

# FIDUCIARY DUTIES

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"Indeed, where a complex course of dealing is in issue, as in this case, minds reasonably may differ as to the outcome of the application of the principles: *Maguire v Makaronis*. The principles in this area of the law are easier to state than to apply."

McLure P (with whom Buss JA agreed) at [76] in *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17; (2011) 278 ALR 291; 82 ACSR 1.

1. The application of the equitable doctrines to the area of fiduciary duties is difficult, and some of the text books and even judgments serve to confuse the matter rather than clarify. This paper attempts to set out the essential aspects of the law affecting fiduciaries in a clear manner. The paper attempts to put particular focus on aspects of this area of equity that often arise for consideration in a commercial context, such as the test for the imposition of a fiduciary duty outside of the traditionally recognised categories, an analysis of causation and remedies. Some attention is also given to the difficult area of causation.

## **Who owes fiduciary duties**

2. A fiduciary relationship exists whenever there is a relationship of confidence such that equity imposes duties or disabilities upon the person in whom the confidence is reposed in order to prevent the possible abuse of confidence (*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 94 per McMullin J for the New Zealand Court of Appeal). A fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense (*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; (1984) 55 ALR 417).
3. A person may become the fiduciary of another including by agreeing to be in a particular relationship with them and by agreeing to do certain things for their benefit. Such relationships will possess the "critical feature" spoken of by

Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97, namely:

“... that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.”

4. In *Vanguard Financial Planners v Ale* [2018] NSWSC 314 Black J applied this line of authority in rejecting an argument that two professional firms who operated together as a “one stop shop” were in the nature of a joint venture owing fiduciary duties. Citing *Australian Securities & Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; (2007) 160 FCR 35; 62 ACSR 427; *John Alexander’s Clubs Pty Limited v White City Tennis Club Limited* [2010] HCA 19; (2010) 241 CLR 1 at [87]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 and *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2; (2013) 92 ACSR 417 Black J held that the essential question is whether the fiduciary expressly or impliedly undertook to subordinate his or her interests to the other party or to the joint venture. It will be a rare case, in commercial joint ventures, that a fiduciary duty is found to exist.
5. The imposition of fiduciary duties in contractual relationships can be problematic. In *Hospital Products*, Mason J spoke in terms that came to be endorsed by the High Court in *John Alexander’s Clubs v White City Tennis Club* (2010) 241 CLR 1 at 36; [2010] HCA 19. Sir Anthony Mason examined cases where contract provides the foundation for a fiduciary relationship:

“In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.”

6. In *John Alexander's Courts*, the High Court found that the Club was in an excellent position to observe the changing scene and protect its interests. There was no entrustment or custodianship to be abused. This focuses attention on the entrustment of one to another, and the position of vulnerability that it creates.
7. It has often been said that the categories of fiduciary relationship are not closed. Certain relationships are recognised as being fiduciary in character. The traditional categories of fiduciary relationship include:
  - Partners: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 408; *Barescape Pty Limited v Bacchus Holdings Pty Limited (No 9)* [2012] NSWSC 984; *Chan v Zacharia* [1984] HCA 36; (1983) 154 CLR 178.
  - Trustees: *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41.
  - Company Directors: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68, Mason J at 96, Dawson J at 141 (CLR); *Mills v Mills* (1938) 60 CLR 150, Dixon J at 185.
  - Solicitors and clients: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68, Mason J at 96, Dawson J at 142.
  - Promoter of the company: *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215, Dixon CJ, Williams and Taylor JJ at 241–242.
  - Agents in some but not all cases: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68, Mason J at 96, Dawson J at 141.
  - Guardians: *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136; [2007] SASC 285 per Gray J at [995].

8. What then of the borderline or marginal cases? The situations which may, according to the facts, give rise to a fiduciary relationship are instructive on an understanding of the nature of the duty. Some of these are discussed below.

#### *Associations*

9. It is probable that committee members of associations in all jurisdictions owe the same duties as are imposed on directors: *Lai v Tiao (No 2)* [2009] WASC 22: Johnson J at [84]; Fletcher KL, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited, 1986) p 289. This observation does not make a distinction between incorporated and unincorporated associations.
10. Where committee members of an unincorporated association are entrusted with funds received for the organisation's members, they will owe a fiduciary duty to the persons whom they represent in the disposal of those funds: *Harrison v Hearn* [1972] 1 NSWLR 428. In *Taylor v National Union of Mineworkers (Derbyshire Area)* [1985] BCLC 237 at 241, Vinelott J held that officers of a trade union owed it a fiduciary duty, which included a duty not to misappropriate funds.
11. In *Haselhurst v Wright* (1991) 4 ACSR 527, Owen J held that although a building society was not regulated by the companies legislation then in force, its directors were in a similar position to directors of a company and had a fiduciary duty to act in the interests of the corporate body as a whole (at 531).
12. In *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 at [112], Hammond J held that members who had been elected to a committee of an incorporated society were in a "trustee-like" fiduciary position in respect of their duties to the society to hold meetings and ensure members were represented.
13. Where the association is incorporated, the position is beyond doubt. Committee members are prevented from making improper use of their position, or of information gained by reason of their position to gain directly or indirectly an

advantage for themselves or any other person to cause detriment to their association: *Associations Incorporation Act 2009* (NSW), ss.32 and 33.

14. Committee members also have a duty to make disclosure of any direct or indirect interest in a contract or proposed contract with the association, to both the committee and to members at the annual general meeting: *Associations Incorporation Act 2009* (NSW), s.31(1).

### *Employees*

15. The mere existence of an employee/employer relationship does not give rise to a fiduciary duty: *Woolworths Limited v Olson* [2004] NSWSC 849 at [214] per Einstein J, *Victoria University of Technology v Wilson* [2004] VSC 33 at [145] per Nettle J. It has been said that Courts do not readily equate an ordinary employee's contractual duties of good faith and loyalty with fiduciary obligations: *Nottingham University v Fishel* [2000] ICR 1462 per Elias J.
16. As Santow J observed in *Colour Control Centre v Ty* (1996) 39 AILR 5-058, employees other than senior executives and officers may owe the business a fiduciary duty, depending on the circumstances. The more senior the employee, the more likely that the obligations will be fiduciary in character. Employees of relative seniority within an organisation (such as employees with managerial responsibilities) will owe fiduciary duties to their employer: *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [17]. The existence of the fiduciary duty owed as employee can arise from circumstances. In *Consul Developments v DPC Estates Ltd* (1975) 132 CLR 373 at 394 – 395 the manager of the property development company, although irregularly appointed, assumed the position of director. He performed, on behalf of the company, the task of finding, investigating and reporting upon properties suitable for purchase by the company and owed fiduciary duties. In that case the manager was in breach of his fiduciary duty by exploiting a business opportunity that was suitable for his employer. In *Singtel Optus v Almad* [2013] NSWSC 1427, a middle management employee, who was many down the corporate ladder from the board, was held to owe a fiduciary duty.

17. However, the authorities do not speak with one voice on the scope of the duty. In *Digital Pulse Pty Limited v Harris* [2002] NSWSC 33; (2002) 40 ACSR 487, in an aspect of his judgment not disturbed on appeal, Palmer J referred to a general duty of an employee to act in the interests of the employer and with good faith and fidelity (at [20]). After referring to the scope of the duty that effectively embraced the conflict rule and the profit rule, his Honour said at [23]:

“When the employment ceases, the employee is free to compete with the employer unless subject to a valid contractual restraint on competition. The employee may take away and use the benefit of personal relationships built up with particular customers of the former employer and may solicit any customer who the employee can recall without the aid of a list taken from the former employer and without deliberate memorization of a customer list. The employee may not, however, use for his own benefit confidential information of the former employer, whether to solicit business from the former employer’s customers or to carry out work for such customers even if unsolicited.

18. One constraint on all employees was the “double employment rule”: *Mothew (t/as Stapley & Co) v Bristol & West Building Society* [1996] EWCA Civ 533 per Lord Millett; *Stephen James Rigg v Paul Sheridan* [2008] NSWCA 79 at [46] per Handley AJA. The rule was set out in *Bristol & West Building Society v Mothew* [1998] Ch 1; [1997] 2 WLR 436; [1996] 4 All ER 698] Millett LJ said at 19:

A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other: see *Clark Boyce v Mouat* [1994] 1 AC 428 and the cases there cited. This is sometimes described as ‘the double employment rule’. Breach of the rule automatically constitutes a breach of fiduciary duty.

19. It appears that all that is necessary to avoid a breach of the double employment rule is some form of consent. Arguably, it need not be “fully informed” consent. Unlike some fiduciary breaches, mere disclosure of the existence of the alternate employment may be enough to avoid a breach of the double employment rule: *Rigg v Sheridan* [2008] NSWCA 79 at [47].

20. The scope of the duties owed by a senior employee as a fiduciary was commented on by O’Keefe CJ Comm D in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (O’Keefe CJ Comm D at [52], Supreme Court of NSW, 14 September 1994, unreported) as follows:

*“Those duties of an employee which are normally characterised as fiduciary relevantly include:*

- (i) to act honestly in the service of the employer. This is sometimes expressed as a duty of loyalty or good faith and in appropriate cases survives the termination of the employment. Breaches of this duty include the taking of bribes or secret commissions or acting in one’s own interests or the interests of another rather than in the interests of the employer;*
- (ii) not to benefit him or herself to the detriment of the employer;*
- (iii) to treat confidential information as such and not disclose it to competitors.”*

Cited in *Woolworths Ltd v Olson* (2004) 184 FCR 121; [2004] NSWSC 844 at [218].

21. It should be remembered that in addition to any fiduciary duty an employee may owe, they will also have an obligation to keep the employer’s confidential information confidential and not to misuse it: *Forkserve Pty Ltd v Pachiaratta* (2000) 40 IPR 74, s.183 of the *Corporations Act 2001*. In *Weldon & Co v Harbinson* [2000] NSWSC 272, Bryson J noted the distinction between equity’s protection of confidential information and fiduciary duties imposed on employees. His Honour said at [10]:

*“An employee may incur fiduciary duties relating to the protection of interests of the employer which are not property under the general law but are protected in equity in ways similar to the protection given to property. Equitable remedies may be given against misuse of trade secrets and confidential information, and against interception of a maturing business opportunity by using opportunities which came to the employee through the employment. The concepts of trade secrets, confidential information and maturing business opportunities are not highly defined, and much depends on circumstances.”*

22. A key distinction between fiduciary duties and obligations of confidence is that once the relationship of the employer and employee ceases, that fiduciary

relationship comes to an end. In *Consolidated Paper Industries Pty Ltd v Matthews* [2004] WASC 161, Newnes M provided this summary of the law:

[60] An employee during the period of his employment must act in the employer's best interest and not in pursuit of his own interests: *Wessex Dairies Ltd v Smith* [1935] 2 KB 80; *Faccenda Chicken Ltd v Fowler & Ors* [1986] 1 All ER 617. Except in special circumstances, however, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: *Faccenda* at 625, *Wessex Dairies* at 89. But during the term of his employment an employee must not solicit customers for a future time when the employment has ceased and the employee has established his own business: *Wessex Dairies Ltd v Smith* (above), *Independent Corporate Services Ltd v Stevens* [2002] WASC 280. An employee is not, however, prohibited during his employment from making preparations for setting up a business when the employment ends. What steps by the employee will be permissible will depend upon the circumstances, but such activities may extend to the issue of circulars, finding business premises and hiring employees: *Robb v Green* [1895] 2 QB 1; *Independent Management Resources Pty Ltd v Brown* [1987] VR 605. But the duty of loyalty of an employee will be breached if the employee engages in unfair or wrongful acts detrimental to the employer's business, such as deferring fulfilment of orders in anticipation of filling them himself, or developing the capacity to copy his employer's products with a view to appropriating for himself his employer's market, or recruiting the employer's staff for the new business, or taking copies of or memorising customer lists or other confidential information of the employer, or engaging in significant work to set up the business in his employer's time: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *McPherson's Ltd v Tate* (1993) 35 AILR 225; *Blythe Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *WA Fork Truck Distributors Pty Ltd v Jones & Ors* [2003] WASC 102.

### **Content of fiduciary duty**

23. The cases often speak of fiduciary duties in general terms, such as "the central obligation of a fiduciary is to give his or her undivided loyalty to the person to whom the fiduciary duty is owed" (*Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165). Those statements do not aid a practical understanding of what a fiduciary must, and must not, do.
24. The obligation on a fiduciary is comprised of the twin duties described by Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 199:

“[A] person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it.”

25. In *Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at 557-558, (a fiduciary breach claim against a former senior executive) the High Court observed that:

The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes: (1) that the fiduciary must account for what has been acquired at the expense of the trust, and (2) to ensure that fiduciaries generally conduct themselves "at a level higher than that trodden by the crowd". The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage.

26. In *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 at 197-199, McHugh, Gummow, Hayne and Callinan JJ formulated the no conflict rule as follows:

... [T]he fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed.

27. Hansen J in *Ultra Tune v McCann* (1999) 30 ACSR 651 explained the twin rules at 673-4, [76] in these terms:

As to the duties of a fiduciary, counsel for UTA then referred to the following cases: *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 137; *Boardman v Phipps* [1967] 2 AC 46 at 105; *Consul Development Pty Ltd v D P C Estates Pty Ltd* (1975) 132 CLR 373 at 393; 5 ALR 231 and *Chan v Zacharia* (1984) 154 CLR 178; 53 ALR 417. A fiduciary must not have a conflict between his duty as a fiduciary and his private interest and he must be independent and impartial as I have already mentioned. A further consequence of the fiduciary relationship is that the fiduciary is not permitted to profit from his position beyond his authorised remuneration.

28. The no conflict rule is usually expressed as the need to avoid conflicts between duty and interest, but it may be better understood as a conflict between interest and interest (as Mason J described it in *Hospital Products*). It is the interests of the person to whom the duty is owed that must be compared with the interests of the fiduciary. As McLure P explained in *Streeter v Western Areas Exploration Pty Ltd (No. 2)* (2011) 278 ALR 291; [2011] WASCA 17 at [68]:

If a director has a positive duty (even if non-fiduciary) to pursue or acquire a particular benefit (which includes an opportunity) or property for the company and seeks that property for his private purposes, there will be a conflict of interest and interest. That is, the existence of a positive duty has the consequence that the company will have a relevant interest in the particular benefit or property for the purpose of the conflict rule. This does not involve the enforcement of a prescriptive fiduciary duty. This analysis may provide an answer to the conundrum about whether the “duty” with which a fiduciary’s interest must not conflict is confined to fiduciary duties and if so, what duties are encompassed within that rubric. The conflict rule also prohibits a conflict of duty and duty.

29. In *Coope v LCM Litigation Fund Pty Ltd* [2016] NSWCA 37; (2016) 333 ALR 524, Payne JA (with whom Gleeson and Leeming JJA agreed) summarised the no conflict and no profit rules as follows (at [105]):

A fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between the personal interest of the fiduciary and those to whom the duty is owed ... A conflict arises if there is a real and sensible possibility that the personal interests of the fiduciary divide the loyalty of the fiduciary with the result that he or she could not properly discharge their duties to the beneficiary. ...

30. In *Re Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789; (2014) 101 ACSR 233 at [351], Black J treated these authorities as necessarily requiring a personal interest before the no conflict rule would be invoked:

“Broadly, the no conflict rule prohibits conduct where a fiduciary has a personal interest or duty owed to a third party which gives rise to a real and sensible possibility of a conflict. That rule and the no profit rule, which provides that a fiduciary cannot obtain a profit from its fiduciary position without the principal’s consent, may overlap.”

31. In *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* [2016] NSWCA 347; (2016) 116 ACSR 566, Bathurst CJ observed, at [4] that:

[D]ifferent minds may reach different conclusions as to the presence or absence of a real possibility of conflict between duty and interest or duty and duty and the doctrine cannot be inexorably applied without regard to the particular circumstances of the relationship.

32. Although those general statements are the appropriate starting point for most fiduciaries, the content of the duty will depend on the circumstances and in particular the relationship. As Hansen J pointed out in *Ultra Tune Australia Pty Ltd v McCann* (1999) 30 ACSR; [1999] USC 58 at [80]:

The concept of a fiduciary and the duties owed lie in equity. The actual scope of the fiduciary's obligations, and in particular whether they have been breached, is determined by reference to the facts of each case. The nature and terms of the relationship are critical.

33. Of course, the two rules may overlap: *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 137; *Boardman v Phipps* [1966] UKHL 2; [1967] 2 AC 46; [1966] 3 WLR 1009. However it is clear that, in Australia at least, the two themes are distinct even though they might overlap (*Chan v Zacharia* (1984) 154 CLR 178 at 198-199 per Deane J).

34. The scope of the duty and the very existence of the relationship may depend on the line of business in which the putative fiduciary is engaged: *Links Golf Tasmania Pty Ltd v Sattler* (2012) 292 ALR 382; [2012] FCA 634 at [481]. Analysis of the type of business, and arrangements between the parties, is critical.

35. The role for common sense, and the precise content of the duty will be determined on the facts of the case. In *Consul Development v DCP Estates* (1975) 132 CLR 373, Gibbs J said at 393, [80]:

The concept of a fiduciary and the duties owed lie in equity. The actual scope of the fiduciary's obligations, and in particular whether they have been breached, is determined by reference to the facts of each case. The nature and terms of the relationship are critical. See *Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384 at 480; [1929] ALR 273, referred to in *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at 15; P D Finn, *Fiduciary*

*Obligations*, LBC, Sydney, 1977, paras 540–7. In para 542 Dr Finn refers to the observation of Upjohn LJ in *Boulting v Assoc of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637–8 that the conflict of duty and interest rule:

... must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict.

36. In the same vein, in *Chan* at CLR 205, at [78] – [79] Deane J said that:

... one cannot but be conscious of the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases ... There is “no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them”: per Lord Selborne LC, *Barnes v Addy*.

37. Black J emphasised the importance of moulding the scope of the duty to the facts of the case in *Colorado Products Pty Ltd (in Liq)* [2014] NSWSC 789 at [361] – [367] in the context of a group of companies operating with a common goal. His Honour held, in circumstances where it might be thought that there was a clear conflict of interest and duty on the part of one director, that duty had been narrowed by the arrangements between the companies that were working together. It should be noted that (for the most part) the fiduciary in that case was within the boundaries of her permissible interaction with third parties. The knowledge of the complaining parties was the reason that the director largely avoided liability on which the plaintiff. The plaintiff only succeeded on diversion of business because she went beyond the specified limits of permissible interaction between the parties. That is to say, the diversion of business was not merely a necessary consequence of the structure of arrangements between the parties.

38. However, once the scope of the duty is established, it will be hard for a fiduciary to justify taking an opportunity that should have been available to the company or principal business. The focus of the fiduciary duty is on

opportunities that the party to whom the duty was owed should have had the chance to exploit. In *Omilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166 the Full Court held (at [213]) that a director is bound by a fiduciary duty not to use information, authority, knowledge or resources which the company is entitled for his benefit. It does not matter that the ability to breach the fiduciary duty was ultimately dependent upon the consent or agreement of a third party (e.g. the potential or opportunity for lucrative business with a new customer). The likelihood that the third party would have agreed to the deal with the company only becomes relevant in the determining the quantum of loss.

39. In *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291; [2011] WASCA 17, McLure P described the content of a company director's fiduciary duty at [69] – [70] in these terms:

It has been observed that in the case of company directors, the conflict rule is not strictly applied: Ford's Principles of Corporations Law (13th ed) [9.060]. Thus a director can also be a shareholder and act with a personal interest even though the director cannot be shown to have freed his or her mind of that personal interest: *Mills v Mills* (1938) 60 CLR 150. It is also said that a director is permitted to occupy board positions in competing companies: *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165; *Bell v Lever Brothers Ltd* [1932] AC 161 at 195. There are similar examples in other types of fiduciary relationships. For example, real estate agents are entitled to act for multiple vendors of real estate even though the vendors are in competition for purchasers in the same geographic or other relevant market.

Of course, the scope of the rules can be narrowed or excluded by contract or other instrument which defines the duties and powers of the fiduciary. There is no suggestion in this case of any relevant provisions in WAE's constitution. However, that is not the only means by which the content of fiduciary duties can be affected. The High Court has said that the content of fiduciary duties are moulded to the character of the particular relationship so that even within an established fiduciary relationship, the content of the duties will not be uniform for all cases: *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11; 60 ALR 741 at 747. Further, the subject matter over which fiduciary obligations extend can be ascertained from the course of dealing between the parties or the circumstances of the appointment of the fiduciary: *Chan v Zacharia* (1984) 154 CLR 178 at 196 and 204; 53 ALR 417 at 431 (*Chan*). In my view,

these authorities provide the principled basis for any narrowing of the fiduciary rules applying to directors.

40. In *Canberra Residential Developments Pty Ltd v Brendas* (2010) 188 FCR 140; [2010] FCAFC 125 at [36] Finkelstein, Siopis and Katzman JJ summarised the law in relation to the nature of duties owed by a fiduciary:

But the mere existence of a fiduciary relationship does not define the nature of the duties that arise for three reasons. First, it is wrong to assume that the duty owed by a fiduciary attaches to every aspect of the fiduciary's conduct, however, irrelevant that conduct is to the relationship that is the source of the duty: *Re Coomber* [1911] 1 Ch 723 at 728–9. Second, the scope of the duty is very much dependent upon the facts of the particular case: *Hospital Products* at CLR 69, 73; ALR 433, ALR 435–6 per Gibbs CJ and at CLR 102; ALR 458 per Mason J. See also *Henderson, Hallam-Eames & Hughes v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206; [1994] 3 All ER 506 at 543. In most cases the duty will be determined in large part by reference to the nature of the activities of the principal: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407–8; [1929] ALR 273 at 283–4, referring to the need to identify the principal's "venture or undertaking". Third, defining the scope of the duty must be approached with commonsense and with an appreciation of the sort of circumstances in which it has been applied in the past. It should only be applied to a state of affairs which discloses a real conflict of duty and interest and not just some theoretical or rhetorical conflict: *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637–8; [1963] 1 All ER 716 at 730.

41. Those cases highlight the need to focus on the evidence on how the facts of a case might shape the content of the fiduciary duty. Particular attention should be paid to any agreements between the parties, ongoing indulgences and operational norms that existed between the parties.

### **The same business test**

42. The scope of business activities that a fiduciary is forbidden from conducting is defined by the business activities of the person to whom the duty is owed (called the "principal business" in this paper). The fiduciary cannot do anything that is within the scope of the principal business, or which might be in competition with it. As Dixon J put it in *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384 at 408:

The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.

43. If the second business is not competing with the principal business, or within the scope of the principal business, the fiduciary will not need to account merely for the use of information obtained from the principal (*Aas v Benham* [1891] 2 Ch 244 at 255-6 per Lindley LJ; at 257-258 per Bowen LJ; approved in *Phipps v Boardman* [1967] 2 AC 48 at 90-91, 107-108, 117), subject to the doctrine of confidential information.
44. The question of whether the business carried on is in the same nature as the business carried on by the partnership has been explored in a number of cases, including *Aas v Benham* [1891] 2 Ch 244 (ship broking and ship building – different businesses), *Glassington v Thwaites* (1822) 1 Sim & St 124; 57 ER 50 (morning newspaper and evening newspaper – same business). In *Gibson v Tyree* (1900) 20 NZLR 278, the majority in the Court of Appeal held that a purchase of boot leather, although in small lots, was in the same class as the business of wholesale leather merchants. In *Gibson*, Stout CJ held that the decisive issue was that the two businesses were in competition.
45. In *Birtchnell v Equity Trustees, Executors and Agency Co Ltd*, Dixon J held (at 408) that the subject matter over which the fiduciary obligations extend is determined not just by the character of the undertaking actually conducted, but also from the course of dealing actually pursued by the firm. His Honour went on to observe (at 412) that:

[T]he partnership was entitled to avail itself of any opportunity to embark upon such a transaction which came to the knowledge of the partners or any of them, and knowledge and information acquired by a partner as to the readiness of a client to share such profits, as to the conditions upon which he would do so, and generally as to every fact bearing upon the terms which the partnership might negotiate with him were all matters which no partner could lawfully withhold from the firm and turn to his own account. The relation between such a client and the partnership is a matter affecting the joint interests which each member was bound to safeguard and protect, and no member could enter into

dealings or engagements which conflicted or might conflict with those interests or which gave him a "bias against the fair discharge of his duty" in that respect.

46. Isaacs J explained the wider notion of the course of dealing in this way (at 394):

If, for instance, A and B are in partnership as wholesale grocers, and B arranges with C, a retail grocer, to share C's profits if B influences A to agree to supply C, I take it as clear that B's arrangement with C is a "transaction concerning the partnership," though C's business itself is wholly outside its scope. The case would fall within the observations of Cotton LJ in *Dean v MacDowell* [8 Ch D at 354], "acquired by him by reason of his connection with the firm".

47. In *Warman International Ltd v Dwyer* (1995) 182 CLR 544, for example, the respondent was the general manager of a branch of the appellant's business and conducted an agency. There was evidence in that case that the second business was carved out of the business operated by the engineering division of Warman. Black J, having referred to the passages of *Birtchnell* quoted above, summarised the test in *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9)* [2012] NSWSC 984 in these terms at [141]:

The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental".

48. Related to the same business test is the prohibition on a partner's use of partnership assets under s.29 of the *Partnership Act*, which is arguably slightly wider than the test in equity. That section provides:
- (1) Every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or for any use by the partner of the partnership property, name, or business connexion.

- (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
- (3) This section does not apply to or in respect of an incorporated limited partnership.

### **When is the duty owed**

49. There are important temporal limitations on the onerous obligations of a fiduciary. Any fiduciary obligation came to an end when the partnership dissolved: *White City Tennis Club v John Alexander's Clubs* [2008] NSWSC 1225 at [88] per Young CJ in Eq whose orders were restored by the High Court, *John Alexander's Clubs v White City Tennis Club* (2010) 266 ALR 462; [2010] HCA 19 at [30]; *Ryder v Frohlich* [2004] NSWSC 418 at [56] – [58] per Cripps J whose findings and reasoning on the point were not disturbed on appeal, *Ryder v Frohlich* [2004] NSWCA 472 at [52], [154], *Hodgson v Amcor Ltd* [2012] VSC 94 at [1370].
50. Gordon J suggested in *Zomojo v Hurd (No 2)* [2012] FCA 1458 at [208] that the fiduciary duty of a director continued after resignation relying (erroneously) on *Cook v Deeks* [1916] 1 AC 554. However, that statement should not be taken as authoritative because it is contrary to principle and precedent.
51. Of course, obligations under s.183 of the *Corporations Act 2001* or the equitable obligation to keep confidential information confidential continue beyond the termination of the employment. However, there can be some cross-over with the notion of fiduciary duties. In *Spotless Group Limited v Blanco Catering Pty Limited* [2011] FCA 979; (2011) 93 IPR 235 at [27], 242, Mansfield J held that the question of whether or not an employee can use information or knowledge after he left the employment depended on the manner in which the employee obtained the information. Where an employee has deliberately copied information while the employment relationship persisted, he could not use it after the employment relationship ceased even where that information was not of a confidential nature (citing *Faccenda Chicken Limited v Fowler* [1987] Ch 117 at 136, a case that has been doubted at the intermediate

appellate level in New South Wales). Apparently based on the idea that the information was obtained through dishonesty, Mansfield J held that the duty of fidelity survived determination of the employment contract. That idea was applied in oblique terms by Gordon J in *Zomojo Pty Limited v Hurd (No. 2)* [2012] FCA 1458 at [309], as explained by Kenny J in refusing leave to appeal from that decision: *Hurd v Zomojo Pty Limited* [2013] FCA 518 at 73 – 74.

### **Causation**

52. The common law rules for causation do not apply where a plaintiff seeks remedies for a breach of fiduciary duty other than equitable compensation: *Swindle v Harrison* [1997] 4 All ER 705 at 717; *Mantonella Pty Ltd v Thompson* (2009) 255 ALR 367 at 388 per Muir JA. However, where equitable compensation is sought, the plaintiff must establish some causal connection between the breach of trust and the loss for which compensation is recoverable, by the fact that the loss would not have occurred but for the breach: *Re Dawson (deceased)*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWLR 211 at 215 per Street J; cited with approval: *O'Halloran v RT Thomas and Family Pty Ltd* (1998) 45 NSWLR 262 at 275 per Spigelman CJ. Where the remedy sought is equitable compensation, the analysis is likely to be similar to common law causation, and it has even been argued, with some force, that it is the same test: M. O'Meara "Causation, Remoteness and Equitable Compensation" (2005) Aust Bar Rev 51.
53. The reasoning behind this was expressed in *Swindle v Harrison* [1997] 4 All ER 705 at 726 by Hobhouse LJ, in a passage cited with approval in *Mantonella Pty Ltd v Thompson* (2009) 255 ALR 367 at 389:
- Breach of fiduciary duty is not to be equated with common law deceit. It simply gives rise to a personal equity which is to be recognised by a court having Chancery jurisdiction so as to lead to a grant of an equitable remedy. It does not itself give rise to a right to damages. It relates to the transaction between the fiduciary and the person to whom he owes the duty. The remedy is essentially restitutionary in its character. The fiduciary may be restrained from enforcing the transaction. It may be rescinded. Accounts and restitution may be ordered. But, if a plaintiff seeks to recover common law damages, he must discharge the same burden of proof as would be required by a court applying the common law.

54. It has reasonably been observed that, to claim equitable compensation for breaches of fiduciary duty, the plaintiff must establish that it has sustained losses and that there is a causal link between the loss claimed and the breaches: *Nicholls v Michael Wilson & Partners Limited* [2012] NSWCA 383 at [172] per Sackville AJA (with whom Meagher and Barrett JJA agreed). The Court must identify a criteria which supply an adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty, which requires focus on the nature of the obligations and the nature of the breach: *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1 at [1090]. Note also the very strict approach to causation taken, in the context of a corporate group case, in *Vanguard Financial Planners Pty Limited v Ale* [2018] NSWSC 314 at [159] - [163].
55. In a causation context, it is important to distinguish a fiduciary's ability to account for profits from the alternative liability for equitable compensation. A fiduciary's liability to account may exist even though the profit or benefit was not of a kind that the person to whom the duty was owed could himself or herself have obtained: *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592 per Dixon and Evatt JJ and *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 108 per Mason J. However care should be taken not to conflate equitable compensation and account of profits. The fact that the person to whom the fiduciary duty is owed could not have derived that benefit usually means that, where the plaintiff elects for equitable compensation rather than an account of profits, they cannot claim the lost profits as "damages" caused by the breach (*Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9)* [2012] NSWSC 984 at [254] – [262]).
56. Where the plaintiff seeks an account of profits, it does not matter that the party to whom the fiduciary duty was owed could not have made the profit: *Phipps v Boardman* [1967] 2 AC 46; *Consul Developments* at 399. Sir Owen Dixon put it rather strongly in *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384 at 408-409 (although query whether the safety of mankind was ever really at risk).

Moreover, in considering such a matter it is important to remember that, in the language of James LJ, ‘the general principle that ... no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal ... is an inflexible rule, and must be applied inexorably by the Court, which is not entitled ... to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that’ (*Parker v McKenna*). Further, and this, perhaps, is a necessary corollary, the partner is responsible to his firm for profits, although his firm could not itself have gained them. See *Costa Rica Railway Co v Forwood*, where Vaughan Williams LJ formulates the principles and concludes: ‘As I understand, the rule is a rule to protect directors, trustees, and others against the fallibility of human nature by providing that, if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby, and will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their cestuis que trust, and although the profits may be such that their cestuis que trust could not have earned them at all.

57. However, traditional equitable constraints, such as the need to do equity, and the idea that equity is not to be used to produce a windfall gain or inequitable benefit. These concepts may be reflected in the terms on which the account is taken (such as just allowances).
58. The causation requirement for compensation under s.1317H of the *Corporations Act 2001* is more demanding than the causation test for a breach of fiduciary duty in equity: *Vanguard Financial Planners v Ale* [2018] NSWSC 314. This requires the plaintiff to establish that the relevant damage was, as a matter of fact, caused by the particular contravention, or satisfied a “common sense” standard of causation: *Adler v Australian Securities & Investment Commission* [2003] NSWCA 131; (2003) 46 ACSR 504; *Hydrocool Pty Limited v Hepburn (No. 4)* [2011] FCA 495; (2011) 279 ALR 646; 83 ACSR 652.

### ***The Briginshaw myth***

59. It is right, at least in theory, to say that a plaintiff faces a more exacting standard of proof when making out each incidence of fiduciary breach (and, arguably, the appropriate remedies). However, in practice, the Court seldom pauses to consider the test when it is faced with a person who has breached a fiduciary

duty. One practical matter that flows from this observation is that once one fiduciary breach is established, the plaintiff is likely to have an easier path to proof of other breaches. A proper understanding of the *Briginshaw* test, in its modern application, goes some way to explaining why that is so.

60. In *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334, Dixon J stated (at CLR 361–2; ALR 342):

... [W]hen the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent likelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

61. Ordinarily, the more serious the consequences of what is alleged in litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion: *CEPU v ASIC* (2007) 162 FCR 466; 242 ALR 643; [2007] FCAFC 132 at [30]. That means that if inferences are to be drawn, the plaintiff has to establish that the circumstances appearing in the evidence give rise to a reasonable and definite inference and not merely to conflicting inferences of equal degrees of probability: *CEPU* at [38].
62. In *Whitlam v Australian Securities and Investments Commission* (2003) 199 ALR 674; NSWCA 183 Hodgson, Ipp and Tobias JJA stated:

*The principle in Briginshaw calls attention to the requirement that a party seeking a finding of serious misconduct produce adequate material to enable a Court to reach a comfortable satisfaction on such a serious matter. Although this is not the same as the obligation of the Crown to call available evidence in a criminal prosecution, we think it is fair to say that a person seeking such a finding does need to be diligent in*

*calling available evidence, so that the Court is not left to rely on uncertain inferences* [at 119].

63. In *ASIC v Hellicar* [2012] HCA 17, the standard of proof required was not contested or at issue. The High Court pointed out that this standard finds its current expression in s.140(2) of the *Evidence Act 1995*. That section provides:
- (2) *Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
- (a) *the nature of the cause of action or defence; and*
- (b) *the nature of the subject-matter of the proceeding; and*
- (c) *the gravity of the matters alleged.*
64. In *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205; [2010] NSWCA 331 (Spigelman CJ, Beazley and Giles JJA) proceeded upon the basis that the *Briginshaw* standard applied to an alleged contravention of s.180 of the *Corporations Act 2001*. After noting that the standard finds its modern expression in the terms of s 140 of the Evidence Act 1995, their Honours observed that the *Briginshaw* standard is routinely applied in civil penalty proceedings. The Court held that under s.140 the Court must reach an ‘affirmative, or definite, conclusion, or an actual persuasion’ at [753].
65. In *Australian Securities and Investments Commission v Healey* (2011) 278 ALR 618; [2011] FCA 717, Middleton J dealt with a claim for breach of fiduciary duty by non-executive directors (a rare occasion where the *Briginshaw* standard is actually acknowledged outside civil penalty proceedings). ASIC made an application for declarations of contravention against the defendants in relation to ss.180(1), 601FD(3) and 344(1) and for orders that each defendant pay pecuniary penalties and be disqualified from managing corporations. His Honour approved of a summary of the law by Gzell J in *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287; (2009) 71 ACSR 368, (2009) 230 FLR 1 concerning the *Briginshaw* standard. That passage can be distilled to these points:

- (a) the Court must take into account the nature of the cause of action or defence, the nature of the subject matter of the proceedings and the gravity of the matters alleged;
  - (b) when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.
  - (c) reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal;
  - (d) in such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.
66. In *Healey*, Middleton J went on to note (at [103]) that where an applicant’s case rests on inferences from primary facts, it is not enough for the circumstances to give rise to conflicting inferences of equal degrees of probability so that the choice between them was mere conjecture (citing the High Court in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1). In *Hodgson v Amcor Ltd* (2012) 264 FLR 1, Vickery J applied the *Briginshaw* standards to claims of fiduciary breach at [551]:
- These are not civil penalty proceedings carrying a pecuniary penalty. However, the allegations made against the Defendants are serious and the consequences which may flow from the matters alleged, if made out, may be grave.

67. Knowing participation by a third party in a dishonest or fraudulent design on the part of the trustee or fiduciary required the *Briginshaw* standard for liability under the second limb of *Barnes v Addy: EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* [2013] WASC 183 at [658]. In *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621; [2012] FCA 1458, Gordon J held at [357] that Zomojo had to meet the *Briginshaw* standard of proof to establish a dishonest and fraudulent design for the purposes of establishing liability under *Barnes v Addy*. See also the statement of the majority of the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 – 451; (1992) 67 ALJR 170 at 170-171 (deceit and other fraudulent conduct attracts the *Briginshaw* standard), *Adler v ASIC* (2003) 179 FLR 1; 46 ACSR 504; [2003] NSWCA 131 at [146]–[148] (s.180 of the *Corporations Act 2001*) and *Re Wan Ze Property Development (Aust) Pty Ltd* (2012) 90 ACSR 593; [2012] NSWSC 722 at [34]: (declarations under s181 of the *Corporations Act 2001* and a constructive trust).
68. Most of the judicial discussion of the *Briginshaw* test arises in civil penalty proceedings. It is hard to find an example of a claim for equitable compensation or an account of profits for breach of fiduciary duty that has failed because of the *Briginshaw* standard. It is easy to find claims proved on strained inferences and inexact proofs: *Zomojo Pty Ltd v Hurd (No. 2)* (2012) 299 ALR 621; [2012] FCA 1458; *Re Springex Pty Ltd; Moshirzadeh v Sajadi* [2013] NSWSC 3. As a practical matter, in most cases where a civil Court believes that a fiduciary breach is likely to have occurred, everything is assumed against the fiduciary. Section 140(2) probably gives the Court some discretion to apply the ordinary standard, or something approaching it, if fines or imprisonment are not being sought.

### **Consent**

69. The classic test for a defence to an allegation of fiduciary breach is “fully informed consent”: *Phipps v Boardman* [1967] 2 AC 46; *Queensland Mines Limited v Hudson* (1978) 52 ALJR 399. However, consent is not a complete defence to a breach of fiduciary duty: *Spellson v George* (1992) 26 NSWLR

666 [1991] NSWCA 254 per Hope AJA at 674-675. In that case, Handley JA noted (at 669) that the authorities establish that:

[C]onsent is only a prima facie defence and that the Court must consider in detail "all the circumstances" in order to determine whether it would be "fair and equitable" for that beneficiary to be permitted to complain of that breach.

70. In *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108, Wilberforce J observed, in an oft-cited passage, that:

The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in ...

71. If the consent is not of the necessary quality, it is open to say that nothing has been consented to. On one view, the state of knowledge of the aggrieved person must be assessed in order to ascertain what has been consented to and what has not been the subject of effective consent.

72. In *Winthrop Investments Ltd v Winns Ltd (No 2)* (1975) 1 ACLR 222, in the context of ratification of directors' conduct by a general meeting, Bowen CJ in Eq referred to:

the general principle of law, namely, that if a general meeting is called to approve an action or proposed action of the directors it will not be effective unless there is a disclosure of material facts to enable shareholders to make a properly informed decision and an absence of material misrepresentation or material concealment.

73. As Black J noted in *Barescape Pty Ltd v Bacchus Holdings (No. 9)*:

Informed consent generally requires that a fiduciary disclose to the beneficiary all information in his or her possession in relation to the proposed transaction which was relevant to the beneficiary's consideration of whether or not to consent to it, and at least the material facts: *Boardman v Phipps* [1966] UKHL 2; [1967] 2 AC 46 at 93, 98, 112; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 NZLR 163; 1 WLR 1126; 2 All ER 1222 at 1227; *Spellson v George* [1992] NSWCA 254; (1992) 26 NSWLR 666 at 670 per

Handley JA; at 685 per Young AJA. It is not sufficient for a fiduciary to disclose information which is sufficient only to "put the principal on inquiry": *New Zealand Netherlands Society 'Oranje' Inc v Kuys* at 1227. The nature of existing legal rights between the parties may be material circumstances in respect of such consent: *Short v Crawley (No 30)* [2007] NSWSC 1322 at [619].

74. There is no hard and fast test on what amounts to the material facts that are required to be disclosed to satisfy the requirement of fully informed consent. As is so often the case, it will depend on the facts. In *Commonwealth Bank of Australia v Smith* [1991] FCA 375; (1991) 42 FCR 390; 102 ALR 453 at 477-478, Gummow J held that:

It frequently is said that the fiduciary will be absolved by the giving of fully informed consent to the existence of what otherwise would be a conflict. There is no precise formula which will determine in all cases if fully informed consent has been given; it is a question of fact in all the circumstances of each case: *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108 per Wilberforce J, whose judgment on this issue was untouched by the Court of Appeal, [1964] Ch 303. Turner LJ had spoken to the same effect in *Life Association of Scotland v Siddal* [1861] EngR 300; (1861) 3 De GF & J 58 at 73; [1861] EngR 300; 45 ER 800 at 806, and also had there said that the question was whether the party had been fully informed of his rights "and of all the material facts and circumstances of the case".

75. In *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 at 455, the majority in the High Court (Brennan CJ, Gaudron, McHugh and Gummow JJ) expressed the principle in this way:

[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given.

76. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [107], the majority of the High Court also noted that disclosure sufficient to establish informed consent could be made "at different times and in different ways" and that "the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made." Their Honours emphasised that, in that case, the principals of *Say-Dee* had much business experience and intelligence and were shrewd and astute, and pointed to the glaring improbability that they would not readily have deduced

relevant matters from their own experience and the information which had been provided to them. However, it has been said that the task of explanation inherent in a request to be excused from a fiduciary requirement is an onerous and exacting one: *McGrath re HIH Insurance Ltd* [2010] NSWSC 404 at [37] per Barrett J.

77. In *Blackmagic Design Pty Ltd v Overliese* [2011] FCAFC 24; (2011) 191 FCR 1; 276 ALR 646 at 668 [110], Besanko J (with whom Finkelstein and Jacobson JJ agreed) observed that not all matters needed to be disclosed to obtain informed consent, and held that:

There is no doubt that the disclosure required to avoid the consequences of a conflict is a full and frank disclosure of all material facts. The identification of the precise information which must be disclosed so that the fiduciary's principal is kept "fully informed of the real state of things" (*Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14 per Lord Radcliffe) is likely to depend on the particular facts of the case before the court. It seems to me that the material facts in this case are the facts which give rise to the conflict ...

78. Similarly, ratification of a fiduciary's breach of duty after the fact cannot occur without full disclosure of the facts: *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666.

### **Limitations**

79. Application of limitation of actions concepts to fiduciary breach is complicated by two matters. The first is that equity has traditionally declined to grant relief where the facts of the case warrant doing so under the overlapping doctrines of delay, laches and acquiescence. The second is that the Court may (and perhaps should) apply equivalent limitations provisions by analogy in some circumstances.

#### *Laches and Acquiescence*

80. The equitable defence of laches is relevant where the plaintiff has, by inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable to place him if the remedy were afterwards to be asserted: *Orr v Ford* (1989) 167 CLR 316 at 341 per Deane J.

81. There must be unreasonable delay in the institution of proceedings, and it must be established that by reason of the delay there has been such substantial detriment to the defendant as to render it unjust to allow the claim to be prosecuted: *Barker v Duke Group (in Liq)* (2005) 91 SASR 167 at [142]. Two relevant circumstances are the length of the delay and the nature of the acts done during the interval: *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291 at [633].
82. Laches is unlikely to be accepted as a defence to a breach of fiduciary duty where the plaintiff was not aware or able to enforce its rights: *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 92 ACSR 554. In that case, the Court considered the position of creditors where a director's breach has caused the company to enter into liquidation (at [89] – [90]).
83. Acquiescence becomes relevant when a plaintiff becomes aware of a breach of fiduciary duty and by inaction infers consent. In *Links Golf Tasmania Pty Ltd v Sattler* (2012) 292 ALR 382; [2012] FCA 634 a director disclosed his intention to establish a competing business in 2007. The company took no action. The director proceeded to incur substantial personal expense creating the business. Upon completion in 2009 the company alleged a breach of fiduciary duty and sought an account of profits. If his Honour had formed the view that the director had breached his fiduciary duty he would of held that July 2009 was too late for the plaintiff to commence proceedings asserting its rights in that regard on the grounds of acquiescence.
84. In *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291 two directors established a competing mining company. The shareholders knew of the material facts and had voting power to remove the directors and cause the company to institute proceedings. Action was taken six years after the fact. There was no explanation for the delay. Murphy JA (McLure P and Buss JA agreeing) found on appeal that by their conduct the shareholders acquiesced the fiduciary breaches. In that time the company established by the directors had developed from a speculative exploration company to a listed resources company. The court took the view that imposition of a constructive trust would

create great injustice (at [663]-[682]) and that even the claim for equitable compensation was barred by laches.

*The court's discretion to apply the limitations analogy*

85. Leaving aside some trust claims, there is no statutory limitations period for equitable claims, except by analogy. The court has the discretion to refuse to apply an analogous limitation period if it is unjust to do so. In *Re Greaves* (1881) 18 Ch D 551 at 553 per Jessel MR expressed the principle in this way:

When the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it.

86. According to Perry J in *Barker v Duke Group (in Liq)* (2005) 91 SASR 167 at [114]–[115], there are two steps to the limitation question where it arises in a pleaded defence to apply a limitation period by analogy to an equitable claim:

Clearly, the court must first determine whether the similarity is such as to justify the application of the analogy. Having done so, it must then consider whether, in all the circumstances, it is just to do so.

87. This inherently discretionary analysis (combined with the principle in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533) makes the court seem extremely reluctant to apply the analogy in interlocutory proceedings (*Young v Waterways Authority of New South Wales* [2002] NSWSC 612 per Burchett JA).
88. The position is different if the plaintiff seeks only an equitable remedy. The distinction between the auxiliary jurisdiction of equity (an equitable remedy in aid of a common law right)<sup>1</sup> and the exclusive jurisdiction (an equitable remedy in aid of an equitable doctrine) is important in this context, as explained by Isaacs J in *The Crown v McNeil* (1922) 31 CLR 76 at 100:

Where a Court of equity finds that a legal right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a Court of law. But where equity has created a new right founded on its

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<sup>1</sup> Damages here are referred to as equitable damages rather than equitable compensation, although the term damages is usually sufficient.

own doctrines exclusively, and no Act bars that specific right, then equity is free.

89. In other words, if the source of the obligation or cause of action is common law, but an equitable remedy is sought, the limitation period applies. However, if the source of the obligation or cause of action is an equitable doctrine, the limitation period will not apply. This focuses attention not just on the discretionary issues of delay, laches and acquiescence.
90. Breach of fiduciary duty is in the exclusive jurisdiction of equity. However, there are analogies in statute, which have limitation periods. Brereton J considered this issue in *Re Auzhair Supplies Pty Ltd (in Liq)* (2013) 92 ACSR 554. His Honour reconciled the two views, stating that in the exclusive jurisdiction of equity a court will undertake an assessment of an analogue legal claim. His Honour set out the test:

[62] First, in equity's auxiliary jurisdiction, where the court is asked to give a superior remedy for a legal right, equity applies the legal limitation period: it obeys the law.

[63] Second, even in equity's exclusive jurisdiction, where the cause of action is equity's own creature, then if there is an analogue between the equitable claim and a legal or statutory right to which a limitation period applies, a court of equity will ordinarily apply the limitation period: in this, equity follows the law, and applies the limitation period as an aspect of the doctrine of laches. The existence of an analogue can only be determined by considering each of the equitable claim, the legal or statutory right and their respective remedies in the context of the facts and circumstances of the case; but it does not depend on a minute comparison between the claim in equity and the supposed analogue; while differences in the elements of the respective causes of action are relevant, and possibly significant, not every difference justifies not applying the statute by analogy. Further, because, in this context, application of the analogous limitation period is an aspect of laches, it is also subject to exceptions where the greater equity outweighs it; thus it is relevant to consider the plaintiff's knowledge of the plaintiff's rights and in particular of the impact of fraud, as equity will not apply a time limit in a case of "concealed fraud". The relevant inquiry is therefore to consider, first, whether the equitable claim and the corresponding legal right are so similar that the time limit applicable to the latter should be applied to the former; and, second, where such a similarity

exists, whether it would nevertheless be inequitable to apply the analogous limitation period.

91. In *Barker and Ors v Duke Group (in Liq)* [2003] SASC 415, Doyle CJ said at [130]:

I agree that the application of a time limit by analogy cannot depend on a minute comparison between the claim in equity and the claim that is said to be similar and is said to be statute barred. It is to be expected that there will always be differences in the elements of the claim in equity and the claim which is said to be statute barred. However, differences in the elements of the respective causes of action must be relevant, and possibly significant.

92. Other cases, however, reveal an inconsistent approach and a tendency to let the merits of the case drive the application of principle. In *Williams v Minister* (1994) 35 NSWLR 497 at 510, Kirby P suggested that the *Limitation Act* could not be applied to a purely equitable cause of action by analogy. He agreed with the judgment of La Forest J of the Canadian Supreme Court in *KM v HM* (1992) 96 DLR (4th) 289 in a case dealing with an allegation that sexual abuse by a father was a breach of fiduciary duty. Curiously, Kirby P (whom Priestly JA tentatively agreed) saw force in La Forrest J's conclusion that the analogy did not apply to the purely equitable claim in that matter (although it should be noted that there were acts of concealment by the father in that case).
93. The Tasmanian Supreme Court in *Stilbo Pty Ltd & Ors v MCC Pty Ltd (in liquidation)* [2003] TASSC 6 at [34] held that a fiduciary breach amounting to theft<sup>2</sup> was analogous to a common law debt, and so the limitation period applied by analogy (applying *Metropolitan Bank v Heiron* (1880) LR 5 Ex D 319).
94. In *Barker and Ors v Duke Group (in Liq)* (2005) 91 SASR 167 at [96], Perry J said that there was a substantial difference between the director's fiduciary duties and a claim in the tort of deceit. However, actions against company directors as fiduciaries have been found to be analogous to claims under corporations legislation: *White Constructions (ACT) Pty Ltd (in liq) v White*

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<sup>2</sup> Where trust property is involved, even a trustee de son tort, section 11 of the *Limitations Act* NSW may apply.

[2005] NSWCA 173; *Hamilton v Kaljo* (1989) 17 NSWLR 381 at 385 and *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 92 ACSR 554.

95. There is no clear guidance on the application of the limitation analogy to equitable claims. However, wherever the equitable action might be said to be a substitute for a common law claim of the same general character, practitioners should be alive to the risk that the claim may be statute barred by analogy, even if there are not strong factors warranting the application of the laches doctrine.

### **Remedies**

96. There is no greater difference between the common law and equitable doctrines than the range of remedies available. Parties are often at pains to find a fiduciary duty or some other equity to enliven the range of flexible remedies that can be advantageous to a plaintiff, especially in a commercial context. The scope of remedies in equity is beyond the scope of this paper, but some of the key remedies that often arise in the context of fiduciary breach are discussed briefly.
97. It should be remembered that damages (or equitable compensation) is available as a remedy for fiduciary breach. While a plaintiff must elect between equitable compensation and an account of profits, the whole range of equitable remedies, including delivery up and cancellation of documents, constructive trusts, declarations, and remedies resulting from a tracing exercise are available. However, the plaintiff cannot “double dip” on remedies, and the remedies will be fashioned to put the plaintiff back into the position it would have been in but for the breach, subject to the requirement that the plaintiff do equity, proceed without undue delay and have clean hands.

*Account of profits*

98. A fiduciary may have to account in two different senses of the term. A fiduciary such as a trustee or agent that holds or manages funds or property on behalf of another person may be ordered to account in the sense that they must justify what has been received on behalf of the principal and what expenses have been disbursed. This remedy usually involves a formal taking of accounts so that there is a process of scrutinising the individual entries put forward by the fiduciary so that the ultimate question of whether any amount is payable by the fiduciary to the principal can be determined. More commonly, a fiduciary that breaches the duty and thereby obtains some sort of benefit or profit may be ordered to account to the principal for those profits. Although this process often involves a formal taking of the account in some sense, it is often done by the trial Judge and without the laborious process traditionally associated with taking accounts. The key aspect of the account of profits remedy is that causation has no role to play; the fiduciary must disgorge the profits that it made regardless of whether the principal has suffered any loss. For example, it does not matter that the principal was not in a position to even capitalise on the opportunity that the fiduciary wrongly took for themselves: *Boardman v Phipps* [1966] UKHL 2; [1967] 2 AC 46; [1966] 3 WLR 1009.
99. It should not be assumed that “profits” is the total net profit after all expenses have been taken into account. While the starting point is the difference between the price received and the cost of manufacture (*Peter Pan Manufacturing Corporation v Corsets Silhouette Limited* [1963] 3 All ER 402 at 412) there is often a dispute about which aspects of income are truly connected with or arising as a result of the fiduciary breach and which of the expenses incurred are just allowances for the purposes of taking the account of profits. Problems arise in allowing for general overheads and the skill on labour of the fiduciary, particularly where the entity in question also had some non-contravening business activities (see generally Finnane, Newton and Wood “Equity Practice and Precedents” (Thomson Lawbook Co., 2008, paragraph [14.30])). These matters involve something of a judicial estimation (*Warman International v*

*Dwyer* (1995) 182 CLR 544 at 567; [1995] HCA 18), making it hard to give any meaningful advice on the likely account of profits at the start of a proceeding.

### *Constructive trust*

100. A constructive trust may be imposed by operation of the law to place property in relation to the fiduciary breach on trust for the party suffering the breach. It is not necessary for the resulting beneficiary to own or have intended to act with regards to the subject property. The Court will typically order a constructive trust where it forms the view that equity would consider it unconscionable for the party holding the property in question to deny the interest claimed by another (*Stepherson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536 at 552, per Gummow J). Typically, a fiduciary who profits from their position by making an improper gain, such as entering into some engagement in circumstances of conflicting interests and thereby derives a benefit, may be held to be constructive trustee of the improper gain or benefit.
101. The imposition of a constructive trust is discretionary. The notion of the minimum equity is important. Generally, the court will consider whether the circumstances warrant the imposition of a constructive trust or an alternative remedy such as the imposition of an equitable charge, account of profits or equitable compensation (*Birchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384). As the court is dealing with property, it will stress the interests of third parties: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 266 ALR 462; [2010] HCA 19.

### *Barnes v Addy*

102. A third party that is involved in another person's breach of fiduciary duty, or knowingly gains a benefit from it, may be personally liable. The rule in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251 involves establishing the liability of third parties according to either one of two alternative "limbs":

That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the

injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive had become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

103. An example of liability under the first limb is to a transfer of company property by directors or other fiduciaries in breach of their fiduciary duties: *Robins v Incentive Dynamics Pty Ltd (in Liq)* (2003) 175 FLR 286; [2003] NSWCA 71 at [60] per Mason P.
104. Under the second limb, a person becomes a constructive trustee of property if that person, appointed as a trustee, purports to acquire for themselves beneficially any property through the giving of knowing assistance to a fiduciary acting in breach of duty. Even where the accessory does not make a profit, and has not received any trust property, but who nevertheless caused loss to the person to whom the fiduciary duty is owed, that accessory is placed under an equitable obligation to compensate whom the fiduciary duty is owed for the loss so caused: *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153 (per McLelland A-JA, with whom Priestly and Meagher JJA concurred at 145).
105. It is clear that the principles in *Barnes v Addy* now extend to breach of fiduciary duty as well as breach of trust (*Consul Developments Pty Ltd v DCP Estates Pty Ltd* (1975) 132 CLR 373 at 397; *Ninety Five Pty Ltd (in liq) v Banque Nationale De Paris* [1988] WAR 132). In any event, a director is regarded as the trustee of the funds (and physical assets) under their control (*Springfield Acres Ltd (in liq) v Abacus (Hong Kong) Ltd* [1994] 3 NZLR 502). The Privy Council has recently rejected the notion that, to establish liability for knowing assistance (second limb), the breach of trust or fiduciary duty must be fraudulent (*Royal Brunei Airlines v Tan* [1995] 3 All ER 97 per Nicholls LJ). Dishonesty on the part of the person assisting is sufficient, but more than knowledge of the facts which make the conduct wrongful is required (*Twinsectra Limited v Yardley*

*and Others* [2002] UKHL 12 per Lord Hoffmann at [20] and Lord Hutton at [49]).

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