

The sophisticated face of elder abuse

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A rare case of a wealthy gentleman without capacity winning equitable compensation for elder abuse suffered at the hands of his sophisticated attorney.



The 2016 decision in *Ash v Ash*¹ and the follow-up 2017 decision in *Ash v Ash (No. 2)*² illustrate sophisticated and modern elder abuse of a wealthy baby boomer.

Background

By late 2013, Mr Ash was in his mid-70s, suffering from Parkinson's disease and numerous other ailments, and residing in a high-care nursing home. In his final years of clarity, he appointed his daughter, Vanessa, as his financial attorney to make decisions for him in the event that he lost capacity. Vanessa was an experienced lawyer, having practised both in private practice and at ASIC.

Mr Ash's assets were substantial. He had an SMSF with a balance exceeding \$1.2m, a less valuable discretionary trust, as well as personal assets exceeding \$2m (consisting of his family home in an affluent Melbourne suburb, cash and shares).

Mr Ash lost capacity some time in 2013 and, in that year, Vanessa took control of Mr Ash's wealth, becoming a signatory on Mr Ash's bank accounts and a director of the trustee company of the SMSF and the trust.

Vanessa's husband, Bradley Grimm, operated "Ostrava", a financial planning business. Vanessa was an officeholder within that corporate group and held the Australian financial services licence, as Bradley had previously been bankrupt and his reputation had been tainted by a failed venture (Bradley had been shamed in the Victorian Parliament as the "Grimm reaper of Collins Street").³

On taking over the assets, Vanessa closed Mr Ash's existing bank accounts and transferred the funds to Ostrava for management.⁴ She also appointed Bradley as her co-director of the trustee company. Subsequently, all of the blue chip shares in

the SMSF and the trust were sold and cash moved to Ostrava's management.

Ostrava proceeded to invest Mr Ash's life savings in various extremely speculative penny dreadful shares and other ventures. Ostrava charged Mr Ash extremely high management, administration, brokerage and advice fees.

In early 2014, Vanessa and her family moved into Mr Ash's home. At first, they resided there rent free, then they paid minimal rent.⁵ Vanessa alleged that her father asked her to move in so he could visit his home whenever he wanted to and move back eventually.

Mr Ash's other daughter became concerned over the management of Mr Ash's affairs and brought a proceeding at the Victorian Civil and Administrative Tribunal (VCAT) to have Vanessa removed as Mr Ash's attorney. It was alleged that Vanessa breached attorney's fiduciary duty to Mr Ash by profiting from her position (living in his house) and by placing herself in a position of conflict (by investing the funds via Ostrava, taking fees and commissions). After a protracted VCAT battle, Vanessa eventually resigned as attorney and an independent administrator was appointed in early 2015 to investigate Vanessa's conduct and to manage Mr Ash's affairs.

By early 2015, Ostrava was worthless⁶ and the concerned investors complained to ASIC. ASIC conducted an investigation and brought a proceeding in the Federal Court.⁷

By late 2015, the Federal Court appointed liquidators over Ostrava and found that Vanessa and Bradley had misled and defrauded their investors, banning them from dispensing financial services for 20 and 10 years, respectively, and from managing corporations for 15 and seven years, respectively.⁸

Mr Ash was one of the investors who lost all of his life savings and, like other investors, he stood to have nothing returned to him by the liquidators. However, Mr Ash had another avenue of redress open to him and his administrator pursued it.

Supreme Court proceedings

Mr Ash, via his administrator, pursued Vanessa in the Supreme Court of Victoria for equitable compensation arising from breaches of the fiduciary rules against deriving a benefit from the attorney position and being in a conflict of personal interest versus that of the principal.⁹

The administrator also alleged that the principles in *Barnes v Addy*¹⁰ apply. *Barnes v Eddy* stands for the proposition that someone knowingly receiving property which results from a breach of trust is guilty of the breach of trust and liable to the victim. This way, the administrator tied in the trustee company and Bradley into the breaches and could access their assets and any insurance.

This is the first case of its kind to run in Victoria and to succeed. It contains an important lesson for attorneys and advisers that the court is willing to break down the barriers between entities and to separate "fiction" from "reality" in strict legal arguments.

Vanessa's defences

Given Vanessa's legal experience, this was a risky case to run and a difficult one to win because Vanessa thoroughly protected her position, for example, Vanessa produced:

- documents signed by Mr Ash which she claimed permitted the conflict of interest and profiting;
- documents signed by Mr Ash which she claimed showed that Mr Ash made

certain decisions personally and they were not made by Vanessa as attorney, for example, in the twilight of capacity, Mr Ash signed ASIC forms appointing Vanessa as director of the trustee company;

- a lease signed by her on behalf of Mr Ash as landlord but in favour of Bradley as tenant permitting him to reside in the home for five years at fixed low rent, which Vanessa alleged, meant there was no conflict of interest as she was not the tenant;
- a deed appointing Vanessa as appointor of the trust in place of Mr Ash, which intended to deny the administrator any control over the trust;
- paperwork adding herself and Bradley as members of Mr Ash's SMSF and an updated SMSF deed which changed voting rights, so Mr Ash could not demand the roll-over of his benefits without Vanessa and Bradley's consent;¹¹ and
- paperwork issuing more shares in the trustee company to herself, so she could outvote Mr Ash and deny the administrator access to information or the release of funds.

All of the paperwork was cleverly intended to bind the administrator to the decisions that Vanessa made while she was attorney, and "bury" the administrator in detail and legal obstacles, so as to deter her or make it impossible for her to set them aside.¹² However, Vanessa had gone too far — Mr Ash was penniless and unable to meet his nursing home fees, so the administrator had no choice but to pursue Vanessa through the courts.

Essentially, Vanessa's defences were:¹³

- informed consent by Mr Ash to some decisions;
- fiduciary duties not attaching to other decisions, as Vanessa had undertaken them not as attorney but as Mr Ash's daughter; and
- Vanessa was fulfilling Mr Ash's various wishes as expressed by him to her prior to his loss of capacity.

Although, to an untrained eye, it may be obvious that Vanessa failed to act in Mr Ash's best interests, the administrator faced formidable obstacles to enforce Mr Ash's rights with respect to his wealth.

Administrator's submissions

Essentially, the administrator had to show that there was no informed consent:

- there was no specific power under the power of attorney document authorising the forbidden conduct;
- Mr Ash had not been provided with sufficient information to give informed consent; and
- if Mr Ash had been provided with such information, Mr Ash did not have capacity to give such informed consent with respect to his decisions or his wishes.

If the administrator could show that Vanessa had no defence, Vanessa would be ordered to compensate Mr Ash for his losses.

The administrator had to link all of Vanessa's acts done as "daughter" and those with respect to the stand-alone entities (the trustee company, the SMSF and the trust — over which, arguably, the power of attorney either does not operate or has limited application) to her being an attorney.

Court findings

Fiduciary duties

McMillan J (constituting the court) said that "fiduciary duties exist where there is a dependency or vulnerability on the part of one party that causes that party to rely on another ... It is well understood that an attorney is burdened with fiduciary obligations ... and [the donor of the power] consents only to the powers being used for the benefit or purposes of the donor and not for the benefit or purposes of the [attorney]".¹⁴

Further, "fiduciary duties prohibit a fiduciary from taking a benefit where ... there is a conflict (or a significant possibility) of personal interest and duty ... or a benefit or gain arises by use of the fiduciary position (or of an opportunity or knowledge resulting from it)".¹⁵

The legislation under which Mr Ash granted the power to Vanessa also contained these "fiduciary proscriptions".¹⁶

Her Honour said that, because Mr Ash placed "full trust and confidence in [Vanessa], who is his daughter as well as a commercial lawyer ... the fiduciary duty stemming from the power of attorney extends to all acts and things done by [Vanessa] that touched upon [Mr Ash's] financial affairs".¹⁷

McMillan J said:¹⁸

"In the present circumstances the fiduciary duty must extend to all acts and things done by

[Vanessa] that touched upon the financial affairs of [Mr Ash]. To recognise otherwise would be to permit a fiction undermining the very purpose of fiduciary duties — to protect those in relationships of dependence and vulnerability."

The court rejected Vanessa's claim that she was not acting as attorney when she undertook transactions relating to the SMSF and the trust:¹⁹

"It is difficult to accept that a superannuation fund, knowing that the member had an attorney, would make significant changes to the superannuation agreement without input from the attorney. It is fanciful that this would occur in the context of a self-managed superannuation fund where an incapacitated individual is effectively the only member. It would require a fiction to attempt to unravel acts done by [Vanessa] as attorney from those done as director of the trustee company when both appointments concerned the one subject matter of [Mr Ash's] financial well-being."

The court said that Vanessa exploited the position of vulnerability of her father and breached her fiduciary duty of no conflict and not to profit. To find otherwise would only undermine the protective role of the attorney. Accordingly, the decisions which Vanessa claimed to have made "as daughter" were entered into in her capacity as attorney or closely linked with it, and so were burdened with the fiduciary obligations.

Informed consent

The court considered whether Mr Ash could give informed consent and whether his wishes (such as about Vanessa's occupation of the house) could be reasonable in all of the circumstances.

There was no evidence that Mr Ash could have supplied informed consent on any issue, as he was not presented with all of the relevant facts about each specific decision (such as with the financial services guide or the explanation of fees in relation to the investment in Ostrava, that Vanessa and Bradley would personally benefit, the risk profile of the investment etc). It was found that, even if he had been presented with all of the facts, Mr Ash would not have had the requisite capacity to understand the facts. Accordingly, there was no evidence of informed consent.

The court found that the allegations against Vanessa were borne out. The transactions carried out by her were not in Mr Ash's best interests, were designed to defeat the administrator's powers and, as such, were invalid.

Knowing receipt in breach of trust

McMillan J determined that Bradley knowingly involved himself in the breaches. The trustee company was also liable according to *Barnes v Addy* as there had clearly been knowing assistance and dishonest and fraudulent design. This resulted from the trustee company allowing the transfer of the funds to Ostrava and thereby placing Vanessa and Bradley's interests ahead of Mr Ash's. The trustee company also permitted the speculative investment strategy which was unsuitable to Mr Ash's circumstances.

The court said that Mr Ash's interests were never seriously considered by the trustee company. This was not only dishonest and fraudulent, but also squarely within the "definition of elder abuse as the term has been employed recently by the Australian Law Reform Commission".²⁰ Being a trustee company, it owed Mr Ash "fiduciary duties not to be in a position of conflict and not to profit, in addition to equitable duties more broadly, including that of due care and skill".²¹

The trustee company was operated by Vanessa and Bradley and, as its "brains and hands", this made the trustee company liable to Mr Ash for the breaches.

Overall, her Honour found there had been a breach of all of the fiduciary and equitable duties by Vanessa, and Bradley and the trustee company knowingly assisted in the breaches. Their conduct was referred to as "reprehensible".²²

Quantifying the losses

In 2017, the matter came back before McMillan J to quantify the compensation to be awarded to Mr Ash.

The administrator claimed that Vanessa, Bradley and the trustee company breached the no profit rule, the no conflict rule, the duty of care and skill with respect to investments, and the duty of loyalty, thereby causing significant loss to Mr Ash.

The court identified four transfers (authorised by Vanessa from Mr Ash, the SMSF and the trust to Ostrava) of Mr Ash's life savings, which were in breach of the various duties and for which Mr Ash should be compensated. The court traced these transfers and the future transactions involving these funds, and ordered that Mr Ash be put back in the position in which he would have been had these transactions not taken place.

The court also examined the various fees charged by Ostrava on the funds and did not allow any of them.

McMillan J awarded the maximum possible penalty against Vanessa, Bradley and the trustee company, totalling well over \$1m:

- equitable compensation of the entire amounts withdrawn by Vanessa — "equitable compensation seeks to place the principal in the position which he or she would have been aside from the breach of equitable duty";²³
- compound interest at 5% on these amounts from the date of each transaction; and
- indemnity costs for the 2016 and the 2017 proceedings.

Conclusion

Given Vanessa and Bradley's difficulties relating to Ostrava, it is unlikely that the administrator will be able to collect the award in the near future. The judgment debt is valid for 15 years, so if Vanessa and Bradley's luck turns, Mr Ash may get back some or all of what is due to him.

Another notable point is that Vanessa continues to hold a practising certificate in Victoria and operates her own law firm. Given that, every year, practitioners have to swear that they are of good character before being granted an annual practising certificate, it is difficult to reconcile why the court did not refer the matter to the Legal Services Board for consideration (the court has been known to do that in the past).

This is perhaps the first "elder abuse" case to come out of the Supreme Court of Victoria, and only a handful have been handed down in other jurisdictions. Such cases are rare, but will increase in number as elder abuse is on everyone's radar, and there is encouragement within the community and from the courts for whistle-blowers to be the voice of the elderly and to protect and enforce their rights.

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References

- 1 [2016] VSC 577.
- 2 [2017] VSC 569.

- 3 See www.smh.com.au/business/banking-and-finance/exasic-lawyer-vanessa-ash-and-bradley-grimm-accused-of-defrauding-owner-20160414-go6yyc.html.
- 4 [2016] VSC 577 at [24].
- 5 [2016] VSC 577 at [27].
- 6 [2016] VSC 577 at [26].
- 7 See www.afr.com/business/asic-investigates-collins-street-broker-bradley-grimm-lawyer-vanessa-ash-20150507-ggw3pi.
- 8 See www.australasianlawyer.com.au/news/former-asic-lawyer-gets-financial-services-ban-222786.aspx.
- 9 [2016] VSC 577 at [67].
- 10 (1874) LR 9 Ch App 244.
- 11 [2016] VSC 577 at [64].
- 12 [2016] VSC 577 at [29]-[30].
- 13 [2016] VSC 577 at [8].
- 14 [2016] VSC 577 at [102] (quoting *Johnson v Buttress* (1936) 56 CLR 113 at 135-135).
- 15 [2016] VSC 577 at [102] (quoting *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 67 per Gibbs CJ).
- 16 [2016] VSC 577 at [103].
- 17 [2017] VSC 569 at [79].
- 18 [2017] VSC 569 at [63].
- 19 [2017] VSC 569 at [61].
- 20 [2017] VSC 569 at [93] (relying on Australian Law Reform Commission, *Elder abuse – a national legal response*, report no. 131).
- 21 [2017] VSC 569 at [96].
- 22 [2017] VSC 569 at [121].
- 23 [2017] VSC 569 at [102] (quoting *Nocton v Lord Ashburton* [1914] AC 932 at 952 per Viscount Haldane LC). See also *Hill v Rose* [1990] VR 129 at 144 per Tadgell J.