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Zibara v Ultra Management (Sports) Pty Ltd [2021] FCAFC 4 – Equity - Costs

A discussion about the case of *Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4.

Discussion Includes

- Key facts
- The trial
- The appeal
- Pleadings and relevant case law
- Remedy of account
- Dissenting judgment
- Costs

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Zibara v Ultra Management (Sports) Pty Ltd [2021] FCAFC 4 – Equity - Costs

In this edition of BenchTV, Richard Perry QC (Barrister, Level 31 West Chambers, Queensland) and Dominic Fawcett (Barrister, Level 31 West Chambers, Queensland) discuss the case of *Zibara v Ultra Management (Sports) Pty Ltd* [2021] FCAFC 4.

Key facts

1. The case primarily concerns the accessorial liability of companies under the second limb as stated in *Barnes v Addy* (1874) LR 9 CH App 244 (*Barnes v Addy*), the plea of knowing assistance and liability of companies who are alter egos of a fiduciary. The case is important but should be confined to its particular facts.
2. The plaintiff was Ultra Management (Sports) Pty Ltd (UMS). There were three defendants, being Mr Zibara, Mr Angeli and a company called Genesis Talent Management Pty Ltd (Genesis).
3. Mr Zibara and Mr Angeli were employees of UMS until they resigned and then incorporated Genesis. Mr Zibara and Mr Angeli were the directors and shareholders of Genesis.
4. UMS is an accredited agent company of the NRL's Accreditation Scheme under which they can enter into contracts with players and earn remuneration based on an agreed percentage of player contract salaries and off the field revenue, such as sponsorships and endorsements.
5. In mid-2017, the NRL Accreditation Committee issued a new standard form contract for agent companies and players. It was to take effect after 28 days. The new standard form contract inserted a break clause that effectively stated that in the event that a nominated agent of the company ceased to perform its duties on behalf of that company and went to a competitor, the player had the option of terminating its contract with the agent company upon seven days' written notice. The nominated agent is always an individual. In most contracts with players, the person named was Mr Zibara.
6. Mr Zibara and Mr Angeli and UMS's sole director, Mr Ayoub, understood that it was more advantageous to UMS for it to continue with its existing contract with players rather than enter into the new standard form contracts because if it did so, there would be a risk that the contracts would be terminated if Mr Zibara or Mr Angeli left UMS.
7. Mr Ayoub told Mr Zibara in no uncertain terms that the existing contracts that UMS had entered into with players are to be preserved, and only if it were necessary were they to enter into the new contract with the new break clause.
8. Mr Zibara renegotiated and entered into contracts with the new break clause with respect to 16 players. At this time, Mr Zibara and Mr Angeli were speaking to players, inducing them

to enter into the new contracts and, when the time arose, to exercise the break clause. This was done without UMS's knowledge or consent and contrary to its earlier direction.

9. Mr Zibara and Mr Angeli tendered their notices of resignation to UMS which was to take effect at the end of 2017. It was not disclosed at that point that Mr Zibara and Mr Angeli would be entering into a contract of employment with a competitor to UMS. However, two months after their resignation, they incorporated Genesis. Genesis entered into contracts with four players that had previously been contracted to UMS who had the benefit of the break clauses. Essentially, this case was about disgorging Mr Zibara, Mr Angeli and Genesis of the benefit of those contracts.

The trial

10. The trial judge noted that the pleadings from the respondents at first instance were generally ones of denial or non-admissions. The defendants chose not to give evidence. Most of the evidence given by witnesses other than Mr Ayoub were not subject to any serious or consistent challenge. That enabled the Court to proceed upon a basis of largely unchallenged evidence. What it meant is that the findings of fact made by the trial Judge were themselves not challenged in the appeal process.
11. Justice Greenwood found that Mr Zibara preferred his own interests over the interests of UMS and found that Mr Zibara knew that he was undermining UMS's position. He also found Mr Angeli assisted in Mr Zibara's breaches of fiduciary duty and stated Mr Angeli was 'transgressing ordinary standards of honest behaviour in his dealings with Mr Ayoub and UMS'. The concept of transgression of ordinary standards of honest behaviour comes from the case of *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266 (*Hasler v Singtel*).
12. The primary judge described Genesis as the vehicle created for the purpose of deriving the gain or benefit arising out of the breaches of fiduciary duty. In equity, Genesis was to be regarded as Mr Zibara and Mr Angeli. The primary judge found that Mr Zibara and Mr Angeli were liable to account for any benefit obtained because of the breaches of fiduciary duty. It was agreed the benefit was to be quantified as being $100,000.

The appeal

13. The majority judgment was a joint judgment by Justice McKerracher and Justice Anderson. Justice Derrington provided a dissenting judgment.
14. There were three key contentions. The first was that it was not open for the primary Judge to conclude that Genesis had a liability to account. It was claimed Genesis should not have been found liable under the second limb of *Barnes v Addy*. This was primarily based on the nature of UMS's pleaded case.

15. The second contention was that Genesis was not incorporated until after the breaches of fiduciary duty, which meant that it could not, as a matter of common sense, have assisted in those breaches.
16. The third contention was that Mr Zibara and Mr Angeli did not have a gain or benefit accrued to them from the conduct complained of, meaning that they could not be made the subject of an order for an account.

Pleadings and relevant case law

17. The assertion made on appeal was said to be consistent with the judgment of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (*Farah*) to the extent that it was submitted to the Court that it was necessary to plead that Genesis had knowledge of a dishonest and fraudulent design or scheme on behalf of the two fiduciaries, Mr Zibara and Mr Angeli.
18. During the course of the trial, it became apparent that Mr Zibara and Mr Angeli had the intent of setting up a rival company to engage as a commercial competitor with UMS and would rely upon, in the first instance, on the break clause they had procured in the new contracts, notwithstanding the fact that each of the players had existing contracts, in some instances with more than two years to run.
19. The basis of this assertion, being non-compliance with the requirements set out in *Farah* was not advanced at trial. The Court noted at paragraph 90 of the judgment that it was not asserted at trial as it is on appeal that the relevant dishonesty and the fiduciary breach was not contended for by UMS. The Court stated that such an assertion could not realistically be advanced.
20. If on the pleading there was no basis on which a finding of accessory liability could be made against Genesis, then it should not be ventilated at the conclusion of the trial. In this case and on this point, the Court relied upon and quoted with approval the case of *Hasler v Singtel*.
21. The case of *Hasler v Singtel* was decided in a somewhat uncertain context because at that point in time there was a real controversy surrounding the requirements of a knowing assistance claim under *Barnes v Addy*. The UK authorities seemed to take the view that dishonesty was not required on the part of the fiduciary.
22. In this case, the majority thought it persuasive that in the pleading, although it did not expressly use the words dishonest and fraudulent design, which is what is referred to in *Barnes v Addy*, it did set out the constituent facts in five paragraphs the conduct relied upon to establish the breach and no sensible person could take the view that that conduct did not transgress ordinary standards of behaviour. A plea of the constituent facts making up the dishonest and fraudulent design will be enough.

23. The Court did not accept the notion that a company incorporated some time after the relevant breaches of fiduciary duty had occurred but incorporated for the purpose of effecting the benefit of those breaches could not be liable.
24. Dismissing the observations of a dissenting judge or judges as irrelevant would be an error. In this case, the Court noted that the case was decided on its particular facts. This does not derogate from the importance of the majority judgment.
25. In *Farah*, a plea of knowledge of a dishonest and fraudulent design and the application of the *Briginshaw* test (see *Briginshaw v Briginshaw* (1938) 60 CLR 336) with respect to the evidence that might be linked to support such a conclusion were required. In this case, the Court observed that in the *Farah* decision, there was also a question of the liability of a company, Lesmint, that was wholly controlled by the fiduciary. At paragraph 128 of the *Farah* judgment, they traversed the claim against the company and concluded that because it was the alter ego of the fiduciary, they were able to establish the liability of the company. *Farah* also provides that it would not be enough to say that the third party received a benefit by reason of the fiduciary beach and there needs to be some awareness by the third party of the virtue of duty.
26. *Farah* addressed two different aspects of potential accessorial liability, one where there were people who were potentially innocent third parties and were not aware of the conduct that gave rise to the breach of fiduciary duty, and another where a corporate vehicle controlled and owned by the fiduciary is used as a means in whole or in part in effecting the benefit that the breach gave rise to. The company in *Farah* was likened to Genesis because the same sort of relationship arose, and so the question of accessorial liability was fairly straightforward.
27. The footnote at paragraph 128 of *Farah* refers to an earlier decision of the High Court in *Hamilton v Whitehead* [1988] 166 CLR 121. At page 127, there is a passage from the judgment of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* (1972) A.C. 153 concerning the circumstances in which in equity a Court will conclude the conduct of a person who in all respects controls and owns the company is also conduct of the company; that is, they are interchangeable entities.
28. Depending upon the facts of any one case, one might proceed upon the basis that it would be sufficient to plead material facts alone, as was done in this case. But as *Farah* shows, there will be circumstances in which it is necessary to more apply the scriptures that were observed or referred to by Justice Derrington in his dissenting opinion, that is to plead the dishonest and fraudulent design and also to plead the basis upon which it was said that the third party was knowingly concerned in those breaches.
29. As the case of *Ancient Order of Foresters in Victoria Friendly Society v Lifeplan Australia Friendly Society* (2018) 265 CLR 1 (*Foresters*) shows, equity is sufficiently flexible to meet the particular circumstances in any one case. When considering a pleading obligation under the second limb of *Barnes v Addy*, it is necessary to look carefully at the nature of the claim that is sought to be made, the facts which are relevant to that claim and the evidence which

will be led in order to support those material allegations. There is no one simple rule. In this case, the majority held that which had been pleaded was more than enough to meet the requirements of the case, particularly within the context of the conduct of the trial. Justice Derrington's view is that in this case it was necessary to plead more. He cautioned against taking what might be described as a formulaic approach to plead circumstances sufficient to enliven the liability under the second limb of *Barnes v Addy*.

30. Every pleader must be careful in assessing the particular nature of the third party's role. If it is a corporation, questions to be asked are: what constitutes it, who are the shareholders, who are the controlling minds, what role did it play in giving effect to the breach of fiduciary duty and what understanding did it have in the facts of the conduct and that such conduct itself constituted a breach of fiduciary duty sufficiently serious to enliven the dishonest and fraudulent design standard?
31. The majority in the case also looked at how the trial was conducted, specifically things that were done outside of the pleading which made it apparent that they really did understand the essence of Genesis's liability to account to UMS.
32. Counsel for the three respondents conceded that the particular aspects of the conduct which the plaintiffs were advancing were to be established on the evidence that breach of fiduciary duty was conceded. The question then arose whether there was a sufficient pleading of knowing assistance. One of the points that the Court seized upon was that Genesis had pleaded that it was not knowingly concerned with any breaches of fiduciary duty of Mr Zibara or Mr Angeli. The Court noted that it could not be contended that Genesis was not aware of the nature of the claim against it because it directly pleaded in response to the knowing concern aspect.
33. There was also the manner in which the trial ultimately ran. That had two aspects. One was the absence of any evidence to the contrary explaining the conduct which was established on incontrovertible evidence. Secondly, the absence of any suggestion, other than at trial, of the fact that Genesis was incorporated after the events had concluded that Genesis had any real defence to the claim in the face of what was overwhelming evidence of a concerted, intentional and well executed plan by two people who subsequently created their own vehicle in order to take advantage of those breaches. During the discussions with some of the players before and after the new contracts were procured, there was reference to the prospect of Mr Zibara and Mr Angeli going back to the management business.
34. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 (*Grimaldi*), it was held that a company could be held liable as an alter ego in the absence of a finding of dishonesty. However, the High Court has made decisions recently that there is a need to show dishonest and fraudulent design, most recently in the case of *Foresters*.
35. At paragraph 149, there is a reference to a quote in *Grimaldi*. The passage provides that where the third party is a corporate creature, vehicle, or alter ego of the wrongdoing fiduciaries, who use it secure the profits of or to inflict the losses by their breach, the corporate vehicle is fully liable for the profits made and the losses. Given the flexibility of

equitable remedies and circumstances, where there is an allegation of a breach of fiduciary duty, it is not too helpful to establish different categories, but it is helpful for the Court to address particular circumstances which then feed back to the simple proposition; that is, whether the third party knowingly assisted in the breach of fiduciary duty and whether it has a dishonest and fraudulent character or design.

Remedy of account

36. In this case, it was also argued that Mr Zibara and Mr Angeli did not directly have a demonstrable benefit or gain accruing to them. It was found that the benefit or gain was that Genesis was armed with contracts with players by reason of the breach of fiduciary duty, and Mr Zibara and Mr Angeli were in the position of being able to benefit from this. There was also the prospect of renewal of the contracts and prospect of successful careers.
37. The process of account is the appropriate remedy because it would necessarily have to take into consideration the contingencies that would be applicable in each particular case. In business, future profits that might be earned would be assessed. In rugby league, other things have to be considered, such as injury and loss of interest in the game.

Dissenting judgment

38. Justice Derrington was skeptical of relying upon the outcome in *Hasler v Singtel*, which was that there was no need to expressly plead the existence of a dishonest and fraudulent design. This was mainly because that outcome was reached based on a particular procedural history. It was difficult to transpose that outcome to this case, which had a different procedural history. While the judges in the majority referenced this case, they conducted their own detailed analysis of the particular aspects of the pleading rules of the Federal Court. The fundamental role of pleadings is one to ensure procedural fairness in trials.
39. Justice Derrington was also reticent to consider matters outside the pleading, such as those concessions that were made during closing submissions, in circumstances where there was no suggestion that the case had been conducted outside the pleadings.

Costs

40. The question as to costs was determined fairly simply. It was held that an order of that kind was one which was within the discretion of the trial judge to make, considering the way the trial had been conducted.

41. The trial ran over a number of days. UMS claimed that it had been put at the expense of a trial to establish that which was patently apparent. The prospect of success became more apparent as the trial went on and in the absence of any particular case being advanced by the defendants in order to meet their denials of breach of fiduciary duty.

BIOGRAPHY

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Mr Perry practices in several legal areas such as alternative dispute resolution, bankruptcy, insolvency, building, construction, equity, insurance, property and medical negligence.

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Mr Fawcett predominantly practises in commercial and public law. Prior to being called to the Bar, he was a solicitor at Corrs Chambers Westgarth, specialising in construction disputes and commercial litigation. He was also the Associate to the Honourable Justice Peter Flanagan of the Supreme Court of Queensland.

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