



The *Bell Group* settlement: where does it leave us?

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- Dr Katy Barnett
 - The *Bell Group* litigation; the key issues on appeal; the remedies question
- Assoc Prof Pamela Hanrahan
 - The directors' duties issues
- Prof Michael Bryan
 - The *Barnes v Addy* issues



- ‘then the equitable compensation provided in lieu had to reflect the cardinal principle of equity that there be disgorgement of profits gained’ [1236] Lee AJA
- ‘the foundation for the assessment of equitable compensation in this matter is *disgorgement of the benefit obtained by the wrongdoer*, not the assessment of what the wronged party could have earned or retained by use of the funds.’ [1259] Lee AJA

- Company lawyers have three key things to ponder:
 - The content of the directors' general law best interest and proper purpose duties
 - The taxonomy of directors' duties: are the duties fiduciary (and why does it matter)?
 - The relationship between the general law duties (dealt with in *Bell Group*) and the statutory provisions



- The only question was whether the Bell directors had breached their duties, arising at general law, to act in the best interests of the Bell companies and for a proper purpose
- Owen J at first instance and Lee and Drummond AJJA on appeal found that they had breached these duties
- But most company lawyers probably think Carr AJA was right
- Furious agreement but contrary findings?



- Justice Carr's dissent identifies the issues in relation to best interests:
 - It is 'subjective', but Owen J says 'genuine belief' – reasonable grounds – failure to obtain information and make plans
 - The pari passu point
 - The duty in the context of corporate groups, the *Charterbridge* element, and the 'but for' test



- Why might the taxonomy of directors' duties matter? Is it just about third party liability?
- The 'fiduciary duties' of directors: the prescriptive/proscriptive distinction and disputes about terminology
- But isn't the real (different) question: what kind of conduct on the part of directors might found a third party claim under *Barnes v Addy*?



A bit of history...

11.23 | FUNDS MANAGEMENT IN AUSTRALIA: OFFICERS' DUTIES AND LIABILITIES

to establish for 'directors of a trust company for the very reason that, often enough, it will be their own conduct in exercising the powers of the board which causes the company to commit a breach of trust': *ASC v AS Nominees Ltd* (1995) 18 ACSR 459 at 475.

Where the breach of trust or breach of duty by the company lay in an action taken by an agent of the operator (for example, a single executive to whom the exercise of a power had been delegated), that agent clearly will have assisted in or procured the breach. Others may also have done so — this is a question of fact and requires a court to look at the actual actions of the relevant person.

Breach of trust or fiduciary duty

11.24 Third, for the rule to apply, there must be a breach of trust or of fiduciary duty by the operator. In *Consul Developments v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398, Gibbs J followed *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555 and held that the expression 'dishonest and fraudulent' includes a breach of trust or of fiduciary duty.

Actions by an agent of the operator that are outside the actual or apparent authority of the agent are not actions of the operator and, therefore, would not amount to a breach of trust or breach of fiduciary duty by the operator.

11.25 For this purpose, a breach by the operator of the duties outlined in Chapter 2, above, other than the duty of care, is sufficient to trigger the operation of the second limb. This includes a failure by the company to exercise its powers bona fide in the interests of the members and for a proper purpose. It also includes where the company has acted in situations of unauthorised conflict, or has derived an unauthorised profit from its operation of the trust or scheme.

Breach of the duty of care is not enough. In *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544 at 580, Hanson J declined to find that the knowing assistance rule could apply in connection with a trustee company's breach of the duty of care. His Honour expressed 'doubts whether the inactivity of the directors (that is, a complete failure to act, as opposed to a positive act which is knowingly detrimental to the interests of the company) can be said to be a breach of fiduciary duty in addition to being a breach of the director's duty of due diligence'.

- Negligence as breach of trust?
- The equitable duty of care; Millett LJ in *Mothew's case*
- Importing or recognising a negligence element in the best interest duty
- Note that involvement in a contravention of CA s 181 is a civil penalty provision, but involvement in a contravention of CA s 180 is not (and CA s 1317H)



- Remember the old uniform companies legislation?
- In company law, isn't all the action now in the Corporations Act?
- The 21st century challenge is going to be understanding the juridical interaction between the general law duties and the statute



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