

THIRD PARTY LIABILITY OF FIDUCIARY DUTIES

Ways in which 3rd party can be liable for participation in a fiduciary breach:

- 3P is a **corporate vehicle/alter-ego** of wrongdoing fiduciary. Fiduciary's knowledge is impugned on corporation and corporation is fully liable.
 - E.g. fiduciary is sole director and wholly controls the company.
- 3P **knowingly induces or procures** breach of fiduciary duty for benefit = no need to show dishonesty by fiduciary.
 - Don't need to discuss *Barnes*, if knowingly induces.
- 3P deals with known fiduciary and offers **bribe or secret commission** ◦ 3P actually involved in the breach

TEST FROM *BARNES V ADDY*:

- **TWO LIMBS:**
 - Knowing Receipt; and
 - Knowing Assistance

'KNOWING'

BADEN TEST: Knowledge is usually divided into 5 categories

- **Actual knowledge** (subjective);
- **Wilfully shutting** eyes to the obvious (subjective);
- **Wilfully and recklessly failing** to make the inquiries that an honest and reasonable person would make (subjective);
- **Knowledge of circumstances** which would indicate the facts to an honest and reasonable person ("moral obtuseness" per *Gibbs J in Consul*); and ◦ An **objective** default rule to prevent 3P from relying on own moral obtuseness (insensitivity)
- Knowledge of circumstances which would put an honest and reasonable person on inquiry (**negligent failure to inquire**).
 - Not enough (*Farah; Grimaldi*) – unless 3P makes an inquiry, there could be innocent explanations.

MUST BE 1-4 FOR ASSISTANCE (RATIO) AND RECEIPT (OBITER) *CONSUL*

1. KNOWING ASSISTANCE

1. There must be a **primary breach** of fiduciary duty (by the fiduciary)

- In exam: 'Refer to above discussion'
- 2. 3P must assist breach;
- 3. 3P must have requisite level of knowledge that the conduct involved breach of FD;
- 4. **Fiduciary** must have had a dishonest and fraudulent design (*Farah*)
 - Only looking at **fiduciary's primary breach**, NOT dishonesty or fraudulence of 3P. Weeding out breaches that were made in good faith, honest, well intentioned (e.g. *Boardman*) – it will be too remote to go after 3P if primary breach was well intentioned or technical.
 - Court has not specified a threshold.

ILLUSTRATIVE CASES:

Barnes: 2 solicitors were asked to amend a trust deed, so that only one person would be trustee. They did so, and trustee then misappropriated trust funds. Beneficiary sued the solicitors, saying they enabled this to happen because it's easier for a single trustee to misappropriate funds;

- **Held:** solicitors not liable – they had no knowledge or suspicion.

Consul: DPC was owned by Walton. Grey was employee and director. Walton's law firm employed Clowes as clerk. G told C about some properties he knew about because of his position at DPC and that DPC was in financial difficulty. G and C together formed CD to develop those properties. Did CD through C assist G breach his duty?

- **Held:** G was in primary breach. CD not liable as constructive trustee. C didn't know of breach, nor would have a reasonable honest person. Could not be knowing receipt because property never belonged to DPC.

Farah: FC and SD agreed to purchase and develop a property as a joint venture. Development was refused by Council. Council issued a public notice saying if that property was developed with neighbouring properties then development might be approved. Mr Elias, director of FC, purchased properties 13 and 15 for himself without notifying company. If FC breached its duty, are Mrs E and daughter knowing assistors or recipients?

- NO knowing assistance – P was notified about reasons for refusal. Mrs Elias and her daughter did not have sufficient knowledge of it; Mr Elias's conduct was not 'dishonest and fraudulent'.

Westpac (WASCA) – 'more than trivial' - LOW THRESHOLD

Banks were held liable under knowing assistance because of directors' dishonest and fraudulent design.

Banks assisted directors to enter into transactions with the relevant knowledge.

- *Courts **lowered threshold for 4th element**. All breaches of fiduciary duty are dishonest and fraudulent if breach is more than trivial and not too serious to be excusable on grounds of honest/reasonableness.
- Not necessary to show fiduciary knew they were engaging in wrongdoing.

- **C.f. Hasler (NSWCA) – ‘transgression of ordinary standards’ - HIGH THRESHOLD**
 - *Rejects *Westpac* decision.
 - There must be dishonesty on part of fiduciary. ‘Dishonesty’ means transgression of ordinary standards of honest behaviour (but not necessary to show the fiduciary thought about what standards were) = **higher standard than *Westpac***.

2. KNOWING RECEIPT

1. **Primary breach** by fiduciary (as discussed above)
2. 3P **received** fiduciary property;
3. **3P knew**, or had reason to know, of the circumstances constituting the breach of trust (*Grimaldi*)

NO need to show fiduciary had a dishonest and fraudulent design

When fiduciary property is received, equity intervenes to protect the proprietary interests of beneficiaries. ***ONLY DISCUSS WHEN THERE IS TRUST/FIDUCIARY PROPERTY**

RECEIPT

- 3P must receive property in their own name, or for their benefit (not only as agents of others).
- Need not retain property – as long as 3P has received it at one point, this will suffice.
 - C.f. acting as a mere conduit; passing through their hands
- 3P must know it is fiduciary property and of circumstances indicating the fiduciary acted in breach of duty (*Farah, Westpac*)

Hypothetical examples:

- Confidential info amounting to a trade secret is imparted to 3P in breach of FD.
- N.B. information is not recognised as property in Australia. Trade secret is property.
- Trust funds are used to purchase a car in 3P’s name
- Real property held in trust’s name is fraudulently transferred to 3P’s name. (liability will all depend upon knowledge)

PROPERTY

- No issue with trust property or company assets (*Grimaldi; Westpac*)
- ‘fiduciary property’ = trust property. Fiduciary is holding that property in their fiduciary capacity – belongs to principal/beneficiary.
- *Farah*: The units were never fiduciary property. The information that the lots were for sale were not confidential and P was able to know. Information was neither confidential nor property.
- *Westpac*: Trade secrets can be trust property. Not limited to tangibles – securities also count as property.

KNOWLEDGE

- Recipient liability also requires sufficient level of knowledge NOT strict liability (*Farah*) • Don't need any technical knowledge of the trust. ○ Just need to know that the property is not actually the fiduciary's to give; it belongs to someone else.
- Knowledge requirement is same as knowing assistance – so can refer to above.

Farah (2007, HC):

Info was not confidential, but, *even if* it were it is not property for the purposes of this limb (unless a trade secret). F had made sufficient disclosure and SD had given informed consent.

Wife and daughter did not receive any property in breach of fiduciary duty; No breach of duty (as HC thought SD had consented), no evidence the relevant info was transferred to the wife and daughters, and the wife and daughters had no knowledge of breach by Mr Elias or FC.

IMPUTED KNOWLEDGE

- Where a director is the 'mind and will' of the company, the director's knowledge can be imputed to the company.
 - Sole director committed the breach and has actual knowledge, therefore company would automatically have requisite knowledge.
 - If there are multiple directors making decisions collectively, they need to individually put their minds to it.
 - § Cannot individually impugn one director's mind on the company.
- An agent's knowledge can be imputed to the principal if within authority. ○ If agent is acting outside authority; 'frolic of their own', do not impute knowledge.
- Otherwise, equity will not hold someone liable without knowledge (*Farah*) ○ E.g. one trustee's knowledge is not imputed to other trustees.

THIRD PARTY LIABILITY ONLY ATTRACTS A PERSONAL REMEDY **

***Can trace into property if the third party still holds the property**

PERSONAL REMEDIES

SPECIFIC PERFORMANCE

- An order for specific performance requires that **obligation arising under a CONTRACT be performed** ○ **Specific performance is essentially to compel the execution of a contract which requires**