank has sold the asset to the SPV. This means that the SPV owns both the benefits and the credit risks of the assets. Accordingly, the bank's transfer and sale of legal title should result in the assets being `derecognised' as an asset on the banks' books. However, the auditor's continue to recognise the assets on the bank's books. This is because of an inadvertent erroneous evaluation and application of the IAS39 accounting standard.

26. IAS39 sets out three main scenarios in which an asset will be derecognised and removed from the bank's books. Under any one of these three scenarios, the mortgage loan assets that have been securitised should be derecognised with the consequent effect that the assets are removed from the banks books.

27. The mis-application of the IAS39 derecognition policy is best illustrated by the following example. In the Northern Rock's Annual Report and Accounts 2007, the derecognition policy states: [128] "The Group also derecognises financial assets that it transfers to another party provided the transfer of the asset also transfers the right to receive the cash flows of the financial asset." In a securitisation, that is exactly the legal effect. However, auditors are called upon to make an evaluation of the bank's legal rights in their analysis. The auditor must determine who has the legal right to the cash flows. Understandably, an auditor is not best qualified to make an accurate legal determination. Nonetheless, the auditors do see that: (i) the bank's legal title is still registered at the Land Registry (albeit falsely); (ii) the auditors see the bank's administration of the mortgage loans; and (iii) the auditors see the cash flows from the mortgage loans are paid to the bank. In contrast, the auditors do not see (iv) the contract of sale wherein the bank transferred to the SPV, all its title and rights to the asset; (v) do not see the bank's administration agreement with the SPV which evidences the bank's interest is merely authority to administrate the mortgage loan asset; and (vi) do not see that the bank has no right or title to the cash flows it receives from the mortgage loans. Consequently, the auditors understandably fail to accurately evaluate the legal rights and accordingly fail to derecognise the asset. As a result, the asset erroneously remains recognised as an asset on the bank's book.

28. However, the auditors are mindful that the asset has been securitised and that such transactions require some acknowledgment and entries in the accounts. Again, IAS39 is the culprit. IAS39 directs the auditor to "Consolidate all subsidiaries (including any SPE)"[129]. The IAS39 therefore instructs the auditor's to consolidate the special purpose entity[130] (or vehicle), into the group accounts.

29. This is an extremely bizarre instruction to auditors for three reasons. Firstly, this instruction contradicts the foundational principle of a securitisation structure which is: that the originator of the asset must be `Bankruptcy Remote' from the SPV. That is, that the SPV is a wholly independent company that is in no manner whatsoever connected with the originator of the assets it has purchased. The true sale must be an `arms-length' transaction between the two wholly independent entities. This is an essential element of the securitisation structure to ensure that the SPV and its assets are not in any way affected by the bankruptcy or insolvency of the asset originator. Secondly, the bankruptcy remoteness of the SPV is the credit rating agencies predominant factor for the SPV's Notes achieving the triple A rating. Thirdly, there is no legal basis on which a wholly independent company, (iean SPV) should be included in the consolidated accounts of another company where the SPV is not a subsidiary or legal undertaking of that company.

30. Notwithstanding that the SPV and Northern Rock are wholly independent and separate companies, the mortgage loan assets and liabilities that the Granite SPV own, was consolidated onto the Northern Rock's Group accounts.

31. To illustrate this point, take for example Granite Master Issuer plc's prospectus where it expressly states: "The Issuer is wholly owned by Funding 2|The Issuer has no subsidiaries|The Seller [Northern Rock] does not own directly or indirectly any of the share capital of Funding 2 or the Issuer"[131].

32. Therefore, when reading the Northern Rock accounts,[132] the figure of £43,069.5 million stated as a Northern Rock liability, is in fact, Granite Master Issuer plc's liability. The "Debt Securities" issued of £43,069.5 million is the liability of Granite Master Issuer plc, a wholly independent company which the auditor has erroneously consolidated on to the Northern Rock Group accounts solely because of the erroneous application of IAS39.[133] That liability is Granite's liability to its investors.

33. Likewise, Granite's assets also appear on Northern Rock's balance sheet. Consequently when reading the figure of £98,834.6[134] million stated as a Northern Rock asset, at least £49,558.5 million,[135] is in fact, Granite Master Issuer plc's asset.

34. The Committee is respectfully reminded that whilst Northern Rock has been used to illustrate the point, this application of IAS39 is common practice.

35. In summary, the assets "appear back on the books" due to the misapplication of IAS39. The error is compounded through the unlawful exploitation of the registration gap which conceals the facts necessary for an accurate application of IAS39. It is this concealment that causes the auditor confusion. These assets and liabilities should not be on the bank's balance sheet. They are there solely because of the combined effect of the legal and auditor ruse[136].

36. In consequence, the British tax payer is not just the supporter of British banks, the tax payer is the unwitting guarantor and supporter of all the privately owned, wholly independent SPVs foreign companies incorporated in tax havens. Their consolidation into the group accounts of British banks means that the tax-payer is also funding the capitalisation of the SPVs. These foreign SPV companies and their investors must be extremely satisfied with the UK tax payers support. After all, there are always winners in any crisis.

37. Recommendations:

— Auditors should reconsider the application of IAS39 and perhaps seek legal opinions on the bank's legal rights and obligations in its evaluation and application of this accounting standard. It is recommended that the law firm that acted on the actual securitisation is not used for this purpose, and that an independent barrister may be more suitable. Moreover, an SPV should never be consolidated into the Group accounts unless it is an actual legal subsidiary or a legal undertaking of the Group.

— Both the SPVs and banks must be held to compliance with the Land Registration Act 2002 and accordingly, complete the registration requirements under the Act. For those that do not comply with the registration requirements, enforcement action should be considered. Transparency is the antidote that will cure the abuses facilitated by concealment.

THE FSA'S REGULATORY ROLE

38. Whilst the FSA regulates mortgages, it does not regulate the SPVs that own the mortgages. Given that it is the SPV's that exercise the power and control over mortgagors, interest rate policies and repossession policies, there is a major lacuna in regulatory oversight. Through the medium of the ruse discussed above, an added bonus of concealment is that the SPV circumvents regulatory oversight. It may be argued that such lacuna is covered by the FSA's authorisation and regulation of the loan administrator. However, this argument does not address the inherent conflict between the bank's compliance with the FSA's regulations and its loyalty to its SPV client. This is because the SPV is vigilant on the bank's implementation of its policies under their administration contract whereas, the FSA in contrast are widely known for its apparent determination not to enforce[137] its MCOB[138] rules and regulations. Therefore, given the choice between the impotency of FSA deterrence on the one hand, and client loyalty and profit incentive of banks and SPVs on the other hand, the dominant motivation that will inevitably prevail is the satisfaction of the profit incentive. This means that the bank's allegiance to its SPV reigns supreme over the bank's regulatory obligations to consumers. After all, the irony of the FSA's `Treating Customers Fairly' principle, is that the SPV is the customer of the bank whereas, the borrower not. The borrower is in fact, the customer of the SPV.

39. But all is not lost. The Financial Services Practitioner Panel is in consensus with the principle that the FSA's MCOB rules should be enforced. In its Annual Report 2007/8 it stated: "This was a major area of risk from a consumer point of view and the Panel considered that the Mortgage Conduct of Business (MCOB) rules were not achieving the objectives that were intended by them—in fact, to some degree, they had served to compound the issue "[139]. The Practitioners Panel then goes on to call for the FSA to supervise and enforce the MCOB rules, it continues, "The Panel remains concerned that the FSA's supervisory and enforcement activities in this area continue to move too slowly to significantly improve standards in this sector."[140] The principle quoted here is highly laudable, and to the extent quoted above, this principle from the consumer's perspective, would attract strong consensus.

40. To be accurate however, the Practitioners Panel is vociferous for FSA enforcement of the MCOB rules only to the extent that they apply to the 3,000 small businesses that provide services in the financial intermediary sector. Nonetheless, the Consumer Panel and Practitioners Panel both support the FSA's enforcement of the MCOB rules in principle and apparently, both the Practitioner and Consumer Panels would wish to achieve the objectives that were intended by the MCOB rules.

41. Whilst the Practitioner Panel's call for MCOB enforcement is supported in principle, it is suggested that enforcement against the many small business in the intermediary sector should be deferred because: (i) enforcement in that sector would yield no immediate assistance to the consumer or small businesses; (ii) that sector of the economy is at present, relatively inactive; (iii) it is probable that some of those small businesses may not survive the economic downturn and the FSA should not exacerbate their plight for survival at this juncture; and (iv) the Government aspires to assist small businesses in any event.

42. Accordingly, in recognition that the FSA's resources are finite and therefore should be focused and targeted to achieve the Government's aspirations, it is suggested that the enforcement campaign focus on the MCOB rules to the extent applicable to mortgage administration and mortgage repossessions. An FSA publicly announced policy decision to take enforcement action against mortgage administrators non-compliance with the MCOB[141] would have an immediate deterrence effect, concentrate the mortgage administrator's mind, attitude and conduct on its regulatory obligations and in turn, produce immediate assistance to consumers in financial difficulty. The announcement of such policy may also achieve the added bonus that the FSA's TCF objectives, (which were also intended to protect consumers), may also be realised as a result of an enforcement policy. Moreover, an actual enforcement may have a longer-term deterrent effect and re-position the FSA's supremacy in the conflict between the bank's deference to its SPV clients prevailing over its obligations to consumers. Finally, and most pertinently, from a public relations perspective, it may restore a large degree of public confidence in the FSA and the financial industry generally and stem the repossession trend.

43. Recommendations:

— the Treasury Committee give its fullest support to the Panels aspirations and immediately recommend that the FSA vigorously enforce the MCOB rules; and

— the courts are informed of the claimant's[142] administration and repossession legal obligations under the MCOB rules and that the courts assure themselves of the administrator's strict compliance

with those rules before ordering repossession. Again, this would have immediate impact to assist consumers in difficulties.[143]

THE FALLACY OF FINANCIAL ADVICE (TERMS OF REFERENCE 1.9 AND 3.7)

44. On 14 January 2009, Mr Tutton of the Citizens Advice Bureau gave oral evidence wherein he enunciated the principles that "|borrowers need to have the risks properly pointed out to them|to understand the consequences|what is the interest rate, what is it going to cost me?|and borrowers are properly helped to decide what they are getting into."[144]

45. There is an abundance of consumer laws and regulations that govern credit agreements and in particular, govern the advice that independent financial advisers provide to consumers on mortgage products. In practice however, the consumer's choice of lender and product is often a nullity and can be deemed an academic exercise. This is because, whilst the consumer may be advised to select a mortgage product from Bank X and may choose to enter into a contract with Bank X on that advice, the reality is that Bank X will not be the company with whom the consumer will ultimately be in privity of contract, nor will Bank X be the entity that performs that contract.

46. In general, neither the IFA, nor the consumer knows at the outset that Bank X will merely originate the mortgage contract and that Bank X will sell the mortgage contract. Moreover, whilst the consumer may be informed of the initial `pass-the-parcel' of their mortgage contracts to various entities, the consumer will never be told of the final and ultimate owner of their mortgage contract, namely the SPV entity that securitises their mortgage contract. In other words, neither the IFA nor the consumer is aware of, nor considers the impact of the "originate-to-distribute model" when providing or considering financial advice.

47. To illustrate the practical impact of the SPV's concealment from the borrower, take for example, a consumer that was advised to choose a GMAC-RFC standard variable rate mortgage. Firstly, some of those borrowers would have been securitised through an SPV called Clavis Securities plc. Thus, the consumer's advice as to the lender is rendered academic. Secondly, unbeknown to the borrowers, Clavis unilaterally decided that borrowers who had purchased a GMAC standard variable rate mortgage contract would be treated as if they had purchased a track-rate mortgage.[145] Accordingly, Clavis' decision renders the consumer's advice on product as also academic. Thirdly, it was irrelevant to Clavis that the borrowers contracted to pay GMAC's standard variable rate, because Clavis at all times charged its borrowers at least 0.25% in excess of GMAC's standard variable rate. Accordingly, Clavis at all times demanded (and was paid) interest that the borrowers were not contractually obliged to pay.

48. In one case on point, the non-contractual demanded interest rate overcharge was disputed. The response was that it had the "power and liberty" to charge as they pleased. Following a vigorous defence of this contention, it was finally conceded that it had overcharged interest but at the same time, inferred that the overcharge was de minimis as it only amounted to approximately £3,000. However, this amount is not de minimis to an individual nor when taken in the context of the securitisation as a whole. That securitisation involved a pool of approximately 4,500 mortgages contracts each of which would have been subjected to the same contractual abuses. As Clavis had overcharged each of those consumers an extra non-contractual 0.25% and assuming that that overcharge was in the region of £3,000 for each consumer, such modus operandi would yield a conservatively estimated extra £13.5 million.

49. There is an abundance of anecdotal evidence that consumers are instinctively aware that their mortgage accounts are being abusively charged.[146] However in the majority of cases, it is improbable that consumers would be able to identify and articulate the character and nature of the abuse sufficient to present such defence in a court. Therefore, this type of abuse remains substantially, undetected. From the consumer perspective it inevitably results in repossession, but on strict construction of the borrower's mortgage obligations it is in fact, dispossession.

50. Therefore, with respect to mortgage products that will be securitised, the notion that a financial adviser can advise consumers, and the notion that consumers have choice, is a pure fallacy. The evidence shows that whilst the fault cannot be laid on the adviser, it does not change the practical reality for the consumer who will be aggressively held to their obligations (including, in some cases demands for money which they are not contractually obliged to pay), whilst the SPV lender will conveniently absolve itself of its obligations (including, in some cases substituting the product with a completely different product). Consequently, neither adviser nor borrower can make an informed decision on that which, directly and substantially affects them. They cannot know how much the interest rates will be, and cannot know how much it will cost them, because all of these variables are

dependent on the arbitrary decisions of the SPV with whom the borrower is ultimately in privity of contract—and that information is at all times, concealed[147].

51. Finally, this issue highlights the importance of the principle of Transparency. To echo the Prime Minister,[148] "all transactions should be transparent and never hidden". The concealment of the SPV from the borrower presents the SPV with the opportunity to abuse with impunity, safe in the knowledge that the consumer would never know who is really perpetrating the abuse and whom they should hold accountable. The borrower should know with whom they are in privity of contract and that information should never be concealed.

52. Recommendations:

— Mortgage originator's must make full and frank disclosure of the effect of securitisation on the borrower

— The contractual formula for interest rate setting must be fully disclosed and fixed such that the extensive discretionary powers are abated and/or

— The SPV's unfettered powers to unilaterally inflate the borrower's obligations should be curbed.

THE RULE OF LAW—REPOSSESSION OR DISPOSSESSION?

53. The Committee's attention is drawn to the Practitioner Panel's promulgation in its Annual Report 2007-08 under the heading "Caveat Emptor" wherein it stated: "The Panel believes that a consumer's legal responsibilities should be those underpinned by contract law, which includes a duty to act lawfully and in good faith, not to make misrepresentations or withhold material information, to abide by the terms of the contract, and to take responsibility for his or her own decision."[149]

54. The Practitioner Panel's is commended for its enunciation of these principles under the banner "caveat emptor" as it demonstrates that the Panel have correctly identified that `the buyer beware' maxim is an appropriate forewarning which consumers should heed when purchasing loans from powerful financial institutions. Consumers should always be alert to the shenanigans of sellers with whom they contract. However, at this juncture it is apposite to remind the Committee that irrespective of a prudent purchaser's precautions, the consumer cannot beware of that which is deliberately concealed. Consequently, the consumer is doomed to become the unwitting counterparty to the SPV in their mortgage contracts in any event. The consumer did not expressly agree to contract with the SPV more accurately, it is the SPV that imposed itself on the consumer.

55. Two observations to the Practitioner Panel's promulgation are appropriate. Firstly, the Panel's axiomatic principles are tantamount to a demand for the faithful application of the Rule of Law. That demand invites an exorable concurrence from consumers which invitation is unreservedly accepted. Secondly, as the Treasury Committee has rightly observed, there are two parties to the contracts and they both share risk.[150] Accordingly, the principles apply with equal force and conviction to the SPVs legal responsibilities.

56. In consideration to the faithful application of the Rule of Law, it is necessary to illuminate the conduct of SPVs in their performance of their legal obligations under the mortgage contracts.

57. The material provision in the mortgage contract is that the lender will loan the advance for a term of 25-years. The SPV imposed itself into the mortgage contract as assignee, and as such, assented to perform this fundamental term of the contract. However, the SPV has no intention of performing that 25-year term. The SPV uses its wide discretionary interest rate setting powers to demand interest, often in excess of that which the consumer is legally obligated to pay, and often sets its rates at levels that are specifically designed to force consumers to seek to remortgage to a more reasonable rate. For those consumers who do not, or cannot remortgage, the excessive fees and interest rate charges are designed to guarantee arrears such that, the alleged arrears can be contrived as the grounds for repossession. Either way, the strategy ensures that the mortgages in the securitised pool will be redeemed within a 2 to 5 year period. Hence, the practice is designed to defeat the SPV's obligation to lend for the 25-year term. Moreover, it does so in a manner that gives the impression that it is the borrower in default of contract.

58. Therefore, with respect to the Practitioner Panel's call for disclosing material information, it is necessary for originator's to disclose the material facts that (i) the consumer's contract will be sold to an SPV and that the SPV may not intend to fully honour its contractual obligation to lend for the full 25-year term; and (ii) that the SPV's interest rates will reflect not only the bank's administration of the

mortgage loans, but also the extensive fees and expenses[151] of all the entities involved in the securitisation transaction[152].

59. Evidential support for these contentions can be found in the repossession policies and the interest rate setting policies. There is also evidence from the lightening speed in which the SPV pays down its Investors and there is prima facie evidence from the amount of new business in mortgage market for remortgages[153] (in comparison to new business written for a house purchase mortgage). Such evidence is best illustrated from actual examples:

60. In June 2006, Clavis Securities plc became the owner of 4,293 consumer mortgage contracts that were originated by GMAC-RFC Limited. Clavis securitised those mortgages totalling £587,945,144 in a securitisation transaction which issued £600 million[154] of Notes to Investors. This £600 million of Notes mature in the year 2031[155] which reflects the 25-year term of the mortgage contracts.

61. In theory, the principal amount on the Investors Notes should pay down in exact correlation with the consumer's payments of principal on the mortgage. From the consumer perspective, this means that it should take at least a couple of decades to pay down the Investors. However, the Clavis Investors Report in December 2008 shows that miraculously, Clavis have paid down £456.8 million of these 25-year consumer mortgage contracts in only 2½ years. This means that within the short duration of only 2½ years, Clavis has successfully manipulated over 77% of its borrowers to redeem either through duress perpetrated on the borrower to remortgage[156] through its interest rate policy and/or through repossession. Either way, Clavis has absolved itself of performing its 25-year loan obligation to the vast majority of its borrowers[157].

62. It is submitted that it can reasonably be inferred from these facts, that Clavis had no intention of performing its 25-year obligation. Whilst the Clavis securitisation is used to illustrate the point, this course of conduct is not an isolated example. It is ubiquitous throughout the securitisation industry and illustrates that the SPVs are in breach of contract for their evident intention not to perform and/or their failure to perform their contractual obligation to the consumer for the 25-year term.

63. To achieve the SPVs absolution from its 25-year obligation, the SPVs use their wide discretionary interest rate setting powers to manipulate consumers to remortgage[158]. For those consumers who cannot remortgage, it is almost a certainty that they will be subjected to repossession action at some juncture. In all cases, the interest rate charged is designed to create arrears. There are cases where one or more of the following examples apply: (i) borrowers who are current in their payments are suddenly informed that arrears had accrued some years earlier for which immediate payment is demanded;[159] (ii) the arrears are contrived through applying interest and charges that the consumer is not contractually obliged to pay[160]; (iii) adding fees and charges and falsely claiming that they are interest arrears contrary to the MCOB[161]; and (iv) the amount claimed as arrears is exaggerated by claiming amounts that are not yet due. In all cases, the consumer has to trust the mortgage administrator's calculations and is rarely in a position to challenge the accuracy of the alleged arrears. The SPV, through their mortgage administrator will commence action grounded on the alleged arrears which are often erroneous, inflated and/or plain false.

64. The abusive use of the SPV's discretionary powers to demand non-contractual interest is best explained through illustration. GMAC borrowers who contracted under GMAC's standard variable rate ("SVR") product, agreed to pay GMAC's SVR following the initial fixed period. Under the legal principle nemo dat qui non habet[162], GMAC did not possess the contractual right to charge its SVR borrowers in excess of GMAC's SVR rate. As GMAC did not possess a contractual right to charge more than its SVR, it did not possess, and could not, assign to any assignee, the right to charge GMAC borrowers in excess of the GMAC SVR. In other words, if GMAC could not contractually enforce the borrower to pay more than its SVR, nor could an assignee of that contract. Therefore, an SPV that acquired a GMAC SVR mortgage had no contractual right to charge the borrower any amount in excess of GMAC SVR. In short, an SPV as an assignee can only lawfully demand of its borrowers to like extent that GMAC could lawfully demand.

65. However, in practice, the SPVs violate this fundamental Rule of Law and unlawfully demanded that consumers pay at interest rates in excess of GMAC's SVR. Failure to remit the unlawfully demanded payment rendered the borrower in jeopardy of repossession. Consequently, the SPVs were in breach of contract to each of those borrowers to whom they charged interest in excess of the GMAC SVR.

66. It is the excess interest that consumers were unlawfully overcharged that often formed the basis of the alleged arrears. Additionally, those falsely alleged arrears were used to form the basis of the SPVs alleged right to further exacerbate the borrowers account with considerable charges such as monthly arrears fees, debt counsellor's fees, legal fees, etc. Following these abusive (and unlawful)

charges, the SPV's use a further strategy of claiming future payments as alleged arrears to further exaggerate the appearance of large arrears. It is these strategies of overcharges and exaggerated claims, that contrive the false appearance of the borrower's breach of contract which the courts accept without reservation and the borrowers are unable to challenge.

67. Again an exact example will demonstrate the point. Clavis Securities plc, through its mortgage administrator issued proceedings on 14 December 2006[163] alleging arrears of £4,530.63 for which they requested an immediate possession order. Of the £4,530.63 claimed as arrears, £1552.27 were not arrears because that amount was not due for payment until 31 December 2006. Nonetheless, the exaggeration of arrears strategy had the effect of giving the court the false impression of substantial arrears which would cause undue prejudice to the consumer before judge[164]. Of the remaining £2978.36 claimed as arrears, £1489.18 represented the payment due on 30 November 2006 and therefore was only 14 days overdue and the final £1489.18 represented the payment due on 31 October 2006 and therefore was only 44 days overdue.

68. On strict construction of the contract, the SPV invoked the one-month arrears clause to commence the action. However, the only payment that was one month in arrears was the October payment of £1489.18[165]. Moreover, on strict construction of the consumer's obligation to pay interest, as discussed above, interest was at all times overcharged (which was eventually admitted[166]). The admitted interest overcharges amounted to some £3,000. Therefore, in this case, out of the total alleged arrears of £4530.63: (i) £1552.27 was not due for payment at all on the date that the amount was falsely claimed as arrears; and (ii) the remaining alleged arrears of £2978.36 could be more accurately classified as representing the £3000 interest overcharges rather than arrears. The conclusion is that the entirety of the repossession claim was falsely alleged and falsely claimed[167].

69. Again, whilst the example illustrates Clavis Securities plc's unlawful breach of contract, this conduct is not isolated to the Clavis Securitisation. It is ubiquitous generally, and standard practice in the context of GMAC mortgages that have been assigned to other SPVs.

70. As another example, consider the repossession policies of Northern Rock plc. The Treasury Committee have searched for explanation for Northern Rock's repossessions rates and its failure to pass on interest rate cuts, adequate explanations for which has hitherto, remained elusive. There are two fundamental questions that should be answered in order to illuminate an adequate explanation for Northern Rock's interest rate and repossession policies. The first fundamental question is "who" sets these policies and the second question is "why" the policies are implemented and apparently immutable.

71. Northern Rock merely administrates the mortgages on behalf of the SPV that owns the mortgage contracts[168]. The SPV that owns the mortgage contracts that Northern Rock originated is Granite Finance Trustees Limited (a Jersey incorporated company). It is Granite Finance Trustees Limited that exercises the contractual powers under the mortgage contracts and it is Granite Finance Trustees Limited that determines the interest-rate setting policy and the repossessions policy. Northern Rock plc as the administrator acts as agent for the SPV and implements the SPV's policies[169]. Therefore, when endeavouring to elicit an explanation for the policies, the Committee should be mindful that it is Granite Finance Trustees Limited who set the policies that Northern Rock must implement.

72. The second fundamental question is "why" those aggressive policies are dogmatically pursued. The answer is: in June/July 2008 Granite Finance Trustees Limited required more than £8.8 billion to redeem some of its Notes. Throughout 2008, the SPV's monthly Investor Reports[170] stated that: "All of the notes issued by Granite Mortgages 03-2 plc may be redeemed on the payment date falling in July 2008 and any payment date thereafter if the New Basel Capital Accord has been implemented in the United Kingdom." The same notice is given on a further five Note issues alerting the investors to the same advice.

73. The condition that triggers the Note redemption is the implementation of the new Basel Capital Accords, a condition that has been satisfied.[171] Accordingly, the Granite Master Issuer's Notes for each of the series 2003-2, 2003-3, 2004-1, 2004-2, 2004-3 and 2005-1, may now be redeemed. Naturally, this means that Northern Rock plc, in its capacity as administrator and cash manager, acting as agent on behalf of the Granite SPV, must raise the cash that will be required for such redemptions. The cost of these redemptions amounts to £8.8 billion[172].

74. Nick Ainger M.P. observed that in the half-year to June 2008, Northern Rock's repossessions increased 68% on the previous period, and he queried whether there was a link between the aggressive repossession policy and the staff's bonus incentive scheme. He requested an explanation from Mr Sandler[173], Northern Rock's Non-Executive Chairman. In reply, Mr Sandler admitted that the staff incentive scheme "|is designed in the early years around the objective of debt repayment"[174]. Mr

Ainger's instinct was correct and the full open and honest answer to his question is: that the incentive scheme was designed around the objective of debt repayment because Northern Rock's client, Granite Finance Trustees Limited and Granite Master Issuer plc, requires £8.8 billion in cash to redeem its Notes.

75. In these premises, it is submitted that the SPVs are in violation of a material term of their legal obligations under the mortgage contracts. The SPVs' course of conduct evidences that they have no intention of honouring their contractual obligation to loan to the consumer for the 25-year term. The Practitioner Panel's calls for the Government to support the rule of law. To that end, consumers would be assisted if the owners of the mortgage contracts would be held to honour their contractual obligations, and/or pay damages to each of the borrowers whom they force to remortgage.

76. The SPVs breaches of contract are not limited to the examples above. The Early Redemption Charges ("ERC") are also unlawful. These ERCs are often in tens of thousands of pounds and do not reflect the SPVs reasonable costs of the redemption. They are therefore, penalties imposed on the consumer and are unlawful because the imposition of such excessive charges on the consumer is a violation of the FSA rules[175]. Moreover, the SPVs impose the charges on properties that they have repossessed. Notwithstanding that ERCs in the tens of thousands are unlawful in any event, the contractual trigger for an ERC charge is when the borrower voluntarily redeems. In the context of repossession, the borrower is not voluntarily choosing to redeem, rather it is the SPV that demands redemption. Thus, the ERC clause is not triggered and should not be charged. Nonetheless, in breach of contract, the SPV demands that charge and borrowers are unlawfully forced to satisfy that non-contractual overcharge too.

77. To conclude, the Practitioner Panel's demand for faithful observance of the Rule of Law is welcomed. They may have intended that only those laws that benefit their members be considered, however on review, consumers would greatly benefit if the courts would properly construe the contracts and that judicial support for the SPVs ubiquitous and excessive and unlawful charges are refused. The consumers would benefit if the SPV were held to their contractual obligation to provide the loan for the 25-year term, and the consumers would benefit if the SPVs were prevented from abusing their discretionary powers to set interest rates. In short, consumers would benefit if the rule of law was observed and that the principle of equality before the law had real meaning, substance and effect.

78. In conclusion: in light of the SPVs legal obligations which are generally performed in violation of the FSA's MCOB rules, and generally, in breach of contract, it begs the question whether the SPVs are lawfully repossessing the homeowner or more accurately dispossessing the homeowner.

79. Recommendations:

— Strictly apply the rule of law. Statute law is merely words on paper until brought to life through judicial observance, application and enforcement.

— Empower the consumer to access the law to effect the enforcement of their rights, both contractual and statutory.

THE PERFECT STORM

80. The Committee has heard the widely rehearsed crie de coeur from bankers that the wholesale markets abruptly closed in August 2007 and that they "didn't see it coming". Which means that the real question to be determined is: why did the wholesale markets abruptly close?

81. The bankers' explanation is that the assets became toxic. The bankers blame the source of toxicity on the allegedly "bad" borrowers who defaulted on their loans. This universal defamation of the borrowing public unjustly stigmatises the homeowner when in fact, in August 2007, the default rates were no more than would be ordinarily experienced. To accept the bankers' allegation without question requires a gullible belief that a minority of defaulting borrowers had the power to bring down the whole of the banking industry. That contention is too incredulous to countenance and consequently, it is submitted that the bankers' explanation should be rejected.

82. A more reasonable and logical explanation for the source of the toxicity can be found in tax law. In the Finance Act 2005, the Government took tentative steps with new tax law targeted specifically at securitisation companies. The 2005 Act provided "interim relief for securitisation companies".[176] Then, on 21 March 2007, H.M. Revenue and Customs made a public announcement[177] stating that legislation would be introduced in the Finance Bill 2007 that would affect "Large companies involved in securitisation or issuance of debt" and that the measures would have effect following its Royal

Assent. The Finance Act 2007 received its Royal Assent on 19 July 2007. It cannot be a mere co-incidence then, that the wholesale money markets went into meltdown within a couple of weeks apparently with the cry "toxic-assets". On the facts, it is logical to deduce that the source of toxicity is tax rather than the bankers' defamatory allegation against the allegedly "bad" borrower. The flight from funding was fear. Fear of paying tax.

83. The twist of fate turned the tide on tax policy and trumped the Treasury's tax intentions. The SPVs, rather than being the new contributors to the Treasury coffers became the greatest recipients of the Treasury coffers. The consumer now pays the money-masters twice. First directly to the banks and then indirectly through the Treasury.

84. To exacerbate these events, a further factor came into play. The banks cry for capital. The cry was driven by the apparent immediate need to comply with the new Basel Capital Accords. Angela Knight informed the Committee that the banks' capital requirements "jumped" overnight[178] which naturally implies, that the banking industry was caught off-guard. Again, this assertion is too incredulous to attract credibility. Nonetheless, this lame excuse is the generally accepted foundation for the tax payer funding the banks' balance sheets. The result is that the ordinary public was hit with this double-whammy of tax policy and Basel.

85. The Government aspires to stimulate the economy which requires the revival of the housing market. The Government appears to be in state-mate with the banks. There is demand for property purchases, but the banks will not facilitate the buyer's desire to buy. Again, the Government is at the mercy of the banks. But the Government does not necessarily need to beg the bankers to lend. It can apply the rule of law and revive and give life to law that already exists.

86. The Law of Property Act 1925 s.95 contains a provision: "Where a mortgagor is entitled to redeem, then subject to compliance with the terms on compliance with which he would be entitled to require a reconveyance or surrender, he shall be entitled to require the mortgagee, instead of re-conveying or surrendering, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly" Emphasis added.

87. This means that the borrowers have a statutory right to assign the mortgage debt to a buyer. The loan already exists. No new lending is required. The borrower can assign the debt to the buyer as part of the property sale. The SPVs have made use of their statutory rights to assign. It is now time to give life and real effect to the borrower's right to assign. The Government does not need the bankers, the funding is already available. The Government can revive the housing market without the acquiescence of the bankers. If nothing else, the threat of facilitating the public's use of this provision would add weighty negotiation leverage to effect the Government's aspirations. The Government has given the golden carrot to the bankers who have coveted that carrot to the exclusion of all. It is perhaps time to use the stick.

88. Implementation of this provision is simple. H.M. Land Registry could create a new Transfer Form to facilitate the mortgage assignment. For example, the TR1, transfer of the property and TR4, transfer of mortgage charge, could be used as the basis to create a new form to simultaneously transfer and assign both the property and the mortgage debt to the buyer. Additionally, the HIP pack could be amended to include disclosure of the mortgage product.

89. The Government has supported the minority, the bankers to the absolute detriment of the majority, the public. The Government should re-focus its perspective and support the majority. Consumers only need the Government commitment to enforce the rule of law to empower the ordinary public.

CONCLUSION

90. Qui Bono? Who benefits? The banks and the SPVs. The banking-crisis has undoubtedly been the greatest heist of public money at the hands of money-men wielding their power in the guise of victimhood. In reality it is passive-aggressive intimidation. Power is being concentrated in the hands of the few remaining banks that have successfully dispensed with competition, leaving the public at the future potential mercy a cabal of bankers and the attendant possibility of a concealed cartel. The golden rule will prevail. He who holds the gold—Rules! Private foreign companies and their investors have also done exceptionally well. The SPVs are being capitalised by the public purse through bank consolidated balance sheets and consequently, the public purse will carry any SPV losses. The investment paradigm appears to have shifted. Historically, investors capitalised their companies and received high returns for taking risk and, if the risk manifests, investors lost their investment; but now,

the Investors still receive high returns but, the public capitalise their companies and guarantee the investors' returns.

91. The intention of this memorandum is to highlight securitisation issues from the consumer and the tax payer perspective. It is not intended to give the impression that the securitisation process is harmful per se but it is intended to demonstrate that without checks and balances, this financial engineering dysfunctions to the detriment of the consumer and ultimately the economy. Transparency is essential, together with openness and honesty from the financial institutions[179].

92. The contractual relationship is not one of equals, it is one of Goliath and David without the stone! The scales of justice are in urgent need of recalibration. To restore equilibrium between the contracting parties the remedy is: the faithful application of the rule of law. The failure of British courts to give effect to consumer rights makes the UK a most creditor friendly jurisdiction (which means a most debtor unfriendly jurisdiction) in the world attracting the highest creditor friendly rating of A1[180]. This high rating is achieved not through the lack of consumer protection law, but rather through the lack of consumer law enforcement. Consumers do not necessarily need new protection laws, consumers need empowerment to enforce their contractual rights and the consumer laws that exist.

This memorandum is respectfully submitted for your consideration.

February 2009

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105 John McFall M.P.: question to the Chancellor of the Exchequer on 19 January 2009 in reference to the Government's £37 billion cash support to the banking industry. Back

106 See eg, Chairman's Q116, Q117, Q169 and Q170. Treasury Committee Banking Crisis Uncorrected Transcripts of Oral Evidence Back

107 True Sale means "This is a genuine sale with title passing to the issuer SPV." Source: H.M. Revenue & Customs CFM20030 at: http://www.hmrc.gov.uk/manuals/cfmmanual/cfm20030.htm Back

108 Additionally, both the bank and the SPV unlawfully suppress and conceal this information from H.M. Land Registry. Back

109 See eg, the SPV's revenue receipts waterfall setting out the order of priority of payments to the many and various creditors followed by the payments due to and investors. Granite Master Issuer plc Prospectus Supplement dated 23 May 2005 at page 144 onward. Back

110 Granite Master Issuer plc Prospectus Supplement dated 23 May 2005 at the 1st para. on page 103 Back

111 See Q170. Angela Knight of the BBA states in explanation that the housing market reduction is value is "affecting the risk weighting of those assets|so the amount of capital that banks hold against that risk also increases". In fact, the bank have sold the assets and passed that risk to the SPV and therefore with respect, Ms Knight's reasoning is defective. In effect, the governments initiatives are supporting the SPVs and their investors and not (as it believes) the banks. This begs the question, why should the tax payer be called upon to guarantee the return of investments? Investors are warned and know that their investments may go down! Back

112 Law of Property Act 1925 s.114 and Land Registration Act 1925 s.33 (note the LRA 1925 is repealed as of October 2003 pursuant to the LRA 2002) Back

113 The legal definition of a disposition includes the conveyance of a mortgage. See Law of Property Act 1925 s.205(ii) Back

114 See Megarry & Wade 7th Ed. Para.7-150 Back

115 See Land Registration Act 2002 s.27(1) As legal title does not operate until registration, it operates in equity pending registration. Also note equity's rule that: equity regards as done that which ought to be done. Back

116 A transfee is: an assignee of a legal charge. See Law of Property Act 1925 s.114(2) Back

117 See Land Registration Act 2002 s.27(3) and Schedule II, paras. 8 and to 10. (Sch. II, para. 10: "In the case of a transfer, the transferee, or his successor in title, must be entered in the register as the proprietor" (bold emphasis added). See also Law Commission Report printed 9 July 2001. Law Com No. 271 HC114 at para. 4.30 Back

118 The contract provides that the SPV will not register unless certain events occur such as, if the mortgage trustee wishes to enforce the security due to the insolvency of the bank, thus defeating any of the bank's creditors claiming against the asset. Back

119 See Land Registration Act 2002 s.123 Back

120 For example, Clavis Securities were sold GMAC mortgages under an absolute assignment with full title guarantee on or around 15 June 2006 and after some 2½ years have failed to register its ownership at the Land Registry. Back

121 Granite Master Issuer plc. Prospectus Supplement dated 23 May 2005 at page 108 under the heading "The mortgage sale agreement". Back

122 Id. See at page 113 under the heading "Assignment of new mortgage loans and their related security". Back

123 Id. See at page 11 under the heading "The Seller, the administrator, the cash manager, the issuer cash manager and the bank account". Back

124 Granite Finance Trustees Limited is a Jersey incorporated company. Back

125 Pursuant to the mortgagee's power as the legal owner under the Land Registration Act 2002 s. 23(1). Back

126 See eg Clavis Securities plc (Reg. No.05778179) Form 395 filing at Companies House on 22 June 2006. Back

127 Although it is conceded that the banks may hold the SPV issued Notes in their Treasury Departments which means: the debts are not trading losses from the bank's loan book of advances to its customers, but rather the (allegedly) poor investments of its Treasury Department in the banks proprietary trading as an investor. Back

128 Northern Rock plc Annual Report and Accounts 2007 at page 55 para. j). Para. "j)" is essentially a concise summary of the three main scenarios of the IAS39 derecognition accountancy standard. Back

129 IAS 39 Technical Summary prepared by IASC Foundation staff (which has not been approved by the IASB). Source http://www.iasb.org/NR/rdonlyres/1D9CBD62-F0A8-4401-A90D-483C63800CAA/0/IAS39.pdf Back

130 Special Purpose Entity ("SPE") is synonymous with Special Purpose Vehicle ("SPV") Back

131 Granite Master Issuer plc, Prospectus Supplement dated 23 May 2005 at page 56. See also, page 60: Northern Rock "does not own directly or indirectly any of the share capital of Holdings or the mortgages trustee". See also page 62: Northern Rock "does not own directly or indirectly any of the share capital of Holdings or the post-enforcement call option holder [namely, GPCH Limited]". Back

132 Northern Rock Report and Accounts 2007. See page 45 and see in particular note 22 on page 73 Back

133 To correct the balance sheet, the "loans and advances to customers" asset figure should be derecognised and reverse from the asset figure against the securitised notes figure. See also note 22 on page Back

134 Northern Rock Report and Accounts 2007 at page 45 Back

135 Id. at page 73 note 22. Back

136 It is probable that tax considerations are also behind this manoeuvre, ie, tax efficient to minimise/ avoid tax liability particularly with respect to the possibility that interest income earned in the UK would be subject to withholding tax prior to payment to the foreign owned SPV. Back

137 "The FSA has been describing itself as `not enforcement led' which we have challenged" Quoted from the Financial Services Consumer Panel, Annual Report 2007/8 at page 21 para. 2.25. Back

138 The FSA's Mortgage Conduct of Business Rules (MCOB). Back

139 The Financial Services Practitioner Panel, Annual Report 2007/8 at page 19 Back

140 Id. Back

141 Which non-compliance is standard practice and ubiquitous and it is submitted there exists and abundance of evidence of non-compliance. See examples of consumer discussions on consumer help forums at: http://www.consumeractiongroup.co.uk/forum/mortgages-secured-loans/ Back

142 Another legal issue arises here. Strictly speaking the claimant should be the SPV, however, the administrator bank will make the claim in its own name. However, at law, the bank has no locus standi to bring the claim in its own name without informing the court that it is claiming in a representative capacity. The court therefore erroneously assumes the bank's legal standing and is wilfully mislead by the legal ruse to conceal the SPV. At law, the bank has no legal right to bring the claim in its own name and no legal right to obtain a possession order against the borrower. Back

143 In similar terms in which the government reminded the courts to enforce the pre-action protocols Back

144 See Mr Tutton's answer to Q135. It is noted that Mr Tutton made these comments in the context of store-cards credit, however, it is averred that these principles apply to any and all credit agreements. Back

145 "|the interest rate payable on those Mortgage Loans is a variable rate set by the mortgage lender| but|the Issuer [Clavis] has undertaken|to set such variable rate at a specified marging or margins in excess of the Bank of England Repo Rate|Accordingly, such Mortgage Loans are treated for all purposes as being Mortgage Tracker Rate Loans". Quoted from: Clavis Securities plc Asset Backed Note Programme Series 2006-1 Note Issue Supplement dated 8 June 2006 at page S-64 under the heading "Interest rate setting in relation to certain Series Portfolio Mortgages"<para>See also eg, without the consent or knowledge of the borrowers, the lenders vary the terms of the mortgages: "Most mortgage lenders in the residential mortgage market vary and extend the Standard Conditions by way of a "Deed of Variation" the terms of which are imported into each Scottish Mortgage|each |Series Portfolio Originator has executed a Deed of Variations of Standard Conditions". Quoted from: Clavis Securities plc Asset Backed Note Programme Series 2006-1 Note Programme Memorandum dated 8 June 2006 at page 40 at section (f)(1). Back

146 See eg, the numerous examples of actual experiences of consumers discussed consumer help forums at: http://www.consumeractiongroup.co.uk/forum/mortgages-secured-loans/ Back

147 There is also an issue here with respect to the advise that a consumer received (or, as is more likely, does not receive) from the solicitor acting in respect of the mortgage. Solicitors should advise their client's on the risks and obligations they are undertaking in the mortgage contract. It is noted that the legal profession are not listed in the Committee's terms of reference which means, that the lawyers have escaped scrutiny for their part in the banking crisis. This is not just limited to the lack of advice to their consumer's clients in the context of mortgage advice, but also the conduct of the City's

securitisation lawyers in condoning and sanctioning their client's wilful breaches of contracts against the mortgagors. Back

148 "First Transparency! All transactions should be transparent and never hidden" Gordon Brown P.M., speech at the Labour Party Conference, September 2008. Back

149 Financial Services Practitioners Panel, Annual Report 2007/8 at page 14 Back

150 Banking Crisis-Consumer Issuers, Uncorrected Transcript of Oral Evidence 14 January 2009, Q122 Nick Ainger Back

151 The colossal numbers of various entities that receive on-going administration fees are astounding. See for example Clavis Securities plc 2006-1 securitisation, Note Programme Memorandum dated 8 June 2006 and the Prospectus Supplement dated 8 June 2006, both of which informs that many different financial institutions acting in capacities will each charge at least 24 various different administration fees and expenses. Back

152 This is the inevitable as the only source of the SPV's income is the cash flows it receives from the borrowers. Back

153 Angela Knight on behalf of the BBA in answer to Q189"|but actually there is a huge amount of remortgaging going on, Northern Rock, for example, and specialist lenders, as they come up for renewal at the end of whatever their [fixed] term was, they [the borrowers] are seeing rates which they consider to be far too high and they are coming back to the major providers." Quoted from Treasury Committee, Banking Crisis, Uncorrected Transcript of Oral Evidence 14 January 2009 to be published as HC 144-ii. Back

154 Observe the difference of some £12 million between the amount of notes issued and the amount of assets that backed the Note issue. The aggregate amount of outstanding principal balances on the mortgages was £588 million (which sum was also the sale/purchase price of the asset), leaving a bonanza of some 12 million extra in cash Back

155 Clavis issued 11 Classes of Notes in the 2006-1 Series. The first 5 Classes of Notes matured in 2031 and the remaining 6 Classes of Notes matured in 2039. Back

156 This remortgaging is another facet of the securitisation industry profitability. Firstly, the remortgaged properties will be securitised which means the consumers are back in the vicious circle. Secondly, the banking industry may charge another set of application fees, arrangement fees etc. Thirdly, the investment banks have a further ready source of new mortgages to securitise which yield further substantial fees and infamous City bonuses. The consumer is the ultimate source of all these cost of all these fees, profits and City bonuses. Back

157 On the balance of probabilities, it is unlikely that Clavis will perform its 25-year obligation to any of its remaining borrowers. Back

158 See footnote 21 Angela Knight: "at the end of whatever their [fixed] term was, they [the borrowers] are seeing rates which they consider to be far too high and they are coming back to the major providers" (underline emphasis added). Back

159 See eg, consumer comment posted on the web 27 November 2008 "They [Southern Pacific Mortgages Limited] have recently started badgering me for arrears that they claim come from DEC 2006!" Source: http://www.consumeractiongroup.co.uk/forum/mortgages-secured-loans/170607-spml-london-mortgage-company.html Back

160 See eg, consumer comments on Southern Pacific Mortgages Limited (a Lehman Bros. securitisation) posted on the web 19 February 2009 "Well I have just been through all bank statements & there is only 6 payments missing unlike the 12 spml mentioned,these total to £4955.74. Also received an upto date statement of spml today stating arrears now stand at £16,101.18 so that £11,145.44 in unfair charges." Source: http://www.consumeractiongroup.co.uk/forum/mortgages-secured-loans/170607-spml-london-mortgage-company-9.html£post1990917. Back

161 Id. "Yesterday [sic] when they phoned me I spoke to 2 people and got quoted £850 as arrears and then £615 and when I said that it didn't tally|I was also told it was not a FSA requirement to NOT add fees etc to the arrears amount and so they would continue to do so!" Back

162 No one gives who does not possess. Black's Law Dictionary, 8th Ed. Back

163 This case was concluded with a dismissal order on 30 January 2007, and then, following inappropriate interventions by the Claimant's solicitors and errors by the court service, the claim was finally dismissed by court order in February 2008. Back

164 A county court judge often has between 20-30 repossession cases in his/her daily cause list. The court sits for only 5 hours per day, which means that the judge has little time to assess the integrity of the Claimant's claim form and the consumer is rarely legally represented. Therefore acting as litigant-in-person the consumer is considerably disadvantaged, often emotionally distressed and intimidated by the court process. Back

165 Compare the FSA's definition of "arrears" "(a) a shortfall (equivalent to two or more regular payments) in the accumulated total payments actually made by the customer measured against the accumulated total amount of payments due to be received from the customer;" See the Glossary in the FSA Handbook. See also FSA Handbook, MCOB 13.3.1 Back

166 The overcharging was admitted on or around September 2008, albeit that they maintained the argument that they had power and liberty to charge and apply their SVR (in excess of GMAC's SVR) at their sole discretion. Back

167 Whilst on this occasion, the case concluded in favour of the consumer (a rare occurrence). The vast majority of consumers as litigant-in-person may not have the knowledge or skills to defeat such claim. Therefore, the Treasury Committee are requested to be mindful that these SPV strategies for claiming repossession would ordinarily result in a possession order against the consumer. Back

168 See the Granite Master Issuer plc Prospectus Supplement dated 23 May 2005, page 101 and the schematic on page 8. Back

169 Id at page 101, "On March 26, 2001, each of the mortgages trustee, Funding and the seller appointed Northern Rock [plc] under the administration agreement to be their agent to exercise their respective rights, powers and discretions in relation to the mortgage loans and their related security and to perform their respective duties in relation to the mortgage loans and their related security| Except as otherwise specified in the transaction documents, the administrator has agreed to comply with any reasonable directions, orders and instructions which the mortgages trustee may, from time to time, give to it in accordance with the provisions of the administration agreement." (Underline emphasis added). Back

170 See, http://companyinfo.northernrock.co.uk/downloads/securitisation/. Granite Master Issuer investor reports 2008 Back

171 Angela Knight of the BBA confirms the implementation of the new Basel Accords. See answer to Q171-172 "We went from, overnight, a situation where as a banking industry we held 8% total capital as a regulatory requirement, of which 2% was core tier one which is the expensive one, if you like, to a situation where we had to hold 8% tier one capital of which 6% was core-a big jump". Quoted from Treasury Committee, Banking Crisis, Uncorrected Transcript of Oral Evidence to be published as HC 144-ii. Back

172 £8.8 billion is understated because it does not take account of the amount of the Notes that may have been redeemed through 2008 in anticipation that the Basel Accord would be triggered. The £8.8 billion aggregate amount outstanding on the Notes as of 31 December 2008. The total figure is calculated from: £2,618,244,672 outstanding Notes denominated in Sterling; $3,373,079,787 Notes outstanding denominated in US Dollars (exchange rate £1 = $ 0.69096 as at 31-12-08); and €2,832,243,408 Notes outstanding denominated in Euros (exchange rate £1 = 0.97404 as at 31-12-08). Source: Granite Finance Trustees Limited's Investor Report available at: http://companyinfo.northernrock.co.uk/downloads/securitisation/ Back

173 See Q431 in particular and Q425 to Q434 generally and answers thereto. Treasury Committee, Banking Crisis, 18 November 2008, Uncorrected Transcript of Oral Evidence, to be published as HC 1167-iii. Back

174 Id. See Q425 and answer thereto. Back

175 See FSA Handbook MCOB 12.3. Back

176 See Global Legal Group Ltd, The International Comparative Legal Guide to: Securitisation 2007, Sanja Warna- kula-suriya and Laurence Rickard of Slaughter and May at page 117: "|under UK GAAP (as it is from 1 January 2005), significant unrealised profits and losses would have had to be recognised in the accounts of securitisation companies and, if tax had to be paid on any such profits, there would have been a risk of securitisation companies becoming unviable. In order to avoid this, and the effect that that would have had on the securitisation market, certain statutory measures were introduced to allow an interim relief for securitisation companies|", (underline emphasis added). Source: http://www.iclg.co.uk/khadmin/Publications/pdf/1321.pdf Back

177 H.M. Revenue & Customs Budget 2007 BN13 available at: http://www.hmrc.gov.uk/budget2007/bn13.pdf Back

178 See above, footnote no. 67 Back

179 It is observed that the legal profession have escaped all scrutiny for their role in the banking crisis. Without the City law firms support, bankers and SPVs may not have so confidently violated statutory obligations nor violated borrowers' contractual rights. Back

180 Contrast the U.K.'s rating of A1 with Germany and U.S.A. rated A2 and France rated B. Source: Standard and Poor's: http://www2.standardandpoors.com/spf/pdf/events/blr200714.pdf Back

 Prepared 1 April 2009

MERCANTILE LAW AMENDMENT ACT 1856 (IMP) - SECT 5

5 . A surety who discharges the liability to be entitled to assignment of all securities held by the creditor

Every person who, being surety for the debt of duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain

from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him:

Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

The Australian legal system provides a range of options for a victim of fraud or breach of fiduciary duty who is seeking to trace the misappropriated property or recover the loss suffered.

A victim of fraud will typically seek compensation through civil proceedings.

Proceedings can be brought against a fraudster or the person who committed the breach. In addition, the victim may have claims against any persons who were knowingly involved in the fraud or breach, or against the recipient of the misappropriated property.

Where the misappropriated property can be sufficiently identified and the victim can establish a proprietary interest in that property, that proprietary interest will rank ahead of competing claims by any other creditors.

Accordingly, an insolvency of the fraudster will not necessarily preclude the victim from recovering the loss.

A broad range of orders are available from the Australian courts to assist the victim. These range from orders for compensation and the return of property to orders freezing the assets or permitting the victim to search premises where evidence may be held.

Where a victim is seeking to trace assets in equity, Australian courts 'have favoured practicality over strict logic'. In other words, Australian courts will adopt a practical and commonsense approach, and even if each link in the chain of accounts through which the money has passed cannot be connected, the court will be willing to draw appropriate inferences as to what occurred.

The broadest range of remedies that are available to a victim arise in equity.

Where fraud or theft is involved, Australian law does not require a pre existing trust or fiduciary relationship to apply to the lost assets for equitable remedies to be available.

The causes of action and remedies that might be available to a victim arise under statute, at common law and in equity. They include both personal and proprietary claims, the latter of which will involve tracing.

Overview

The Asset Tracing and Recovery Review: Australia

Christopher Prestwich *Allens*

07 September 2020

In matters such as the misappropriation of company funds and fraudulent misrepresentation in company sales or equity raisings, criminal proceedings are sometimes brought by the regulator, the Australian Securities and Investments Commission (ASIC), rather than by the police.

ASIC has powers to bring criminal proceedings under legislation including the Corporations Act and the Australian Securities and Investments Commission Act 2001. While ASIC may

seek compensation orders as a result of the conduct in question, its focus is often on seeking criminal sanctions (including imprisonment) or seeking civil penalty or banning orders.
The Director of Public Prosecutions (DPP) may also prosecute cases such as fraud. While the DPP's focus will typically be obtaining a criminal conviction, there are procedures under which, following a successful criminal prosecution, a victim can apply for compensation orders in that criminal proceeding.
Where property is misappropriated, the victim's primary recourse will often be a civil claim against the person who committed the fraud or breach of duty. As stated above, where the relevant conduct infringes legislation administered by ASIC, ASIC can also bring civil claims.
Causes of action available to the victim include:
a. misleading or deceptive conduct: where the fraud has occurred in the context of business, a claim may be available for misleading or deceptive conduct;
b. breach of duty: fraudulent conduct by a company director can result in pecuniary penalty orders, compensation orders, equitable claims for constructive trust over profits, account of profits or equitable compensation. Breaches of duty by trustees can also be remedied by equitable claims;
c. money had and received: where money has been taken, a claim for money had and received on the basis of unjust enrichment may be available;
d. tort of deceit: where the victim suffers loss by relying on a fraudulent representation by the defendant that the defendant intended the victim to rely upon, a claim may be made for damages; and
Tracing is not of itself a claim under Australian law. Australian courts have approved the statement by the House of Lords in *Foskett v. McKeown* that tracing is neither a claim nor a remedy; rather, it is a process by which a claimant demonstrates what has happened to the claimant's property, identifies its proceeds and justifies a claim to those proceeds as being the claimant's property.

Legal rights and remedies
i Civil and criminal remedies
Claims against the person who commits the fraud or breach of duty
Criminal remedies
Civil remedies
e. torts of conversion and detinue: where goods have been taken, claims may lie for conversion and detinue. This is likely to be most relevant where money has been taken by cheque fraud.
The basis for a claim against the primary wrongdoer is likely to be straightforward. However, as a practical matter, civil claims are often of limited value in terms of recovering the property or obtaining damages, as assets are regularly dissipated or removed from the jurisdiction, and the wrongdoer may either disappear or file for bankruptcy.
Where a fraud has been committed by an employee in the course of doing acts that he or she is empowered to do by his or her employer in the course of employment, the employer may also be found vicariously liable for the employee's fraudulent acts.
A better source of potential recovery for the victim may be a claim against a third party who participated in, was knowingly involved in, or assisted the person who committed the fraud or breach of duty.
That type of knowing involvement claim is illustrated by Australia's longest running piece of litigation, being proceedings brought against a syndicate of banks arising out of the collapse of the Bell group. Those proceedings concerned, in summary, claims that the directors of the Bell group companies breached their duties to those companies, and that the banks had the requisite knowledge of the breaches to be held liable as constructive trustees. Judgment was

entered against the banks for A$1.75 billion. Set out below are potential causes of action against accessories to the breach or to the fraud.

Other claims that may be available against accessories include claims for the tort of conspiracy and the tort of negligence.

The Corporations Act and the Australian Consumer Law (ACL) both contain accessorial liability provisions:

a. Under the ACL, damages can be sought against both a person who contravenes the statute (e.g., by engaging in misleading or deceptive conduct) and a person involved in the contravention. A person is involved in the contravention if that person, inter alia, aids or abets the contravention, counsels the contravention or induces the contravention.

b. Similarly, damages can be sought under the Corporations Act against persons who are involved in a contravention of that Act (e.g., breaches of directors' duties).

A claim against an accessory involves considerations that can make it considerably more difficult to establish than a claim against the principal wrongdoer. To illustrate this, some of the issues that often arise in an accessorial liability claim arising out of a misrepresentation inducing the sale of a business at an inflated price include the following:

Claims against persons who assist in committing the fraud or breach of duty

Civil accessorial liability – statute

Civil accessorial liability – equity

a. the quality of the accessory's knowledge: actual rather than constructive knowledge of the falsity of the representation is required to found an accessorial liability claim. In cases of wilful blindness, an inference could be made of actual knowledge;

b. corporate knowledge: where the accessory is a corporation, whether the knowledge of a particular individual can be imputed to the corporation may be a live issue; and

c. identifying the right parties to sue: if the misrepresentation was contained in a disclosure document, damages may be available from, inter alia, the directors of the body making the offer (although there are defences that may be available to the directors, such as the due diligence defence).

However, the following factors are advantageous to a person making a claim against an accessory:

a. the accessory's knowledge: it is not necessary to show that the alleged accessory knew that the conduct in question (i.e., the misrepresentation to the purchaser) was unlawful. It is sufficient if he or she had actual knowledge of the essential matters of the principal's contravention, which are that a representation was made and that the representation was false; and

b. causation: a person may be knowingly involved in a contravention and liable in damages even if that person's conduct was not causally connected with the contravention.

In equity, the two main heads of accessorial liability are the two limbs of *Barnes v. Addy*, being knowing assistance in the breach of trust or fiduciary duty, and knowing receipt of trust property. Knowing receipt is discussed further below. A knowing assistance claim under Australian law has three elements: a dishonest and fraudulent breach of duty in the sense of being morally reprehensible; knowledge of the dishonest and fraudulent breach on the part of the third party; and assistance in that breach by the third party.

To establish knowing assistance, the actions of the third-party assistant must have had some causal significance – that is, 'the plaintiffs must prove that the defendants' conduct made a difference, in the sense that it advanced the primary breach in some way', although English law suggests it is not necessary to establish a precise causal link between the assistance and the loss. The equitable remedies that are available if the claim is established are discussed below.

There are also criminal consequences for an accessory to fraud. A person who, before or during the commission of an offence, intentionally encourages or assists another to commit a crime may be charged for the offence itself. To be liable, an accessory must have actual

knowledge of the essential facts and circumstances of the principal offence, and must aid, abet, counsel or procure the commission of the offence.
Where proceeds of fraud or a breach of duty have been transferred to a third party, the victim may be able to recover that property from the third party or be compensated for the loss under a range of civil remedies.

Criminal accessorial liability for fraud
Claims against third parties who receive or transmit the proceeds of fraud or breach of duty

Establishing a proprietary interest in the misappropriated property will enable the victim to rank ahead of all other creditors in respect of that property.
The main remedies at common law against a third-party recipient of property are actions for money had and received, and for conversion and detinue.
A detailed discussion of those remedies is beyond the scope of this chapter.
However, it should be noted that the common law remedies have some notable limitations. They rely on the plaintiff establishing a legal title to property that needs vindicating, which requires being able to trace title to the property at common law. There are some common forms of mixing that will result in legal title to the property no longer being traceable. For example, if a director misappropriates company funds, pays those funds to a relative and the relative mixes the funds with his or her own funds, that will end the company's common law chain of title.
Equitable remedies are broader and more flexible than common law remedies. They include declarations of ownership and constructive trust, declarations of charge, an account of profits and equitable compensation.
Equity will recognise proprietary claims, via a constructive trust or charge, in more situations than common law because equity will trace into mixed funds as well as into any property that is substituted for the original asset, including any proceeds of the sale of the property.
Tracing is not restricted to cases involving breach of fiduciary duty (e.g., misappropriation by a director of company funds). In *Black v. S Freedman & Company*, the High Court recognised a right to trace funds against a thief on the basis that stolen money is held on constructive trust by the thief. The company that was the true owner was able to trace the moneys that were paid over to the thief's wife. It was not suggested that the thief's fiduciary relationship with the company was a necessary element to the tracing claim.
Some specific issues that might arise in a proprietary claim are as follows:
a. property transferred away: the proprietary remedies consequent on tracing do not impose any personal liability. Once the property leaves the recipient's hands, the remedies are no longer available against that recipient;
b. bona fide purchaser for value without notice: the remedies will not be enforceable against a bona fide purchaser for value of the property without notice of the victim's equitable interest;
c. indefeasibility of Torrens title to land: it is generally not possible to trace into land held by a registered proprietor under the Australian Torrens title system. This is because Torrens legislation gives indefeasible title to the individual recorded as the registered proprietor of land on the Torrens register. However, title is defeasible against a person who becomes the registered proprietor of the land through fraud, or any person who derives title through them who is not a bona fide purchaser for value without notice; if the recipient purchases something valuable with money withdrawn from the mixed account, the victim may be entitled to claim that property; in the event the plaintiff's property is traced into a fund that mixes the plaintiff's property with a third party's property, the plaintiff and the third party will share the mixed fund in proportion to their contributions, with the third party having the onus to prove his or her contribution; and in the event a third party uses the plaintiff's money

on improvements to the third party's own assets, the plaintiff will not be able to trace into the improved asset. The plaintiff may not, in that case, have a remedy; and
d. mixing and priority rules: complex apportionment and priority rules apply when tracing into a volunteer third party recipient's hands. By way of example:
e. tracing into overdrawn bank account: it is not possible to trace into an overdrawn bank account that remains overdrawn even after the misappropriated money is paid into it as the money has 'no identifiable existence after the payment'. It may be possible to trace into an account that is in credit, although occasionally overdrawn; however, this approach has been criticised.
If a plaintiff establishes a proprietary entitlement to certain assets via tracing, the court has no discretion to deny a remedy, although it may have a discretion as to which remedy is applied.
An equitable claim that imposes personal liability on the recipient is the claim for knowing receipt under the first limb of *Barnes v. Addy*. A detailed discussion of that claim is beyond the scope of this chapter, but in summary, where a third party receives property that has been misapplied in breach of fiduciary duty with knowledge of the breach of duty, equity will hold the third party as a constructive trustee of the property; and equity will impose on the recipient of the property the trustee's personal obligation to restore property to the trust. If the trust property leaves the recipient's hands, equitable compensation may be ordered against the recipient.
To illustrate how such a claim would work in the context of a director's misappropriation of company funds (e.g., by paying them to a relative), to establish a claim against the recipient of the funds, the company would need to show:
a. the recipient received trust property. The weight of authority is that the first limb of *Barnes v. Addy* applies not only to trust property in the strict sense but also to property to which a fiduciary obligation attaches, for example, company property; and actual knowledge; wilfully shutting one's eyes to the obvious; wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; and
b. the recipient knows that the property is trust property and that it is being applied in breach of trust or fiduciary duty. The quality of knowledge the recipient must have of the breach is not conclusively settled in Australia.
Recent cases suggest that mere knowledge of circumstances that would put an honest and reasonable person on inquiry is not sufficient, but that any of the following types of knowledge identified by Peter Gibson J in *Baden v. Société Générale* will suffice:
knowledge of circumstances that would indicate the facts to an honest and reasonable person.
A third-party recipient may be criminally liable for receiving stolen property if he or she knows that the property was stolen at the time of receiving the property.
In the case of fraud, there is an obvious risk of assets that would otherwise be available to meet a judgment being moved or dissipated. A party may apply to the court for a freezing order, or *Mareva* order, to preserve assets in aid of a contemplated proceeding in order to prevent abuse of the court's process.
An applicant seeking a freezing order will typically bring an *ex parte* application for it. To obtain a freezing order, the applicant must, inter alia:
a. prove that judgment has been given in its favour or that it has a good arguable case on its claim;
b. prove by evidence that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the relevant assets might be, for example, removed or disposed of. The applicant does not need to provide demonstrable proof that, absent the making of an order, assets will inevitably be disposed of. Rather, the court will consider whether there is a real risk that assets will be dealt with so as to prevent the satisfaction of a judgment. As to evidence, in a case concerning a misappropriation of company funds by a

director, evidence might be led of the director's lack of probity. Other relevant evidence might include the respondent's corporate structure, the nature of its assets, evidence of past disposals of assets and any evidence of an intention to transfer assets; and
c. give an undertaking as to damages.
Orders can also be sought against third parties who hold or control assets beneficially owned by a respondent (e.g., banks).
The limitation period in Australia for statutory and common law claims is six years. However, in cases of concealed fraud, the limitation period will only run from the time the fraud is discovered.
For equitable claims, the position is more complex. There is no limitation period, but equity may apply a limitation period by analogy with an equivalent statutory claim. For example, directors owe both statutory and equitable duties to corporations. A six-year limitation period applies to a claim for breach of the statutory duty, and a time bar may be applied to an
analogous claim for breach of the equitable duty.

Criminal liability Defences to fraud claims Limitation periods
Seizure and evidence i Securing assets and proceeds Asset disclosure orders

If an *ex parte* freezing order is made by the court, it operates only until the first *inter partes* return date. On that occasion, the applicant bears the onus of establishing why the order should continue, and the respondent will have the opportunity to argue as to why the order should be discharged.
In addition to a freezing order, the court has the power to make ancillary orders for the purpose of obtaining information about the frozen assets, or as to whether an order should be made at all. The most common type of order made is that the respondent disclose, by way of affidavit, the nature, value and location of its assets.
A party seeking to preserve evidence for use in a proceeding may apply to the court to obtain a search order, also known as an *Anton Piller* order after the decision in *Anton Piller KG v. Manufacturing Processes Ltd*.
An application for a search order is brought *ex parte*. To obtain a search order, the applicant must show:
a. a strong prima facie case on an accrued cause of action;
b. that if a search order is not made, the potential or actual loss to the applicant will be serious; and
c. sufficient evidence that the respondent possesses important evidentiary material, and that there is a real possibility that the respondent might destroy that material or cause it to be unavailable for use in a subsequent court proceeding. The requirement for showing a real possibility of destruction of evidence will typically require evidence of fraud or dishonesty on the part of the respondent.
Some practical matters that arise in the context of a search order are as follows:
a. the court requires that the search party must include an independent solicitor, nominated by the applicant and appointed by the court to supervise and report back on the search;
b. the proposed orders must list the items to which the search order will apply. Where the premises are likely to include electronic items, it is useful to include a provision requiring that the search order cover any cloud data that is not physically held on the premises but is accessed through electronic equipment on the premises;
c. the orders must also list the people who will comprise the search party. It may be necessary to include an independent computer expert who can identify, search and image electronic materials;
d. the materials obtained during a search order are kept in the custody of the independent solicitor until the first *inter partes* return date. On the return date, the court will consider

what is to be done with the seized materials and any claims of confidentiality or privilege in the materials; and
e. a separate application must be brought for access to the seized materials.
The Australian courts have jurisdiction to make orders restraining a defendant from leaving the jurisdiction and requiring the delivery up of any passports.

Obtaining evidence
Search orders
Restricted travel

Before commencement of proceedings, evidence can also be obtained by an application for pre-action discovery from the proposed defendant.
Third parties who were somehow involved in and facilitated the wrongdoing (even innocently) can be ordered to give limited discovery for the purposes of identifying the proper defendants to a proposed action (a *Norwich Pharmacal* order). Where a proceeding is on foot, material can be obtained from third parties by issuing subpoenas requiring the third party to produce relevant documents to the court.
Where a bank makes payment under the direction of a forged cheque and debits a customer's account for the amount paid, the bank will be liable to its customer for the unauthorised payment. In the absence of a genuine signature by the drawer customer, there is no valid cheque and no mandate. The bank will almost always be found to have paid out its own money rather than the customer's, unless the customer has failed to use ordinary care to prevent cheques being forged or fraudulently altered (e.g., by leaving gaps that enable easy alteration to figures or words), or has failed to disclose to the bank any knowledge of related forgery, or is otherwise estopped from denying the cheque's validity (e.g., by making a representation ratifying the forgery).
In the event of a payment instruction that has been fraudulently made by an authorised signatory outside the signatory's authority, it would appear that a bank can, in limited circumstances, be found liable for paying under the fraudulent mandate even though the instruction appears to have been properly signed. Australian courts have recognised the existence of a duty to question a valid mandate in certain circumstances, but the precise scope of the duty is not well defined. The likely standard is that a banker should question a mandate where a reasonable and honest banker with In circumstances in which ASIC is investigating a wrongdoing, it may conduct private examinations of persons it believes can give information relevant to the matter. ASIC may then give a copy of a written record of that examination, together with a copy of any related book (document), to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on, or contemplating, a proceeding in respect of the matter that was the subject of the investigation. Subject to some limited exceptions, the record of that examination is admissible as evidence in a subsequent proceeding against the wrongdoer.
Pre-action discovery and subpoenas
ASIC examinations
Fraud in specific contexts
i Banking and money laundering
Banks' liabilities for forged and fraudulently made payment instructions
knowledge of the relevant facts would consider that there was a serious or real possibility that the customer was being defrauded or that the funds were being misappropriated.
The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and its related Rules require financial institutions to undertake customer identification procedures, perform ongoing customer due diligence and report suspicious matters. This legislation introduced heavy investigatory

burdens on financial institutions. As a result, behaviour that had been sufficient to protect financial institutions from a claim for money had and received may no longer be adequate. For example, banks accepting deposit instructions from a fraudster or the fraudster's agent without first checking the title to the funds have successfully maintained a defence of adverse change of position in the past.

The insolvency of either the fraudster or the defrauded person can lead to additional avenues for the recovery of money or obtaining information in the wake of fraud.

Where a fraudster is made bankrupt, a trustee-in-bankruptcy has extensive powers that can be used to require the bankrupt to provide information about his or her dealings, and there are a number of claims available to the trustee-in-bankruptcy to pursue against persons to whom the fraudster transferred money. For example, transfers of property for no consideration or less than market value that took place in the five years before the commencement of the bankruptcy are void as against the trustee-inbankruptcy as an undervalued transaction.

Where the defrauded entity becomes insolvent, extensive informationgathering powers are available to an external administrator of that entity.

For example, a liquidator of an insolvent company can apply to court for leave to conduct a public examination. The court may require a person to attend court to give evidence and be cross-examined about the corporation's examinable affairs.

The International Arbitration Act 1974 provides that a court may refuse to enforce an award if it would be contrary to public policy. Unlike equivalent legislation in many other countries, the Australian statute expressly provides that fraud can render enforcement of an arbitral award contrary to public policy: the enforcement of a foreign award would be contrary to public policy if 'the making of the award was induced or affected by fraud or corruption'.

Money laundering, Insolvency, Arbitration,
Fraud as a basis for refusing to enforce a foreign award Court relief in support of arbitral awards

Where a plaintiff is taking steps to seek to enforce an arbitral award in its favour and the defendant has assets in Australia, one of the options that the plaintiff might consider is applying to the Australian court for a freezing order in respect of those assets if there is a risk that they would otherwise be dissipated. A decision by the Federal Court of Australia in *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited* provides an example of the Court being willing to grant a freezing order over shares owned by that company prior to enforcement of the arbitral award.

The civil standard of proof (the balance of probabilities) applies to civil allegations of fraud. However, given the seriousness of the allegations, the tribunal of fact must be reasonably satisfied before fraud can be found.

A crime and fraud exception applies to claims for legal professional privilege in Australia, although that tag is a misnomer. As explained by the High Court in *Commissioner of Australian Federal Police v. Propend Finance Pty Ltd*:

The applicable law for a claim arising out of fraudulent conduct or breach of fiduciary duty is the law of the place of the wrong, being the place where the relevant conduct took place (subject to any mandatory statutes of the forum). If proceedings are brought in Australia in respect of such wrongs, this may mean there is no ability to serve process on an overseas

defendant pursuant to the relevant court rules. It may also provide a basis on which an Australian court may decline to exercise its jurisdiction to hear the claim.
Determining where the wrong took place can be complex where crossborder communications are involved. The communication might be made in one country but acted on in another. The position under Australian law is that the act is committed at the place to which the communication is directed, whether or not it is acted upon there.
In determining whether that exception precludes a claim for legal professional privilege being made, relevant considerations are that it is the client's state of mind that is relevant, not the solicitor's; the exception is not limited to the actual crime or fraud itself and includes communications made to further an illegal purpose; and a mere allegation of fraud will not be sufficient, rather a prima facie case of fraud must be established by evidence.

Fraud's effect on evidentiary rules and legal privilege

Communications in furtherance of a fraud or crime are not protected by legal professional privilege, because the privilege never attaches to them in the first place. While such communications are often described as 'exceptions' to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of the privilege.
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International aspects
i Conflict of law and choice of law in fraud claims
Collection of evidence in support of proceedings abroad
Australia has acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Each state and territory has passed legislation that gives power to the relevant Supreme Court to make orders for the collection of evidence upon receipt of a letter of request from a foreign court. The types of orders that a court can make include ordering the attendance of witnesses for examination; ordering the production of documents; and ordering the inspection, preservation, detention or custody of any property.
Where there is a sufficient prospect that a foreign court will give judgment in favour of a plaintiff in a foreign proceeding, and that judgment will be registered or enforced in an Australian court, the Australian court has jurisdiction to make a freezing order against the prospective judgment debtor and its assets in Australia.
Judgments obtained abroad for matters such as fraud or breach of fiduciary duty can be enforced in Australia in the same way as any other judgment. There are, however, various criteria that must be met before a foreign judgment can be enforced in Australia.
The Foreign Judgments Act 1991 provides a statutory scheme for the recognition and enforcement of judgments from various foreign countries with which Australia has made reciprocal arrangements. The Australian court will register the judgment at any time within six years of its date if the following requirements are met: the judgment must be final and conclusive; the judgment must be for a sum of money (punitive damages are not excluded from registration, although judgments for taxes, fines and penalties are excluded); and the judgment cannot be registered if it has been wholly satisfied or it could not be enforced in the country of the original court.
At common law, there are four well-established requirements for the recognition and enforcement of foreign judgments *in personam*:
a. the foreign court must have exercised jurisdiction over the judgment debtor that Australian courts will recognise;
b. the foreign judgment must be final and conclusive;
c. there must be an identity of the parties; and
d. the foreign judgment must be for a certain sum.
Seizure of assets or proceeds of fraud in support of the victim of fraud
Enforcement of judgments granted abroad in relation to fraud claims

The statutory scheme
The common law scheme
Subsequent enforcement steps
Once a judgment against a corporation is entered or recognised in Australia, it is commonly enforced by issuing a statutory demand to the corporation. If the corporation fails to pay the debt or have the demand set aside, the judgment creditor is entitled to bring proceedings to have the corporation wound up in insolvency.
Possible enforcement steps against individuals include petitioning for bankruptcy, serving an examination notice, obtaining a writ of execution, obtaining a garnishee order or obtain a charging order over property owned by the judgment debtor.
In Australia, there is currently a particular focus on the obligations of banks in relation to their compliance with the Anti-Money Laundering and Counter Terrorism Financing Act 2006. In 2017, AUSTRAC (Australia's financial intelligence and regulatory agency) commenced proceedings in the Federal Court of Australia against a domestic bank alleging serious and systemic non-compliance with that legislation. That proceeding arose out of the use of intelligent ATMs that accept cash deposits, with the funds deposited then being immediately available for transfer. AUSTRAC highlighted the higher money laundering and financing of terrorism risks associated with that product. The proceeding focused on:
A judgment will not be enforceable in Australia if the defendant is able to establish that the judgment was obtained by fraud. The principles that the court will apply when a plaintiff alleges fraud as a basis for resisting enforcement of a judgment include the following:
a. the party asserting fraud must show that there has been a discovery of fresh facts that would provide a reason for setting aside the judgment;
b. mere suspicion of fraud is not sufficient. The party asserting fraud must establish that the new facts are so material that it is reasonably probable that the action will succeed. The proof of the facts 'should be clear and cogent such as to induce, on a balance of probabilities, an actual persuasion of the mind as to the existence of the fraud';
c. proof of perjury by a witness in the original proceeding will not of itself be sufficient. The plaintiff will need to establish that the defendant knew the true state of affairs and knowing it, called a witness to give a false and perjured account; and
d. it must be shown that the successful party was responsible for the fraud that taints the judgment under challenge.
Having regard to the public interest in finality of litigation, resisting the enforcement of a judgment on the basis of an alleged fraud is not straightforward. Further, if the alleged fraud was known at the time of the original proceedings or raised in those proceedings, it seems likely that an Australian court would hold that estoppel prevents the alleged fraud being raised at the time of enforcement.

Fraud as a defence to enforcement of judgments granted abroad
Current developments
i Money laundering
a. the adequacy of the money laundering and financing of terrorism procedures put in place by the bank;
b. the assessments the bank undertook and whether appropriate risk-based systems were put in place to mitigate the risks; and
c. allegations of non-reporting and late reporting.
In June 2018, the Federal Court of Australia ordered the largest civil penalty in Australia's corporate history against the bank, being a penalty order of A$700 million
.
Christopher Prestwich is a partner at Allens. This chapter was written with assistance from Ashleigh McNamara, a lawyer at Allens.
Justice Mark Leeming, 'Proprietary relief and tracing in equity' (2016) 90 ALJ 92 at 94.

Toksoz v. Westpac Banking Corporation [2012] NSWCA 199; (2012) 289 ALR 577 at [8]–[9] (Allsop ACJ, Hoeben JA and Sackville AJA agreeing).
Black v. S Freedman & Co (1910) 12 CLR 105 at 110 (O'Connor J); [1910] HCA 58.
[2001] 1 AC 102 at 128 (Lord Millett).
Corporations Act 2001 (Cth).
Australian Securities and Investments Commission Act 2001 (Cth).
See, for example, the Victims Rights and Support Act 2013 (NSW) and equivalent legislation in other Australian states and territories.
Section 1317G of the Corporations Act 2001 (Cth).
Section 1317H of the Corporations Act 2001 (Cth).
See RP Balkin and JLR Davis, *The Law of Tort*s (2013) at [23.12]–[23.42].
See, for example, *Perpetual Trustees Australia Ltd v. Heperu Pty Ltd* (2009) 76 NSWLR 195; [2009] NSWCA 84.
AUSTRAC predicts that Australia's financial system will be more vulnerable to certain forms of criminal and fraudulent exploitation during the covid-19 pandemic. These include:
a. that government assistance programmes will be targeted by fraudulent applications and phishing activity;
b. that large amounts of cash will be moved as a result of purchases and sales of illegal or stockpiled goods; and
c. unusual purchases of precious metals and gold bullion.

COVID-19
Footnotes

Pioneer Mortgage Services Pty Ltd v. Columbus Capital Pty Ltd (2016) 250 FCR 136; [2016] FCAFC 78.
Westpac Banking Corporation v. Bell Group Ltd (in liq) (No. 3) (2012) 44 WAR 1; [2012] WASCA 157, which was appealed to the High Court but settled prior to judgment.
Formerly known as the Trade Practices Act 1974 (Cth).
Section 236 of the Australian Consumer Law.
Australian Consumer Law definition of involved (Section 2).
See Sections 79 and 1325 of the Corporations Act.
Giorganni v. R (1985) 156 CLR 473 at 507–508 (Wilson, Deane and Dawson JJ); [1985] HCA 29.
See, e.g., Krakowski v. Eurolynx Properties Ltd (1995) 183 CLR 563; [1995] HCA 68.
Section 729 of the Corporations Act 2001 (Cth).
Yorke v. Lucas (1985) 158 CLR 661 at 667–668 (Mason ACJ, Wilson, Deane and Dawson JJ); [1985] HCA 65. However, in a different factual context, the precise essential matters of which knowledge must be established may be open to dispute: Lifeplan Australia Friendly Society Ltd v. Ancient Order of Foresters in Victoria Friendly Society Ltd (2017) 250 FCR 1; [2017] FCAFC 74 (That the applicant possessed the requisite knowledge was upheld in Ancient Order of Foresters in Victoria Friendly Society Ltd v. Lifeplan Australian Friendly Society Ltd [2018] HCA 43; (2018) 92 ALJR 918).
HIH Insurance Ltd (in liq) v. Adler [2007] NSWSC 633 at [37].
Barnes v. Addy (1874) LR 9 Ch App 244.
See Farah Constructions Pty Limited v. Say-Dee Pty Limited (2007) 230 CLR 89 at [160]–[163] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); [2007] HCA 22.
See Selangor United Rubber Estates Ltd v. Craddock (No. 3) [1968] 1 WLR 1555 at 1590-1, referred to with approval by Gibbs J in Consul Developments Pty Ltd v. DPC Estates Pty Ltd (1975) 132 CLR 373 at 398; [1975] HCA 8.
The High Court held in Farah Constructions Pty Limited v. Say-Dee Pty Limited (2007) 230 CLR 89 at [177]–[178]; [2007] HCA 22 that the level of knowledge required is at least knowledge

of circumstances that would indicate the facts to an honest and reasonable person (i.e., something short of actual knowledge or wilful blindness can be sufficient to found a knowing assistance claim in equity).
Nicholson Street Pty Ltd (Receivers & Managers Appointed) (In Liquidation) v. Letten [2015] VSC 583 at [86] (Judd J) (reversed by the Full Court on other grounds).
Casio Computer Co Ltd v. Sayo (No. 3) [2001] EWCA Civ 661; Grupo Torras SA v. Al-Sabah [No. 5] [1999] CLC 1469 at 1667 (Mance J). See further Alison Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34(2), Melbourne University Law Review 481.
Giorgianni v. R (1985) 156 CLR 473 at 482–483, 486–8 (Gibbs CJ), at 494–495 (Mason J), at 500, 505–506 (Wilson, Deane, Dawson JJ); [1985] HCA 29.
The precise terms used for the conduct of the accessory varies among different states and territories.
For a recent example involving funds that could not be traced at common law once they were gambled in poker machines, see Silversea Cruises Australia Pty Ltd v. Abellanoza [2019] NSWCA 306 at [51]-[52] (Bathurst CJ); [115]-[116], [119] (Gleeson JA).
See, for example, Ancient Order of Foresters in Victoria Friendly Society Ltd v. Lifeplan Australian Friendly Society Ltd [2018] HCA 43; (2018) 92 ALJR 918.
In re Diplock; Diplock v. Wintle [1948] Ch 465 at 520; [1948] 2 All ER 318; Agip (Africa) Ltd v. Jackson [1991] Ch 547 at 566.
(1910) 12 CLR 105 at 110 (O'Connor J); [1910] HCA 58.
Foskett v. McKeown [2001] 1 AC 102 at 127; In re Diplock; Diplock v. Wintle [1948] Ch 465 at 544; [1948] 2 All ER 318.
See, for example, Sections 42 and 118 of the Real Property Act 1900 (NSW).
See further Cassegrain v. Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425; [2015] HCA 2. However, volunteers who register their interest will enjoy indefeasible title in the Northern Territory and Queensland: Land Title Act 2000 (NT) Section 183; Land Title Act 1994 (Qld) Section 180.
Re Oatway; Hertslet v. Oatway [1903] 2 Ch 356; (1903) 88 LT 622.
In re Diplock; Diplock v. Wintle [1948] Ch 465 at 539, 541; [1948] 2 All ER 318.
See Sze Tu v. Lowe (2014) 89 NSWLR 317; [2014] NSWCA 462.
In re Diplock; Diplock v. Wintle [1948] Ch 465 at 546–8; [1948] 2 All ER 318.
Russell Gould Pty Ltd v. Ramangkura (2014) 87 NSWLR 552; [2014] NSWCA 310.

Alesco Corporation Limited ACN 008 666 064 v. Te Maari [2015] NSWSC 469 at [115]. See also *Federal Republic of Brazil v. Durant International Corporation* [2015] 3 WLR 599; [2015] UKPC 35; [2015] All ER (D) 21 (Aug).
J C Campbell, 'Republic of Brazil v. Durant and the equities justifying tracing' (2016) 42, *Australian Bar Review* at 32; *Nadilo v. Souris* [2019] NSWSC 108 at [95] (Leeming JA).
Alesco Corporation Limited ACN 008 666 064 v. Te Maari [2015] NSWSC 469 at [151].
(1874) LR 9 Ch App 244; *Consul Development Pty Ltd v. DPC Estates Pty Ltd* (1975) 132 CLR 373; [1975] HCA 8; *Farah Constructions Pty Ltd v.* Say-Dee *Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22.
Grimaldi v. Chameleon Mining NL (No. 2); *Chameleon Mining NL v. Murchison Metals Ltd* (2012) 200 FCR 296; [2012] FCAFC 6.
Westpac Banking Corporation v. Bell Group Ltd (in liq) (No. 3) (2012) 270 FLR 1; (2012) 89 ACSR 1at [2132]–[2136] (Drummond AJA, Lee AJA agreeing); [2012] WASCA 157; *Consul Development Pty Ltd v. DPC Estates Pty Ltd* (1975) 132 CLR 373 at 396–7; [1975] HCA 8; *Farah Constructions Pty Ltd v.* Say-Dee *Pty Ltd* (2007) 230 CLR 89; (2007) 236 ALR 209 at 245; [2007] HCA 22; *Grimaldi v. Chameleon Mining NL (No. 2)*; *Chameleon Mining NL v. Murchison Metals*

Ltd (2012) 200 FCR 296; [2012] FCAFC 6; *Evans v. European Bank Ltd* (2004) 61 NSWLR 75 at 107; [2004] NSWCA 82.
Evans v. European Bank (2004) 61 NSWLR 75 at 106–107; [2004] NSWCA 82.
Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 WLR 509.
Westpac Banking Corporation v. Bell Group Ltd (in liq) (No. 3) (2012) 270 FLR 1; (2012) 89 ACSR 1 at [2127]–[2130] (Drummond AJA, Lee AJA agreeing); [2012] WASCA 157; Grimaldi v. Chameleon Mining NL (No. 2); Chameleon Mining NL v. Murchison Metals Ltd (2012) 200 FCR 296; (2012) 287 ALR 22 at [268]–[270]; [2012] FCAFC 6; Equiticorp Finance Ltd (in liq) v. Bank of New Zealand (1993) 32 NSWLR 50 at 103; Re Three Chimneys Pty Ltd (in liq) [2015] NSWSC 1754; Simmons v. New South Wales Trustee and Guardian [2014] NSWCA 405 at [90]–[92] (Gleeson JA).
Crimes Act 1900 (NSW) Section 188; Criminal Code (NT) Section 229(1); Criminal Code (Qld) Section 433; Criminal Code (WA) Section 414; Criminal Code (Tas) Section 258; Criminal Code 2002 (ACT) Section 313; Crimes Act 1958 (Vic) Section 88(1); and Criminal Law Consolidation Act 1935 (SA) Section 134(5), 134(6).
G E Dal Point, Law of Limitation (2016) at [13.32]–[13.39].
Mareva Compania Naviera SA v. International Bulk Carriers SA [1980] 1 All ER 213.
Frigo v. Culhaci [1998] NSWCA 88.
Downer EDI Engineering v. Taralga Wind Farm Nominees No. 2 [2014] NSWSC 971.
[1976] 1 Ch. 55.
See Section 25 of the Australian Securities and Investments Commission Act 2001 (Cth).
See Section 76 of the Australian Securities and Investments Commission Act 2001 (Cth).
See also Section 32(1) of the Cheques Act 1986 (Cth): a forged drawer's signature is wholly inoperative unless there is an estoppel against the person whose signature it purports to be, or the person has ratified or adopted the signature.
Marion Hetherington, 'Responsibility for Payment of Forged Cheques:
Lessons from NAB v. Hokit' (1996) 7 *JBFLP* 313. See also Tony Damian, 'The Customer is Nearly Always Right: Banks and Unauthorised Cheque Payments' (1996) 7 *JBFLP* 277.
See Varker v. Commercial Banking Co of Sydney Ltd [1972] 2 NSWLR 967;
Ryan v. Bank of New South Wales [1978] VR 555; National Australia Bank Ltd v. Meeke [2007] WASC 11. See also Alan Tyree, 'Questioning a valid mandate' (2012) 23(1) Journal of Banking and Finance Law and Practice 40.
Alan Tyree, *Banking Law in Australia* (2011) at 210; *Lipkin Gorman v. Karpanale Ltd* [1991] 2 AC 548.
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
See Sections 32, 36, 41, 43, 81–84. The federal government has previously indicated it is working on extending the reforms to lawyers, accountants, trust and company service providers, real estate agents and jewellers, but it remains to be seen whether any such amendments will be made to the legislation. See, for example, Pip Harvey Ross, 'Anti-money laundering: Hung out to dry?' (2019) 39(10), *The Proctor* 24.
See Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Cth), Chapter 4.
See *Port of Brisbane v. ANZ Securities Ltd (No. 2)* [2003] 2 Qd R 661; [2002] QCA 158; *Australian Financial Services and Leasing Pty Ltd v. Hills Industries Ltd* (2014) 253 CLR 560; [2014] HCA 14
Section 120 of the Bankruptcy Act 1966 (Cth).
International Arbitration Act 1974 (Cth).
Section 8(7A)(a) of the International Arbitration Act 1974 (Cth).
[2013] FCA 882, upheld on appeal in Gujarat NRE Coke Ltd v. Coeclerici Asia (Pte) Ltd (2013) 304 ALR 468; [2013] FCAFC 109 at [76] (Allsop CJ, Besanko and Middleton JJ).

Briginshaw v. Briginshaw (1938) 60 CLR 336; [1938] HCA 34. Certain state legislation now prescribes the standard of proof in civil proceedings: See, for example, Evidence Act 2008 (Vic) Section 140.
(1996–7) 188 CLR 501 at 556 (McHugh J); [1997] HCA 3.
Baker v. Campbell (1983) 153 CLR 52; [1983] HCA 39.
AWB Limited v. Honourable Terence Roderic Hudson Cole (No. 5) (2006) 155 FCR 30; [2006] FCA 1234.
Attorney-General (NT) v. Kearney (1985) 158 CLR 500; [1985] HCA 60.
See Traxon Industries Pty Ltd v. Emerson Electric Co (2006) 230 ALR 297 at [62]; [2006] FCA 450.
Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55.
PT Bayan Resources TBK v. BBC Singapore Pte Ltd (2015) 325 ALR 168; [2015] HCA 36.
Foreign Judgments Act 1991 (Cth).
As specified in the Foreign Judgments Regulations 1992 (Cth).
See Foreign Judgments Act 1991 (Cth) Part 2.
See *Wentworth v. Rogers (No. 5)* (1986) 6 NSWLR 534.
Rejfek v. McElroy (1965) 112 CLR 517; [1965] HCA 46.
Benefit Strategies Group Inc v. Prider (2005) 91 SASR 544 at [37]; [2005] SASC 194.
See M Davies, AS Bell and PLG Brereton, *Nygh's Con?ict of Laws in Australia* (2013) at [40.65].
See **www.austrac.gov.au/media/media-releases/austrac-welcomes-federal-court-orders-cba-penalty**.
See **www.austrac.gov.au/smrs-during-covid-19**.
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This brings in interrogatories omissions propounded to plaintiff (creditor). Failing to comply with particulars of a claim would be malversation under pre action protocol and litigation in Law.

The Chose of Action by the Bank creates a Trust, The Trust gains equitable title to the residential (Mortgage), as a result of the equitable assignment not the Deed of assignment, if the Original Notice of a Deed of Assignment was ever to come to court it would create a Title Perfection Event and collapse the Trust. The Trustee's obligation is to the Trust and to look out for the beneficial interest, That means that any Chose in Action (Claim) must be made by the Trustee and in claiming that position would create a Title Perfection Event and collapse the Trust and that means the particulars of the claim would be malversation by all parties involved in the Trust.

Equitable assignment.

An assignment which does not fulfil the statutory criteria for a legal assignment. An equitable assignment may be made in one of two ways:

The assignor can inform the assignee that he transfers a right or rights to him.

The assignor can instruct the other party or parties to the agreement to discharge their obligation to the assignee instead of the assignor.

Only the benefit of an agreement may be assigned. There is no requirement for written notice to be given or received. The only significant difference between a legal assignment and an equitable assignment is that an equitable assignee often cannot bring an action in its own name against the third party contractor, but must fall back on the rules governing equitable assignments and join the assignor as party to the action.

A deed of assignment, in relation to property, is used to assign an equitable interest in land to another party. Equitable interest is also known as beneficial interest. Unlike a deed of trust that is drafted at the point of purchase, a deed of assignment is drafted at the point you own the property and want to assign some or all of your ownership to someone else. The objective is similar to that of a deed of trust as it allows joint owners to share the beneficial interest in property in a tax efficient way for receiving property income, such as rent or capital gains, or as part of inheritance tax planning.

Every party coming against you is a body corporate, the banks, the police, the councils etc; SO where is the contract? Where is the deed of assignment? Where is the deed of novation? And if we don't have a contract how are they getting your personal information? How did you identify me or are you implying slavery via the birth certificate? Now we can't go down that path can we your honour because it is copy write of the Crown isn't it? Somebody came up to you and failed to identify themselves and then demanded your personal information, now they can only show two things in law to touch your personal data, Lawful or legal, now if we don't consent it cannot be lawful so they must show a legal reason and there is the problem, legally they are a corporation it says it in their own acts which would require deed of assignment, deed of novation or contract to come forward or they are not even doing it legally. You don't need to argue anything else that is the complete argument, (case dismissed).

Your honour it's quite simple this cop, bank, council claims to be something but according to this ASIC search it is a body corporate and if you do a google search for body corporate it comes up with private for profit corporation that means it is a company with directors, secretaries and shareholders and must have a beneficial owner for litigation and damages but we will get to that later. The point of the matter is that is a contract, Where is the legal contract they are talking about to touch my personal information? They don't have my consent to touch it so they need to bring a contract forward, who is the contract

with? Is it the government? Is it the Crown? Is it the birth certificate? This is where you need to be careful, If the judge says you have committed an offence for such and such they are now attempting to coerce you into a contract so all you have to say is **your honour it is all about the DATA, they touched my data and they need to show a lawful or legal process for that, now they don't have my consent so there is no lawful here so they must have used legal and there is the problem. The judge will probably ask, how is that a problem? Well your honour according to the act, subsection blah blah they are a body corporate, a for profit organisation so where is the contract? Where is the rule of law? I put it to you your honour there is no rule of law, who assigned it to the court, there is no contract I have just proved it.**

So now we have a sticky situation because how did they touch my data? Did they use the birth certificate because I might add it is not evidence of my identity it is evidence of my beneficial interest in the estate and if it is used as identity that would imply slavery.

The only one that can identify you is the one that has possession of the Guthrie card with the blood on it and the live born record because they were taken at birth.

Forget any claim coming against you they are all smoke and mirrors, how can it be real when it is built on a fiction via the birth certificate and that is not proof of anything we just make it real by arguing about it with them, it is so simple to get rid of.