SUPREME COURT OF QUEENSLAND

CITATION:	*Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd & Anor* [2016] QCA 88
PARTIES:	**COMGROUP SUPPLIES PTY LIMITED** ACN 008 732 465 (applicant) **v** **PRODUCTS FOR INDUSTRY PTY LTD** ACN 111 733 576 (first respondent) **GAVIN DUNWOODIE** (second respondent)
FILE NO/S:	Appeal No 1983 of 2015 DC No 3538 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2014] QDC 293
DELIVERED ON:	8 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2015
JUDGES:	Margaret McMurdo P and Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **Application for leave to appeal the decision made by the District Court on 19 December 2014 refused.** 2. **Application for an extension of time to appeal refused.** 3. **Application for leave to amend the application for leave to appeal refused.** 4. **Unless the applicant files submissions on costs in accordance with paragraph 52(4) of Practice Direction 3 of 2013 within 14 days, with any response by the respondents with seven days of receipt of those submissions, the applicant is to pay the respondents' costs of the applications.**

CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – KNOWING RECEIPT – where an employee of the applicant induced the first respondent, through its managing director, the second respondent, to invoice the applicant for work done by a company owned and controlled by the employee – where in fact no such work had been performed by the employee's company and the invoices were a fabrication – where the applicant submitted that the issue of the fictitious invoices by the respondents constituted knowing assistance of the employee – where the applicant submitted that the respondents knowingly received the proceeds of payment of the invoices – whether the respondents' held the kind of knowledge necessary to be found accessorily liable for the employee's breach of fiduciary duty EQUITY – GENERAL PRINCIPLES – MISTAKE RECOVERY OF MONEY PAID OR EXPENDED – MONEY PAID BY MISTAKE – MISTAKE OF FACT – where the applicant paid money to the first respondent under an operative mistake of fact – where the respondents entered into the arrangement with the applicant's employee in good faith – where the respondents would be placed in a worse position if ordered to make restitution of payments that it had passed on to the employee's company than if it had not received payments from the applicant at all – whether the respondents could rely on a change of position defence to a claim by the applicant for restitution APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the proposed appeal does not raise any significant questions of law but rather the application of well-established principles of law to the facts – whether, in the circumstances, leave to appeal should be granted *District Court of Queensland Act* 1967 (Qld), s 118 *Uniform Civil Procedure Rules* 1999 (Qld), r 748 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; [2014] HCA 14, applied *Baden v Société Générale pour Favoriser le Development du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509; [1992] 4 All ER 161, cited *Baguley v Lifestyle Homes Mackay Pty Ltd* [2015] QCA 75, cited *Barnes v Addy* (1894) LR 9 Ch App 244, considered

COUNSEL:	T D Castle with J R Green for the applicant D G Clothier QC, with J A Castelan, for the respondents
SOLICITORS:	Corrs Chambers Westgarth for the applicant Tucker & Cowen Solicitors for the respondents

[1] **MARGARET McMURDO P:** I agree with Atkinson J's reasons for refusing these applications and with the orders she proposes.

[2] **ATKINSON J:**

Procedural matters

[3] The applicant, Comgroup Supplies Pty Ltd ("Comgroup"), made three applications to this court. They were an application under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) for leave to appeal against a decision made in the District Court on 19 December 2014; an application pursuant to r 748 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") for an extension of time to appeal; and an application for leave to amend the application which it had filed on 25 February 2015. If those applications were successful the applicant sought to rely upon an amended Notice of Appeal and the respondent wished to cross-appeal.

The relevant factual background to the applications

[4] On 19 December 2014 the learned District Court judge published orders that the first defendant, Products for Industry Pty Ltd ("Products for Industry"), pay the plaintiff, Comgroup, the sum of $25,886.94, giving judgment for the second defendant, Gavin Dunwoodie, dismissing the third party claims and adjourning the question of costs ("the 19 December 2014 judgment"). Reasons were published for that decision. Then on 29 January 2015, the judge made costs orders in the proceedings ("the 29 January 2015 judgment") and published reasons for that decision. On 25 February 2015, the applicant, Comgroup, filed an application for leave to appeal the 19 December 2014 judgment and an application for an extension of time to appeal. On 24 June 2015, Comgroup filed an application to amend the application for leave to appeal to include an application for leave to appeal the 29 January 2015 judgment.

[5] The discretion to extend the time within which to file a notice of appeal conferred by r 748 of the UCPR must be exercised judicially. As was held by Muir J in *Beil v Mansell (No 1)* relevant considerations include the length of the delay, the adequacy of the explanation for the delay and the merits of the proposed appeal.

[6] The explanation for the relatively short delay in filing the application for leave to appeal and in filing the application to amend that application was misadventure and oversight by the solicitors previously acting for the applicant. No responsibility for that was attributable to action or inaction by the applicant itself. There was no suggestion of any prejudice to the respondents arising from that delay so it is

necessary to consider the merits of the proposed appeal to determine whether any necessary extension of time and application to amend should be allowed.

[7] As far as the application to appeal the costs order is concerned, if leave to appeal the substantive decision is granted, it would be convenient to deal with the costs order as well. If leave to appeal is not granted, then the applicant conceded that there would be no power in this court to grant leave independently on the application to appeal the costs order. If leave to appeal were to be granted, then the respondents' proposed cross-appeal should also be considered.

The background facts

[8] The applicant, Comgroup, is a subsidiary of Consolidated Foods Australia Limited. It produces and processes snap-frozen raw and cooked food products and sells them to fast food chains in Australia and also exports its products to the Middle East and Asia. Its turnover is about $100 million a year. It employs between 140 and 160 people in its production plant.

[9] On 22 February 2010, Comgroup, after a rigorous recruitment process, appointed Gabriel Soldini as its engineering manager. Unbeknown to Comgroup, Mr Soldini had been dismissed by a previous employer for serious misconduct in May 2009. That misconduct was similar to the dishonesty referred to in this case. He worked for Comgroup until he was made redundant in July 2012. The learned trial judge found that Mr Soldini was employed in that role from June 2009, but that is not supported by the documentation relied upon at trial. It does not appear to have had any impact on the judgment so is not a matter of any importance.

[10] One of the conditions of Mr Soldini's employment was that he not have any direct or indirect pecuniary interests that would in any way compromise the performance of his duties and, in particular, that he not hold any position for monetary or other reward which could conflict with his responsibilities to Comgroup.

[11] As engineering manager, Mr Soldini had an operating budget of over $2 million and was responsible for 14 employees and for the repair and maintenance of the production plant. He had the authority to order goods and services to a certain financial limit. The procedure was that he would raise a purchase order for those goods and services; the purchase order would be sent to the supplier of the goods or services; the goods or services would be supplied; the supplier would send an invoice to Comgroup; Mr Soldini would initial and date the invoice to show the work had been done or the goods supplied; the signed invoice would be passed on to Comgroup's accounts department for payment; the invoice would then be checked against the purchase order and authorised for payment. Payment would not be made without an invoice signed by Mr Soldini showing that the work had been done.

[12] Products for Industry carried on the business of designing and supplying

machine safety systems, machine automation systems and engineered mechanical systems.

[13] Gavin Dunwoodie is the managing director of Products for Industry. Mr Dunwoodie knew Mr Soldini from a previous work association in Victoria in about 2003 or 2004. Mr Dunwoodie made contact with Mr Soldini in mid to late 2010 and, on behalf of Comgroup, Mr Soldini offered work to Products for Industry. In accordance with the usual practice, Mr Dunwoodie dealt with the engineering manager for Comgroup in arranging work and payment.

[14] Mr Soldini told Mr Dunwoodie that there was another company, GTAKS Pty Ltd ("GTAKS"), whose manager was Peter Hersig, who did work for Comgroup but put its invoices through another company which was finishing on site. He said this arrangement had been in place since before Mr Soldini started working with Comgroup and that Comgroup's management was comfortable with the arrangement.

[15] At Mr Soldini's request, Mr Dunwoodie agreed that Products for Industry would take over invoicing Comgroup for work performed by GTAKS. It was said to be done in this way because GTAKS did not have an approved account with Comgroup and wanted to be paid within seven days rather than Comgroup's 30 days payment terms.

[16] The arrangement made was that Mr Soldini told Mr Dunwoodie that he would give Products for Industry a purchase order. Products for Industry would then send an invoice to Comgroup for the work shown on the purchase order. That work would have been done or would be done by GTAKS. GTAKS would invoice Products for Industry for that work. Products for Industry was then to pay GTAKS in seven days or less. Comgroup would pay Products for Industry 30 days from the end of the month. Products for Industry would make approximately 10 per cent margin on the transaction.

[17] The evidence from both the Chief Executive Officer of Comgroup, Steven Myler, and the financial controller, John Thompson, was that they had never heard of such an arrangement being made. Had they known of the arrangement being made in this instance, Comgroup would not have authorised payment of the invoices. On the other hand, Mr Thompson said that it was not unusual for a supplier to sub-contract so that in that case the supplier sending the invoice was not necessarily the party that had done the work.

[18] A credit application form was filled out by Mr Thompson, as the financial controller for Comgroup, on 28 October 2010. On 3 November 2010, Mr Ramsay, the accounts manager for Products for Industry, wrote to Mr Thompson informing him that Comgroup's account application had been processed and approved and informing Comgroup that the trading terms of Products for Industry were strictly 30 days from the end of the month. Mr Dunwoodie's evidence was that this

practice was a sensible business practice to deal with parties who would owe or pay him money. From that time, on at least two occasions, Products for Industry performed services for Comgroup. Comgroup expressed satisfaction with the quality of that work.

[19] Mr Dunwoodie said that Mr Soldini wrote out or had written out a purchase order to show him how the arrangement with GTAKS would work. That purchase order shows Products for Industry as the supplier. It is dated 3 November 2010. The description of the item is one "safety system as discussed." The estimated cost was shown as $4,600. It was signed by Mr Soldini on behalf of Comgroup. Mr Dunwoodie then organised for Products for Industry to prepare an invoice to Comgroup relating to that purchase order showing the item as one "project supply: safety system as discussed" for the price of $4,600 plus GST making an amount due of $5,060.

[20] The relevant tax invoice from GTAKS to Products for Industry stated the description of the work as "Design and documentation implementing IC-SEP pumping system for AQUA Water Filtration Plant. Includes both mechanical & electrical drawings." The unit price was said to be $4,000 with $400 GST. These were the specialist services that Mr Soldini told Mr Dunwoodie were GTAKS particular area of expertise. There is a handwritten note on that invoice that it was paid on 12/11. Mr Dunwoodie said he received this invoice by email from "Peter Hersig" with a copy to Mr Soldini which made reference to Mr Soldini approving it or as per his request or instruction.

[21] There is a similar disparity between the description of the work supplied on the purchase orders from Comgroup and invoices from Products for Industry on the one hand and invoices for GTAKS for apparently the same work on the other, in the following 40 transactions. The difference between the amount invoiced by Products for Industry to Comgroup and the amount invoiced by GTAKS to Products for Industry varied without, according to Mr Dunwoodie, raising any questions in his mind. Nor did the fact, as the judge put it in a question to him, that he was being paid a lot of money for not doing very much.

[22] Under this arrangement, Comgroup paid Products for Industry $277,483.99 on 39 invoices in the period from November 2010 until July 2012 in respect of work supposedly done by GTAKS; Products for Industry paid GTAKS $256,840.50; and the difference of $20,643.49 plus GST was retained by Products for Industry as its margin for processing the accounts.

[23] Mr Dunwoodie said that such an arrangement was not unusual. He referred to transactions of a similar kind with a different company where he invoiced Alto Manufacturing Ltd ("Alto") for work performed by a roofing company and by an engineer. However on those occasions before he sent an invoice to Alto, he had received both the purchase order from Alto and the invoice from the other party

and had specific instruction from Alto before making any payment to the other party. They were one-off rather than recurring transactions.

[24] However, Products for Industry also called evidence from other manufacturing and construction firms that arrangements whereby an approved supplier billed for the work of an unapproved supplier and kept a margin of between 10 to 20 per cent was not uncommon.

[25] In fact no work was ever done by GTAKS for Comgroup. Mr Hersig did not exist. The email address, which was purportedly Mr Hersig's, was in fact used by Mr Soldini. The GTAKS invoices were a complete fabrication. The fraud was discovered by chance after Mr Soldini left the employ of Comgroup and another employee found an unpaid invoice on Mr Soldini's desk. A company search then revealed that GTAKS was owned and controlled by Mr Soldini.

[26] Mr Dunwoodie agreed in cross-examination that he was helping to facilitate a company which was not an approved supplier to be paid by Comgroup. Mr Dunwoodie also agreed in cross-examination that while the first invoice from Products for Industry reflected the purchase order from Comgroup, the GTAKS invoice did not reflect the same information and that was true for each of the 41 invoices from GTAKS. Products for Industry sent an invoice to Comgroup on the basis of the purchase order from Comgroup rather than waiting for an invoice from GTAKS. He knew he was invoicing Comgroup for work that his company had not done and that his company would benefit from this arrangement by way of fees. Mr Dunwoodie agreed in cross-examination that he should have done some further checks.

[27] Mr Dunwoodie's evidence was he dealt with Mr Soldini as often as daily or several days a weeks. In spite of this he said he never saw Mr Hersig whom he was told, because of production at the plant, could not get on site during the day. Mr Dunwoodie received emails from Mr Hersig and tried on three occasions to ring Mr Hersig; but the phone rang out. Mr Dunwoodie said he told Mr Soldini that he would like to do the work apparently being done by GTAKS but was told by Mr Soldini that the relationship that Mr Hersig had with the general manager meant that there was nothing that could be done about that. Mr Soldini told Mr Dunwoodie that the quality of Mr Hersig's work was good and that he, Mr Soldini, managed it.

[28] In early August 2011, Mr Dunwoodie became aware that GTAKS had been deregistered. He emailed Mr Hersig's email address to tell him that; but continued to invoice Comgroup as per the purchase orders and to pay GTAKS. He accepted the explanation given by Mr Hersig which put the blame on others.

[29] Mr Dunwoodie said that in spite of the fact that he performed work at Comgroup's production plant over the same period as GTAKS was supposedly performing work billed by Products for Industry, he did not ever notice that none of

the work set out in the 41 invoices had been done.

[30] Comgroup took proceedings in the District Court against Products for Industry and Mr Dunwoodie to recover its loss of $277,484. The relief and causes of action pleaded in the alternative were for damages and/or compensation for misleading and deceptive conduct pursuant to s 82 of the *Trade Practices Act* 1974 (Cth) (“TPA”) and/or s 236 of Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) (“CCA”); damages and exemplary damages for deceit; money had and received by the defendants for the use of the plaintiff (as a result of knowing assistance or knowing receipt); damages for breach of contract or for consideration that had totally failed; restitution of money paid by Comgroup to Products for Industry under a mistake of fact; a declaration that the defendants held the sum paid to the Products for Industry on constructive trust for Comgroup and an order that they account to it for that sum; and equitable damages. In each case, apart from exemplary damages, the amount claimed was $277,484. Comgroup also claimed interest on that sum and costs.

The judgment at first instance

[31] The learned trial judge characterised these proceedings as a dispute as to which of two innocent parties is to suffer for the fraud of a third.

[32] The trial judge did not find any want of reasonable care by Comgroup in employing Mr Soldini as its engineering manager.

[33] The trial judge accepted that the arrangement made by Mr Soldini with Mr Dunwoodie was a normal transaction in business. Evidence was given on behalf of Comgroup that they had never entered into an arrangement of the type whereby an approved supplier would invoice for work done by an unapproved supplier. The judge recorded the scepticism of the plaintiff about the arrangement and also his own initial scepticism. He referred to the fact that as well as Mr Dunwoodie’s evidence, the defendants called three apparently independent witnesses involved in the engineering contracting business who testified to the fact that they had been involved in or knew of similar arrangements and that such arrangements were common place because of the practice of large companies having only a limited number of authorised vendors. The learned trial judge said that he saw no good reason to reject this evidence.

[34] The learned trial judge then made relevant findings of fact as to the details of the transactions that occurred. He accepted that the defendant in general, and Mr Dunwoodie in particular, were not knowingly involved in Mr Soldini’s fraud. Because of that finding he dismissed the claim in deceit.

[35] So far as the knowing assistance/knowing receipt claim was concerned, the claim was dismissed because after going through all of the factors which, on Comgroup’s submission, would or should have led Mr Dunwoodie to suspect that

Mr Soldini was acting in breach of his fiduciary duty to his employer, the judge concluded that he was not persuaded on the evidence that Mr Dunwoodie ought to have known that Mr Soldini's conduct was in breach of his fiduciary duty to Comgroup or that a reasonable person would conclude that there was impropriety in Mr Soldini's conduct. The judge found there was no breach of contract between the plaintiff and defendant nor any total failure of consideration. The trial judge dismissed the claim for misleading and deceptive conduct. He held that if, contrary to that finding, the defendants were liable for misleading and deceptive conduct, he would apportion the liability under s 87CD of the *Australian Consumer Law* ("ACL"), 5 per cent to the defendants and 95 per cent to Mr Soldini.

[36] So far as mistake of fact was concerned, the trial judge held that the payments were made under an operative mistake by the plaintiff and so were *prima facie* recoverable. However the first defendant had made payments to GTAKS in good faith, that is without actual knowledge of the fraud, and had therefore changed its position in reliance on the payments. A change of position defence was therefore made out, but only to the extent of payments made to GTAKS. The judge found that the change of position defence did not apply to the monies retained by Products for Industry. Accordingly the plaintiff was entitled to recover the sum of $20,643.49 plus GST from the first defendant as money paid under a mistake of fact.

[37] On 29 January 2015, the learned trial judge made the following costs orders:

1. The first defendant pay the plaintiff's costs of the proceeding to 17 September 2012 fixed at $1,115;
2. The plaintiff pay the first defendant's costs thereafter assessed on the indemnity basis; and
3. The plaintiff pay the second defendant's costs of the proceeding to be assessed after 17 September 2012 on the indemnity basis.

[38] The reasons for those costs orders were essentially that Comgroup was entitled to costs on the Magistrates Court scale until the time it should have accepted an offer by the defendants to pay the whole of its claim subject only to payment by instalments and other conditions which did not detract from the proposition that it was, the judge found, a very generous offer that ought to have been accepted.

Grounds of Appeal

[39] The grounds in the proposed amended notice of appeal and the written outline of submissions by Comgroup identified six issues as follows:

[40] (1) Accessory liability for breach of fiduciary duty;

[41] (2) Money had and received and change of position defence;

[42] (3) Invoice representation;

[43] (4) Reliance on the representation;

[44] (5) Apportionment;

[45] (6) Costs.

[46] The applicant, Comgroup, argued that a central issue if leave to appeal were granted was whether, as the trial judge found, parties such as the first and second respondent, who chose to issue fictitious invoices, and for which they were remunerated by way of a margin, could properly be described as "innocent" parties or whether they ought to bear the full amount of the applicant's loss, subject only to any reduction required under apportionment legislation for statutory causes of action for misleading and deceptive conduct.

[47] The applicant submitted that the learned trial judge ought to have found that the respondents were liable as accessories to Mr Soldini's breach of fiduciary duty (Issue 1), were liable for the full amount of $277,483.99 in respect of the common law claim for monies had and received (Issue 2), were liable for at least 50 per cent of the applicant's loss in respect of the misleading and deceptive conduct claim (Issues 3 to 5) and were liable for the applicant's costs of the proceedings (Issue 6).

Issue One: Accessory Liability for Breach of Fiduciary Duty

[48] This issue arises because it was admitted on the pleadings that Mr Soldini owed a fiduciary duty to his employer and his dishonest scheme was in breach of that duty. The applicant submitted that the payments made on the invoices presented by Products for Industry were thereby impressed with a trust in favour of Comgroup.

[49] The principles with regard to accessorial liability were set out in *Barnes v Addy*. The rule in *Barnes v Addy* was set out by Lord Selbourne LC as follows:

> "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."

[50] This form of liability was examined by the High Court in *Farah*

Constructions Pty Ltd v Say-Dee Pty Ltd. After quoting the passage set out in the previous paragraph, the court held:

> "The form of liability referred to in the first part of the last sentence is often called the 'first limb' of *Barnes v Addy*, and the form of liability referred to in the second part of the last sentence is often called the 'second limb'.
>
> …
>
> It has become common to describe the first limb as involving 'knowing receipt' and the second limb as involving 'knowing assistance'. Lord Selborne LC did not use the expression 'knowing receipt'.
>
> …
>
> Lord Selborne LC's expression was 'receive and become chargeable'. Persons who receive trust property become chargeable if it is established that they received it with notice of the trust.
>
> In 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. Since the appellants did not contend that the first limb was incapable of applying on the ground that neither Farah nor Mr Elias was a trustee, the correctness of this assumption need not be examined."

[51] The applicant submitted that both limbs of *Barnes v Addy* were satisfied. In particular:

- the issue and presentation of the 39 fictitious invoices by the respondents was the relevant 'assistance' in Mr Soldini's breach of fiduciary duty. That is, the invoices issued by the first respondent, as directed by the second respondent, provided the means by which Mr Soldini's breach of fiduciary duty occurred; and
- the respondents received the proceeds of payment of the invoices, namely the amount of $277,483.99 and thus were in receipt of property subject to a constructive trust in favour of the applicant.

[52] "Knowledge" is essential to both limbs. The first question is therefore what knowledge is sufficient. In *Farah Constructions*, the High Court examined what knowledge was required for the second limb of *Barnes v Addy* to apply in particular circumstances. The court held that *Consul Development Pty Ltd v DPC Estates Pty Ltd* supported four of the five categories of knowledge identified later in *Baden v Société Générale pour Favoriser le Development du Commerce et de l'Industrie en France SA*. The five categories identified in *Baden* were:

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

[53] The High Court concluded from its analysis of *Consul Development*:

> "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."

[54] To be found liable for knowing assistance, the respondents must therefore at least have had knowledge of circumstances that would indicate the facts to an honest and reasonable person. The test is objective, that is did Mr Dunwoodie, and through him Products for Industry, have knowledge of circumstances which would indicate the dishonest and fraudulent design by Mr Soldini to an honest and reasonable person. The respondents would be liable if they assisted Mr Soldini with knowledge, in that sense, of his dishonest and fraudulent design.

[55] The learned trial judge addressed that question and made the following finding:

> "In the light of the evidence I am not persuaded that the scheme that Mr Soldini presented to Mr Dunwoodie was so unusual as to lead a reasonable person to conclude that there was impropriety in Mr Soldini's conduct, in the light of the findings that I have made."

[56] That finding reveals no error. The applicant invites this court to draw a different conclusion from the facts found by the learned trial judge. There is no reason to do so. The test was stated correctly. The facts as found are not in dispute. The conclusion reached by the trial judge was open to him and it is not obviously wrong. If, as his Honour found, the practice of invoicing for a third party was a common practice not suggestive of any fraud or dishonesty and if, as his Honour also found, Mr Soldini assured Mr Dunwoodie that he was personally ensuring the work in the invoices was being done satisfactorily by GTAKS then Mr Dunwoodie did not have knowledge that would indicate to an honest and reasonable person Mr Soldini's fraudulent design.

[57] The applicant referred to a finding made later in the judgment where the trial

judge observed that he was not persuaded on the evidence that Mr Dunwoodie ought to have known that Mr Soldini's conduct was in breach of his fiduciary duty to Comgroup. The finding was made relevant by the case pleaded by the applicant that Mr Dunwoodie knew, or ought to have known, that Mr Soldini's conduct was in breach of his duty to Comgroup. The applicant submits that the trial judge impermissibly applied a subjective test rather than the objective test referred to earlier. However in the judgment it is only stated for the purpose of the judge's making findings as to Mr Dunwoodie's state of mind. It does not mean that the judge had not applied the correct test of what a reasonable person would have concluded in determining whether Mr Dunwoodie had the requisite knowledge for the purposes of accessorial liability.

[58] The test for knowledge in the first limb of *Barnes v Addy* or "knowing receipt" cases is similar to that for knowing assistance. It is apparent that if the applicant fails on knowing assistance, because it has not satisfied the court that the respondents had the requisite knowledge, it must likewise fail on knowing receipt.

[59] The applicant's submission on its proposed ground of appeal that the first respondent is liable for knowing receipt and the first and second respondents for knowing assistance must fail.

[60] The applicant formally submitted in the alternative that it was entitled to succeed if the test for accessorial liability in respect of a breach of fiduciary duty were to be based upon objective dishonesty (rather than knowledge) adopted by the Privy Council in *Royal Brunei Airlines v Tan* applied to the facts at hand. The applicant submitted that the objective dishonesty arose from the issuance by Products for Industry, at the instance of or with the involvement of Mr Dunwoodie, for work it had not performed and in respect of which it had no head contractor or subcontractor relationship with GTAKS. However, the applicant acknowledged in its submissions that this court was bound by the decision of the High Court in *Farah Constructions* which held that the decision in *Royal Brunei* does not presently form part of Australian law. In these circumstances there is no occasion for this court not to follow the High Court in *Farah Constructions*.

Issue Two: Money Had and Received and the Change of Position Defence

[61] Unsurprisingly, it was not disputed in the proposed amended notice of appeal that the trial judge was correct to find that Comgroup made payments to Products for Industry under an operative mistake of fact and so those payments were *prima facie* recoverable. However, the applicant submitted the learned trial judge erred in concluding that the first respondent was entitled to rely upon a change of position defence in respect of the $256,840.50 paid by Products for Industry to GTAKS on the basis that those payments were made in good faith.

[62] In support of this argument the applicant referred to the High Court's decision in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*. In that

case, all of the judges agreed that the defence of change of position applied to a claim for restitution of monies paid under a mistake. The plurality held that the change of position defence should be decided by reference to a test of whether or not the party who received the money paid under a mistake of fact should be required to do so where the disadvantages that would inure to that party if required to repay the money received were such that it would be inequitable to require it to do so.

[63] Chief Justice French defined the situation in which a change of position defence might apply as follows:

> "When money is paid under a mistake of fact, the person paying the money may recover it from the recipient in a common law action for money had and received. Recovery depends upon whether it would inequitable for the recipient to retain the benefit. Retention may not be inequitable if the recipient has changed its position on the faith of the receipt and thereby suffered a detriment."

The application of the change of position defence was further explained by the Chief Justice:

> "A recipient of a payment made under mistake may suffer a detriment by acting on the faith of the payment. If the detriment cannot be reversed at the time that demand is made of the recipient, the recipient can be said to have changed its position and to have a defence to a claim for repayment of the money as money had and received. Whether or not the defence is available depends upon whether it would be inequitable for the recipient to refuse to repay the money. That is a judgment which the recipient, properly advised, must be able to make within a reasonable time and at a reasonable cost."

His Honour further held that irreversible detriment is a useful and flexible guiding criterion for the examination of a change of position defence.

[64] Gageler J, while agreeing with the result, expressed his own reasons for coming to that conclusion. So far as monies had and received and the defence of change of position are concerned his Honour said:

> "The fact that a payment is caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the recipient to make restitution. That is because a causative mistake is the circumstance which the law recognises to be prima facie sufficient to make the recipient's receipt, and retention, of the payment unjust. To displace that prima facie obligation, the recipient must establish some other circumstance which the law recognises would make an order for restitution unjust. The defence of change of position comprehends

> one of those circumstances. The defence, if established, results in the prima facie obligation of the recipient being in whole or in part displaced at the time an order for restitution is sought."

[65] Gageler J held that the defence of change of position is established where a recipient proves the existence of two conditions. Those are:

1. that the defendant has acted in good faith on the assumption that the defendant was entitled to deal with the payment which the defendant received; and

2. by reason of having so acted the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all.

[66] His Honour also held that the entitlement to rely upon a defence of change of position and retain a payment made to a recipient is qualified to the extent that the retention of the whole of the payment can be shown to be disproportionate to the degree of the detriment. Where the detriment is less than the amount received, the entitlement of the defendant to retain the payment is reduced.

[67] An application of those concepts to the defence of change of position in this case shows that the learned trial judge was correct to find that *prima facie* Comgroup was entitled to restitution of the monies paid by it to Products for Industry under an operative mistake of fact. However, given the facts as found by the trial judge, the recipient, Products for Industry, was entitled to rely on a change of position defence but only to the extent of the monies paid out by it in good faith to GTAKS. This is so whether it would be inequitable to require Products for Industry to repay monies to Comgroup which it had not retained but paid out to GTAKS on the basis of an arrangement it entered into in good faith with Mr Soldini; or whether Products for Industry paid monies to GTAKS in good faith on the assumption that it was entitled to deal with the payment which it received and, by reason of having so acted, Products for Industry would be placed in a worse position if ordered to make restitution of the payment than if it had not received the payment at all.

[68] This ground of appeal that the change of position defence does not apply must also fail.

Issues Three and Four: Invoice Representations and Reliance

[69] In its oral submissions the applicant said it was content to rely on its written submissions on these issues. The third amended statement of claim in paragraph 4 pleaded that the invoices delivered by Products for Industry to Comgroup were representations by Products for Industry and Mr Dunwoodie that Products for Industry had undertaken the works described in each of the invoices. However the finding by the learned trial judge of the common practice of invoicing for work done by others means that it was inevitable that this pleaded representation was not

made out. If the pleaded representation was not made out then there could be no reliance on the representation. This ground of appeal must also fail.

[70] Accordingly it is not necessary to deal with the question of apportionment which is said to be Issue Five.

Conclusion

[71] It follows from the examination of the merits of the proposed amended notice of appeal, that it is bound to fail. The proposed appeal does not raise any significant questions of law but rather the application of well-established principles of law to the facts of this case. There was no error in the judge's explication of the law or the application of the law to the facts as found.

[72] Accordingly I would refuse the application for leave to appeal the decision made by the District Court on 19 December 2014; the application for an extension of time to file the application; and the application for leave to amend the application for leave to appeal.

[73] In view of the applicant's concession that if leave to appeal is not granted, this court has no power to grant leave independently to appeal the costs decision, I would also refuse the application to amend the application to include an application for leave to appeal the costs judgment.

[74] In view of the applicant's concession that if leave to appeal is not granted, this court has no power to grant leave independently to appeal the costs decision, I would also refuse the application to amend the application to include an application for leave to appeal the costs judgment.

Orders:

1. Refuse the application for leave to appeal the decision made by the District Court on 19 December 2014;

2. Refuse the application for an extension of time to appeal;

3. Refuse the application for leave to amend the application for leave to appeal;

4. Unless the applicant files submissions on costs in accordance with paragraph 52(4) of Practice Direction 3 of 2013 within 14 days, with any response by the respondents within seven days of receipt of those submissions, the applicant is to pay the respondents' costs of the applications.

[75] **MULLINS J:** I agree with Atkinson J.