

Knowing assistance: the meaning of ‘dishonest and fraudulent design’

James Willis reports on *Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty Ltd v Almad Pty Ltd* [2014] NSWCA 266.

In *Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty Ltd v Almad Pty Ltd* [2014] NSWCA 266 (*Hasler*), the New South Wales Court of Appeal considered, inter alia, the meaning of the phrase ‘dishonest and fraudulent design’, in the context of a claim under the ‘second limb’ of *Barnes v Addy* (1874) LR 9 Ch App 244 (known as the ‘knowing assistance’ limb). The Court of Appeal was invited to depart from what was described as the ‘more relaxed test’ for knowing assistance adopted by the Western Australian Court of Appeal in *Westpac Banking Corporation v Bell Group Ltd (No 3)* [2012] WASCA 157 (*Bell*). In declining to follow the reasoning in *Bell*, the New South Wales Court of Appeal concluded that the High Court, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (*Farah*), had not changed the meaning of the phrase ‘dishonest and fraudulent design’ in such a way that it would encompass all breaches of fiduciary duty more serious than a trivial breach that was excusable by reference to various (and inconsistent) statutory standards.

Background

The judgment in *Hasler* arose out of three separate appeals and two cross-appeals. The matters for determination in these appeals were distilled concisely by Leeming JA into five separate issues.¹ This article will focus on the second of these issues, being whether the conduct of Mr Curtis, one of the defendants at first instance, amounted to a dishonest and fraudulent breach of duty.

A brief summary of the factual circumstances which are relevant to this issue is as follows. Mr Curtis was an employee of one of the three defendant companies and, in that capacity, was responsible for supervising a considerable number of staff. At first instance, a finding was made that Mr Curtis owed fiduciary duties to all three of the defendant companies (which were related Optus companies) and that Mr Curtis had breached those fiduciary duties. The gravamen of the breach was that Mr Curtis had put his personal interests in conflict with the defendants by causing a company (Sumo) of which he was a shadow director to offer warehousing services to the defendants without obtaining the defendant’s fully informed consent.

Mr Hasler, a further defendant at first instance, who was previously an employee of Optus (reporting to Mr Curtis) had, at the relevant time, worked for Sumo and managed its day-

to-day operations. On the basis of these facts, the court at first instance found that:

- (a) Mr Curtis’ breach of his fiduciary duties to the defendant companies amounted to a ‘dishonest and fraudulent design’ within the meaning of the ‘second limb’ of liability under *Barnes v Addy*; and
- (b) Mr Hasler had knowingly participated in that breach of fiduciary duties.

The issue at sub-paragraph (a) involved a consideration of both the meaning of ‘dishonest and fraudulent design’ and whether or not Mr Curtis’ conduct fell within that meaning. The Court of Appeal found, that on any view of the meaning of ‘dishonest and fraudulent design’, Mr Curtis’ conduct was caught. However, for the reasons discussed below, Gleeson and Leeming JJA gave further consideration to the meaning of ‘dishonest and fraudulent design’.

The *Bell* decision

As identified by Leeming JA,² there had been some uncertainty as to the meaning of ‘dishonest and fraudulent design’, in the context of a ‘knowing assistance’ claim, following the decision in *Bell*.

In *Bell*, Drummond AJA considered the explication of the phrase ‘dishonest and fraudulent design’ by the High Court in *Farah*. Relevantly, his Honour found that the following considerations applied to the meaning of the phrase:

- (a) it is not necessary to show that the trustee or fiduciary ‘acted with a conscious awareness that what he [or she] was doing was wrong: the breach of duty can be characterised as dishonest or fraudulent according to equitable principles and that will suffice for liability’;³
- (b) it will be sufficient ‘if the breach of duty is more than a trivial breach and is also too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly be excused’;⁴
- (c) in determining when a breach of duty is excusable, ‘the court should take an approach analogous to that of courts under provisions such as s 75 of the *Trustees Act 1962* (WA) and s 1318 of the *Corporations Act 2001 (Cth)*.’⁵

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After giving due regard to matters of judicial comity,⁶ Leeming JA (with whom Gleeson JA agreed) came to the view that there were good reasons for determining whether the decision in *Bell*, in respect of this issue, was correctly decided.⁷ These reasons included the fact that the issue was of general importance,⁸ the uncertainty was giving rise to considerable difficulty throughout Australia⁹ and that the High Court had granted special leave to appeal *Bell*, in circumstances where one of the issues at the forefront of the appeal was a challenge to the formulation of the second limb of *Barnes v Addy*.¹⁰

In applying the High Court’s test in respect of the departure by intermediate appellate courts from the decisions of other intermediate appellate courts,¹¹ Leeming JA (with Gleeson JA agreeing¹²) held that the decision in *Bell* was ‘plainly wrong’.¹³ In agreeing with the comment of Leeming JA that the issue of whether *Bell* was correctly decided did not *need* to be decided to determine the appeal, Barrett JA stated that he preferred ‘to let the matter rest for the time being’.¹⁴

Reasons for not following the *Bell* decision

The following is a summary of some of the detailed reasons given by Leeming JA and Gleeson JA in respect of their decision not to follow the decision of the Western Australian Court of Appeal in *Bell*.

1. Farah did not dilute the meaning of ‘dishonest and fraudulent’

Leeming JA found that there was no suggestion in *Farah* that the High Court intended ‘substantially’ to expand the class of breaches of fiduciary duty to which the second limb of *Barnes v Addy* would apply. Relevantly, his Honour noted that the High Court was at pains to preclude the Australian courts below itself from following the more relaxed formulation of the test adopted by the Privy Council in *Royal Brunei Airlines SdnBhd v Tan* [1995] 2 AC 378.¹⁵

Gleeson JA identified the critical error in *Bell* as misconstruing the rejection in *Farah* of the ‘submission that a breach of trust or breach of fiduciary duty had to be ‘significant’ (to come within the second limb of *Barnes v Addy*), as in some way diluting the *quality* of conduct that is sufficient to answer the

description ‘dishonest and fraudulent’. His Honour noted that the High Court made it clear that in rejecting the ‘significant’ formulation of the test, the High Court was ‘not adopting the suggested abandonment of the ‘dishonest and fraudulent design’ integer as part of an accessorial liability claim’.¹⁶

2. The meaning accorded to ‘dishonest and fraudulent’ in *Bell* is not well defined

Leeming JA identified a further anomaly which would arise if the standard of a trustee or fiduciary’s conduct were to be measured by reference to the standards set out in s 75 of the *Trustees Act 1962* (WA) and s 1318 of the *Corporations Act 2001* (Cth). Relevantly, his Honour examined the legislative history of these provisions and came to the conclusion that for the last three decades, two separate, different, tests have applied under these two provisions.¹⁷ Accordingly, the application of such a standard would create significant uncertainty.

Concluding comments

Following the Court of Appeal’s decision in *Hasler*, it would seem that the meaning of ‘dishonest and fraudulent’ has been settled in New South Wales. However, it is less clear what position will be taken by other state Supreme courts. It may be that the issue in those states remains unresolved until such time as the High Court has occasion to consider the standard.

Endnotes

1. *Hasler*, at [35].
2. *Hasler*, at [57].
3. *Bell*, at [2112(b)].
4. *Bell*, at [2112(c)].
5. *Bell*, at [2112(c)].
6. *Hasler*, at [99], [101].
7. *Hasler*, at [58].
8. *Hasler*, at [59].
9. *Hasler*, at [60].
10. *Hasler*, at [62].
11. *Farah*, at [135]; *Hasler*, at [92].
12. *Hasler*, at [9]–[10].
13. *Hasler*, at [102].
14. *Hasler*, at [4].
15. *Hasler*, at [105].
16. *Hasler*, at [11].
17. *Hasler*, at [111] – [114].