

Commercial fiduciaries have little cause to celebrate such expanded liability in circumstances that are difficult, or impossible, to anticipate and prevent.

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EQUITABLE THIRD PARTY LIABILITY

THE unanimous judgment of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (May 24, 2007) marks the first time in 30 years that the High Court of Australia has had the opportunity to consider and clarify the equitable liability of third parties to breach of trust or fiduciary duty. Hence, it was also the first opportunity for the High Court to consider the possibility of recognising a strict liability unjust enrichment claim in factual circumstances encompassed by equity's knowing receipt rule.

The first appellant, Farah Constructions Pty Ltd, formed a joint venture with the respondent, Say-Dee Pty Ltd, to re-develop a block of land in Sydney. The director of Farah, Mr Elias, oversaw an unsuccessful development application to the local council, in the course of which he learned that if adjacent properties were purchased, a revised application would most likely secure Council approval. Say-Dee alleged that Farah, through Elias, breached its fiduciary obligations by not imparting this information to Say-Dee and instead arranging for a related company controlled by Elias, Lesmint Pty Ltd, and Elias' wife and two daughters, to purchase the relevant properties adjoining the joint venture's land. It was alleged that in doing so Elias acted as his wife and children's agent and, consequently, that his knowledge of the breach of duty should be imputed to them.

The New South Wales Court of Appeal overturned Palmer J.'s decision at first instance that there had been no breach of fiduciary duty by Farah. It also held that Lesmint, Elias' wife, and his children were liable under the first limb of *Barnes v Addy* (1874) L.R. 9 Ch. App. 244 (knowing receipt of trust property in breach of a trust or fiduciary duty); and, controversially, that the facts supported a strict liability claim in unjust enrichment. The High Court reinstated Palmer J.'s finding of no breach of fiduciary duty by Farah; but in lengthy obiter dicta went on to consider the Court of Appeal's reasoning with respect to the recipient liability of the third parties and an alternative submission by Say-Dee that the third parties were knowing assistants to the breach of fiduciary duty by Farah, under the second limb of *Barnes of Addy*. Importantly, the court continued to frame the legal questions in terms of the two limbs of the so-called rule in *Barnes v Addy*.

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^{LT} Canada; Fiduciary duty; Retainers

Equitable recipient liability

There are at least two ways to interpret the Court of Appeal's finding that the third parties had knowingly received "trust" property according to the first limb of *Barnes v Addy*. The first possibility is that the information acquired by Elias was itself property belonging to the joint venture, which was then "received" by the third parties; that is, it was part of the joint venture's "intellectual stock-in-trade" ([2005] NSWCA 309 at [173], *per* Tobias J.A.). Alternatively, the land acquired by the third parties as a result of the information was the relevant "trust" property; that is, the third parties acquired "the fruits of the valuable intelligence" obtained by Elias ([2005] NSWCA 309 at [175], *per* Tobias J.A.).

The High Court, correctly in our view, rejected the Court of Appeal's reasoning in both respects as fundamentally flawed. Recipient liability is the personal liability companion to a proprietary claim contingent upon the application of priority or tracing rules; that is, the beneficiary or principal must have an equitable proprietary interest which can be identified in property received by the third party. In this case, the High Court held, the information acquired by Elias was not property to which a trust could attach (*contra* Edelman (2006) 122 L.Q.R. 174 at 177). Even if the information were confidential, which it was not, this would not necessarily make it property for the purposes of recipient liability. Nor was the land acquired by the third parties "trust" property as it was never held by the joint venture, or by Elias, and nor was it possible to trace the information acquired by Elias into the properties. The High Court's approach is consistent with recent English authorities: *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All E.R. 652; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638; [2006] F.S.R. 17 at [1525], *per* Lewison J. Further grounds for rejecting recipient liability were that the evidence did not establish that Elias was acting as the agent of his wife and children and, unconvincingly, that his actual knowledge could not be imputed to them.

In a surprising aside, the High Court also expressed doubt as to whether recipient liability should apply at all in relation to property which is not the subject of an express trust: this had been "assumed, but rarely if at all decided" (at [113]). Previously, the requirement of "trust" property in the first limb was assumed to encompass all situations where a fiduciary has property of the principal under his or her control (see, e.g. *Belmont Finance Corp v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393 at 405, *per* Buckley L.J. and *Foley v Hill* (1848) 2 H.L. Cas. 28 at 35-36, *per* Lord Cottenham L.C.).

Strict liability

The New South Wales Court of Appeal held that a restitutionary, unjust-enrichment based claim was available to Say-Dee. Such liability is strict, subject to defences, and thus no knowledge needs to be proved where “recipients” have been unjustly enriched at the claimant’s expense.

The High Court categorically rejected the use of unjust enrichment to impose strict liability in this context and was highly critical of the lack of analysis by the Court of Appeal. First, the High Court emphasised that long-established authority, including “seriously considered” (at [134]) obiter dicta of the High Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 C.L.R. 373, precluded an intermediate court from taking such a radical step. Thus, the requirement of notice or knowledge as a foundation of recipient liability in equity is too firmly entrenched to be abandoned. Say-Dee had sought to explain the unjust enrichment claim as arising alongside the equitable claim, rather than as a recasting of it (consistently with Birks’s later writing on the subject, e.g. “Receipt” in Birks and Pretto (eds), *Breach of Trust* (2002), p.213 at p.223). The High Court, however, correctly recognised that this would be to render the first limb of *Barnes v Addy*, and its notice requirement, otiose (at [134]). Hence, recipient liability should not be outflanked by the recognition of a strict liability unjust enrichment claim. Apart from precedent, a number of conceptual arguments can be advanced in support of this view and the “want of intellectual merit” (at [132]) of a strict liability unjust enrichment claim in this context.

Specifically, the High Court rejected the view that there had been any receipt of trust property by the third parties, for the purposes of the knowing receipt rule. Although the High Court did not separately consider the point, it is equally problematic, and for similar reasons, to establish the receipt of any “enrichment” at the claimant’s expense. What was the enrichment: the information itself? Or the property purchased “using” that information? Clearly, regardless of whether the courts are to impose recipient liability or strict liability under unjust enrichment, on the receipt of property or enrichment, respectively, it is imperative to avoid loose and overly broad meanings of those concepts.

The High Court also noted that there was no relevant “unjust factor” justifying restitution. “Breach of fiduciary duty” could not be such a factor, as the third parties were not fiduciaries, and did not have knowledge of any such breach. The only possible candidate was “ignorance”, but the High Court stated that even in England, no case has treated ignorance as a basis for restitution (at [156]).

At a normative level, the High Court emphasised the injustice of recognising a strict liability unjust enrichment claim on these facts. The High Court stressed that the unjust enrichment claim should not be used

to “cut down traditional equitable protection” (at [153]). The onus is on those advocating the recognition of the strict liability unjust enrichment claim to justify the normative merits of such change to the law (at [148]). It was not clear “how there was any justice in permitting restitution against a defendant who received trust property without notice of that fact” (at [155]).

Hence, the assumption by many that a strict liability unjust enrichment claim is both conceptually and normatively preferable to knowledge-based liability in such cases, such as to be almost “foreordained and . . . inevitably correct” (*Farah*, at [133]), is finally being challenged at the highest judicial levels. This is something to be welcomed; we have extensively expressed our own views on the matter recently, in particular rejecting the burdensome onus that strict liability under unjust enrichment places on innocent recipients to satisfy defences (*Dietrich and Ridge*, (2007) 31 M.U.L.R. 47).

If all this suggests that the divide between the English and Australian law of restitution is ever widening (on which, see *Hedley* (2004) 28 M.U.L.R. 759), of even more interest is the approach of the High Court to the “unjust enrichment” principle more generally. This is not a concept to be given a free or wide-ranging operation. Unjust enrichment is not to be used as a mechanism to recast the law; at best, it operates in narrow terms, requiring the existence of specific qualifying or vitiating factors (at [150]). Perhaps most importantly, in a probable reference to the Birksian school of unjust enrichment theory, the High Court rejected “a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development” (at [154]). The court adopted views of Gummow J. in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 C.L.R. 516 at 544, stressing that theory in the common law derives from judicial decisions rather than the other way around (at [154]). It also endorsed Gummow J.’s view that much modern unjust enrichment theory represents a dogmatism that

“will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields . . . so that they will answer the newly mandated order of things” (at [151]).

For those who may have thought that these views of Gummow J. are essentially his own, *Farah* puts paid to such arguments.

Knowing assistance liability

In the Privy Council case of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 Lord Nicholls of Birkenhead drew on nineteenth-century case law concerning the liability of third parties who participated in breaches of trust to formulate a general principle of “accessory liability” for breaches

of trust and fiduciary duty for which dishonesty on the part of the third party is the requisite element for liability (*Fyler v Fyler* (1841) 3 Beav. 550; *Attorney General v Corp of Leicester* (1844) 7 Beav. 176; *Eaves v Hickson* (1861) 30 Beav. 136). Lord Nicholls used these cases to support his reasoning that a dishonest and fraudulent breach of duty by the trustee or fiduciary is not required and consequently he rejected Lord Selborne's formulation of the second limb of *Barnes v Addy*.

In contrast, the High Court in *Farah*, whilst relying on almost the same nineteenth-century case law, has taken the opposite approach to that of Lord Nicholls by expressly differentiating the ways in which third-party participatory liability for breach of trust or breach of fiduciary duty may arise. Thus, whilst the Privy Council's formulation of accessory liability incorporates various forms of third party involvement in breach of trust or fiduciary duty, namely, inducement, procurement, and assistance, into one general principle with one criterion for liability (dishonesty by the third party), Australian courts are to maintain the distinction between liability under the second limb of *Barnes v Addy* and liability by way of procuring or inducing a breach of trust. Unfortunately, there is little in the way of principled explanation for why the distinction between assistance by a third party in a breach of trust or fiduciary duty on the one hand, and procurement or inducement by a third party of a breach of trust on the other, should be maintained. Nor is there any explanation of whether third-party liability for procurement and inducement applies only in relation to breaches of trust.

The immediate consequence of the High Court's approach is that Lord Selborne's statement of principle in *Barnes v Addy* is given far greater weight. Thus, the High Court affirmed that for knowing assistance liability the breach of trust or fiduciary duty by the fiduciary must itself be dishonest and fraudulent before the third party is liable; whereas, this is not necessary in order for a third party who procured or induced a breach of trust to be liable.

The extent to which the knowledge criterion for knowing assistance liability in Australia differs in substance from the dishonesty test for English accessory liability continues to be an open question. Further reinforcing its divergence from the English position, the High Court expressly adopted the *Baden* scale of knowledge (*Baden v Société Générale, etc.* [1992] 4 All E.R. 161 at 235, per Peter Gibson J.) as being of assistance in interpreting the judgments in *Consul* as to the third party's requisite state of knowledge (contra *Royal Brunei* at 392, where Lord Nicholls suggested that the *Baden* scale of knowledge is "best forgotten"). This is rather surprising given that one member of the court has referred, extra-judicially, to the scale as "the zenith of complexity": Heydon and Leeming, *Jacob's Law of Trusts in Australia*, 7th edn (2006), para.[1335]. The court used the scale to clarify some uncertainties arising

from *Consul*, and concluded that level (iv) on that scale, "knowledge of circumstances which would indicate the facts to an honest and reasonable man" is sufficient for liability. It is designed to capture the "morally obtuse" defendant who does not recognise an impropriety that would have been recognised by an "ordinary person" (at [177]).

"Knowing assistance" in Australia now has a much narrower scope than English accessory liability. The motivation for this appears to be a concern with the potential for injustice when third-party liability rules developed in relation to traditional express trusts are applied to breach of fiduciary duty in general. Particular reference is made to the situation of "directors, advisers and bankers of [an] insolvent company" (at [179]). A pressing question after *Farah*, then, concerns the extent to which breach of equitable duties by fiduciaries and trustees should be treated as interchangeable for the purposes of third-party liability. Nor, we would suggest, is this question solely an Australian concern.

Unfortunately, whilst the High Court made some attempt to address the conceptual and normative merits, or lack thereof, of an unjust enrichment claim, there is little substantive discussion of the normative questions raised by the court concerning the proper scope of equitable wrong-based liability for third parties to breach of trust or fiduciary duty. For the moment, arguments based upon precedent have won the day; in the longer term, however, a principled and normative analysis, which builds upon precedent in an acceptable way, is required. It is to be hoped that it will not be another 30 years before the High Court has that opportunity.

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FINAL GUIDELINES ON COMPENSATION OF COMMERCIAL AGENTS

THE Commercial Agency Regulations, which regulate the relationship that commercial agents have with their principals, implement an EC Directive which aims to reinforce the legal protection of commercial agents. One of the most important protective features of the Directive is to give commercial agents, on termination of the agency relationship, the right to claim a lump sum payment. The Directive allowed Member States to choose between "indemnity" or "compensation for loss" (Art.17(1)), the two concepts drawing on German and French law respectively, but offered limited guidance on the meaning of such terms or how they should be calculated. The Government did not select one or the other and instead left the choice between the two options to the parties (reg.17(1)). In

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