ORIGINAL

HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S67 of 2011

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED
Appellant

and

ROBERT COLIN NICHOLLS
First Respondent

DAVID ROSS SLATER
Second Respondent

TEMUJIN SERVICES LIMITED
Third Respondent

TEMUJIN INTERNATIONAL LIMITED
Fourth Respondent

TEMUJIN INTERNATIONAL FZE
Fifth Respondent

HIGH COURT OF AUSTRALIA
FILED
16 JUN 2011
THE REGISTRY SYDNEY

THE RESPONDENTS' SUBMISSIONS IN REPLY

I. INTRODUCTION

1. These Written Submissions have been prepared:

   (a) on behalf of the Respondents;

   (b) in reply to the document filed on 6 June 2011 entitled "Appellant's Supplementary Submissions"; and

   (c) pursuant to a direction given by the High Court on 1 June 2011 ([2011] HCA Trans 142 at page 105 (line 4582), read with page 102.

2. The subject matter of the parties' Submissions is paragraph two of the document dated 1 June 2011 and entitled "The Respondents' Formulation of Abuse of Process other than Reichel v Magrath".

3. That paragraph contains a submission by the Respondents to the effect that "[the] proceedings in the Supreme Court were not designed to allow (and the law does not allow) the Appellant to claim or recover from the Respondents as accessories to Mr Emmott (as principal wrongdoer) compensation independent of the taking of accounts between the Appellant and Mr Emmott and without bringing into account in favour of the Respondents profits or property (by way of set off or otherwise) for which the Appellant is or might be obliged to account to Mr Emmott."

4. The particular focus of these Submissions is the meaning of the expression "not designed to allow (and the law does not allow)" in its application to proceedings against an alleged "Accessory" under the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 without joinder of the "Fiduciary" upon whose alleged breaches of fiduciary obligations the proceedings brought by the " Beneficiary" of those obligations as plaintiff are based.

II. OVERVIEW

5. The Respondents submit that: (a) such proceedings are not designed to impose on an Accessory a liability for the payment of compensation that is independent of, or greater than, such (if any) liability that the Fiduciary might have; and (b) the law does not allow a plaintiff Beneficiary to pursue independent claims against the Fiduciary and the Accessory (leading to the possibility of inconsistent outcomes) in separate proceedings without any obligation to take into account the interdependency of those claims and the secondary, derivative character of such, if any, liability the Accessory might have.

6. The major differences between the Appellant and the Respondents identified in the Appellant's Supplementary Submissions appear to be the following:

   (a) First, the Appellant resists use of the expression "accessory liability" in connection with liability under the second limb of *Barnes v Addy* (SS [4]-[5]), although it acknowledges that "liability under the second limb cannot arise until, *inter alia*, a breach of fiduciary duty by another is established" (SS [5]). The Respondents submit that liability under the second limb is dependent upon, derivative from and secondary to that of the Fiduciary as primary wrongdoer: below, [10], [18(b)] and [19]-[21].

   (b) Secondly, the Appellant attributes substantive significance to the expression "liable to account as a constructive trustee" in its application to a person liable under the second limb (SS [4] and [6]). The Respondents adopt criticism of that expression by Lord Millett: below, [19].

(c) Thirdly, the Appellant contends that the liability of a person under the second limb can be determined completely independently of any liability of the Fiduciary alleged to have been in breach (SS [7] and, possibly, [11]). The Respondents submit to the contrary: below, [7]-[10], [17]-[18] and [20]-[24].

(d) Fourthly, the Appellant implicitly contends that no question as to whether the Fiduciary is a "necessary or proper party" to proceedings against a person alleged to be liable under the second limb arises (SS [7] and [11]). The Respondents submit that it necessarily arises, and that an examination of Equity's general approach towards questions of "parties" affirms that reality: below [7]-[18] and [22]-[24].

(e) Fifthly, the Appellant relies upon the existence of "the equity of double satisfaction" operating at the point of enforcement to contend that there is no need to examine limitations on a plaintiff Beneficiary's entitlements, if any, earlier than the time of judgment (SS [11]). The Respondents submit that the fact that Equity is concerned about unconscientious conduct at the point of enforcement of a judgment cannot justify a lack of concern about proper procedures and entitlements at an earlier stage of the litigation process, particularly (as noted in [17] below) in the context of a risk of inconsistent judgments and complications in working out of rights of contribution and indemnity.

(f) Sixthly, the Appellant's perspective of the factual matrix, and relevance, of the London Arbitration (SS [9]-[10]) differs from that of the Respondents below: [25]-[32].

III. GENERAL PRINCIPLES

III.A The question of parties in proceedings under the second limb of Barnes v Addy

7. A Fiduciary's liability for equitable compensation for breach of a fiduciary obligation owed to a Beneficiary, and the liability of a person with liability for that breach under the second limb of *Barnes v Addy* (for convenience, described in these Submissions as an "Accessory"), have the character of a joint liability: *US Surgical Corporation v Hospital Products International Pty Limited* [1982] 2 NSWLR 766 at 817C-D.

8. Their liability does not lose its character as a joint liability by virtue of s. 95 of the *Civil Procedure Act* 2005 (NSW), which precludes the possibility that entry of judgment against one or more of jointly liable persons operates as a release of other persons jointly liable.

9. As between themselves, the Fiduciary and the Accessory may have rights of contribution or indemnity arising out of their joint liability.

10. The "wrong" in respect of which their joint liability arises is that of the Fiduciary as the primary wrongdoer; the liability of the Accessory is dependent upon, secondary to, and a derivative of, the liability of the Fiduciary: SB Elliott and C Mitchell, "Remedies for Dishonest Assistance" (2004) 67 *Modern Law Review* 16 at 17-20 and 36-44.

11. Equity has a predisposition against a multiplicity of suits and in favour of a complete and final determination of all questions in controversy: *Daniell's Chancery Practice* (7th ed, Stevens & Sons, London, 1901; reprint by The Lawyers Bookshop, Brisbane, 1982), vol. 1, pp. 163, 172 and 200; Denis Browne (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933; reprint by Legal Books, Sydney, 1983), pp. 42-43; PW Young, C Croft and ML Smith, *On Equity* (Law Book Co, Sydney, 2009), paras. [15.50]-[15.60], esp. at p. 966.

12. That predisposition is reinforced by section 63 of the *Supreme Court Act* 1970 (NSW), which reads: *"The [Supreme] Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."*

13. Accordingly, the general rule is that, where a Beneficiary claims relief against an alleged Accessory under the second limb of *Barnes v Addy,* the Beneficiary is obliged to join the alleged Fiduciary in the same proceedings: *Ashburner*, page 43, paragraph (c); *Daniell,* volume 1, pages 211-213, 215 and 218.

14. However, the general rule is not absolute. It is a practical rule of convenience in the service of the administration of justice: Young, Croft and Smith, *On Equity*, page 966, citing *Cockburn v Tompson* (1809) 16 Ves 321; 33 ER 1005 at 1007 and *Richardson v Hastings* (1844) 7 Beav 323; 49 ER 1089[1].

15. The general rule is open to variation (characterised as "exceptions") to accommodate particular cases, including cases in which a person exposed to a claim of joint liability is insolvent, out of the jurisdiction or cannot be found[2].

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[1] The text of *On Equity* erroneously refers to volume 44, instead of volume 49, of the English Reports citation for *Richardson v Hastings.*

[2] *Cockburn v Tompson* (1809) is a primary authority relied upon not only in *On* Equity, but also by RW White (as his Honour then was) in "Equitable Obligations in Private International Law: The Choice of Law" (1986) 11 *Sydney Law Review* 92 at 97 in analysis of defendants outside the jurisdiction.

16. In the exercise of equitable jurisdiction or statutory powers (including section 63 of the *Supreme Court Act* 1970) the Supreme Court can accommodate the dictates of justice in a particular case by the imposition of terms.

17. If separate proceedings are maintained against an alleged Accessory before the determination of a claim against the Fiduciary, the plaintiff Beneficiary must confine its case within the limitation that any relief granted against the Accessory in those proceedings must ordinarily be subject to terms designed to reserve to the parties, and the Court, a right to adjust the orders of the Court in light of any determination of a claim against the Fiduciary if consistent, and equitable, outcomes are to be achieved. Unless that is done there is a distinct risk not only of inconsistent outcomes as between the Beneficiary (on the one hand) and the Fiduciary and the Accessory respectively (on the other hand) but also, in other proceedings, between the Fiduciary and the Accessory if and when they contest entitlements to contribution and indemnity *inter se*.

18. In summary:

(a) As a general rule, where a Beneficiary claims relief against a Fiduciary and an Accessory said to be liable under the second limb of *Barnes v Addy*, the Beneficiary is obliged to join both the Fiduciary and the Accessory as parties in the same proceedings.

(b) If a Beneficiary claims relief against a Fiduciary and an Accessory in separate proceedings, the proceedings against the Fiduciary should generally be determined before those against the Accessory (because the Accessory's liability, if any, is secondary to the liability, if any, of the Fiduciary), subject to the Court's extensive powers to manage cases before it, to control its own processes and (if need be) to grant Asset Preservation Orders ("freezing orders" under *Part* 25, *Division* 2, of the *Uniform Civil Procedure Rules,* 2005 (NSW)).

(c) If a Beneficiary claims compensation against a Fiduciary and an Accessory in separate proceedings and the Court determines to allow the Beneficiary to proceed to judgment against the Accessory first, or if a Beneficiary sues only an alleged Accessory alone, the Court may require the Beneficiary to submit to terms (or, in default of submission, it might impose terms on the Beneficiary) to ensure that:

(i) the Beneficiary does not obtain a judgment, or recover an amount of compensation, in excess of such (if any) entitlement as the Beneficiary might be found to have against the Fiduciary as the primary wrongdoer.

(ii) in the event that the Beneficiary recovers from the Accessory an amount of compensation in excess of such (if any) entitlement the Beneficiary might subsequently be found to have against the Fiduciary as primary wrongdoer, the Beneficiary must restore to the Accessory the amount of the excess (having regard, *inter alia*, to the principles governing "the equity of double satisfaction" considered in *Baxter v Obacelo Pty Limited* (2001) 205 CLR 635 at 658-661 [56]-[62]; powers to stay the execution of a judgment by reason of events occurring after judgment[3]; and the power of the Court to make orders for the restitution of moneys paid on a judgment subsequently found to have been erroneous[4]).

III.B The nature of liability under the second limb of Barnes v Addy

19. To describe an Accessory with "secondary civil liability" under the second limb of *Barnes v Addy* as "a constructive trustee" is a misnomer for the reasons explained by Lord Millett in *Dubai Aluminium Co Limited v Salaam* [2003] 2AC 366 at 404 [141]-[142], cited in Elliott and Mitchell, "Remedies for Dishonest Assistance" (2004) 67 *Modern Law Review* 16 at 20-23. An Accessory liable under the second limb of *Barnes v Addy* may be "accountable in equity", but is not *ipso facto* a trustee.

III.C The Nature and Measure of Relief Available against an Accessary

20. In deciding upon the nature and measure of such relief as may be granted against an Accessory with liability under the second limb of *Barnes v Addy* the Court will have regard to the particular circumstances of the case to ensure that the relief granted accords with the requirements of justice and good conscience: *US Surgical Corporation v Hospital Products International Pty Ltd* [1982] NSWLR 766 at 817D.

21. That being so, it cannot be said that the Beneficiary has an unqualified right to an election, binding on the Court, as to the nature of the relief it obtains against an Accessory. Nor would it be open to a Beneficiary to receive compensation *vis à vis* a Fiduciary and to claim an account of profits *vis à vis* an Accessory[5].

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[3] The power of the Supreme Court to stay the execution of judgments or proceedings is no less extensive than that considered in *Permewan Wright Consolidated Pty Limited v Attorney General* (NSW) (1978) 35 NSWLR 365 at 367E-F and 374F, although the current rules of court contain no precise equivalent of the *Supreme Court Rules* 1970 (NSW) *Part* 42 *rule* 12 considered in that case. See *Civil Procedure Act,* 2005 (NSW), ss. 67 and 135.

[4] *The Commonwealth v McCormack* (1984) 155 CLR 273 at 276-277; *Production Spray Painting & Panelbeating Pty Limited v Newnham [No. 2]* (1991) 27 NSWLR 659 at 661D-662A.

[5] The Respondents contend that: (a) having been awarded compensation against Mr Emmott (subject to a set off) in the London Arbitration, the Appellant cannot now seek an account of profits from the Respondents in the New South Wales proceedings in relation to the breaches of fiduciary obligations alleged against them and Mr Emmott in common; and (b) further and alternatively, having elected to

IV. APPLICATION OF GENERAL PRINCIPLES

22. The non-joinder of Mr Emmott in the Appellant's proceedings in the Supreme Court of New South Wales was an impediment to its claims against the Respondents under the second limb of *Barnes v Addy*[6], but it was not in itself necessarily fatal to those claims because the principles governing claims for relief in the equitable jurisdiction (which inform statutory provisions such as section 63 of the *Supreme Court Act* 1970 and rules of court) are rules of convenience liable to be adapted to the dictates of justice in the particular case.

23. The vice in the Appellant's Supreme Court proceedings was the fact of Mr Emmott's non-joinder combined with:

(a) the refusal or failure of the Appellant:

(i) to proceed to a final determination of such rights as it might have *vis à vis* Mr Emmott before proceeding against the Respondents; and

(ii) to offer to bring into account *vis à vis* the Respondents any relief it might obtain *vis à vis* Mr Emmott in the London Arbitral proceedings[7];

(b) the insistence of the Appellant that it was entitled to proceed against the Respondents in the New South Wales proceedings independently of the outcome of the arbitration proceedings;

(c) the fact that the Appellant's claims for equitable compensation against Mr Emmott (in the arbitration proceedings) and the Respondents (in the New South Wales proceedings) were referable to the same loss allegedly sustained by the Appellant; and

(d) the fact that the Appellant implicitly reserved a right to obtain and enforce a judgment against the Respondents, and (until disclaimer of such a right in argument in the High Court) to retain any proceeds of that judgment, independently of such (if any) entitlements it might have against Mr Emmott in the London Arbitration.[8]

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claim compensation against the Respondents at trial, the Appellant should not be permitted to change that election at any re-trial.

[6] Reflected in paragraph 89(f) of the Respondents' "Commercial List Response" at 1AB 139-140; the Respondents' objection to the trial of the Appellant's claims against them being conducted before the determination of the London Arbitration (2 AB 825 lines 19-42 and 951 [100]); and the Respondents' Closing Submissions to the Primary Judge identified in footnote 2 to paragraph 19 of their "Outline of Argument" dated 31 May 2011.

[7] *Vide Seton's Judgments and Orders* (7th ed) at page 1312 and paragraph 19 of "The Respondents' Outline of Argument" dated 31 May 2011.

[8] The fact that the Appellant adheres to the stance here attributed to it is apparent in its Supplementary Submissions. See the final sentence of [7] and, perhaps by implication, [11].

24. Insofar as the Appellant sought compensation against the Respondents as Accessories under the second limb of *Barnes v Addy* referable to breaches of fiduciary obligations by Mr Emmott as primary wrongdoer:

(a) it was not entitled to seek, obtain or retain an order for compensation against the Respondents larger than such (if any) entitlement to compensation it might have against Mr Emmott;

(b) it was not entitled to seek, obtain or retain compensation from the Respondents in excess of such (if any) entitlement to compensation as it might have against Mr Emmott; and

(c) it was not entitled to seek or obtain any award of compensation against the Respondents in absolute terms unqualified by reference to such (if any) entitlements to compensation it might have against Mr Emmott.

(d) it was not entitled to maintain two sets of independent proceedings (the London Arbitration against Mr Emmott as the primary wrongdoer and the NSW proceedings against Respondents as Accessories), claiming compensation against the Respondents in absolute terms without qualifying its claim against the Respondents as limited to such (if any) liability the Respondents might have by reference to such (if any) liability that Mr Emmott might have.

V. THE FACTUAL MATRIX OF THIS CASE

25. The fourth of the five matters addressed in the Appellant's Supplementary Submissions focuses on the facts of the present case, but at a level of generality that might (incorrectly) be taken to suggest that there is not a direct correlation between:

(a) the Appellant's allegation in the London Arbitration to the effect that Mr Emmott breached his fiduciary obligations to the Appellant in respect of the work of "MWP clients" allegedly diverted away from the Appellant; and

(b) the Appellant's allegation in the Supreme Court of New South Wales that the Respondents are liable to it under the second limb of *Barnes v Addy* in respect of those breaches of duty.

26. Although the London Arbitration has been litigated in the broader context of competing claims to an accounting between the Appellant and Mr Emmott as "quasi-partners", the Appellant presented against Mr Emmott a discrete case of breach of fiduciary obligations referable to an alleged diversion of "MWP clients".

27. That case was essentially the same case being advanced in different forums (in the arbitration, against Mr Emmott; and, in the Supreme Court, against the Respondents): eg, 1 AB 143 (lines 31-42), 180[4], 185[6(i)] and 191[8(b)]. The character of the Appellant's claim for compensation at the trial before the Primary Judge was described, uncontroversially, in paragraph 9 of the "Respondents' Annotated Submissions" (filed 25 May 2011) as "a claim calculated by reference to fees invoiced by the Third Respondent to its clients [namely, entities associated with Mr Sinclair, entities associated with Mr Schoonbrood and two smaller clients, Kangamuit Seafoods and the Lancaster Group] for work done by it between 9 January 2006 and 31 January 2008."[9]

28. As explained at [2011] HCA Trans 142 at page 105, the "MWP clients" whose work the Appellant alleged was diverted away from it by Mr Emmott and the Respondents allegedly acting in concert comprised three groups:

(a) entities associated with Mr Sinclair (Sokol Holdings / Frontier Mining).

(b) entities associated with Mr Schoonbrood (Pinegrove Equities / Roxi Petroleum).

(c) the two entities not associated with either Mr Sinclair or Mr Schoonbrood:

(i) Kangamuit Seafoods (in respect of fees said to total €39,750 Euros); and

(ii) The Lancaster Group (in respect of fees said to total US$19,504).

29. At trial before the Primary Judge, the Appellant's same, core claim was advanced against the Respondents on the three bases enumerated at 1 AB 143 (lines 31-39) on the basis of a contention that the Appellant was entitled to the same amount of compensation whichever of the three formulations of its claim might succeed.

30. The effect of the London Arbitral Award[10] was that:

(a) As regards larger claims referable to Messrs Sinclair and Schoonbrood, the Appellant failed against Mr Emmott:

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[9] No issue with that characterisation of the Appellant's case was taken in the "Appellant's Submissions in Reply" (filed 15 April 2011).

[10] On 8 June 2011 Mr Justice Andrew Smith dismissed the Appellant's challenge to the Award under sections 68 and 69 of the *Arbitration Act* (1986) (UK): *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm).

(i) Mr Sinclair: "Conf AB" 183-184 [8.22], read with 94-95 [4.129].

(ii) Mr Schoonbrood: "Conf AB" 183-184 [8.22], read with 101-102 [4.144(h)].

(b) as against the smaller claims referable to Kangamuit Seafoods and The Lancaster Group:

(i) The Appellant succeeded against Mr Emmott: "Conf AB" 184 [8.24] and 187 (Orders 1(d)-(e)), read with 115-116 [4.180] and 117 [4.188-4.189].

(ii) The London Arbitrators ordered that any amounts due to the Appellant on those claims be set off against the Appellant's obligation to account to Mr Emmott referable to his claim on the Appellant's shares in Steppe Cement Ltd: "Conf AB" 184-185 [8.25]-[8.26] and 188-189 (Order 4), read with 180 [8.13].

31. If a similar outcome were to pertain in respect of the Appellant's proceedings against the Respondents in New South Wales (eg because of an application of the principle in *Reichel v Magrath* or a determination that the Primary Judge's acceptance, at 2 AB 634[244]-643[270], of the evidence of Messrs Sinclair and Schoonbrood should have led to the same conclusion as that reached by the London Arbitrators on claims against Mr Emmott referable to Messrs Sinclair and Schoonbrood) then, subject to any reformulation of the Appellant's case against the Respondents pursuant to the leave reserved to it by the Court of Appeal (described by Basten JA at 2 AB 954 [108] and adopted by Lindgren AJA at 1038 [403]), the only amounts potentially recoverable by the Appellant against the Respondents (if not satisfied by Mr Emmott, by way of set off in the London Arbitration, or otherwise) would be amounts referable to Kangamuit Seafoods and The Lancaster Group.

32. Accordingly, upon the assumption that the Appellant's claim against the Respondents is in substance limited to the total of the fees said to have been invoiced by the Third Respondent to Kangamuit Seafoods and The Lancaster Group (the sum of €39,750 and US$19,504) or thereabouts, the Respondents contend that that claim, on the taking of accounts between the Appellant and Mr Emmott, will prove to have been extinguished by the Arbitrators' order for a set off, leaving the Appellant with: (a) no unsatisfied loss in respect of which it can maintain a claim against them; and (b) no entitlement to any further relief against them referable to the breaches of fiduciary obligations alleged against them and Mr Emmott in common.

Date: 16 June 2011

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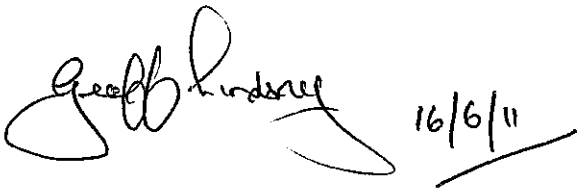

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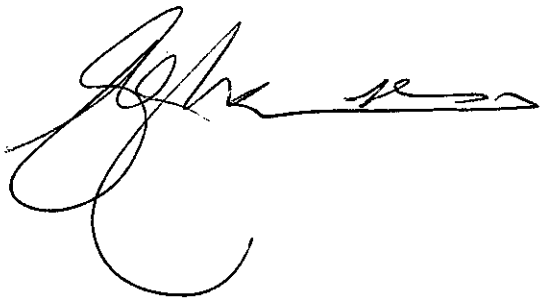

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