ORIGINAL

IN THE 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

APPELLANT'S SUPPLEMENTARY SUBMISSIONS

(filed by leave of the Court granted on 1 June 2011)

1. These submissions concern paragraph 2 of the document entitled "Respondents' Formulation of Abuse of Process other than *Reichel v Magrath*", which was handed to the Court by the respondents on 1 June 2011 ("**paragraph 2**").

2. The appellant submits that paragraph 2 is incorrect both as a matter of principle and by reference to the facts of the present case. Five matters may be noted.

3. *First*, paragraph 2 wrongly assumes that a defaulting fiduciary is the "principal wrongdoer" and a knowing assistant is some form of accessory.

Filed by:
Clayton Utz
Lawyers
Levels 19-35
No. 1 O'Connell Street
Sydney NSW 2000

Date: 6 June 2011

DX 370 Sydney
Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
Ref: 80046949

4. This Court has not accepted the existence of a general principle of "accessory liability" in the context of knowing assistance, as propounded by the Privy Council in *Royal Brunei Airlines And Bhd v Tan* [1995] 2 AC 378.[1] Instead, the Court has recognised that the second limb of *Barnes v Addy* makes a defendant liable to account as a constructive trustee if he or she knowingly assists in a breach of fiduciary duty.[2] The liability is imposed directly upon the assistant who "becomes bound in good faith and in conscience by the trust in consequence of his conduct and behavior".[3]

5. Although it will often be convenient short-hand to describe the second limb of *Barnes v Addy* as an "accessorial liability", that expression means no more than that liability under the second limb cannot arise until, *inter alia*, a breach of fiduciary duty by another is established.[4]

6. *Secondly*, once it is accepted that a knowing assistant is accountable directly to the claimant as a constructive trustee, it follows that the relief awarded against a defaulting fiduciary and knowing assistant will not necessarily coincide in either nature or quantum. There is no reason in principle why a claimant could not seek equitable compensation from a fiduciary who caused the claimant loss, but made no profit, from his breach, while at the same time seeking an account of profits from a knowing assistant who profited handsomely from his own misconduct.[5] Similarly, a claimant may seek separate accounts of profits both from a defaulting fiduciary and from a knowing assistant, notwithstanding that the two accounts will inevitably differ.[6]

7. *Thirdly*, paragraph 2 ignores the fact that proceedings may be brought against a dishonest assistant without joining the defaulting fiduciary.[7] This is particularly common where the

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[1] See *Farah Constructions Pty Limited v Say-Dee Limited* (2007) 230 CLR 89 at [162] – [164].

[2] See *Barnes v Addy* (1874) 9 Ch App 244 at 251; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 408; Cf *Farah* at [160], [161].

[3] *Soar v Ashwell* [1893] 2 QB 390 at 396.

[4] See *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 at [160].

[5] Cf *United States Surgical Corp v Hospital Products International Pty Ltd* (1982) 2 NSWLR 766 at 817.

[6] Cf *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397: "I therefore conclude, on principle, that a person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation"; see also in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1589] – [1600].

[7] See eg Mitchell, 'Assistance' in Birks and Pretto (ed), *Breach of Trust* (2002) at 157 and the cases cited therein.

fiduciary is deregistered, insolvent or otherwise lacks the ability to satisfy any grant of relief.[8] It will also occur where, as here, an agreement to arbitrate in force between the claimant and fiduciary prevents the fiduciary and third-party knowing assistants from being joined in the same proceedings. In each of these circumstances, the liability of the knowing assistant is, by necessity, calculated independently of the taking of accounts or granting of other relief as between the claimant and the fiduciary: contra paragraph 2.

8. If accepted as correct, paragraph 2 would allow a knowing assistant to limit his or her liability to a claimant by reference to the financial capacity or continued existence of the fiduciary found to have breached duty. That is not, and cannot be, the law in Australia.

9. *Fourthly*, so far as the present case is concerned, paragraph 2 ignores the particular basis on which accounts were ordered to be taken as between Mr Emmott and the appellant by the London arbitrators: Conf AB 184-185. The accounting is premised on treating Mr Emmott and Mr Wilson (the principal of the appellant) as partners as at 31 December 2005 and accounting to Mr Emmott for his 1/3 share in the partnership. Various other amounts owing to and from MWP are also required to be accounted for. In addition, the possibility of set-off of those amounts is expressly provided for by the arbitrators: Conf AB 185 [8.26].

10. In these circumstances, there is no basis for requiring MWP to account, in the NSW proceedings, for all "profits or property" for which it "is or might be obliged to account to Mr Emmott": contra paragraph 2. To take but one example, the respondents have not explained why MWP's liability to pay Mr Emmott a 1/3 share of the partnership must be taken into account in reducing the liability of the respondents in their capacity as knowing assistants. Yet that would be the effect of paragraph 2 if accepted by this Court.

11. *Fifthly*, paragraph 2 ignores the existence of the equity of double satisfaction which will, at the point of enforcement, preclude an obligee from enforcing judgment against an obligor if the obligee has already received full satisfaction in respect of the same liability from a co-obligor. Conversely, the interests of co-obligors may be protected by principles of contribution.

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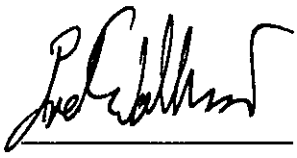
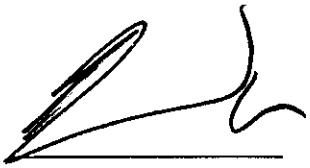
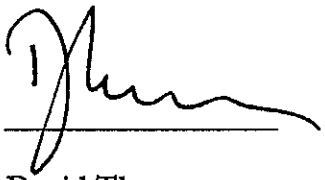
[8] See eg *NCR Australia Pty Ltd v Credit Connection Pty Ltd (in liq)* [2004] NSWSC 1 at [2] (no leave was sought by the claimant to proceed against a fiduciary then in liquidation); *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (2008) 39 WAR 1 (the defendants were sued for knowingly assisting in breaches of directors duties by non-parties).

12. For these reasons, paragraph 2 should not be accepted as correct, either as a matter of general principle or as applied to the facts of the present case.







Bret Walker
Tel: (02) 8257 2527
Fax: (02) 9221 7974
maggie.dalton@stjames.net.au

Matthew Walton
Tel: (02) 9235 0157
Fax: (02) 9221 5604
mwalton@sixthfloor.com.au

David Thomas
Tel: (02) 9232 4478
Fax: (02) 9221 5604
dthomas@sixthfloor.com.au