Bank of Credit and Commerce International (Overseas) Ltd v Akindele[1]

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INTRODUCTION

The common law courts have traditionally approached the issues relating to the liability for receiving another person's property following a breach of fiduciary duties owed to the owner of the property by examining the recipient's state of knowledge. If the recipient had the requisite knowledge that the property he received was traceable to a breach of fiduciary duty, or acquired the knowledge while in possession of the trust property, constructive trusteeship will be imposed on him.[2] The basis of the recipient's liability under this traditional approach is that where his knowledge that the payment or transfer was pursuant to a breach of fiduciary duty affects his conscience, he should be treated in the same manner as a trustee who has acted in breach of trust and misapplied trust property.[3] To establish a recipient's liability, obviously, the court must make a determination as to the recipient's state of knowledge.

In *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*,[4] Gibson J adopted a five-fold test of knowledge:

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

The *Baden* categories have been influential in the courts' decisions in more recent cases on knowing receipt.[5] The courts' views on the *Baden* categorisation,

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1 [2000] 3 WLR 1423 *('BCCI')*.

2 See, eg, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ).

3 *Equiticorp Industries Group (In Statutory Management) v The Crown* [1998] 2 NZLR 481, 528 (Smellie J); *Belmont Finance Corporation Ltd v Williams Furniture Ltd* (No 2) [1980] 1 All ER 393, 405 (Buckley LJ); *Re Montagu's Settlement Trusts* [1987] Ch 264, 273 (Megarry V-C).

4 [1993] 1 WLR 509, 575-6 *('Baden')*.

5 Nourse LJ observed: 'Reference to the *(Baden)* categorisation has been made in most of the knowing receipt cases to which I have referred from *Re Montagu's Settlement Trusts* [1987] Ch 264 onwards. In many of them it has been influential in their decision': *'BCCI'* [2000] 3WLR 1423. Among the cases his Honour referred to, *Baden* was applied in *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, 42 and referred to in *Equitycorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700, 703; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 267 and 292; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, 702 and 754; *Polly Peck International plc v Nadir* (No 2) [1992] 4 All ER 769, 771; *Eagle Trust plc v SBC Securities Ltd* (No 2) [1996] 1 BCLC 121, 122.

however, have not been unanimous. In *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming*,[6] for example, Lord Nicholls expressed the view that 'knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* ... scale of knowledge is best forgotten'.[7] On the other hand, in *Koorootang Nominees Pty Ltd v Australian and New Zealand Banking Group Ltd*,[8] Hansen J ruled that knowledge falling into the first four Baden categories may constitute the requisite knowledge for establishing a case of knowing receipt, whereas Ashley J in Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd[9] held that knowledge must fall into any the five Baden categories.[10]

> 'The High Court of Australia has not yet ruled on the degree of knowledge requisite for imposition of personal liability in a case of knowing receipt.'[11]

In *Consul Development Pty Limited v DPC Estates Pty Limited*,[12] which was a knowing assistance case, Stephen J commented on the requisite knowledge for establishing liability for knowing receipt. His Honour seemed to be inclined to the view of Edmund Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*[13] that 'want of probity ... is the hall-mark of constructive trusts, *however created*'.[14] However, at the same time his Honour endorsed the contrary view expressed by Jacob P in the New South Wales Court of Appeal in Consul. Jacob P was of the view that a distinction exists, in terms of the requisite degree of knowledge for the imposition of constructive trusteeship, between persons who received trust property and persons who had not done so.[15] The less than clear-cut position taken by Stephen J throws some doubt on the force of his Honour's dicta on this issue. There seems to be a high degree of consensus, though, among some lower courts in Australia in more recent years that it is not essential to prove dishonesty or want of probity to expose a stranger to personal liability for knowing receipt.[16]

An alternative to a fault-based rationale is a restitutionary approach. Under this approach, strict liability is imposed on the recipient, regardless of whether the recipient is at fault in receiving the trust property. The recipient is, however, provided with a change of position defence. '[T]he defence is available to a person whose position has so changed that it would be inequitable in all the

6 [1995] 2 AC 378.

7 Ibid 392. It should be noted, however, that the context in which Lord Nicholls made this observation was one where the issue was the liability for knowing assistance, rather than for knowing receipt.

8 [1998] 3 VR 16, 105.

9 Unreported, Supreme Court of Victoria, 28 October 1997, 2010/1993.

10 *Royal Brunei* is a Privy Council case and prima facie should carry more weight than *Koorootang Nominess and Sixty-Fourth Throne*, which are both Victorian cases. However, the significance of the latter two cases should not be underestimated, given that they are both more recent decisions.

15 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 410-11. His Honour said, dicta, at 411 that it served to distinguish earlier authorities on strangers' liabilities as constructive trustees 'from the present case, and this in the manner suggested by Jacobs P.

16 See *Ninety Five Pty Ltd (in liquidation) v Banque Nationale de Paris* [1988] WAR 132, 173-4 (Smith J). See also above nn 8, 9, 10 and the accompanying text.

circumstances to require him to make restitution, or alternatively to make restitution in full.'[17] The core principle of restitution is unjust enrichment.[18] In the context of knowing receipt what the restitionary approach says is that the recipient has received something that he is not entitled to. He must therefore return it. Otherwise he is unjustly enriched. This approach was applied for the first time in *Lipkin Gorman (a firm) v Karpnale Ltd.*[19] The case has since been followed in *Woolwich Equitable Building Society v Inland Revenue Commissioner*[20] and endorsed by Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*,[21] who echoed Lord Nicholls' call to replace the fault-based approach with the restitution-based approach in determining knowing receipt liability. [22]

Whether the fault-based approach can realistically be replaced by the restitution-based approach, and whether the Baden categorisation of knowledge is of any value for determining a recipient's liability, are questions that the court must confront in knowing receipt cases, at least until a court of the highest authority has reached a definitive conclusion on the basis for knowing receipt liability.

In a recent UK Court of Appeal case, *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,[23] Nourse LJ attempted to simplify the fault-based approach by offering a test for knowing receipt liability that appears to be simpler than the *Baden* categories. His Lordship's judgment[24] and the scenario of this case have thrown some interesting light on the utility of the fault-based approach and the *Baden* categorisation, as well as on the limitations of a restitution-based approach.

Facts

Bank of Credit and Commerce International Holdings ('BCCI Holdings') acquired parcels of its own shares for the purpose of artificially boosting the amount of capital to reinforce its image in the eyes of the regulator, the depositors and the public at large. The acquisition was done through nominees who included International Credit and Investment Co (Overseas) ('ICIC Overseas'), which was a company in the BCCI group, and an individual called Wabel Pharaon.

[17] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991 2 AC 548, 580 (Lord Goff). His Lordship said the change of position defence should be made available to defendants because: '[W]here an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.'

[18] Graham Virgo, *The Principles of the Law of Restitution* (1999) 6. It should be noted however that there are two more, lesser principles underlying restitution, ie the prevention of a wrongdoer from profiting from his or her wrong and the vindication of property rights with which the defendant has interfered: Virgo (1999) 8.

[19] [1991] 2 AC 548.

[20] [1993] AC 70.

[21] [1998] 3 VR 16.

[22] Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in William Cornish et al (eds), *Restitution Past, Present and Future* (1998) 231, 244.

[23] *BCCI* [2000] 3 WLR 1423.

[24] Ward LJ and Sedley LJ concurred.

The acquisition was financed by dummy loans made to the nominees by companies within the BCCI group. Each of the 'loans' was entered in the books of both the lender and borrower. However, if a dummy loan was not serviced or repaid the lender's auditor would require it to be written off. Such write-offs would precipitate losses within the BCCI group and decrease its profits. There was therefore a need to make the dummy loans look as if they were 'performing normally'.

ICCI Overseas was the 'lender' of a dummy loan made to Wabel Pharaon. In early 1985, ICCI Overseas was suffering acute liquidity problems and needed outside money to give the false impression that the dummy loan that had been made by it was performing normally. To achieve this purpose, a number of employees of BCCI Overseas procured ICCI Overseas to enter into a loan agreement with the defendant, Chief Akindele, which had the appearance of a stock investment service contract. Under the agreement dated 10 July 1985, the defendant was to purchase USD10m shares of BCCI Holdings through ICCI Overseas. The shares, however, were to be held in the names of the present holder for at least two years after the purchase. Following the minimum two year period and up to a period of five years from the date of agreement the defendant purchaser could require the sale of the shares together with any dividends accrued. The sale price would be such that would give the defendant a return of 15 percent on his investment per year compounded annually. The agreement also entitled the defendant to take up rights issues of shares in BCCI Holdings. (The defendant did take up a rights issue in 1985 at a cost of USD330,680).

The BCCI group went into insolvent liquidation in 1991. The liquidators of BCCI Overseas and ICCI overseas, in consequence of the agreement and a payment to the defendant under the terms of a divestiture agreement in 1988, claimed USD6,679,226 from the defendant as a constructive trustee, on the basis of knowing assistance and knowing receipt.

The plaintiffs alleged that the defendant knowingly assisted the BCCI Overseas employees in the breach of fiduciary duties they owed to the company in arranging the false loan and the BCCI group's self-acquisition. The plaintiffs further alleged that by virtue of receiving profits from the BCCI Group pursuant to the false share investment service contract and the divestiture agreement, the defendant knowingly received the plaintiffs' property.

The trial judge dismissed the action on the ground that dishonesty by the defendant was the essential foundation of the plaintiffs' case whether under the head of knowing assistance or of knowing receipt and the plaintiffs had failed to establish dishonesty on the part of the defendant.

Judgment

To determine the defendant's liability for knowing assistance and/or knowing receipt, it was necessary for the court to determine the following issues:

(1) Whether it was necessary to prove dishonesty on the part of the alleged assister to establish a case for knowing assistance;

(2) Whether it was necessary to prove dishonesty on the part of the alleged recipient to establish a case for knowing receipt, and

(3) If question (2) was answered in the negative, what constituted the element of knowledge for establishing knowing receipt.

Obviously, the defendant's liability for knowing assistance and/or knowing receipt was also dependent on the court's finding on the defendant's state of mind.

For the sake of convenience, my account of the judgment starts with the court's finding as to the defendant's state of mind when he entered into the investment agreement with ICCI. A description of the court's decision as to the above issues and a discussion of the judgment will ensue.

Whether the defendant acted dishonestly

The trial judge ruled that the high rate of interest and the artificial nature of the agreement, on which the claimants' case rested, did not put an honest person in the defendant's position on notice that fraud or breach of trust had been perpetrated.[25] The judge observed that: 'The form of the agreement was undoubtedly artificial, but there was nothing obviously illegal about it. The interest was very high, but he (the defendant) was entitled to assume that the bank were offering it in good faith and for proper reasons.'[26] Nourse LJ agreed with the trial judge on that point.

Knowing assistance and honesty

Nourse LJ did not really need to decide on whether, to establish a case based on knowing assistance, the claimant would need to prove that the assister had acted dishonestly, given that an affirmative answer to this question has long been established. As his Lordship observed, in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* (No 2)[27] the claim in knowing assistance failed because the claimants were not able to prove that the directors of the defendant company acted dishonestly, although the claimant's case in knowing receipt did succeed.[28] It should be noted, however, that to be liable for knowing assistance an alleged assister does not have to be subjectively dishonest. As Gibbs J observed in *Consul*,[29] 'a stranger who participated in a breach of trust or fiduciary duty with knowledge of all the circumstances' may do so without 'knowing that what he was doing was improper'.[30] 'It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognising an impropriety that would have been apparent to an ordinary man.'[31] Therefore, if 'honesty' is to be used as a test for establishing knowing assistance, the word should be used in an objective, rather than subjective sense.

Knowing receipt and honesty

His Lordship, however, ruled that the trial judge's assumption that dishonesty is a prerequisite for proving knowing receipt was wrong: '[w]hile a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should.'[32] His Lordship pointed out that

25 *BCCI* [2000] 3 WLR 1423, 1431.
26 Quoted by Nourse LJ, ibid 1431.
27 [1980] 1 ALL ER 393.
28 *BCCI* [2000] 3 WLR 1423, 1433.
29 (1975) 132 CLR 373.
30 Ibid 398.
31 Ibid.
32 *BCCI* [2000] 3 WLR 1423, 1433.

Belmont Finance Corporation Ltd v Williams Fruniture Ltd (No 2) 'is clear authority for the proposition that dishonesty is not a necessary ingredient of liability in knowing receipt'.[33] His Lordship also made reference to a number of more recent cases such as *Polly Peck International plc v Nadir (No 2),*[11] *Agip (Africa) Ltd v Jackson*[12] *and Eagle Trust Plc v SBC Securities Ltd*[13] to illustrate this point.

Knowing receipt - what constitutes the required knowledge?

If dishonesty is not a necessary element of knowing receipt, then the issue of what kind of knowledge a recipient must have in order to fix him or her with the liability for knowing receipt becomes relevant.

In order to make a judgment on this issue, Nourse LJ reviewed a number of authorities on knowing assistance and knowing receipt from *Re Montagu's Settlement Trusts*[14] onwards.[15] Most of the authorities his Lordship reviewed, with the notable exception of *Re Montagu's Settlement Trusts*,[16] seem to suggest that constructive knowledge (or 'constructive notice'[17]) was enough. 'Constructive knowledge' in this context, according to Nourse LJ, means the last two categories of the five-fold categorisation of knowledge adopted by the court in *Baden*.[18]

In many of the cases his Lordship referred to, the *Baden* categorisation of knowledge 'has been influential in the decision'.[19] His Lordship therefore found it necessary to make an assessment on the applicability of the *Baden* categorisation for knowing receipt cases.

The conclusion his Lordship reached on this issue was that '[a]lthough my view is that the categorisation is often helpful in identifying different states of knowledge which may or may not result in a finding of dishonesty for the purposes of knowing assistance, I have grave doubts about its utility in cases of knowing receipt'.[20] His Lordship's conclusion was based on two considerations. First, the categorisation was not really formulated by the court. It had been 'propounded by the counsel for the plaintiffs (in *Baden*), accepted by counsel for the defendant and then put to the judge on an agreed basis'.[21]

33 Ibid.

11 [1992] 4 All ER 769.

12 [1990] Ch 265.

13 [1993] 1 WLR 484.

14 [1987] Ch 264.

15 The cases his Lordship reviewed include, aside from *Baden, Karak Rubber Co Ltd v Burden* (No 2) [1972] 1 WLR 602; *Belmont Finance Corporation Ltd v Williams Furniture Ltd* (No 2) [1980] 1 All ER 393; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246; *Houghton v Fayers* [2000] 1 BCLC 511; *Re Montagu's Settlement Trusts* [1987] Ch 264; *Eagle Trust plc v SBC Securities* [1993] 1 WLR 484; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700; *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41; *Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700; *Lankshear v ANZ Banking Group (New Zealand) Ltd* [1993] 1 NZLR 481; and *Citadel General Assurance Co v Lloyds Bank Canada* (1997) 152 DLR (4th) 411; see *BCCI* [2000] 3 WLR 1423, 1434-38.

16 [1987] Ch 264. The effect of Megarry V-C's decision in *Re Montagu's Settlement Trust* was that 'in order to establish liability in knowing receipt, the recipient must have actual knowledge (or the equivalent) that the assets received are traceable to a breach of trust and that constructive knowledge is not enough': *BCCI* [2000] 3 WLR 1423, 1437 (Nourse LJ).

17 In *Re Montagu's Settlement Trust* [1987] Ch 264, Megarry V-C made a distinction between 'constructive notice' and 'constructive knowledge'.

18 [1993] 1 WLR 509, 1438.

19 *BCCI* [2000] 3 WLR 1423, 1438.

20 Ibid 1439.

21 Ibid 1438.

Second, the categorisation was formulated with knowing assistance primarily in mind. The claim for a constructive trust in that case was on knowing assistance, not on knowing receipt and neither of the parties sought to submit that there was any distinction for that purpose between knowing receipt and knowing assistance. This, his Lordship thought, was also confirmed by the references to 'an honest and reasonable man' in categories (iv) and (v).[22]

The two considerations on which his Lordship's conclusion on the value of the *Baden* categories rests, do not seem to support a wholesale dismissal of the utility of the *Baden* tests. First, the fact that the categorisation was formulated by the counsel of the plaintiff and adopted by the court does not, of itself, negate the value of the categorisation as a conceptual tool in determining knowing receipt liabilities.

Second, the fact that the categorisation was formulated with knowing assistance chiefly in mind does not necessarily mean that the categories are useless for determining knowing receipt liability. The adequacy of the categorisation depends on whether it is capable of providing an accurate classification of state of mind that indicates a person's honesty or conscionability, not who was the formulator of it or for what purpose it was formulated. Indeed, as will be seen below, the actual test his Lordship applied in reaching his conclusion on the defendant's liability seems to be that of *Baden* categories (iv) and (v).

Knowing receipt - the proper test

If the *Baden* categorisation is of little assistance when it comes to knowing receipt, what then should be the proper test? The solution Nourse LJ offered was a single test based on unconscionability:

> [J]ust as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.[23]

What is the basis of this single test of knowledge for knowing receipt? The following is his Lordship's explanation. Any categorization is of little value unless the purpose it is to serve is adequately defined.[24] In the context of knowing receipt the purpose of categorizing knowledge is to enable the court to determine whether 'in the words of Buckley LJ in *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* (citation omitted), the recipient can "consciously retain [the] funds against the company" or in the words of Sir Robert Megarry V-C in *Re Montagu's Settlement Trusts* (citation omitted), "[the recipient's] conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee." But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.'[25]

22 Ibid.
23 Ibid 1439.
24 Ibid.
25 Ibid.

As Lord Nicholls of Birkenhead observed in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* '[u]nconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience.'[26] However, to apply a broadly-worded conscience-based test one needs to know 'what, *in this context, unconscionable* means',[27] given that a vague legal concept will render the application of it impeachable for lack of certainty.

Knowing receipt - the application of the conscience-based test

In determining the defendant's liability for knowing receipt with his conscience-based test, it was necessary for Nourse LJ to consider two separate issues:

(1) Whether the defendant's state of knowledge was such that as to make it unconscionable for him to enter the 1985 agreement; and
(2) Whether the defendant's state of knowledge was such that as to make it unconscionable for him to enter the 1988 divestiture agreement.

As to the first issue, his Lordship held that the defendant's state of knowledge was not such as to make it unconscionable for him to enter into the 1985 agreement. His Lordship based this finding on the trial judge's ruling that the high interest rate and the artificial nature of the agreement were not sufficient to put an honest person in the defendant's position on notice that some fraud or breach of trust was being perpetrated.[28]

It is not clear what the trial judge meant by 'put on notice'. Nourse LJ was of the opinion that the trial judge's findings were 'expressed in language equally appropriate to an inquiry as to constructive notice'.[29] However, his Lordship did not explain what he meant by 'constructive notice'. In *Re Montagu's Settlement Trust*,[30] Megarry V-C made a distinction between 'constructive notice' and 'constructive knowledge'. Megarry V-C preferred to reserve the phrase 'constructive notice' for the requisite knowledge for 'the ancient doctrine of purchaser without notice'[31] and to use 'constructive knowledge' to indicate the required level of cognizance for determining whether a person holds property as a constructive trustee.[32] However, in the knowing receipt cases Nourse LJ reviewed in the present case, the phrase 'constructive notice', where used, was used to mean what Megarry V-C would call 'constructive knowledge'.[33] Given that the claimants' contention at trial was that the

26 Ibid.
27 Ibid.
28 *BCCI* [2000] 3 WLR 1423, 1441.
29 Ibid.
30 [1987] Ch 264.
31 Ibid 271.
32 Ibid.
33 See *BCCI* [2000] 3WLR 1423, 1434-8 for Nourse LJ's comments on these cases. More specifically, in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] 1 Ch 246, 248 and 306-07 Browne-Wilkinson J used the phrase 'notice' and 'notice -actual or constructive' when discussing a knowing recipient's liability; in *Karak Rubber Co. Ltd. v Burden* (No 2) [1972] 1 WLR 602, 603 Brightman J referred to a person 'who is a constructive trustee because (though not nominated as a trustee) he has received property with actual or constructive notice that it is trust property transferred in breach of trust, or because ... he acquires notice subsequent to such receipt and then deals with the property in a manner inconsistent with the trust'; in *Agip (Africa) Ltd v Jackson* (Ch D) [1990] Ch 165, 291, Millett J, made reference to 'the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust'.

defendant was liable to account to them as a constructive trustee, what the trial judge meant by "put...on notice" and what Nourse LJ meant by 'constructive notice' may be what Sir Robert would call 'constructive knowledge' or the fixation of constructive notice (or 'knowledge') on somebody after that person is put on inquiry because of his or her awareness of certain matters or circumstances. If this is so, then the test applied seems to be the same as category (v) knowledge adopted in *Baden*. If what the trial judge meant by 'put...on notice' and what Nourse LJ meant by 'constructive notice' was what Megarry V-C would call 'constructive notice', then what the trial judge and Nourse LJ were suggesting was that the defendant did not have constructive notice for the doctrine of purchaser without notice at the relevant time. *A fortiori*, the defendant could not have constructive knowledge required for the imposition of constructive trusteeship.[34] In other words, if the defendant was not to be put on notice as a purchaser, *it was impossible to put him on notice for the purpose of fixing him with the liability as a constructive trustee*. It can be seen from the italicised part of the sentence that *Baden* category (v) is *operational in this logic process*. Therefore, regardless of whether 'constructive notice' as used by Nourse LJ meant what Megarry V-C would call 'constructive notice' or 'constructive knowledge', *Baden* category (v) seems to be an essential ingredient in his Lordship's reasoning process.

Nourse LJ 's answer to the second question was also in the negative. His Lordship considered circumstances that occurred around the time when the divestiture agreement was entered into. These circumstances included the existence of press rumours of irregularities involving BCCI, the fact that the defendant was warned by a senior business figure in Nigeria about irregular banking practices around the world, and the likely effect a scandal relating to BCCI could have on the defendant's business image. His Lordship also considered the defendant's awareness of the arrest of various BCCI officials in connection with money laundering offences, and his knowledge of the objection by his UK financiers of one of his property investment ventures to the involvement of BCCI in the same venture. His Lordship concluded that the additional knowledge the defendant acquired between July 1985 and December 1988 went to the general reputation of the BCCI group from late 1987 onwards and did not make it unconscionable for him to retain the benefit of the payment pursuant to the divestiture agreement.[35]

As can be seen from the above, his Lordship's judgment on the second issue can be seen as being based on category (iv). The knowledge of circumstances the defendant acquired between July 1985 and December 1988 did not indicate to an honest and reasonable man the facts in relation to the internal fraud within BCCI group regarding the investment agreement between the defendant and ICCI Overseas. The additional knowledge the defendant acquired during this period only went to the general reputation of the group.

As discussed above, Nourse LJ offered a single conscience-based test for knowing receipt liability. However, his Lordship's reliance on what can be seen as *Baden* categories (iv) and (v) in determining the defendant's conscionability

[34] The onus regarding the investigation of the title for the property transferred is heavier for a purchaser than for the receiver of a bounty, see *Re Montagu's Settlement Trusts* [1987] Ch 264, 271.

[35] *BCCI* [2000] 3 WLR 1423, 1442.

shows that to apply the broadly defined test, the court cannot avoid the task of defining the meaning of unconscionability for the purpose of fixing knowing receipt liability. It also illustrates that the *Baden* categorisation can be useful in determining state of knowledge for deciding knowing receipt liabilities.[36] The Baden categorisation may not be able to accommodate all possible knowing receipt situations. Perhaps development in common law jurisdictions on a case by case basis will eventually lead to the identification of principled rules on the types of knowledge required for establishing a case for knowing receipt. Before the arrival of this day, as has been shown above, it may not be a good idea to abandon the Baden categorisation altogether.

Restitution as a basis for liability?

Compared to the ratio Nourse LJ formulated for his decision in this case, his Lordship's obiter in relation to the utility of restitution as a basis for knowing receipt liability seems to be more interesting and convincing.

In the course of argument the court was referred to Lord Nicholls' extra judicial opinion that the liability of knowing receipt should be restitution-based rather than fault-based.[37] What Lord Nicholls meant was that the liability of a recipient of trust property to return the property should be strict, subject to a defence of change of position, described above.[38] Neither of the parties relied on the restitution-based theory. His Lordship therefore needed not make a judgment on the applicability of the theory. His Lordship observed, however, that even if argument before the court was based on a restitution based theory as suggested by Lord Nicholls, 'it would have been a fruitless exercise'.[39] It will be contrary to the spirit of the rule in *Royal British Bank v Turquand* to apply the restitution-based principle in a situation where the receipt is of a company's funds misapplied by its directors.[40] In *Turquand*, the court held that a party who dealt with a company was entitled to assume that acts of internal management were regular.[41] The *Turquand* rule is not restricted to a situation where an outsider contracts with a company. It can be applied in circumstances where a person has other types of dealings with a company.[42] It will run counter to the *Turquand* rule to shift to the recipient the burden of defending receipt 'either by a change of

36 On the other side of the coin, the agony Nourse LJ went through in his attempt to come up with a suitable knowledge test for knowing receipt illustrates the difficulties that a court may encounter if the *Baden* five-category approach is to be maintained. Lord Nicholls' opinion that the *Baden* scale of knowledge is best forgotten (see above n 7 and the accompanying text) was perhaps a manifestation of the frustration experienced by the English courts in their application of the *Baden* tests.

37 *BCCI* [2000] 3 WLR 1423, 1439-40.

38 See above n 11 and the accompanying text.

39 *BCCI* [2000] 3 WLR 1423, 1440.

40 (1856) 6 E&B 327 ('Turquand').

41 In *Turquand*, a company borrowed money from a bank on the security of a bond signed by two of the directors on which the seal of the company had been affixed. The company's deed of settlement permitted borrowing by directors in that way when authorized by an ordinary resolution of a general meeting. The company alleged that no requisite resolution had been passed for the borrowing. The court ruled that the company was bound by the loan contract and the bank was entitled to assume that the required ordinary resolution had been passed.

42 In *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119, 157 Gummow J observed that 'in *Turquand's* case itself, Jervis CJ, who gave the judgment for the Court of Exchequer Chamber, spoke in terms of "dealings", and did not limit the transactions comprised in that term'.

position or perhaps some other way', in the words of Nourse LJ, 'simply on proof of an internal misapplication of the company's funds'.[43]
Deane J in *Muschinski v Dodds*[44] pointed out that no general doctrine of unjust enrichment has been recognized in Australia as providing an acceptable basis in principle for the imposition of a constructive trust. The restitutionary approach to knowing receipt liability, however, has the express endorsement of Hansen J in a recent case *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*,[45] although his Honour's observation on this issue was, like that of Nourse LJ on the same issue in the present case, obiter. The restitutionary approach is probably less problematic where the property received is the property of a trust and the recipient's lack of knowledge of any type about the tainted transfer of trust property is not in dispute, as *Lipkin Gorman (a firm) v Karpnale Ltd*[46] indicates. The *Akindele* scenario and Nourse LJ's comment on the restitution approach, however, serve as a caveat on the limitation of the of restitution approach and the utility of the fault-based approach where the receipt is of a company's funds which are misapplied by its directors.

CONCLUSION

The scenario and Nourse LJ's judgment of the present case clarifies two issues in relation to knowing receipt liability. First, Nourse LJ's judgment affirms the value of the fault-based approach and arguably, the utility of the *Baden* categorisation of knowledge, albeit in a negative manner, for establishing knowing receipt liability. His Lordship tried to formulate an overarching theory based on conscionability for the fault-based approach but ended up utilising the last two *Baden* categories without expressly acknowledging it when purportedly applying the conscience-based test his Lordship had formulated. His Lordship's suspicion of the utility of the *Baden* categories was based mainly on the fact that the tests were formulated chiefly with knowing assistance in mind by the counsel of one party of the case and adopted by the court. This, however, does not necessarily negate the categorisation's value for cases in knowing receipt. It is not surprising that his Lordship has resorted to the help of the *Baden* categorisation, perhaps subconsciously. A conscience-based test is not workable without a definition of unconscionability. Conscionability for the purpose of knowing receipt is determined by the type and degree of knowledge the recipient possesses. It would therefore be more helpful for the court to provide some guidance as to what type

43 *BCCI* [2000] 3 WLR 1423, 1440.
44 [1986] 160 CLR 583, 617.
45 [1998] 3 VR 16, 105.
46 [1992] 4 All ER 409. In this case, a solicitor gambled in a private club with money stolen from the trust account of the law firm for whom he was working. The club did not have knowledge of any sort about the solicitor's misapplication of the trust money. The club was held liable to a common law restitutionary claim but was allowed to reduce its liability on the basis that it had innocently changed its position in response to its receipt of the money (it had paid the solicitor some winning money). It should be noted though that the case was argued only on common law principles of restitution. If the club had at least constructive knowledge about the solicitor's theft and if the case had been argued on equitable principles, the club would have been held liable to account to the law firm as a constructive trustee. A restitutionary approach would obviously have been an inferior option for the law firm.

and degree of knowledge would support a finding of unconscionability in cases of knowing receipt, if the *Baden* categorization is regarded as inadequate for determining knowing receipt liability. It will also assist if the court can provide some indication as to what factors should be taken into consideration when determining whether a recipient has the type and degree of knowledge that will render his receipt unconscionable. For example, the nature of the transaction and the person or entity whose property has been misappropriated, as well as the character of the recipient, may all have a bearing on determining whether the recipient has the knowledge required for the establishment of knowing receipt liability.[47]

Second, and more significantly, this case illustrates the limitation of the restitution based approach in determining knowing receipt liability when the property received belongs to a company and is misappropriated by directors of the company. As Nourse LJ pointed out, placing the burden to defend the receipt on the innocent recipient will run counter to the time-honoured common law rule in the Turquand's case, which has been adopted in Australia in the *Corporations Law 2001* (Vic) ss 128-129. *Akindele* and Nourse LJ's judgment in this case, therefore serves as a caveat on the limitation of the restitutionary approach and the utility of the fault-based approach where the receipt is of a company's funds misapplied by its directors.

[47] For example, in the present case, the trial judge's finding as to the defendant's state of mind was based, *inter alia*, on the fact that 'in 1985 *BCCI* were regarded as a reputable international bank. The defendant would have had not reason to question the form of the transaction' (*BCCI* [2000] 3 WLR 1423, 1431) and 'even though he (the defendant) was an experienced businessman, he had no duty to the bank or to its regulators which made it dishonest for him to do other than look after his own interests' (ibid). The nature of the transaction can also be relevant. 'If the transaction is one of a kind in which it is customary for a person acquiring property or taking security over property to initiate certain standard inquiries such as in a transaction about land ..., it is assumed that an honest and reasonable person would do that. Hence, if recipients would have learnt a fact by making those inquiries, they are deemed to know the fact'. (Ford and Lee, above n 11, [22800]).