

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

ISSUE 6: SUMMER 2007/2008

RECIPIENT LIABILITY FOR BREACH OF TRUST OR FIDUCIARY DUTY

By Sam Duggan

Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 81 ALJR 1107 concerned a joint venture for the purpose of property development. It involved questions, among others, of the content and extent of fiduciary obligations owed by one joint venturer to another and the basis upon which a third party can be liable for receipt of property in breach of trust or fiduciary duty. Say-Dee alleged that Mr Elias had concealed from it important development consent information imparted to him by the local council, and then used that information to his own advantage, and the advantage of his wife and daughters by their purchase of some parcels of land.

The New South Wales Court of Appeal held that Mr Elias' wife and daughters held the parcels of land as constructive trustees because that land had been purchased in breach of Mr Elias' fiduciary duty. It held that such liability arose not only on the basis of established equitable principles, namely the family members were knowing recipients under what is commonly described as "the first limb of *Barnes v Addy*", but also (controversially) on restitutionary principles. The Court of Appeal held that even if Mrs Elias and her daughters had no notice of the breach of duty (a prerequisite to found relief in equity), a constructive trust should be imposed on the parcels of land acquired by them by reason of their unjust enrichment.

The High Court in a unanimous judgment described the Court of Appeal as having made a "grave error" stating that the changes by the Court of Appeal to the doctrine of knowing receipt "were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court. They must be rejected."

The High Court's decision is a blow to those who advocate an expansion of restitution based liability in Australian law. The Court affirmed its view from *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, that "unjust enrichment is not a definitive legal principle according to its own terms". The Court said that the concept of unjust enrichment applies in areas which are specific and usually long established and recipient liability for breach of trust or fiduciary duty has not been one of them.

In practical terms, *Farah v Say Dee* means that it is still necessary to establish notice (within the recognised categories of actual and constructive knowledge set forth in *Consul Developments v DPC Estates* (1975) 132 CLR 373) to found a stranger's liability for receipt of property in breach of trust or fiduciary duty.

Clerk:

Barristers

(alphabetically):

Troy Anderson
Nic Angelov
Timothy Barrett
Andrew Bouris
Tom Brennan
Kim Burke
David Davies SC
Gary Doherty

Paul Walker
Jason Downing
Sam Duggan
Kerry Eassie
Edmund Finnane
John Graves SC
Simon Gregory
Adrian Gruzman
Philip Hallen SC
Rhonda Henderson
Colin Hodgson

Matthew Hutchings
Sydney Jacobs
Benjamin Kasep
Stuart Kettle
Izaz Khan
Gregory Laughton SC
William McManus
Michael Meek
Alwyn Narayan
Nicholas Newton

Andrew Robins
Patrick Rooney
Geoffrey Rundle
James Thomson
Martin Watts
David Weinberger
Craig Wilson
Michael Windsor
Christopher Wood
Steven Woods

CONTEMPT – Breach of implied undertaking as to use of documents obtained in court proceedings: *Street v Hearn* [2007] NSWCA 113

The NSW Court of Appeal made findings of contempt against the respondents who during the course of proceedings at first instance concerning the Luna Park site, emailed excerpts of an affidavit and expert's report filed by the appellants to the Minister of Sport, Tourism and Recreation with the object of procuring amendments to the *Luna Park Site Act 1990* (NSW) to retrospectively defeat the appellants' claim.

The decision serves as an important reminder of the 'implied undertaking' which attaches to the use of documents obtained during the course of legal proceedings. See also Matthew Groves, 'The Implied Undertaking Restricting the Use of Material Obtained During Legal Proceedings' (2003) 23 Australian Bar Review 314.

By Benjamin Kasep

MEDICAL NEGLIGENCE – Claims arising out of events occurring in utero: *Mills v Lee & Ors* [2007] NSWCA 332

The Court of Appeal dismissed an appeal by the plaintiff, who was born in 1983 suffering from cerebral palsy with spastic quadriplegia and severe intellectual impairment. He sued the two GP obstetricians who managed his mother's pregnancy, which was complicated by recurrent ante-partum haemorrhage, and the private hospital at which she was admitted in the weeks leading up to the plaintiff's delivery. The principal allegation was that the defendants had not taken appropriate steps to diagnose and treat an intrauterine infection in his mother, which developed into chorioamnionitis, causing cerebral palsy.

The appeal turned largely on the expert evidence, with the Court of Appeal finding no error in Hislop J preferring the defendants' obstetric experts to those of the plaintiff. Of some significance, the Court of Appeal found that because the expert evidence indicated a consensus view (in 1983) that intact membranes were effective to protect the foetus from ascending infection and the plaintiff's mother had intact membranes up until hours before delivery, there could be no breach of duty to the plaintiff in not administering antibiotics, even if his mother had an intrauterine infection. The Court reaffirmed the principle that a duty of care can be owed to an unborn child, but found that the child, once born, cannot 'piggyback' on a duty owed to his or her mother, in order to make out a case in negligence.

By Jason Downing

MORTGAGES: Mortgagor trumps Second Mortgagee: *New Beach Apartments Pty Ltd v Epic Hotels Pty Ltd* [2007] NSWSC 474

There is an inherent power in equity, reserved for special or exceptional circumstances, to order a judicial sale of a mortgaged property at the suit of a mortgagor, which does not depend upon wrongdoing by the mortgagee. New Beach Apartments confirms the power may be exercised even where the mortgagee will not be paid in full (and hence the mortgagor will not be paid at all). There were two mortgages on the property. The mortgagor had agreed to sell the property and sought judicial sale to enable the contract to proceed. The first mortgagee, who was the only party who would receive full payment, supported the order. The second mortgagee opposed the order.

White J considered an order for sale to be justified in the circumstances – pertinent factors were that the price was at the upper end of the valuation range; a forced sale would produce a lower price; if the order was not made the first mortgagee would sell but with delay while interest was running; the property was earning no income; and the second mortgagee's speculative prospect of achieving a better result was disproportionate to the risk of loss to the mortgagor (under its personal covenants) and the guarantor.

By Edmund Finnane

ANNOUNCEMENTS

New Members and Readers

Thirteen Wentworth Selborne welcomes **Gary Doherty** as a member of the floor. Gary was previously a reader on the floor.

The floor also welcomes **Patrick Rooney** and **Troy Anderson**, both of whom have joined us in 2007 as readers.

New Publications

Commercial Damages, 2nd Edition (Thomson) by **Sydney Jacobs** will be released by web-based subscription (early 08) and as a book (late 08). Sydney is also a co-author of the service, ***Injunctions Law and Practice*** (Thomson), which has now been expanded to deal with injunctions in the context of restraints of trade, confidential information and security of payments.

Equity Practice and Precedents (Thomson) by **Edmund Finnane, Nicholas Newton** and **Christopher Wood** will be published late 2007/early 2008. The book outlines the essential principles, and provides precedents for, a broad range of equitable remedies and statutory remedies associated with the equity jurisdiction.

To receive this newsletter by email, or to cease receiving it, please contact paulwalker@13wentworthselbornechambers.com.au It is also published on the floor's website www.13wentworthselbornechambers.com.au.

Important: This newsletter is not advice. You should not act solely on the basis of the material contained in this newsletter. The contents of this newsletter may have been superseded by changes in the law.