

# SUPREME COURT OF QUEENSLAND

CITATION: *20 Trevis Court Pty Ltd v Emmapeel Holdings Pty Ltd & Ors*  
[2023] QSC 254

PARTIES: **20 TREVIS COURT PTY LTD ACN 629 623 972**  
**AS TRUSTEE FOR THE BLACKSTONE PROPERTY**  
**TRUST**  
(plaintiff)  
v  
**EMMAPEEL HOLDINGS PTY LTD ACN 617 954 328**  
**AS TRUSTEE FOR THE TREVIS COURT UNIT**  
**TRUST**  
(first defendant)  
AND  
**PETER ROBERT MARLES**  
(second defendant)  
AND  
**KOPPS ROAD DEVELOPMENT PTY LTD**  
**ACN 609 905 017**  
(third defendant)  
AND  
**GPF NO. 7 PTY LTD ACN 629 564 576**  
(fourth defendant)  
AND  
**GM PRIVATE CAPITAL PTY LTD**  
**ACN 620 333 539**  
(fifth defendant)  
AND  
**GALLERY DEVELOPMENTS PTY LTD**  
**ACN 626 778 765**  
(sixth defendant)  
AND  
**GALLERY HOMES PTY LTD ACN 151 101 914**  
(seventh defendant)

FILE NO: 3247 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 14 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 23 October 2023

JUDGE: Applegarth J



- [1] The plaintiff (“Trevis”) once owned land at 20 Trevis Court, Blackstone. The first defendant (“Emmapeel”) purported to exercise its power of sale as a second mortgagee. It sold the land to the third defendant (“Kopps Road”) for \$1,240,000.
- [2] Kopps Road on-sold the land to the fourth defendant (“GPF No. 7”) for \$2,794,000.
- [3] Kopps Road and GPF No. 7 are related entities that, together with the sixth and seventh defendants, form part of the “Gallery Group” of companies that are controlled by Adam and Kim Barclay.
- [4] The Gallery Defendants apply to strike out parts of Trevis’ pleading on two grounds. Each relates to the separate bases upon which the Gallery Defendants are alleged to be liable.

**The Gallery Defendants’ alleged knowing participation in Emmapeel’s breach of equitable duty**

- [5] Trevis alleges that Emmapeel recklessly sacrificed Trevis’ interest in the land and sold at a gross undervalue in breach of its statutory duty and in breach of its equitable duty of good faith as mortgagee.
- [6] Trevis alleges that the Gallery Defendants knowingly participated in Emmapeel’s breach of its equitable duty of good faith.

**Trevis’ constructive trust case**

- [7] Trevis also alleges that Kopps Road held the land as constructive trustee for it and that Kopps Road owed it a fiduciary duty not to deal with the land in a manner inconsistent with the constructive trust. Given the alleged knowledge of Kopps Road of certain matters, Kopps Road’s conduct in selling the land to GPF No. 7 is pleaded by Trevis to be “a dishonest and fraudulent design”.
- [8] GPF No. 7 is alleged to have purchased the land with knowledge of Kopps Road’s breach of its fiduciary duty and to hold the land on constructive trust for Trevis.
- [9] Each Gallery Defendant is alleged to have known certain matters (which I will later detail), “knowingly assisted and participated in the Kopps Road breach of fiduciary duty”, and to have done so with knowledge of the alleged dishonest and fraudulent design.

**The application to strike out**

- [10] The Gallery Defendants are alleged to be accessories to a breach of the mortgagee’s equitable duty of good faith when the mortgagee recklessly sacrificed the mortgagor’s interest by selling the land to Kopps Road. Trevis pleads that each Gallery Defendant:
- “(a) knowingly procured or induced Emmapeel’s breach of the Equitable Duty of Good Faith;
  - (b) assisted in Emmapeel’s breach of the Equitable Duty of Good Faith with knowledge that the breach was a dishonest and fraudulent design; and

(c) was a party to Emmapeel’s purported exercise of its power of sale as a fraud on its power of sale.”

- [11] The Gallery Defendants originally applied to strike out all of these allegations. However, in advancing its amended application it accepts that subparagraphs (a) and (c) are arguable bases upon which a third party may be a party to and made liable for another party’s breach of an equitable duty. The Gallery Defendants maintain, however, their challenge to subparagraph (b). They argue that, as a matter of law, accessorial liability for assisting with knowledge that a breach is “a dishonest and fraudulent design” is limited to a breach of trust or a breach of fiduciary duty.
- [12] This is the second limb of *Barnes v Addy*<sup>1</sup> in a breach of trust or breach of fiduciary duty case. No analogue is submitted to exist for breach of other equitable duties, such as a duty of confidence or a mortgagee’s equitable duty to act in good faith. Such a basis for liability for assistance with knowledge of a dishonest and fraudulent design is said to be precluded by the High Court’s decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.<sup>2</sup>
- [13] Trevis submits that this is not so and that such a basis for liability exists for having knowingly assisted in a mortgagee’s breach of its equitable duty of good faith where there was a dishonest and fraudulent design.
- [14] The second aspect of the strike-out application relates to the alternative basis for the Gallery Defendants’ alleged liability. It concerns the Gallery Defendants’ alleged liability in respect of the on-sale by Kopps Road in breach of its fiduciary duty as a constructive trustee. The issue here is not a point of law. The Gallery Defendants accept that, as a matter of law, liability under the second limb in *Barnes v Addy* for knowing assistance and participation in a breach of fiduciary duty is open where the assisting party has knowledge of the alleged dishonest and fraudulent design of the fiduciary.
- [15] The complaint concerns the adequacy of Trevis’ pleading of such a claim against the Gallery Defendants. The complaint centres on what the Gallery Defendants, and the sixth and seventh defendants in particular, are alleged to have done and known. The pleading does not allege that the Gallery Defendants knew of two particular acts of deception that are alleged to have been committed by the second defendant, Peter Marles, on behalf of Emmapeel.
- [16] The essential complaint is that the Gallery Defendants are left to guess what conduct they are alleged to have known about and how such conduct constitutes a “dishonest and fraudulent design”, as distinct from a more routine transgression of a fiduciary’s duty.

## **Two issues**

- [17] Two issues, therefore, arise for determination:
- (a) Is Trevis’ claim that each Gallery Defendant assisted in Emmapeel’s breach of its equitable duty of good faith with knowledge that the breach was a

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<sup>1</sup> (1873) 28 LT (NS) 398.

<sup>2</sup> (2007) 230 CLR 89 (“*Farah*”).

dishonest and fraudulent design open as a matter of law? Expressed differently, is such a claim for knowing participation in a breach of duty, confined to a breach of trust or a breach of fiduciary duty under the second limb in *Barnes v Addy*?

- (b) Is Trevis' claim that each of the Gallery Defendants knowingly assisted and participated in Kopps Road's breach of fiduciary duty with knowledge of the dishonest and fraudulent design adequately pleaded?

**Is a claim for assistance in a breach of the equitable duty of good faith, with knowledge that the breach was "a dishonest and fraudulent design", not open as a matter of law?**

- [18] The Gallery Defendants acknowledge that a claim for having *knowingly procured or induced* a breach of an equitable duty as mortgagee is open as a matter of law. They submit, however, that *Farah* confined liability for knowing participation in a breach of equitable duty to breach of trust or breach of fiduciary duty. What is described as "a *Barnes v Addy* liability" is submitted to be not available because Kopps Road's breach of equitable duty is not one for breach of trust or breach of fiduciary duty. *Farah* is submitted to be limited to participation in a dishonest and fraudulent design in cases of breach of trust or breach of fiduciary duty.
- [19] Trevis responds that the "extension of the *Barnes v Addy* type claim" to breaches of other equitable duties is not precluded by *Farah* or any other authority, and is left open by academic articles.
- [20] What do the lawyers mean when they speak about a liability under the second limb in *Barnes v Addy*? The phrase "the second limb of *Barnes v Addy*" means different things to different people.
- [21] On one view, it is the category of accessorial liability for breaches of trust or fiduciary duty, and it makes no sense to apply it to other equitable duties or to extend it beyond its province.
- [22] To others, the phrase refers to a broader category of accessorial liability that may apply, subject to the same requirements as apply to breaches of trust and fiduciary duty, to other breaches of equitable duty. These would include a duty of confidence or an equitable duty to act in good faith in the exercise of a power of sale as mortgagee.
- [23] Because of the differences in usage and the scope for confusion, reference to liability under the second limb in *Barnes v Addy* may serve to confuse the present issue.
- [24] The issue is not the extension of a principle that applies to breaches of trust and fiduciary duty. The issue is one concerning the arguable existence of accessorial liability for breach of an equitable duty of good faith. The issue is whether an analogous liability to that in *Barnes v Addy* may exist as a matter of legal principle or is precluded by authority.

***Farah***

- [25] In *Farah*, the High Court authoritatively stated for the purposes of Australian law what has become known as the second limb of *Barnes v Addy*. This limb “makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary”.<sup>3</sup>
- [26] The High Court observed in relation to the scope of the second limb that it was not expressed by Lord Selborne LC “as an exhaustive statement of the circumstances in which a third party who has not received trust property and who has not acted as a trustee de son tort nevertheless may be accountable as a constructive trustee”.<sup>4</sup> The High Court observed that before *Barnes v Addy* there was a line of cases that accepted that a third party might be treated as a participant in a breach of trust where the third party “had knowingly induced or immediately procured breaches of duty by a trustee where the trustee had acted with no improper purpose”.<sup>5</sup> These are not cases of a third party *assisting* the trustee in any dishonest and fraudulent design on the part of the trustee.
- [27] The Court in *Farah* recognised that, on one reading of the Privy Council decision in *Royal Brunei Airlines Sdn Bhd v Tan*,<sup>6</sup> the distinction recognised in the Australian case law may have been displaced by a general principle of “accessory liability”. Despite this, a distinction exists between rendering liable a defendant participating with knowledge in a dishonest and fraudulent design, and rendering liable a defendant who dishonestly procures or assists in a breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design. Until an occasion arises for the High Court to reconsider the matter, Australian courts should continue to observe the distinction and apply the formulation in the second limb of *Barnes v Addy*.<sup>7</sup>
- [28] In *Grimaldi v Chameleon Mining NL (No 2)*<sup>8</sup> the Full Court of the Federal Court (Finn, Stone and Perram JJ) considered the applicable legal principles governing third party liability, including four quite distinct manifestations of third party participation in another’s breach of fiduciary duty or breach of trust that arose in that case. The categories were said to illustrate that “participatory liability as it evolved in equity in cases prior and subsequent to *Barnes v Addy* was not based on inflexible formulae”. The variety of circumstances in which a third party could be characterised as a wrongdoer in equity were said to vary in importance.<sup>9</sup> The court’s discussion concerned participation in a breach of trust or fiduciary duty. The court noted in passing third party participation in a breach of confidence or the abuse of a relationship of influence.<sup>10</sup>
- [29] Presently it is unnecessary to explore the category of third party liability by which a party may be liable for knowingly inducing or procuring a breach of trust or breach of fiduciary duty. The Gallery Defendants no longer apply to strike out subparagraph (a) of the relevant paragraphs which plead that each Gallery Defendant “knowingly procured or induced” Emmapeel’s breach of an equitable

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<sup>3</sup> *Farah* at 159 [160].

<sup>4</sup> At 159 [161].

<sup>5</sup> *Ibid.*

<sup>6</sup> [1995] 2 AC 378 at 392.

<sup>7</sup> *Farah* at 160 [163].

<sup>8</sup> (2012) 200 FCR 296.

<sup>9</sup> At 358 [247].

<sup>10</sup> *Ibid.*

duty of good faith. Therefore, it is sufficient to observe that in *Pittmore Pty Ltd v Chan*,<sup>11</sup> Leeming JA, with whom Bell P and Brereton JA agreed, considered this basis of liability in a case in which the defendant was alleged to have procured a breach of fiduciary duty. The court confirmed that *Farah* established that a third party who assists a breach of trust or a breach of fiduciary duty may only be made liable as an accessory pursuant to the second limb in *Barnes v Addy* if the breach *by the fiduciary* amounts to a “dishonest and fraudulent design”. In the separate context of a third party who procures or induces a breach of trust or fiduciary duty, it was sufficient if the inducer or procurer “knew of the facts which, to a reasonable person, would indicate a breach of trust or fiduciary duty”.<sup>12</sup> In addition, the inducer or procurer must have intended the trustee or fiduciary to do the thing which is a breach of trust or fiduciary duty.<sup>13</sup>

- [30] These authorities, like *Farah*, were concerned with a breach of trust or breach of fiduciary duty. *Farah* did not need to consider breaches of other equitable duties. *Farah* neither endorses nor disapproves the recognition of a category of accessorial liability for breaches of other equitable duties. It restated Australian law in relation to the second limb of *Barnes v Addy*, being a liability that relates to breaches of trust and breaches of fiduciary duty. *Farah* did not consider whether an analogous category of accessorial liability might exist for breaches of other equitable duties, such as breaches of a duty of confidence or breaches of a duty of good faith.

#### **Accessorial liability for breach of equitable duties apart from breaches of trust and breaches of fiduciary duty**

- [31] There seems no reason in principle why a form of accessorial liability that applies to breaches of trust or breaches of fiduciary duty should not apply to breaches of other equitable duties.
- [32] In *Vestergaard Frandsen A/S v Bestnet Europe Limited*,<sup>14</sup> the Supreme Court of the United Kingdom considered accessorial liability for breach of confidence. The claim failed on the facts. However, Lord Neuberger recognised that, while the recipient of confidential information may be said to be primarily liable in a case of its misuse, “a person who assists her in the misuse can be liable, in a secondary sense”.<sup>15</sup> Consistently with the approach of equity, the person assisting would normally have to know that the recipient was abusing confidential information. Lord Neuberger went on to consider the possibility of liability for breach of confidence on the basis of “common design”. It was accepted that, in principle, common design may be invoked against a defendant in a claim based on misuse of confidential information. However, to be a party to a common design, the person must share with the other party, or parties, to the design, “each of the features of the design which make it wrongful”.<sup>16</sup>

- [33] In a 2014 article,<sup>17</sup> Professor Ridge argued that the *Barnes v Addy* formulation of accessorial liability falls within a broader principle of liability that applies not only

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<sup>11</sup> (2020) 104 NSWLR 62.

<sup>12</sup> At 102 [192].

<sup>13</sup> At 102 [193].

<sup>14</sup> [2013] UKSC 31; [2013] 1 WLR 1556.

<sup>15</sup> At [26].

<sup>16</sup> At [34].

<sup>17</sup> *Equitable accessorial liability: Moving beyond Barnes v Addy* (2014) 8 Journal of Equity 28.

to breaches of trust and fiduciary duty, but which operates at various levels across equity. Particular consideration was given to breach of confidence and undue influence. Accessorial liability might attach to equitable wrongs other than breach of trust or fiduciary duty.

- [34] Professor Gummow in a 2013 article, *Knowing Assistance*,<sup>18</sup> remarked upon the tendency to take passages from decisions like *Barnes v Addy* and to apply them as if they were statutory enactments, without regard to the setting in which they arose. Professor Gummow observed that over-refinement in case law of the two “limbs” of *Barnes v Addy* “obstructs an appreciation that they do not occupy the conceptual universe of accessorial or participatory liabilities for breaches of duty by trustees and other fiduciaries, particularly company directors”. The article did not specifically discuss accessorial liability for other equitable wrongs but argued that accessorial or participatory liability is “fault based” in the sense of “responding to what in the eye of a court of equity is unconscientious conduct”.<sup>19</sup>
- [35] Counsel for Trevis also relied upon Professor Austin’s *Constructive Trusts in Essays in Equity*.<sup>20</sup> Professor Austin remarked upon three overlapping categories of liability. One area of liability was where no property of any kind was received by the third party. Its ingredients were said to be “assistance, dishonest and fraudulent design and knowledge”.<sup>21</sup> He recognised that the categorisation could apply to analogous topics, including the liability of a third party who benefits from wrongful disclosure of confidential information, and the liability of a third party who benefits from an abuse of power by a mortgagee.<sup>22</sup>
- [36] Professor Dietrich agreed about the scope to develop participatory or accessorial liability in equity in areas that are “at least closely analogous” to accessorial liability for breaches of trust or fiduciary duty.<sup>23</sup>
- [37] I refer to academic commentary on this topic as recognising that the kind of liability pleaded by Trevis, and which the Gallery Defendants wish to strike out, is arguable and not apparently foreclosed by authority.
- [38] It is sufficient on an application of this kind to conclude that it is arguable that a party may be liable for assisting another’s breach of the equitable duty of good faith as a mortgagee, in circumstances where the third party does so with knowledge that the breach was “a dishonest and fraudulent design”.
- [39] Such a liability is not precluded by *Farah* or any other authority that binds me. It is unnecessary on a strike-out application to discuss whether such a liability should be viewed as an application of a broader principle of accessorial liability in equity or, the application by analogy of an existing category of accessorial liability for breach of trust or breach of fiduciary duty to a different equitable duty. There may be arguments that differences between equitable duties should make a difference, such

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<sup>18</sup> (2013) 87 ALJ 311.

<sup>19</sup> At 319.

<sup>20</sup> R P Austin, ‘Constructive Trusts’ in P D Finn (ed), *Essays in Equity* (Law Book Co, 1985), 196.

<sup>21</sup> At 201.

<sup>22</sup> At 200.

<sup>23</sup> *The Liability of Accessories Under Statute, in Equity, and in Common Law: Some Common Problems and (Perhaps) Some Common Solutions* (2010) 34 Melbourne University Law Review 106 at 122-123.



that there is some point of distinction or that the breaches are not closely analogous. However, that is an argument for another day and not one which was developed on this application.

- [40] I conclude that the form of liability pleaded in subparagraphs 49A(b), 50B(b), 50C(b), 50D(b) and 50E(b) of the second further amended statement of claim is open to argument as a matter of law, and that I should not strike those subparagraphs out.

### **The lack of utility in striking out the pleas**

- [41] On occasions it is said that a judge should, as a general rule, decline to proceed with an application to strike out that involves a prolonged and serious argument, unless the judge “not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself”.<sup>24</sup>
- [42] I noted this advice and proceeded to hear the argument. However, the observation is relevant to my discretion in circumstances in which striking out subparagraph (b) in each paragraph will not affect the evidence that is presented at the trial, nor shorten it.
- [43] Striking out an arguable basis for liability which is not clearly precluded by binding authority or principle would have disadvantages. Such a course may later be found to be in error by an appellate court requiring the issue to be reconsidered at a new trial. That would be productive of wasted costs and delay.
- [44] This is not a case in which the success of Trevis’ proceeding is “critically dependent upon a proposition of law which contradicts binding authority”.<sup>25</sup>
- [45] Either in the context of an application for summary judgment or the striking out of a pleading that depends upon a proposition of law apparently precluded by existing authority, the court may justifiably conclude that the proceeding has no reasonable prospects of success and that the pleading should be struck out without leave to plead. However, where the success of a proceeding depends upon a proposition of law apparently precluded by existing authority, that may not always be the end of the matter. French CJ and Gummow J in *Spencer v Commonwealth of Australia*<sup>26</sup> observed that summary processes must not be used to stultify the development of the law. Existing authority may be further explained.
- [46] The retention of subparagraph (b) in each paragraph is not said to open up new bodies of evidence or have the potential to prolong the trial. Instead, allowing these pleas to go forward permits propositions of law to be argued (or reargued) at trial, and the subject of determination. That will occur in the light of facts that will be considered in deciding other claims.
- [47] Therefore, I decline to uphold the Gallery Defendants’ first complaint in relation to Trevis’ pleading.

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<sup>24</sup> *Williams and Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368 at 435-436.

<sup>25</sup> *Raging Thunder Pty Ltd v Bank of Western Australia Ltd* [2012] QSC 329 at [13].

<sup>26</sup> (2010) 241 CLR 118 at 132 [25].

### **The second complaint about the pleading**

- [48] The second complaint relates to the adequacy of the pleading in relation to what is alleged to be a “dishonest and fraudulent design” by Kopps Road in conveying the land to GPF No. 7 in breach of its fiduciary duty, and the allegation that each Gallery Defendant knowingly assisted and participated in Kopps Road’s breach of fiduciary duty with knowledge of the dishonest and fraudulent design.
- [49] The essential complaint is that the “dishonest and fraudulent design” constituted by the conduct of Kopps Road is poorly defined. One central point is that Kopps Road and the other Gallery Defendants are not alleged to have known of two deceptions that are alleged to have been practised by Mr Marles upon the then owner of the land. The result is that the Gallery Defendants are left to guess what conduct by Kopps Road is said to be a dishonest and fraudulent design, and how that conduct qualifies as “a transgression of ordinary standards of honest behaviour” so as to qualify as a dishonest and fraudulent design for the purposes of the second limb in *Barnes v Addy*.<sup>27</sup> The Gallery Defendants contend that it is insufficient merely to assert, as paragraph 50J of the pleading does, that the conduct of Kopps Road in conveying the land was “a dishonest and fraudulent design” in the light of Kopps Road’s alleged knowledge.
- [50] An additional complaint in relation to the *Barnes v Addy* claim for knowing assistance brought against each of the Gallery Defendants is that the only pleaded acts are those of Kopps Road (the constructive trustee) and GPF No. 7 (the related-party purchaser). The Gallery Defendants submit that the claim for knowing assistance against the sixth and seventh defendants does not plead acts or omissions by them that could be said to mean that they participated in a breach of trust or fiduciary duty. The Gallery Defendants rely upon the principle that there must be “facilitative conduct or activity which is more than mere knowledge or notice of the breach of duty” to engage the second limb of *Barnes v Addy*.<sup>28</sup>

### **The pleading of a dishonest and fraudulent design**

- [51] The second further amended statement of claim is lengthy and complex. I shall attempt to summarise those parts of it that bear upon the adequacy of the pleading of Kopps Road’s alleged conduct being a dishonest and fraudulent design and each Gallery Defendant’s alleged knowing assistance in Kopps Road’s breach of fiduciary duty.
- [52] For the purpose of the strike-out application, the allegations contained in Trevis’ pleading should be taken as facts.
- [53] Trevis became and remains the trustee of the Blackstone Property Trust (“BP Trust”). Before 8 November 2018, an entity known as Che Che Holdings Pty Ltd was the trustee of the BP Trust. Che Che Holdings was controlled by a Mr Joseph Cheihk.

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<sup>27</sup> *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75 at 94 [92].

<sup>28</sup> *KTC v David* [2022] FCAFC 60 at [77].

- [54] Mr Marles was a sole director and shareholder of Emmapeel. He also was a sole director and shareholder of other entities, Associated Equity and Western Gateway, which were placed in liquidation.
- [55] The sixth defendant, Gallery Developments, was incorporated on 13 June 2018 and thereafter was engaged in the business of acquiring land with a view to it, or a related company, developing it. The seventh defendant, Gallery Homes, was engaged in the design, construction and sale of residential houses. These entities, along with Kopps Road and GPF No. 7, were part of the Gallery Group, which comprised about 30 companies that were related to Mr Adam Barclay and his wife. Mr Adam Barclay was its chief executive officer. Kopps Road and GPF No. 7 were incorporated as special purpose vehicles.
- [56] Ben Russell was the General Manager for Gallery Developments during the relevant period and responsible within the Gallery Group for locating and evaluating prospective development sites. He was held out by “the Gallery Entities” (which the pleading defines to mean Gallery Developments and Gallery Homes) as having authority to engage in the conduct pleaded by Trevis. The knowledge of Mr Russell is attributed to each of the Gallery Defendants.
- [57] The land was acquired by Associated Equity in January 2015 as trustee for the BP Trust. In 2017 it was transferred to Che Che Holdings as trustee for the BP Trust. In January 2019, 20 Trevis Court Pty Ltd as trustee for the BP Trust became the registered proprietor of the land.
- [58] Associated Equity as trustee for the BP Trust and Western Gateway as trustee for the Trevis Court Unit Trust entered into a loan agreement. In October 2015, Associated Equity mortgaged the land in favour of Western Gateway. Western Gateway went into liquidation in December 2018. Earlier, in August 2018 it had ceased to be the mortgagee and Emmapeel became registered as mortgagee.
- [59] Che Che Holdings entered into a contract to sell the land for a purchase price of \$2.6 million plus GST. A few days later it received an offer from GPF No. 7 to purchase the land for a price of \$3,345,000 plus GST.
- [60] On 30 November 2018, Emmapeel’s solicitors issued a notice of exercise of power of sale to Che Che Holdings, alleging that Che Che Holdings was indebted to Emmapeel in the amount of \$736,451.04. However, according to Trevis, no such amount was due and payable by Che Che Holdings to Associated Equity and no previous demand had been made upon it.
- [61] In or about December 2018, Mr George Cheihk on behalf of Che Che Holdings telephoned Mr Marles, challenging the validity of the notice of exercise of power of sale. During the conversation Mr Marles told Mr George Cheihk that the notice of exercise of power of sale was issued by mistake and in error, and that Che Che Holdings need not be concerned about it and should ignore it. This is alleged to have been a deception.
- [62] Mr Marles is alleged to have practised another deception on Che Che Holdings after a decision was made in late November 2018 between Marles (on behalf of Emmapeel) and the Gallery Entities, whereby they agreed to proceed with the sale of the land by Emmapeel exercising its power of sale. Marles is alleged to have

failed to inform Che Che Holdings of the impending exercise of power of sale in circumstances where an honest and reasonable person would have done so, and in sending requests for Che Che Holdings to pay the debt owed to the first registered mortgagee, the NAB.

- [63] Interactions between Marles (on behalf of Emmapeel) and some of the Gallery Defendants leading up to the purported exercise of power of sale are pleaded in numerous paragraphs commencing at 43A. They arise against the background of the Gallery Group between August and November 2018, treating with Trevis in relation to the purchase of the land up to a proposed purchase price of \$3,345,000. By reason of these communications the Gallery Group, including Gallery Developments and Gallery Homes, knew that Che Che Holdings was considering selling the land and was prepared to sell it for a price of \$3,345,000, subject to the negotiation of suitable conditions.
- [64] Mr Marles knew that Che Che Holdings had a valuation in the order of \$2 million.
- [65] On or about 20 November 2018, the Gallery Defendants (by Russell) ascertained that Emmapeel held the second of three registered mortgages. On 20 November 2018, the Gallery Entities ascertained that Marles was a director of Emmapeel and Mr Russell, on behalf of the Gallery Entities, communicated with Marles to discuss the land. The first registered mortgage with the NAB secured a debt of \$638,956. Marles had guaranteed the NAB debt and, as a result, had a personal interest in securing payment of that debt so as to no longer have a personal liability to the NAB.
- [66] Between 22 and 27 November 2018, the Gallery Entities made an offer directly to Emmapeel to purchase the land.
- [67] Paragraph 44K pleads numerous matters that Marles is alleged to have known by no later than 27 November 2018. They include:
- (a) The Gallery Entities wished to treat with him as a second mortgagee and that they had made an offer to purchase;
  - (b) The Gallery Entities could acquire the land by either purchasing it from its then owner, Che Che Holdings, or by Emmapeel exercising its power of sale as second mortgagee. Difficulties associated with the first option included the owner not agreeing to the sale and resistance by the third mortgagee. Having Emmapeel exercise its power of sale could “squeeze out” the owner and the third mortgagee;
  - (c) The owner would not agree to sell the land to the Gallery Group if the amount offered was insufficient to pay out all three mortgages;
  - (d) The NAB would be content if its secured indebtedness would be paid out;
  - (e) For Emmapeel to be able to exercise the power of sale there had to be a default in the payment of money that was owed to it and a demand for payment.
- [68] The Gallery Defendants (by Mr Russell and Mr Adam Barclay) were aware by no later than 28 November 2018 of these matters and of Mr Marles’ knowledge of them.

- [69] Mr Marles believed that Emmapeel in exercising its power of sale would see the NAB's mortgage and Emmapeel's second mortgage being paid in full. At about this time the Gallery Entities decided to proceed with the option of having Emmapeel exercise its power of sale.
- [70] At some time between 28 November and 12 December 2018, the Gallery Entities decided to interpose a company within, and controlled by, the Gallery Group as the purchaser of the land with a further on-sale to another company within the group for a higher price.
- [71] This is the basis upon which Kopps Road entered into a contract of sale with GPF No. 7. The contract price was not intended to record a transfer at market value, but was a price that provided a certain rate of return for prospective investors associated with the mortgagee and the fifth defendant, GM Private Capital Pty Ltd. The difference between the Kopps Road contract and the GPF No. 7 contract was intended to reflect the estimated future equity in the land.
- [72] The Gallery Entities carried out a feasibility on the development that justified a land value price of \$2,540,000.
- [73] Emmapeel entered into a contract to sell the land to Kopps Road for \$1,240,000.
- [74] At no time prior to the Kopps Road contract coming into existence did Emmapeel:
- (a) advertise the land for sale;
  - (b) engage a real estate agent to sell the land;
  - (c) put the land to market;
  - (d) obtain a valuation of the land;
  - (e) attract the interest of potential buyers of the land;
  - (f) obtain the best possible bargain for the sale of the land;
  - (g) obtain a truly independent bargain for the sale of the land.
- [75] The sale of the land by Emmapeel was a breach of s 84 of the *Property Law Act*.
- [76] By reason of these and many other of the pleaded matters, Emmapeel is alleged to have breached its equitable duty of good faith. This allegation is made in paragraph 45C of the pleading, which I will set out for ease of reference:
- “45C. By reason of:
- (a) the matters in paragraphs 40, 41, 43A, 44C, 44F to 44K, 44O to 44R, 44T, 44V, 44X and 44Y above;
  - (b) alternatively, the matters in paragraphs 44F, 44I, 44J, 44JA, 44K(a) to 44K(g), 44O, 44P, 44V, 44X and 44Y(a), (b), (c), (e), (f) and (g) above;
- Emmapeel breached the Equitable Duty of Good Faith.”

- [77] The same matters are relied upon in paragraph 45D to allege that Emmapeel's purported exercise of its power of sale was not a *bona fide* exercise of the power of sale and was a fraud on the power of sale.
- [78] Emmapeel's conduct, as pleaded in paragraphs 45C and 45D, is alleged to have been "a dishonest and fraudulent design".
- [79] By a contract dated 24 January 2019 Kopps Road sold the land to GPF No. 7 for a purchase price of \$2,540,000 plus GST. Its market value at that time is pleaded to be no less than \$2.6 million (excluding GST) and no more than \$3,345,000 (excluding GST).
- [80] Importantly, Emmapeel's conduct that is pleaded to have been a dishonest and fraudulent design includes the two deceptions by Mr Marles on its behalf, to which I have earlier referred. One is the advice that the notice of exercise of power of sale was issued by mistake and should be ignored. The other was failing to inform Che Che Holdings of the impending exercise of power of sale and requesting it to pay the debt owed to the NAB.

#### **The Gallery Defendants' knowledge of relevant matters**

- [81] Paragraph 49A, 49B and 49C of the pleading allege that the Gallery Defendants knew numerous matters. I will not list all of them. They include that they knew that Marles:
- (a) had a personal liability in respect of the NAB debt that was secured by the first mortgage; and
  - (b) had a personal interest in securing payment of that debt, so that he would no longer have any personal liability to the NAB.
- [82] The Gallery Defendants are alleged to have known the market value of the land, the amounts that had been offered to Che Che Holdings to buy it (offers of \$3 million and \$3,345,000), and the amount by which the land was to be on-sold from Kopps Road to GPF No. 7, being \$2,540,000. They are said to have known that the land had not been advertised for sale by Emmapeel, put to the market, and that Emmapeel had not taken steps to attract the interest of potential buyers in it. They are said to also have known that the Kopps Road contract was not the best possible bargain for the sale of the land, and that the Kopps Road contract was not a truly independent bargain.
- [83] The Gallery Defendants are also alleged to have known of, and done, the things pleaded in paragraphs 44A, 44B, 44D, 44E, 44F, 44I, 44J, 44JA, 44L, 44M, 44N, 44O, 44P, 44S, 44U, 44W and 44X.
- [84] Importantly, the Gallery Defendants are not alleged to have known of the two deceptions by Mr Marles that are pleaded in paragraphs 40, 44Q and 44T.

#### **What are the Gallery Defendants, and the sixth and seventh defendants in particular, alleged to have done?**

- [85] Liability under the second limb in *Barnes v Addy* requires proof of more than knowledge or notice of the breach of duty. There must be facilitative conduct or activity.<sup>29</sup>
- [86] The Gallery Defendants complain that the pleading does not plead acts or omissions by either the sixth or the seventh defendants, which could be said to mean that they participated in a breach of trust or fiduciary duty. Instead, the pleaded acts are those of Kopps Road and GPF No. 7.
- [87] This is a valid complaint. Paragraph 50L of the second further amended statement of claim is, at best, a plea that rolls up the conduct of each Gallery Defendant that is alleged to have “knowingly assisted and participated in the Kopps Road breach of fiduciary duty”. Paragraph 50L reads:
- “By reason of the conduct pleaded in paragraph 50E above, and the knowledge pleaded in paragraph 49B above, each Gallery Defendant knowingly assisted and participated in the Kopps Road breach of fiduciary duty pleaded in paragraph 50I above with knowledge of the dishonest and fraudulent design in paragraph 50J.”
- [88] The “conduct pleaded in paragraph 50E” to which paragraph 50L refers is the conduct of Kopps Road in knowingly procuring or inducing Emmapeel’s breach of its equitable duty, or in having assisted in Emmapeel’s breach. Paragraph 50E refers, in turn, to the conduct and knowledge pleaded in paragraph 49B. It, in turn, refers to a multiplicity of matters, almost all of which concern matters about which the Gallery Defendants are alleged to have known, rather than what they did. Paragraph 49B(h) does, however, refer to both things done and the knowledge of the Gallery Defendants. It reads:
- “the Gallery Defendants had the knowledge of, and had done, the things pleaded in paragraphs 44A, 44B, 44D, 44E, 44F, 44I, 44J, 44JA, 44L, 44M, 44N, 44O, 44P, 44S, 44U, 44W and 44X above;”
- [89] When one turns back to the things pleaded in those paragraphs, one finds certain things done by the “Gallery Group”, the “Gallery Defendants” or the “Gallery Entities”. They include:
- (a) the Gallery Group treating in relation to land with a purchase price of up to \$3,345,000 (44A);
  - (b) the Gallery Entities causing a company search of Emmapeel to be carried out (44E);
  - (c) the Gallery Entities sending an email to Mr Marles asking him to contact Mr Russell (44F);
  - (d) the Gallery Entities offering to purchase the land (44J);
  - (e) the Gallery Entities deciding to proceed with the option of the land being sold by Emmapeel by exercising its power of sale, rather than purchasing the land from its registered owner (44N).

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<sup>29</sup> *KTC v David* [2022] FCAFC 60 at [77].

- [90] Not all of these acts are self-evidently conduct that facilitated Kopps Road’s breach of fiduciary duty.
- [91] The Gallery Defendants, and the sixth and seventh defendants in particular, should not be left to guess what conduct by each Gallery Defendant is alleged to have facilitated Kopps Road’s breach of duty, such that the defendant knowingly “assisted and participated in” the Kopps Road’s breach of fiduciary duty.

**What is each Gallery Defendant alleged to have known and how do those matters constitute a “dishonest and fraudulent design”?**

- [92] The breach of fiduciary duty that each Gallery Defendant is alleged to have known must have been known by it to be a “dishonest and fraudulent design”. There must have been dishonesty on the part of the fiduciary. As has been said:<sup>30</sup>

“Nothing falling short of dishonest conduct by the fiduciary is sufficient to engage the second limb of *Barnes v Addy*.”

- [93] It is not sufficient that a Gallery Defendant knew of a breach of fiduciary duty. It must have been a “dishonest and fraudulent design” by the fiduciary. Dishonest is used in this context to mean “a transgression of ordinary standards of honest behaviour”.<sup>31</sup>
- [94] Trevis’ pleading says many things about what the Gallery Defendants, or some of them, knew. Sometimes the allegation is cast in terms of what the “Gallery Defendants knew”, presumably meaning that each of the Gallery Defendants knew the matter. In some places the knowledge is said to be that of the Gallery Entities being the sixth and seventh defendants.
- [95] Some of the matters that they are alleged to have known might be said to be routine and innocuous. Others, taken together, are said to support the conclusion that they knew of Emmapeel’s breach of its equitable duty of good faith (49C), or that its exercise of its power of sale was not a *bona fide* exercise, and a fraud on the power (45D).
- [96] The pleading should be clear about what things the Gallery Defendants, and each of them, are alleged to have known being things that went beyond a transgression by *Kopps Road* of standards to be expected by a fiduciary, to a transgression of ordinary standards of *honest* behaviour.
- [97] Clarity is required in circumstances in which the Gallery Defendants (including Kopps Road) are not alleged to have known of the two acts of deception allegedly perpetrated by Mr Marles on behalf of Emmapeel. Importantly, the matters that are alleged to constitute a “dishonest and fraudulent design” in the present context are not the prior conduct of Emmapeel in purporting to exercise a power of sale. The relevant dishonest and fraudulent design concerns Kopps Road’s conduct in transferring the property to GPF No. 7.

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<sup>30</sup> *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 613 [9] per Gleeson JA, adopting the analysis of Leeming JA at 624 [64] – 636 [125].

<sup>31</sup> *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd* [2015] 1 Qd R 75 at 94 [92].



- [98] Emmapeel’s earlier alleged dishonest conduct in purporting to exercise its power of sale may be an important fact in explaining why Kopps Road is alleged to have been a constructive trustee. Still, the consecutive dishonest and fraudulent designs, one by Emmapeel, and the second by Kopps Road, should not be conflated or equated with each other. This is because Kopps Road and the other Gallery Defendants are not alleged to have known all of the matters that are alleged to have rendered Emmapeel’s conduct dishonest. In particular, they are not alleged to have known of two acts of deception.
- [99] Trevis’ case that Kopps Road engaged in a dishonest and fraudulent design must therefore rely upon conduct that does not include knowledge of those acts of deception.
- [100] Mr Psaltis of counsel was correct to submit that it is not sufficient for Trevis to simply assert that the breach by Kopps Road was a dishonest and fraudulent design. It must identify what about that breach made it a dishonest breach, or a transgression of ordinary standards of honest behaviour. This entails identifying the conduct of Kopps Road that is alleged to constitute a *dishonest* breach of duty. The pleading should be clear about what made Kopps Road’s conduct a transgression of ordinary standards of *honest* behaviour. Presently, the pleading does not do so with sufficient clarity. As a result, the pleading has a tendency to prejudice or delay the fair trial of the proceeding.

### **Conclusion on the second complaint**

- [101] The pleading is inadequate in its present form to identify the matters that rendered Kopps Road’s breach of fiduciary duty a “dishonest and fraudulent design”. Many allegations in the pleading concern a multiplicity of matters about what all or some of the Gallery Defendants knew or did. Therein lies the problem. Absent their involvement in or knowledge of two alleged acts of deception, the pleading does not sufficiently identify the particular matters that are alleged to have rendered Kopps Road’s conduct dishonest, as distinct from a departure from its duty as a fiduciary.
- [102] Any new pleading should plead with appropriate particularity:
- (a) what each of the Gallery Defendants, and the sixth and seventh defendants in particular, did to knowingly assist and participate in Kopps Road’s breach of duty;
  - (b) the “dishonest and fraudulent design” of Kopps Road (which must be distinguished from the alleged dishonest and fraudulent design of Emmapeel, which included two acts of deception that are not alleged to have been known by the Gallery Defendants).

In particular, the pleading should clarify what about the conduct of Kopps Road made it dishonest according to the ordinary standards of honest behaviour, as distinct from a breach of fiduciary duty.

- [103] When the pleading alleges that the Gallery Defendants knew certain things, is it to be taken that the allegation is that each of the Gallery Defendants, including the sixth and seventh defendants, knew those things? If so, is the basis of the knowledge of each Gallery Defendant derived from the knowledge of Mr Russell

and/or Mr Barclay, or attributed to it by some other means? This should be clarified.

- [104] The Gallery Defendants accept that Trevis should have an opportunity to replead. I will grant leave to replead within a certain time, provisionally within 28 days, failing which paragraphs 50J and 50L of the second further amended statement of claim will be struck out.

### **Orders**

- [105] I propose to order that:

“The plaintiff have leave to replead within 28 days, failing which paragraphs 50J and 50L of the second further amended statement of claim be struck out.”

- [106] Each side has enjoyed some measure of success on this application. The plaintiff succeeded in resisting the first part of the application. The Gallery Defendants succeeded in relation to their second complaint. Their second complaint was far narrower than the matters canvassed in the original application. They should not be unduly criticised for narrowing the focus of their complaint closer to the hearing. Still, Trevis had to prepare for a much broader challenge to its pleading than the one pressed at the hearing.
- [107] Unless the parties can agree a costs order, I will hear short oral submissions on costs.