

'Knowing Receipt' Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*

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Abstract

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, the High Court embarked upon its first substantial examination of the rule in *Barnes v Addy* in over three decades. The unanimous court comprehensively rejected the restitution scholars' claim that the 'first limb' ought to be understood and reshaped through the prism of unjust enrichment. In doing so, the court made a number of important statements about the way in which the common law of Australia properly develops. Further, the court held that a claim under the 'first limb' of *Barnes v Addy* cannot be maintained in the face of Torrens indefeasibility. This resolved a live controversy, however the reasoning on this point is surprisingly brief and is susceptible to multiple interpretations.

1. Introduction

The unanimous judgment of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹ is a significant one, as it resolves a number of important and controversial questions. The judgment contains the High Court's first substantial examination of the rule in *Barnes v Addy*² since *Consul Development*,³ and affirms an orthodox approach to the notice element of the first limb. For the New South Wales Court of Appeal to have defied the equitable canon and bitten the restitutionary bullet, was held to be a 'grave error'.⁴ The controversy concerning the relationship between liability for knowing receipt and the Torrens system has apparently been resolved. Finally, the court has identified, but left unresolved, the question of whether the first limb applies to breaches of fiduciary duties other than those owed by trustees.

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1 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

2 *Barnes v Addy* (1874) LR 9 Ch App 244.

3 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 ('*Consul Development*').

4 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [131].

This note is principally concerned with the discussion of the first limb of the rule in *Barnes v Addy* contained in the second half of the judgment in *Farah*. It will not deal in any depth with the specifics of the case, nor the various factual issues which arose. However a basic outline of the facts and of the history of the litigation is necessary to provide the context of the discussion of principle which follows.

2. *Case History*

In early 1998, Farah Constructions Pty Ltd entered into an agreement with Say-Dee Pty Ltd, to purchase and to redevelop a residential property on 11 Deane Street in Burwood (hereafter 'No 11'). The principals of Say-Dee were to provide the capital and the principal of Farah, Mr Farah Elias, was to manage the project. Over the next few years, the development stalled as various iterations of the development application were considered by Burwood Council. Essentially, the council considered that the property was too narrow for the proposed construction and would need to be amalgamated with adjoining sites for the full potential of the development to be realised. In June 2001, Mr Elias along with his wife and two daughters entered into a contract to purchase one unit on a nearby property, No 15 Deane Street (hereafter 'No 15'), and in August 2002, Lesmint Pty Ltd, which Mr Elias controlled, contracted to buy an adjoining property, No 13 Deane Street. Thereafter, the relationship between Say-Dee and Farah deteriorated. In March of 2003, Farah filed a summons seeking the appointment of a trustee for sale in respect of No 11. Say-Dee filed a cross-claim, seeking declarations that Farah, Lesmint, Mr Elias and his wife and daughters held their interests in the various properties on constructive trust for the partnership between Say-Dee and Farah.

The judge at trial,⁵ Palmer J, found that Say-Dee had declined invitations to participate in the purchase of Nos 13 and 15. Moreover, it was held that Farah's fiduciary duties to Say-Dee did not extend to an obligation to disclose information concerning the opportunities to acquire the properties. There being no breach of duty found on the part of Farah, the liability of the other cross-defendants as participants in the alleged breach did not arise for examination.

On appeal,⁶ Tobias JA, with whom Mason P and Giles JA agreed, reversed many of the findings of fact made by the trial judge. Notably, it was found that Say-Dee had not been invited to participate in the purchase of Nos 13 and 15. Farah was obliged and had failed to disclose this and other information to Say-Dee and so had breached its fiduciary duties. Moreover, it was held that Mrs Elias and her daughters were liable as recipients of the benefit of a breach of fiduciary duty. It was decided that, under the first limb of *Barnes v Addy*, they held their interests on constructive trust because the requisite knowledge could be imputed to them. Independently of this, Tobias JA declared unjust enrichment to be the true basis of this limb and knowledge to be unnecessary for a finding of liability.

5 *Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800. Anomalously, this case refers to 'Farah Construction' while the two appeals refer to 'Farah Constructions'.

6 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309.

In *Farah*, the High Court overturned practically every finding made by the Court of Appeal. It reinstated the finding that there had been no breach of fiduciary duty to begin with. Accordingly, it was not strictly necessary for the court to engage with the principles of recipient liability, though it did so nonetheless. It is this discussion with which this note is principally concerned. The High Court's reasoning on the factual questions and upon the scope of Farah's duty will not be dealt with. Suffice it to say that the Court of Appeal was found to be in error at almost every instance.

Before turning to *Barnes v Addy*, however, two matters are worthy of some note. First, the High Court did accept that the scope of Farah's duty was broader than was held by the trial judge. While Farah was not under an obligation to disclose the opportunities to purchase the adjoining properties, Farah could not exploit those opportunities absent the informed consent of Say-Dee as to do so would be to place itself in a position of conflict of interest and duty.⁷ Nonetheless, the High Court held that Say-Dee had given its informed consent to Farah's pursuing the purchase of these properties on behalf of Lesmint, Mr Elias, his wife and daughters. The High Court affirmed the trial judge's finding that Say-Dee had declined invitations to participate in the purchase of the adjoining properties, and, so, was certainly informed, to some extent, of the proposed acquisition. Having reversed the Court of Appeal's findings of fact, the High Court held that 'there is also no doubt that Say-Dee gave consent to what Mr Elias did. The question is whether the consent which Say-Dee gave to Farah pursuing the opportunities to buy Nos 13 and 15 on behalf of Mr Elias's interests was sufficiently informed.'⁸ Yet the reversal of the findings of fact only establishes that Say-Dee had declined offers to participate. Why the refusal of an offer amounts to positive consent is not addressed in the judgment. Conceivably, consent is inferred from Say-Dee's acquiescence to this course of action. However, it is surprising that this aspect of the statement that Say-Dee gave its informed consent is not dealt with more explicitly.

Secondly, the judgment purports to leave open the question 'whether, if Say-Dee, after being given full information, refused consent, Farah was debarred from proceeding.'⁹ No answer is given as informed consent was made out. It is somewhat puzzling that this is presented as an open question given that earlier in the judgment it is stated that the opportunities were 'not open to Farah to exploit, consistently with its fiduciary duty, unless Say-Dee gave its informed consent to a contrary course.'¹⁰ This would appear correct given the conflict of duty and interest which arose and which the High Court itself identified. Therefore the answer to the 'open question' must likely be in the affirmative.

7 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [103].

8 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [106].

9 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [108].

10 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [103].

3. *The First Limb of Barnes v Addy*

Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.¹¹

The first limb of *Barnes v Addy* has developed a life far removed from the actual words of Lord Selborne LC, the description of those who receive and become chargeable with trust property from which the rule derives. This first limb, most often now referred to as ‘knowing receipt’, applies where a third party receives an interest in trust property with notice that it is trust property and that it is being misapplied.¹² It is this requirement of notice which the Court of Appeal sought so radically to revise.

This note will deal with three aspects of knowing receipt arising out of the decision in *Farah*: first, the High Court’s affirmation of the requirement of knowledge and its rejection of the Court of Appeal’s embrace of unjust enrichment; second, the relationship between knowing receipt and the Torrens system of title to land; and third, the application of the first limb to fiduciary duties other than those of a trustee.

A. *The Requirement of Knowledge*

The Court of Appeal in *Say-Dee v Farah*, purported to declare unjust enrichment to be the true basis of recipient liability and accordingly did away with the orthodox approach to knowing receipt. In its place, the court would have recognised liability where the defendant was enriched at the expense of the plaintiff, which enrichment was unjust according to some recognised factor.¹³ Significantly, the notice requirement of recipient liability was abandoned. For the past few decades, there has been agitation for a recharacterisation of recipient liability under the rubric of unjust enrichment from some academic voices. The most prominent proponent of this view was Professor Birks. Before *Say-Dee v Farah*, the most explicit embrace of this position by an Australian judge had come from Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand*

11 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 (Lord Selborne LC).

12 See J D Heydon & M J Leeming, *Jacob’s Law of Trusts in Australia* (7th ed, 2006) at [1334].

13 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [222], [232].

Banking Group Ltd,¹⁴ who had indicated his support for the principle, but who had the good sense not to base his judgment upon it.

The Court of Appeal's decision to embrace unjust enrichment as the basis for recipient liability was all the more striking for the manner in which it was done. After listing some of the various academic and judicial writings which supposedly support the restitutionary position, Tobias JA simply stated, 'in the absence of any High Court authority to the contrary, I see no reason why the proverbial bullet should not be bitten by this Court in favour of the Birks/Hansen approach.'¹⁵ It is notable that Tobias JA presented no substantial or independent reasoning in support of this radical change, instead treating it as an inevitability.

The reference to an absence of High Court authority could only be accurate in a very strict sense. The elements of knowing receipt were discussed at length in *Consul Development*. This apparent authority was dismissed because the case related only to the second limb and because the restitutionary argument was not raised.¹⁶ In *Farah*, this was found to be an improper way to treat the seriously considered dicta of the High Court and an inappropriate step for an intermediate appellate court to take.¹⁷ Moreover, the authorities upon which Tobias JA relied were found to provide little, if any, support for this position. The cases 'either do not support the restitutionary approach, or were uttered in circumstances where no appropriate issue was presented or relevant argument advanced, or were otherwise entirely unnecessary for the decision of the cases in which they were uttered.'¹⁸ As for the judgment in *Koorootang*, which provided the Court of Appeal with its most explicit judicial support, the High Court stated, with respect, that 'Hansen J did not identify any compelling reason why the law should be changed.'¹⁹ No such respect is reserved for the decision of the Court of Appeal. The High Court in *Farah* is scathing of the inability of Tobias JA to perceive, let alone to address, any reason why the restitutionary bullet ought not to be bitten. This failure is derided as 'a state of affairs more likely to arise when courts make pronouncements without hearing argument than when they do so after argument.'²⁰ The court then went on to list a number of such reasons.

First, unjust enrichment is inconsistent with, and distorting of, equitable doctrines.²¹ This is so as it does not focus upon conscience or fairness, but rather functions mechanically by reference to the presence or absence of qualifying and vitiating factors. Secondly, by purporting to replace the first limb of *Barnes v Addy*, the Court of Appeal adopted a position more radical than that advocated by Professor Birks. Thirdly, the suggestion that equity should follow the law in this

14 *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16.

15 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [232].

16 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [225].

17 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [134].

18 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [146].

19 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [142].

20 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [149].

21 For the following, see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [150]-[158].

area was misconceived as equity's protection of those to whom fiduciary duties are owed is founded in the law's failure to provide such protection. Accordingly, for equity to follow the law in this area would be to diminish the protection afforded, which was the very reason for equity to enter the field in the first place. Moreover, to adopt an alternate approach and to recognise a restitutionary recipient liability in addition to the first limb of *Barnes v Addy* would tend to render the first limb otiose. Fourthly, the position is described as 'unhistorical' and 'violent'.²² Advocacy of restitution is a modern phenomenon. It is inappropriate and dangerous for the law to develop through violent changes justified only by the theory of the day. Fifthly, there was no injustice worked by reliance upon the orthodox position in the present case. To embrace liability with no identification of an injustice would be to create a form of liability of extraordinary width.

Obviously, some of these reasons pertain chiefly to the specific facts of this case. Some pertain to a proposed alteration of knowing receipt, while others pertain to the recognition of an additional form of liability. Yet, taken together, they represent a comprehensive rejection of the unjust enrichment as the true basis of recipient liability.

The first and the fourth of these reasons, which are intimately related, are of wider significance. Here, the High Court goes beyond the identification of errors particular to the present case and suggests that many of these specific errors are the product of a broader error, namely a wrong-headed jurisprudential conception of the way in which law develops. The court quotes two passages from the judgment of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd*²³ concerning judicial method, which, it seems, have now been whole-heartedly endorsed. The second encapsulates the central criticism:

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.²⁴

The Procrustean attempt of Birks and his acolytes to impose from above a unifying and supposedly coherent schema upon existing legal and equitable doctrines, based upon an underlying principle of unjust enrichment, is thus premised on and reflective of an invalid and dangerous approach to the law. This clear statement of principle has ramifications beyond the particular issue of recipient liability. It marks a broader and likely fatal rebuff to unjust enrichment advocates, which may well be added to when the court comes to consider *W Cook Builders Pty Ltd (in liq) v Lumbers*,²⁵ leave to appeal having been very readily granted.²⁶ Further, it has

22 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [154].

23 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

24 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544, quoted in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [154].

25 *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406 (Court of Appeal).

26 See *Lumbers & Anor v W Cook Builders Pty Ltd (in liquidation)* [2007] HCATrans 420 (8 August 2007).

an even broader consequence, in that it applies to the development of the entirety of the common law of Australia.

Aside from rejecting the Court of Appeal's answer to the restitutionary question, the High Court reserved its harshest criticism for the 'grave error' of addressing that question in the first place.²⁷ That error has two bases. First, it was unjust to the parties to present unjust enrichment, on which neither party had been heard, as an independent basis for decision.

It is conceivable that the appellants might have wished to defeat restitution-based liability, not merely by advancing argument about its want of intellectual merit and its inconsistency with Australian authority, but also by calling evidence to show, for example, a change of position.²⁸

This was necessarily unjust, as the Court of Appeal effectively subjected the respondents to a form of liability on which they were not heard and deprived them of the opportunity to present a defence.

The second aspect of the 'grave error' was found in the confusion caused by the decision of the Court of Appeal. By purporting to effect a dramatic change to recipient liability, the Court of Appeal had not only sown confusion in New South Wales, but had placed the courts of the other states in a difficult position.²⁹ The High Court was at pains to point out that the intermediate appellate courts of the various states ought not to depart from each other's decisions, unless they are believed to be plainly wrong.³⁰ Indeed, such a court ought to show the same reticence in departing from another jurisdiction's decisions in relation to the common law as it would with decisions upon Commonwealth or uniform national legislation. This is an important and novel statement of principle. Implicit within all of the criticism of the New South Wales Court of Appeal is a warning that intermediate appellate courts ought to be very cautious when effecting any significant developments in the law and to avoid the effective usurpation of the role of the High Court.

B. The Torrens System

The judgment in *Farah* has now seemingly resolved the controversy concerning the relationship between knowing receipt and the Torrens system. Before this decision, the Courts of Appeal of four states had delivered judgments on this issue, two deciding that a constructive trust could be imposed in respect of the knowing receipt of Torrens title, and two deciding that it could not. It now appears that if a trustee transfers Torrens title property to a third party, in breach of trust, the third

27 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [131].

28 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [132].

29 Two examples of this confusion are given: *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2006) 58 ACSR 63 at 78 (Hamilton J) and *Multan Pty Ltd v Ippoliti* [2006] WASC 130 at [45] (Simmonds J).

30 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [135].

party having achieved registration with actual or constructive knowledge of the breach, the deprived beneficiary cannot argue that the property is held on constructive trust under the first limb of *Barnes v Addy*. However, the section of the judgment devoted to this question³¹ is surprisingly brief and the precise basis for this decision is arguably uncertain.

It is uncontroversial that a claim may be brought in personam against a party holding registered title, notwithstanding the so-called indefeasibility provisions of the *Real Property Act* 1900 (NSW) and its various equivalents. So much has been clear at least since *Frazer v Walker* in which it was said that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.'³² Whether or not a claim for the enforcement of a constructive trust arising under the first limb of *Barnes v Addy* was such an in personam claim was the source of considerable dispute until the decision in *Farah*.

In the Victorian Court of Appeal, in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*,³³ Winneke P and Tadgell JA (Ashley AJA dissenting) found that a claim under the first limb of *Barnes v Addy* could not be brought in respect of Torrens title property. This position was adopted by the majority in *LHK Nominees Pty Ltd v Kenworthy*.³⁴ A majority of the Queensland Court of Appeal, in finding that there was an arguable case in *Tara Shire Council v Garner*,³⁵ preferred the dissent of Ashley AJA. The New South Wales Court of Appeal in *Say-Dee v Farah*, which did not deign to refer to any of these cases, held that the Torrens system was no impediment to the relief sought by Say-Dee.

The judgment in *Farah* adopts the reasoning of the majorities in *Sixty-Fourth Throne* and in *LHK Nominees* and quotes at length from the judgment of Tadgell JA. His Honour had argued that a claim under the first limb cannot be made out, as it fails at the level of receipt. A third party, in whom title vests by operation of statute, cannot properly be said to have received trust property from the trustee. *Mayer v Coe* stands as authority for the proposition that the third party obtains title purely by virtue of the fact of registration and not because of any antecedent act.³⁶ Accordingly, the property acquired by the third party is not trust property in the requisite sense nor is it received by reason of the trustee's misapplication. This argument is clearly conveyed in the passage of the judgment of Tadgell JA quoted in *Farah*. However, it is not immediately clear whether the High Court intends to accept that the elements of the first limb cannot be made out in the case of Torrens title property, or only that an action under the first limb will not overcome the indefeasibility of the third party's title.

31 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [190]-[198].

32 *Frazer v Walker* [1967] 1 AC 569 at 585.

33 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 ('*Sixty-Fourth Throne*').

34 *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517 ('*LHK Nominees*').

35 *Tara Shire Council v Garner* [2003] 1 Qd R 556.

36 *Mayer v Coe* [1968] 2 NSW 747 at 754 (Street J).

There is something of a disjunct between the High Court's representation of the reasoning of Tadgell JA and what his Honour, in fact, said. In *Farah* it was said that 'Tadgell JA... held that a claim under *Barnes v Addy* was not a personal equity which defeated the equivalent of s 42(1).'³⁷ This is only broadly true. What Tadgell JA strictly said was that a claim under *Barnes v Addy* cannot be made out. The question of whether it 'defeats' s 42(1) does not arise. Moreover, the High Court goes on to endorse the comments of Pullin J in *LHK Nominees*,³⁸ namely that a claim based on knowing receipt is distinguishable from High Court authorities such as *Muschinski v Dodds*³⁹ and *Baumgartner v Baumgartner*.⁴⁰ on the grounds that the knowing recipient is not the primary wrongdoer.⁴¹ This is, at best, superfluous, and at worst inconsistent. According to the strict logic of Tadgell JA, there is no claim which needs to be distinguished.

Nevertheless, it must be taken to be the case that the decision in *Farah* supports the reasoning of Tadgell JA, namely that acquisition of title by operation of statute cannot amount to receipt of trust property. To suggest otherwise would imply that the court did not understand the import of the passages of the judgment of Tadgell JA, which it endorsed. This seems highly unlikely. Two comments may be made about this.

First, it is unfortunate that neither Tadgell JA nor the court in *Farah* explained why it is the case that the conscience of a third party is any less engaged when property is received through the operation of Torrens legislation than under old system conveyance. Secondly, it is unfortunate that arguments about receipt of trust property antecedent to registration did not arise on the facts of either case. To explain what is meant by this, in another case, before registered title is transferred to a third party in breach of trust, that third party may receive other trust property. For example, a third party may receive a certificate of title from a trustee in respect of property held on trust. That certificate of title is trust property. If the certificate is transferred to a third party in a breach of trust of which the third party had notice, then the third party holds the certificate of title upon a constructive trust for the beneficiary of the original trust. It is then arguable, if the third party achieves registration, in breach of the constructive trust in respect of the certificate, that the third party is liable for the acquisition of the property, either to account for the benefit gained, or to compensate for the loss occasioned.⁴² This argument, if it has weight, would not have been of any use to the plaintiffs in *Farah* or in *Sixty Fourth Throne*. In *Farah*, no trust property was ever received by the defendants, by which they procured registration. The same is true of *Sixty-Fourth Throne*, in which the documents used to obtain registration were forgeries.

37 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [193].

38 *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517 at 571.

39 *Muschinski v Dodds* (1985) 160 CLR 583.

40 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

41 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [195].

42 See, for example, Jonathon P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (1998) 72 *Australian Law Journal* 258 at 264 and Lyria Bennett Moses, 'Recipient Liability and Torrens Title' (2006) 1 *Journal of Equity* 135 at 145-147.

Such an argument has been criticised as an artificial attempt to circumvent the inconsistency between a claim under *Barnes v Addy* and the Torrens legislation by treating a mere 'piece of paper' as substantive property.⁴³ This is not a convincing rebuttal. It is the duties in respect of the certificate which are sought to be enforced, rather than its substance as property. To take a second hypothetical, leaving aside questions of tracing, suppose that certain money held upon trust is transferred to a third party in breach of trust of which the third party had notice. That third party is undoubtedly constituted a trustee of that money. Suppose then that the third party uses the money to purchase property under Torrens title and achieves registration. Following the reasoning in *Hagan v Waterhouse*, that third party would hold the interest in the property on trust for the deprived beneficiary.⁴⁴ If such arguments about receipt of trust property antecedent to registration are not accepted, then it may be the case that *Hagan v Waterhouse* was wrongly decided on this point.

If it is the case that the High Court in *Farah* is stating that a claim under the first limb of *Barnes v Addy* cannot succeed in respect of Torrens land, for some reason other than failure at the level of receipt, then it is a notable development in the relationship between equitable remedies and Torrens indefeasibility. From the brief comments of the court on this point, there are two possible bases for this development. First, it could be suggested that an in personam equity may not be raised insofar as it is inconsistent with the indefeasibility provisions. Secondly, it could be that an in personam equity cannot be raised in respect of a party who is not the 'primary wrongdoer'.⁴⁵

Aside from the question of whether the vesting of title by virtue of registration can constitute receipt, it is difficult to see how inconsistency with indefeasibility applies any more to a claim under *Barnes v Addy* than any other in personam equity. On one level, all in personam claims are necessarily inconsistent with the principle of indefeasibility. A personal equity will be enforced when a party cannot consistently with good conscience rely upon the indefeasibility of their title. It seems that the specific inconsistency complained of is that recognition of such a claim would appear to revive the doctrine of priorities by enforcing an unregistered interest on the basis of purchase with notice. However, this complaint is misconceived. It is not mere notice of the existence of a trust, but rather notice of its breach which renders a third party liable as a knowing recipient. Moreover, the constructive trust imposed does not simply enforce the antecedent interest, but is an independent claim which arises at the time of and because of receipt.

If it is the case that a claim under the first limb of *Barnes v Addy* does not succeed because it does not pertain to the primary wrongdoer, then this is a very novel development of the law. The primacy of wrong-doing has never before appeared in High Court authorities on in personam claims. Neither the judgment

43 Moore, above n42.

44 *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 365C (Kearney J). The correctness of the decision in *Hagan v Waterhouse* has been accepted by some who would also accept *LHK Nominees* and *Sixty-Fourth Throne*. See Peter Butt, *Land Law* (5th ed, 2005) at [20103], [20105].

45 *LHK Nominees* (2002) 26 WAR 517 at 571 (Pullin J).

in *Farah* nor that in *LHK Nominees* state why this is recognised as a distinguishing criterion. The recognition of such a distinction leads to the curious position that one of the most well established equitable claims, being a claim under the first limb of *Barnes v Addy*, is defeated by registered title, whereas a much less conventional claim, such as that which succeeded in *Baumgartner*, survives.

C. Other Fiduciary Duties

The judgment in *Farah* leaves open a large question as to the scope of the first limb of *Barnes v Addy*. The High Court noted that '[i]n recent times it has been assumed, but rarely if at all decided, that the first limb applies not only to persons dealing with trustees, but also to persons dealing with at least some other types of fiduciary.'⁴⁶ As *Farah* did not seek to deny liability on the ground that recipient liability did not extend to the relevant fiduciary duty, the High Court did not resolve this issue.

The High Court's scepticism of the authority on this point stands in stark contrast with another recent judgment of the New South Wales Court of Appeal in which Mason P deemed it to be 'well established that the first limb of the rule in *Barnes v Addy* extends to property protected by fiduciary or statutory fiduciary obligations...'⁴⁷ While it is something of a stretch to state that it is well established that the first limb extends to all fiduciary obligations, there is certainly some authority for the proposition that it goes beyond merely the receipt of trust property. In *Russell v Wakefield Waterworks Co*, Jessel MR stated that:

In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.⁴⁸

In more recent times, this position has been endorsed by the English Court of Appeal in *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*⁴⁹ and in *Beach Petroleum NL v Johnson*, von Doussa J rejected an argument 'that no constructive trust arose because the money was not strictly trust money', though the decision did not turn upon this point.⁵⁰

It would seem an odd result if it were held that the first limb of the *Barnes v Addy* applied only to trusts, when the second limb is of much broader application. The seeming inconsistency of such a position, for which there appears no ready justification, is surely one of the chief reasons that the extension of the first limb beyond trusts is so widely assumed. It may be that, by noting the lack of authority in support of this common assumption, the High Court seeks not to suggest that the proposition is incorrect, but rather to urge courts to adopt a proper approach to a

46 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [113].

47 *Robins v Incentive Dynamics Pty Ltd (in liq)* [2003] NSWCA 71 at [60].

48 *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 479.

49 *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405.

50 *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 50.

question of law on which there is no clear authority. Given the High Court's advertence to the issue and its severe treatment of the Court of Appeal, it is unlikely that very many judges will continue blithely to assume that the first limb extends beyond the case of trusts. Nevertheless, with the centrality of corporations to modern life and litigation, it is highly likely that this question will arise again before too long.

4. Conclusion

The decision in *Farah v Say-Dee* will have a number of consequences for the law in respect of the first limb of *Barnes v Addy*. It ought definitively to have silenced the murmurings of the restitution advocates, at least in Australia. It has raised some doubts about the application of knowing receipt to duties other than those arising under trusts. Finally, it has offered an apparent, if not entirely satisfactory, answer to the disputed relationship between knowing receipt and Torrens indefeasibility. It is to be hoped that the High Court will be presented with further opportunity to elaborate upon and to clarify its reasoning upon this point.