BREACH OF FIDUCIARY DUTIES IN COMMERCIAL CASES: RECENT DEVELOPMENTS

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1. For a plaintiff in a commercial case, if it can establish that a defendant owed it fiduciary duties and that the defendant has breached those duties, those matters open a potential gateway to equitable remedies, principally to an account of profits, equitable compensation or a constructive trust. Fiduciary duties (or obligations) are imposed on a defendant by the Court exercising its equitable jurisdiction. The Court, at the highest level of abstraction, asks: Has the defendant by reason of having breached fiduciary duties engaged in unconscionable conduct such as to require equitable remedies to be ordered against the defendant and in favour of the plaintiff? At the forensic level, what does the plaintiff have to prove to persuade the Court to order one of these equitable remedies?

2. The plaintiff will typically seek to establish a breach of fiduciary duties owed by the defendant to it in circumstances where common law, or statutory, claims are not applicable or if they are, where such claims result in remedies less advantageous to the plaintiff than equitable remedies. For example, the plaintiff may have no contractual claim because no agreement was concluded with the defendant. If an agreement was reached, the plaintiff on a breach of contract claim may be confined to a loss of opportunity claim in accordance with the principles in *Sellars v Adelaide Petroleum NL*,[1] and be unable to claim the actual profits made by the defendant from the impugned conduct. Consequently, the defendant's interest will be in contending that no fiduciary duties are owed by it - hence no question of breach (much less of remedies)

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1 (1994 179 CLR 332; [1994] HCA 4.

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arises, and that the plaintiff must seek to make good other causes of action, if it can.

3. The Court will readily infer that some relationships give rise to fiduciary duties, such as between trustee and beneficiary, director and company, agent and principal, solicitor and client, employee and employer and partners inter se. However, the principal focus of this paper will be upon other commercial relations or dealings between the plaintiff and defendant where fiduciary duties arise, or may arise, from all of the relevant facts comprising the course of dealings between them, rather than from the well-recognised legal status of the other relationships to which I have referred. The plaintiff and the defendant may have entered into a legal binding commercial agreement for mutual advantage, or may have negotiated to reach such an agreement but substantially performed the venture without having concluded an agreement. The question then immediately arises: What was it about the agreement or course of dealings that grounds, or gives rise to, or justifies the Court in finding that fiduciary duties bind the defendant fiduciary, or fiduciaries, in addition to contractual or other legal obligations that apply? Also: Where status-based fiduciary duties were owed, such as by directors to companies and by partners inter se, how do such duties fit with the legal obligations that otherwise apply?

4. The breach of fiduciary duty complained of will commonly involve a diversion of a trade or business or commercial opportunity, away from the corporate or other vehicle used or to be used by the plaintiff and the fiduciary in their commercial dealings, to a person or persons controlled by the fiduciary or associated, or in some way involved with the fiduciary. The plaintiff will seek to strip the defendants of the profit so gained by them, or will seek compensation from the defendants for the losses suffered by it from the impugned conduct.

5. In this paper, as is customary, I will refer to the person who owes fiduciary duties to another as the fiduciary. The person to whom the duties are owed is often referred to as the principal, or the beneficiary. I will not use these descriptions because of the agency/trust connotations of those words, and will instead simply refer to the recipient of the duties as the plaintiff. The plaintiff will allege that the relevant defendant owes it fiduciary duties, but of course the

plaintiff may or may not succeed in making good that allegation. I attempt here to provide an overview of the plaintiff's claim: Fiduciary obligations, breach, defences and remedies, with particular reference to recent cases.

6. In a proceeding where the plaintiff alleges breaches of fiduciary duties in a commercial dealings context, typically the plaintiff sues multiple defendants. The alleged fiduciary or fiduciaries may be an individual and/or a company controlled or operated by the individual. Liability in the company can readily arise if it is the alter ego of the individual. The knowledge and conduct of the person can be imputed to the company. If the company is the fiduciary, the controller may be liable by reason of his or her participation in and control of the affairs of the company. Importantly, third party non-fiduciaries who truly are at arm's length to the fiduciary defendant, but who have knowingly assisted in a dishonest and fraudulent breach of the fiduciary duties, may be liable as if it or they were fiduciaries.[2] Such liability in third parties is referred to as accessorial liability, or perhaps more accurately as ancillary liability.[3] The accessories will be sued by the plaintiff as defendants, as well as the fiduciary. That such third party defendants may be persons with whom the plaintiff had no dealings at all, but yet can be liable to the plaintiff as though they were fiduciaries, shows the long arm of equitable remedies here.

What are fiduciary duties?

7. It is convenient to state, at the level of equitable principle, what the content of fiduciary duties or obligations are, before turning to the difficult questions of when and why they arise in a commercial dealings case. The law is clear: Fiduciary duties are proscriptive (thou shalt not), rather than prescriptive (thou shall). The fiduciary is obliged to not act against the interests of the plaintiff and in his own interests, or those of a third party instead, in connexion with their commercial dealings. However, the fiduciary is not obliged to act solely

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2 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd (Ancient Order of Foresters)* (2018) 360 ALR 1; [2018] HCA 43, [77], per Gageler J.

3 *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [76], [77], per Gageler J; *Lewis Securities Ltd (in liq) v Carter (Lewis Securities)* (2018) 334 FLR 9; [2018] NSWCA 118, [63] per Leeming JA.

in the *best* interests of the plaintiff.[4] The distinction between proscriptive and prescriptive duties or obligations is important. A Court of equity here will not judge what the plaintiff's best interests are, especially when the fiduciary exercising a discretionary power under the commercial relationship between them may properly do so in a number of different ways. However, a Court of equity can and will judge whether the fiduciary has exercised the power against the interests of the plaintiff, and in favour of those of the defendant instead. Where the subject matter or scope of proscriptive fiduciary duties owed by the fiduciary to the plaintiffs arising from the nature and extent of their commercial dealings together are clearly defined, if the fiduciary has breached his duties, that should likewise appear clearly to the Court.[5]

8. Gageler J in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*,[6] described the two overlapping proscriptive obligations, the conflict rule and the profit rule, in the following terms:

> [68] "The first", often referred to as the "conflict rule", "is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest." The unconscionability which attracts equitable remedies in circumstances where the conflict rule alone is invoked lies not so much in receipt by the fiduciary of the benefit or gain (over which the fiduciary need not have control) as in retention by the fiduciary of the benefit or gain which in conscience ought to be disgorged to the principal.
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> [69] "The second", often referred to as the "profit rule", "is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of [the] fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing [the fiduciary's] position for [the fiduciary's] personal advantage." The unconscionability which attracts equitable remedies in such circumstances lies in pursuit by the fiduciary of self-interest, or,

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4 *Howard v Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21, [31], [56] per Hayne and Crennan JJ; *Breen v Williams* (1996) 186 CLR 71 at 95; [1995] HCA 63 (per Dawson and Toohey J) 113 per Gaudron and McHugh JJ; *Pilmer v Duke Group Ltd (in Liq)* (2001) 207 CLR 165; [2001] HCA 31 at [74] per McHugh, Gummow, Hayne and Callinan JJ.

5 *Birtchnell v Equity Trustees* (1929) 42 CLR 384 at 408; [1929] HCA 24 per Dixon J.

6 [2018] HCA 43 at [68], [69], [70].

more precisely, in pursuit of an interest other than the exclusive interest of the principal.

[70] Consistently with the objective of imposing each obligation, in neither case does the benefit or gain to the fiduciary need to be at the expense of the principal, though it may be. And in neither case does the fiduciary need to act dishonestly or fraudulently, or otherwise than in good faith, though again the fiduciary may do so. Where a fiduciary does act dishonestly and fraudulently, however, the dishonest and fraudulent character of the breach of fiduciary duty is not without consequence for the intensity of the equitable remedies available against the defaulting fiduciary. More important for present purposes is that the dishonest and fraudulent character of the conduct of the fiduciary gives rise to the potential for similar remedies to be available in equity against another person who might knowingly participate in the fiduciary's breach.

(citations omitted)

9. Gageler J also stated:

> [67] … the fiduciary duty that … [a] person in a fiduciary position has to any other person to whom the fiduciary duty is owed within the scope of the venture or undertaking in respect of which the person in the fiduciary position has undertaken or assumed a responsibility to act in the exclusive interests of that other person, is a duty of absolute and disinterested loyalty.[7]

The conflict rule and the profit rule are imposed by equity as the means by which the duty of loyalty owed by the fiduciary is achieved or enforced. Accordingly, where the fiduciary has breached the conflict rule and/or the profit rule, the fiduciary will have been disloyal to the plaintiff.

10. The conflict rule was explained by the Full Federal Court in *Commonwealth Bank v Smith*:[8]

> "… Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in

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7 Fiduciary loyalty has been considered by one commentator to be loyalty as fidelity (faithfulness), rather than loyalty as partiality: Matthew Harding, "Disgorgement of Profit and Fiduciary Loyalty"; Chapter 2 in Equitable Compensation and Disgorgement of Profit, Simon Degeling and Jason NE Varuhus Hart Publishing 2017.

8 (1991) 42 FCR 390; [1991] FCA 375, [81], [82].

> the other … In such a case, it is not to the point that the fiduciary himself may not stand to profit from the transaction he brings about between the parties. The prohibition is not against the making of a profit (though may cases of breach of duty involve the wrongful acquisition of a profit, rather than the infliction of a loss) but of the avoidance of conflicting duties … "[9]

11. Black J in *Vanguard Financial Planners Pty Ltd v Ale,*[10] stated:

> [129] … The no conflict rule has a strict application when it applies in the sense that, if a transaction has occurred in conflict of interest, a company director cannot avoid a breach of that rule by asserting the fairness of the transaction or that the director was not acting with subjective dishonesty.

12. That the prevention of unconscionable conduct by the fiduciary is the ultimate touchstone of the conflict and profit rules, does not mean that the Court of equity requires that the fiduciary must have been subjectively or consciously aware of a conflict of interest. The test for the existence of a conflict, or of a real and substantial possibility of conflict, is an objective one. It is to be determined from the standpoint of the objective observer with knowledge of all relevant facts and circumstances.[11]

13. Concerning the position of non-fiduciary third parties, Gageler J stated:[12]

> [71] Knowing participation by a non-fiduciary in a dishonest and fraudulent breach of fiduciary duty is conduct which is regarded in equity as itself unconscionable and as attracting equitable remedies against the knowing participant of the same kind as those available against the errant fiduciary.[13] Knowing participation in a dishonest and fraudulent breach of fiduciary duty includes knowingly assisting the fiduciary in the execution of a "dishonest and fraudulent design" on the part of the fiduciary to engage in the conduct that is in breach of fiduciary

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9 See too *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1; [2014] WASC 102, [265]-[268] per Edelman J.

10 (2018) 354 ALR 711; [2018] NSWSC 314, [129].

11 *Boardman v Phipps* [1967] 2 AC 46 at 124; [1966] UKHL 2 per Lord Diplock; *Coope v LCM Litigation Fund Pty Ltd (Coope)* (2016) 333 ALR 524; [2016] NSWCA 35 [109] per Payne JA; *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307, [94] per Meagher JA.

12 *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [71], [72].

13 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 378 at 397-398; [1975] HCA 8; *Farah Constructions Pty Ltd v Say-Dee Ltd (Farah Constructions)* (2007) 230 CLR 89 at 164, [179]; [2007] HCA 22.

> duty.[14] The requisite element of dishonesty and fraud on the part of the fiduciary is met where the conduct which constitutes the breach transgresses ordinary standards of honest behaviour.[15] Correspondingly, the requisite element of knowledge on the part of the participant is met where the participant has knowledge of circumstances which would indicate the fact of the dishonesty on the part of the fiduciary to an honest and reasonable person.[16]
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> [72] That is not to say that other participatory conduct by non-fiduciaries in other breaches of fiduciary duty cannot attract equitable remedies.[17]

A fiduciary relationship?

14. What is it about the commercial dealings between the plaintiff and the alleged fiduciary defendant that give rise to the defendant being obliged to act in conformity with the proscriptive, negative fiduciary duties comprised by the conflict and profit rules? Where a defendant is bound by fiduciary duties, the defendant is considered to be in a fiduciary relationship with the plaintiff. It is that relationship which gives rise to these fiduciary duties. What characterises such a relationship?

15. The starting point is what it is that the plaintiff and the alleged fiduciary have agreed or undertaken between themselves to do, or not do, in relation to their commercial enterprise. That the plaintiff and the defendant may have reached a legally binding agreement does not mean that the commercial relationship between them is not fiduciary, or that the contract governs their relations to the exclusion of equitable fiduciary duties. However, the terms of the agreement will be important on the question whether fiduciary duties subsist together with the parties' contractual obligation, for at least three reasons.[18]

16. First, the nature and extent of the contractual obligations of the parties under the contract may well determine whether fiduciary duties are owed by the

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14 *Farah Constructions* (2007) 230 CLR 89 at 159; [2007] HCA 22, [160].

15 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 636; [2014] NSWCA 266, [124].

16 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163-164; [2007] HCA 22, [174]-[177]; This paragraph is a statement of *Barnes v Addy* non-fiduciary third party liability.

17 Citing *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; *(Grimaldi)* [2012] FCAFC 6 at [242]-[248], which includes reference to inducement liability discussed below.

18 See generally Justice Leeming, "The scope of fiduciary obligations: How contract informs, but does not determine, the scope of fiduciary obligations" (2009) 3 Journal of Equity.

defendant, and if so the scope of those duties and the subject matter of them. Secondly, the alleged fiduciary duties must be consistent with the terms of the agreement. Fiduciary duties can add to express contractual obligations provided by the terms of the contract, but cannot contradict or cut across the terms. Thirdly, the parties may by the terms have expressly attempted to contract out of fiduciary obligations. If so, such contractual terms must be objectively construed having regard to the provisions of the rest of the agreement, and the commercial context of the contract, in the usual way.[19] The Court will be slow to find that the parties can contract out of the relationship between the parties as being fiduciary in nature, if the Court is satisfied that it otherwise bears that nature. However, the Court must give such effect to the exclusion clause/s on the proper construction of the agreement as a whole. Questions arise here: Why would either party seek to contract out of fiduciary duties anticipating that the other party would breach such duties? Why would either party seek to deny itself the benefit of equitable remedies in the (unexpected) event that the conflict or profit rules were to be breached (even assuming that the parties were aware of those rule) and turned their minds to them).

17. Importantly, the Court in characterising the nature of the relationship under the contract as being fiduciary or not, is not bound by the four walls of the terms of the agreement. The course of dealings between the parties will be relevant as well.[20] That this is so is consistent with the different scenario of a concluded agreement never having been reached. There the course of dealings between the plaintiff and the alleged fiduciary will obviously be critical, including their negotiations directed towards reaching a binding agreement, and any conduct in the nature of part-performance of a prospective concluded agreement consistent only with them being in serious commercial relations with one another.

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19 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37, [46]-[51] per French CJ, Nettle and Gordon JJ.

20 *Birtchnell v Equity Trustees* (1929) 42 CLR 384 at 400, 401, 408; [1929] HCA 24 per Dixon J; *Chan v Zacharia* (1984) 154 CLR 178, 196; [1984] HCA 36 (per Deane J); *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC 6, [179] per Finn, Stone and Perram JJ.

18. Concerning the fiduciary obligations which company directors owe to the company, the proscriptive duties attach to the powers and discretions exercised by company directors. These include:

> "… a duty not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict … As fiduciary agents, directors must exercise their powers honestly in furtherance of the purposes for which they are given and not for their personal benefit or gain or for that of a third party."[21]

19. It commonly occurs that where a director has breached his or her fiduciary obligations to the plaintiff company, the factual basis for that also establishes that ss 181 and 182 of the *Corporations Act* have been breached. In such circumstances the Court may refrain from making findings in relation to those provisions, and to the remedies provision s 1317H.[22]

20. Concerning partnerships, Sifris J in *Chickabo Pty Ltd v Zphere Pty Ltd*[23] stated:

> [49] It is critical to note that the fiduciary obligations between partners arise as a result of their position vis a vis one another, and the nature of the undertaking by each fiduciary, rather than necessarily arising from any partnership deed between them.
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> [51] Where a partnership deed or some other instrument exists, it will be necessary to have regard to the terms of the instrument to determine the scope or ambit of the fiduciary's undertaking. The limits of fiduciary duties in the context of a partnership may be determined by 'the character of the venture for which the partnership existed, the express agreement by the parties, and the course of dealings' pursued by the partnership.
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> (citations omitted)

21. As to the position where the prospective contractual parties are found to have failed to enter into a legally binding agreement (whatever the plaintiff may have

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21 *Howard v Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21, [31]; see too *Corporations Act 2001* (Cth) ss 181-185, 1317H.

22 Eg. *Coope* (2016) 333 ALR 524; [2016] NSWCA 37, [158]-[159] per Payne JA; Cf. *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418; [2013] FCAFC 16.

23 [2019] VSC 73.

thought about whether an agreement had been struck),[24] Mason, Brennan and Deane JJ in *United Dominions Corporation Ltd v Brian Pty Ltd*[25] stated as follows:

> [7] It was submitted on behalf of UDC that no fiduciary relationship existed and no fiduciary duties arose between the prospective participants in the joint venture until the joint venture agreement was actually executed in July 1974. To the extent that that submission involves a general legal proposition that the relationship between prospective partners or joint venturers cannot be a fiduciary one until a formal agreement is executed, it is clearly wrong. A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement. Likewise, the relationship between prospective partners or participants in a proposed partnership to carry out a single joint undertaking or endeavour will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps involved in its establishment or implementation.

22. There is no authoritative, comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship is determined. That this is so is unsurprising, particularly in relation to commercial dealings which do not depend on the status of the plaintiff and the alleged fiduciary, but upon the specific circumstances of the dealings between joint venturers, a distributor and a manufacturer, a franchisee and a franchisor or other co-operative commercial parties. The law develops case by case. However at the level of equitable principle, the position is clear enough.

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24 Plaintiffs here tend to be optimists and believe that there was a deal done, but the Court may decide that there was no concluded agreement.

25 (1985) 157 CLR 1; [1985] HCA 49 at [7].

23. In *Hospital Products Ltd v United Surgical Corporation (Hospital Products)*,[26] Mason J observed that "the critical feature" of the recognised traditional types of fiduciary relationship:

> "… is 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… It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed."

24. In *Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd*,[27] Santamaria JA stated:

> [119] The essence of a fiduciary relationship is that one party to the relationship is obliged to act in the interests of another party (or, in the case of a partnership or joint venture, their joint interest) to the exclusion of the former's self-interest. As a result, the fiduciary is prevented from entering into any engagement in which the fiduciary has, or could have, a personal interest conflicting with that of his or her principal; nor is the fiduciary allowed to retain any benefit or gain obtained or received by reason of or by use of its fiduciary position or through some opportunity or knowledge resulting from it.
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> [123] In *Breen v Williams*, Gaudron and McHugh JJ identified several circumstances that point towards, but do not determine, the existence of a fiduciary relationship:
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> > These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.

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[26] (1984) 156 CLR 41 at 96-97; [1985] HCA 64.

[27] (2017) 54 VR 625; [2017] VSCA 326 at [119], [123], [124], [125].

> [124] The existence of one or more of the above indicia is not determinative of the existence of a fiduciary relationship; 'the fundamental question is for what purpose, and for the promotion of whose interests, are powers held?' That being said, a fundamental and inflexible feature of a fiduciary relationship is the existence of an obligation of loyalty: '[t]he principal is entitled to the single-minded loyalty of his fiduciary'.
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> [125] More often than not, commercial transactions which were negotiated at arm's length between self-interested and sophisticated parties on an equal footing do not give rise to fiduciary duties. Similarly, equity will not lightly impose fiduciary duties on parties to a well-defined contractual relationship in which the parties have prescribed in detail their rights and obligations. The reluctance of equity to intervene in these situations is understandable: the relationship between the parties is far removed from those relationships which tend towards the existence of fiduciary duties and exhibit such features as an undertaking to act for or on behalf of another, a representative character, loyalty, dependency, ascendancy, vulnerability, reliance and so on. The principle was conveyed succinctly in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*:
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> > [T]he reason why commercial transactions falling outside the accepted traditional categories of fiduciary relationship often do not give rise to fiduciary duties is not that they are 'commercial' in nature, but that they do not meet the criteria for characterisation as fiduciary in nature.
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> (citations omitted)

25. Finn, Stone and Perram J in *Grimaldi*,[28] put the matter differently by focusing on the position of the person to whom the fiduciary owes obligations:

> [177] … a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would reasonably entitle that other to expect, that he or she will act in that other's interests to the exclusion of his or her own or a third party's interest citing …[29]

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[28] (2012) 200 FCR 296; [2012] FCAFC 6 at [177].

[29] See similarly *Red Hill Iron Ltd v API Management* [2012] WASC 323, [364] per Beech J.

26. Where the plaintiff and the fiduciary are in a fiduciary relationship, no doubt it will be the case that the plaintiff had such a reasonable expectation. Professor Finn writing later in 2014 suggested that:

> "One can only describe, but not define, when a relationship will be a fiduciary one in whole or partly. The description I have proposed is this: A person will be in a fiduciary relationship with another when that other is reasonably entitled to expect that he or she will act in that other's interest (or in their joint interest) to the exclusion of his or her own several interests, for a purpose, or some or all purposes of their relationship".

27. Of particular relevance here are joint venture agreements, or where prospective joint venturers have not yet reached a concluded legally binding agreement but yet have commenced to substantially perform the joint venture in the belief or expectation that an agreement had been, or would be, concluded. Mason, Brennan and Deane JJ in *United Dominions Corporation Ltd v Brian*[30] explained as follows:

> [5] The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may on occasion be blurred. Thus, where one party contributes only money or other property, it may sometimes be difficult to determine whether a relationship is a joint venture in which both parties are entitled to a share of profits or a simple contract of loan or a lease under which the interest or rent payable to the party providing the money or property is determined by reference to the profits made by the other. One would need a more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one. The most that can be said is that whether or not the relationship between joint venturers is

30 (1985) 157 CLR 1; [1985] HCA 49, [5].

> fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers from being a fiduciary one. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship.[31]

(citations omitted).

28. Where there is a fiduciary relationship between the defendant and the plaintiff in connexion with a joint venture between them, the fiduciary will be obliged in equity to subordinate his or her or its own interests to the interests of the joint venture in which they are both participants. The fiduciary's interest in the venture will be a joint interest with the plaintiff, and not a several one separate from a like several interest of the plaintiff. Under the conflict and profit rules, the fiduciary will be obliged not to exercise powers or discretions as a joint venturer in her own several interests against the joint interests of the fiduciary and the plaintiff in connexion with the business of the joint venture. Each joint venturer obviously will have her own interest in the venture succeeding. That would be to the mutual advantage of the plaintiff and the fiduciary. However the fiduciary will not be permitted to pursue her own different separate interest where to do so would conflict with her fiduciary duties not to act against the interests of the joint venture, but only in favour of them.

29. The fiduciary will not be entitled to appropriate a business opportunity or contract with other persons to himself, to his alter ego company or to third parties that otherwise the joint venture could or would have been taken up. Indeed, where the plaintiff demonstrates to the Court that the joint venturers were in a fiduciary relationship and that the fiduciary has breached the conflict and/or profit rules, it matters not that on a counterfactual[32] the relevant business venture may not have taken up the business opportunity which the

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31 See too *Chan v Zacharia* (1984) 154 CLR 178 at 199; [1984] HCA 36 per Deane J; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1 at 9-11, per Williams J.

32 What was likely to have happened but for the impugned conduct.

fiduciary or third parties did take up.[33] That the fiduciary may have acted honestly and reasonably provides no defence to the fiduciary if the Court decides that the fiduciary duties that he owed to the plaintiff have been breached.[34]

30. The conflict and/or profit rules can be avoided by the fiduciary if he or she or it makes full disclosure to the plaintiff of the nature and extent of the opportunity, and the plaintiff consents or agrees to the fiduciary or others exploiting the opportunity instead of the joint venture. Difficult questions of fact can arise whether the prospective opportunity "belonged" to the joint venture in the sense that the opportunity was the very thing that the venture was seeking to identify, or if the opportunity was outside of that but resulted from knowledge gained by the fiduciary in performing his, her or its tasks under the venture.[35] If it did and there had been some disclosure, there may well be a question whether the disclosure was sufficient.[36] Such factual issues typically are determined by the scope of the obligations undertaken by the fiduciary concerning performance of the joint venture. The fiduciary may well have managerial control of the joint venture business and dealings with third parties, whereas the plaintiff may have provided funding to the business, not have been involved in the day to day operations and have trusted managerial discretions to his co-venturer. In such joint ventures, profit sharing despite the different roles played by the plaintiff and the fiduciary, and equal ownership of the corporate vehicle of the joint venture, will tend to indicate that the relationship between the joint venturers was a fiduciary one.

31. In commercial dealings cases outside the recognised categories of status-based fiduciary relations, in order to describe the circumstances in which such dealings are characterised as giving rise to a fiduciary relationship between the

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33 *Warman International Ltd v Dwyer* (1995) 182 CLR 544; [1995] HCA 18, [24] per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ, citing *Regal (Hastings) Ltd v Gullivery* (1967) 2 AC 134; [1942] UKHL 1; *Phipps v Boardman* (1967) 2 AC 46; [1966] UKHLZ; *Birtchell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409; [1929] HCA 24; *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592; [1936] HCA 3; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 394; [1975] HCA 8; *Industrial Development Consultants Ltd v Cooley* (1972) 1 WLR 443; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371.

34 Eg *Coope* (2016) 333 ALR 524; [2016] NSWCA 37, [158]-[159] per Payne JA.

35 Eg. *Chan v Zacharia* (1984) 154 CLR 178; [1984] HCA 36.

36 *Farah Constructions* (2007) 230 CLR 89; [2007] HCA 22.

fiduciary and the plaintiff, it is instructive to consider cases where no fiduciary relationship has been found.

32. In *Gibson Motorsport Merchandise Pty Ltd v Forbes (Gibson Motorsport)*,[37] the appellant at trial had unsuccessfully alleged that a joint venture agreement had been reached, and alternatively that fiduciary duties were owed by the respondents in any event. On appeal, the appellants did not contest the finding by Crennan J that no joint venture agreement had come into existence.[38] However, the appellants argued that there was a fiduciary relationship between them and the respondents as they had reposed mutual trust and confidence in each other in the negotiating phase.[39] The Full Court rejected that contention. Sundberg and Emmett JJ considered that:

> [98] It is significant that there is no challenge in the appeal by the appellants to the findings made by the primary judge that the protagonists did not want, and thus were not negotiating toward, a joint undertaking for mutual profit but rather toward individual profits from separate contracts and asset management. On her Honour's assessment of the whole of the arrangements under discussion in the action, the protagonists were pursuing their several, and not joint or mutual, interests. Her Honour found that the protagonists did not want a joint undertaking for mutual commercial gain in relation to the operations of the race team and merchandising business.

33. In *Hospital Products*,[40] a majority of the High Court held that a contractual arrangement between an overseas manufacturer and a local distributor did not give rise to a fiduciary relationship between the distributor and the manufacturer. Deane J stated:

> [7] The relationship between a manufacturer and a distributor is not, in itself, ordinarily a fiduciary one even in a case where the distributor enjoys sole rights of distribution in a particular area. Such a relationship is ordinarily that of seller and buyer. It is true that the manufacturer and distributor have a common interest in ensuring that the distributor should sell as much of the relevant product as possible. That however is a truism of the market place and not a legal principle. In seeking such sales, the distributor is ordinarily acting in pursuit of his own interests. It is in the

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37 (2006) 149 CLR 569; [2006] FCAFC 44.

38 *Gibson Motorsport* (2016) 236 FCR 1; [2006] FCAFC 44, [43].

39 *Gibson Motorsport* (2016) 236 FCR 1; [2006] FCAFC 44, [10].

40 (1984) 156 CLR 1; [1984] HCA 64.

pursuit of his own interests that he acts to the advantage of the manufacturer by generating more sales of the product.

[8] The express term of the contract in the present case requiring the distributor to use its "best efforts" to build up the market for, and distribute, the products in Australia "to the common benefit" of both manufacturer and distributor did not, of itself, impose a general fiduciary duty on the distributor to seek no profit or benefit for itself or to disregard its own interests where they conflicted with the manufacturer's. In the context of the term precluding the distributor from dealing in any competing product, the reference to "the common benefit" was no more than a reflection of the commercial fact that, while the distributorship subsisted, it was in the interests of both manufacturer and distributor that, consistently with ordinary economic restraints on pricing, the market for the manufacturer's product in the relevant area be maximized. Neither that nor any other provision of the contract transformed the relationship into a partnership or joint venture. Nor was there anything in the contract which either authorized the distributor to act on behalf of the manufacturer in the sense of acting as agent for a principal or which required the distributor generally to subordinate its own interests to those of the manufacturer. The arrangement under the contract was the ordinary arrangement that a distributor would buy product from a manufacturer and sell it on its own behalf. Subject to one possible qualification, the manufacturer - distributor arrangement between USSC and HPI was not a fiduciary relationship and did not involve general fiduciary duties.

34. In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*,[41] the Court stated that:

[87] The only vulnerability of the Club was that which any contracting party has to breach by another. The only reliance was that which any contracting party has on performance by another.

35. In *Streetscape Projects (Australia) Pty Ltd v City of Sydney*,[42] Barrett JA stated:

[121] The Supreme Court of Canada emphasised in *Galambos v Perez* that a fact-based fiduciary duty cannot arise unless one party undertakes, expressly or impliedly, to act in the particular factual context solely in the interests of the other. The word "solely" deserves particular emphasis. That essential requirement shows why fiduciary duties, of their nature, do not ordinarily attend

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41 (2010) 241 CLR 1; [2010] HCA 19 at [87].

42 (2013) 85 NSWLR 196; [2013] NSWCA 2, [121].

> bargains struck at arm's length between sophisticated parties with equal bargaining power who, in pursuing their own financial ends, take care to document their respective rights and obligations in a comprehensive way. A person of that kind who makes such a bargain in that way safeguards his or her own interests and aims to achieve the particular advantage sought for the person's own benefit. The contract may import implied duties of good faith performance. One party may have a clear interest in fostering the ability of the other to perform and in seeing that other derive the advantages that the contract is intended to confer. A relationship with a contented counterparty is usually more productive than a relationship with a hostile one. But none of this alters the reality that each party's role is a selfish role, not one of self-denial and subordination of personal interest.

(citations omitted)

36. Barrett JA in *Streetscape Projects* also stated:[43]

> [100] The contractual terms are paramount. A fiduciary duty cannot detract from or contradict them. The two types of obligation - contractual and fiduciary - will, in general, co-exist only if and to the extent that the sanctions available for breach of contract (including any implied terms) are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed
>
> …
>
> [107] The adequacy of remedies for breach of contract is therefore, in general, the determinant of whether there is scope for equity to play a supplementing role by way of the imposition of a fiduciary duty upon a contracting party; and the mere fact that one party puts faith and trust in the other is not of itself sufficient to bring equity to centre stage in that way.

37. I suggest that these latter statements by Barrett JA are perhaps too strong. Fiduciary duties derived from the Court finding that a fiduciary relationship existed between contracting parties are not merely a means of filling contractual gaps, and of curing any inadequacy of remedies from the plaintiff's viewpoint for breach of contract. However, these statements are insightful as they focus attention on the plaintiff's clear intention in alleging the applicability of fiduciary duties, and breach of them, as being to secure equitable remedies for it which are not otherwise available. This leads to an important point: At trial

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43 (2013) 85 NSWLR 196; [2013] NSWCA 2, [100], [107].

where breach of fiduciary duties are alleged by the plaintiff, the Court will decide whether a fiduciary relationship arose and hence whether there were fiduciary duties owed which could be breached, with the full glare of hindsight.

38. The conduct by the alleged fiduciary contended by the plaintiff to have been in breach will be in evidence before the Court. The impugned conduct is most unlikely to have been in prospect at the time of any contract being concluded, or until late in the course of dealings between the plaintiff and the alleged fiduciary. The contract or dealings will have spelled out the respective obligations of the parties to each other in relation to the business venture between them. The parties are not likely to have stated the obvious: That the fiduciary was obliged by the conflict rule and the profit rule not to engage in the impugned conduct in relation to the subject matter and scope of the dealings between them.

39. Where the Court finds that there was a fiduciary relationship and hence that fiduciary duties are imposed, the Court does not act somehow retrospectively and in an unjust way because the contract or dealings did not prospectively advert to the obvious. Rather, the plaintiff and the alleged fiduciary will have undertaken or agreed to act in certain ways in relation to each other. It is such conduct that the Court fastens upon if it finds that there was a fiduciary relationship between the plaintiff and the defendant. It is that voluntary conduct, mutually known between the parties, upon the basis of which the Court will decide whether fiduciary duties are imposed on the defendant, or not. Importantly, the Court of equity does not impose fiduciary duties on a defendant in a vacuum. Rather those duties arise from the undertaking of the fiduciary to act within the scope of the business venture with the plaintiff.[44] The fiduciary can be in breach despite subjectively believing that there was no conflict, and that the chance of profit being made by him or her or others did not belong to the business venture between the plaintiff and the fiduciary. Yet this matters not where, objectively considered, the Court decides that the

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[44] *Hospital Products Ltd* (1984) 156 CLR 41 at 96-7; [1984] HCA 64 per Mason J; *Pilmer v Duke Group* (2001) 207 CLR 165; [2001] HCA 31, [70], [71]; per McHugh, Gummow, Hayne and Callinan JJ; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19, [87] per French CJ, Gummow, Heydon and Kiefel JJ. See also Justice Edelman, "The Importance of the fiduciary undertaking" (2013) 7 Journal of Equity 128; and Matthew Conaglen, "Fiduciary duties and voluntary undertakings" (2013) 7 Journal of Equity 105, for divergent views as to the importance of voluntary undertakings.

fiduciary impermissibly acted against the plaintiff's interests, or the venture's interests, and in favour of his own conflicting interests.

40. The Court will decide that the fiduciary or third parties acted dishonestly or fraudulently, where the evidence justifies such a strong finding. The Court will do so notwithstanding that there will be no contractual foundation for that. The Court tests whether it would be unconscionable for the fiduciary, or other defendants, not to be required to remedy the (wrongful) conduct in favour of the plaintiff. Equitable compensation is ordered against the fiduciary in appropriate cases with the full glare of hindsight. The but for test applies. Concurrent or separate causal factors are of no moment.[45] The Court does not start with the proposition that fiduciary relationships, and hence fiduciary duties in contractual commercial dealings cases, are only exceptionally or unusually found. Rather, the Court considers all of the relevant dealings between the plaintiff and the alleged fiduciary, and decides whether in those circumstances the defendant was obliged to wholly have subordinated his or her interests in favour of those of the plaintiff, or of the joint business venture.

41. Where the defendant has undertaken onerous fiduciary obligations, in the event of breach the Court will not hesitate to hold the fiduciary to them by the conflict and profit rules. However, the Court will not require the alleged fiduciary to account to the plaintiff for having acted self-interestedly in his or her or its commercial dealings with the plaintiff unless those dealings clearly enough demonstrated that the defendant was obliged to selflessly not prefer his own interests to those of the plaintiff, or of their business venture. Where the Court finds that there was a fiduciary relationship that arose out of the commercial dealings between the plaintiff and the defendant, then the Court as a matter of equitable principle requires the fiduciary to have acted loyally in favour of the plaintiff or the joint business venture between the plaintiff and the defendant, and to bear the consequences if the fiduciary has acted disloyally instead.

42. In *AHRKalimpa Pty Ltd v Schmidt*,[46] Elliott J held that although a binding and enforceable 5 year contract was never reached, nevertheless the prospective

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45 *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [88] per Gageler J.

46 [2017] VSC 701.

joint venturers were in a fiduciary relationship particularly because the participants had actually performed the joint venture. Elliott J found as follows:

> [256] Accordingly, to the extent that the plaintiffs' claim was based upon a binding and enforceable 5 year contract, either in November 2012 (or mid 2013), it cannot succeed. At most, the Chart recorded an agreement that the parties intended to further negotiate to finalise a binding agreement in due course. In these circumstances, it is not the role of a court to seek to impose terms, implied or otherwise, to find a binding and concluded agreement when the parties themselves had not reached such a position.
>
> [257] It follows that the trading engaged in by way of Voyages 1 to 4 was on a piecemeal basis or pursuant to an interim ongoing agreement (provided all the parties continued to agree), but, on either scenario, always under the umbrella of the parties having agreed to seek to finalise a proposed 5 year (or longer) joint venture agreement (or series of agreements).
>
> [258] In making these findings as to the more limited nature of the joint venture relationship, the court does not accept the defendants' submission that the relationship was not fiduciary in nature because the "process of negotiation did not involve trust or confidence, simply hard bargaining". Although the creation of a joint venture relationship is not, in itself, determinative of whether a fiduciary relationship is also created, in my view the circumstances upon which such a relationship ought to be found existed in this case.
>
> [259] At least from the moment Schmidt, Bzezinski and Ruschin (both personally and through their corporate vehicles) agreed to the establishment of a joint venture business in November 2012 and acted on that agreement (including allowing information and know-how to be used in pursuit of the joint venture), a fiduciary relationship was brought into existence, involving mutual trust and confidence with respect to the affairs of the venture. This characterisation of the joint venture relationship did not preclude any party from robust negotiations in seeking to finalise a long-term joint venture agreement, 'for it is well settled a person may be a fiduciary in some activities but not in others'.
>
> [260] Equally, the fact that the long-term agreement was never concluded does not undermine the premise for the finding of a fiduciary relationship. Even proposed participants in a joint venture may owe fiduciary duties in certain circumstances. But the participants in this case were more than merely proposed; they were actually engaging in the joint venture, despite the fact that the terms of that venture had never been agreed in their entirety.

(citations omitted)

Contracting out of fiduciary obligations?

43. In *Eaton v Rare Nominees Pty Ltd*,[47] at issue was whether under a joint venture agreement, a fiduciary relationship subsisted between the parties and the respective individual directors of the company. The trial judge found that there was such a relationship, but the Court of Appeal overturned the judgment in favour of the plaintiffs, particularly because of the provisions of the joint venture agreement:

    (a) Clause 3.2.1 provided that the "legal relationship of the Parties under the Joint Venture shall be contractual only" and clause 3.2.2 that their roles "shall be as set out in clause 3.3 and 3.4".

    (b) Clause 3.5 stated that the "only duties of any Party are those set out in this Agreement" and that, "To the Extent permitted by law" duties "including duties of fiduciary nature) are excluded".

    (c) Clause 14.1 provided that, "The relationship between the Parties does not constitute a partnership nor, will any Party have authority to act as an agent of or otherwise for, or assume any Obligation of any other or the Joint Venture."

    (d) Clause 20.1 provided that, "Each Party will perform its Obligations and be just and faithful to the other parties in all its activities and dealings concerning the Project, the Joint Venture and any matter provided for in this Agreement."

44. Philippides JA reasoned:

    (a) The trial judge failed to give proper weight to the critical consideration that any fiduciary relationship in the present case had to accommodate the terms of the JVA so as not to be inconsistent with them.

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47 [2019] QCA 190.

(b) To superimpose a fiduciary obligation would have the effect of altering the operation which the contract was intended to have according to its true construction.

(c) Given that the parties had addressed the nature of their relationship in some detail, and given the express circumscription and limitations imposed in the contract on the parties' relationship, there was no basis for the imposition of a fiduciary duty of the nature found by the trial judge arising as a matter of a reasonable expectation of loyalty.[48]

45. Perhaps by way of contrast is the decision of the South Australian Full Court in *Blong Ume Nominees Pty Ltd v Semweb Nominees Pty Ltd*.[49] There the trial judge held that joint venturers under a joint venture agreement did not owe each other fiduciary duties, but on appeal the Full Court held that such duties were owed and had been breached. One of the contentions made by the unsuccessful respondent on appeal was that fiduciary obligations were excluded by the provisions of the agreement. The contention of the respondent and the Full Court's rejection of it is indicated in the following passage of the Court's judgment:[50]

> [16] Clause 10 of the JVD stipulates that nothing in it 'shall be construed so as to constitute any of the parties hereto a party agent or representative of the other or to create any trust or commercial partnership or their partnership with any company or corporate or commercial entity for any purpose whatsoever'. The respondents contend that that clause, and in particular the word 'representative', relieves the parties to the JVD from any fiduciary obligations which might otherwise have been assumed by entering into it. That submission must be rejected. Clause 10 is an interpretative clause which precludes any construction of the other clauses of the JVD which would place the parties in any of the relationships, in law or equity, to which it refers. The meaning of 'representative' in cl 10 is coloured by the words 'party' and 'agent'. Together those words of cl 10 exclude a construction of the other clauses of the JVD which would authorise any one of the Joint Venturers to legally bind the others. Plainly enough, to the extent to which any of those relationships would have carried with them fiduciary obligations, those obligations too are excluded, but the clause

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48 [2019] QCA 190, [64]-[67].

49 [2019] SASCFC 151.

50 [2019] SASCFC 151, [16] per Kourakis CJ, Stanley and Lovell JJ.

> cannot operate more widely to exclude fiduciary obligations which might otherwise arise from the terms of the JVD.
>
> (citation omitted)

46. The Court held that the concept of "representation" under a fiduciary relation was wider than the form of agency contemplated by cl 10. Clause 10 was held not to be construed, in context, as an elliptical attempt to exclude any fiduciary obligations which might otherwise attach to the joint venturers.[51]

47. What follows from the decisions in *Eaton* and *Blong Ume* is that the Court will give effect to contractual terms that the parties to an agreement are not to be subject to fiduciary duties, if the wording of the agreement to that effect is clear enough in the context of the other terms, and of the course of dealings between the parties.

***Barnes v Addy* liability: The position of (some) third parties**

48. The accessorial or ancillary liability of third parties to the plaintiff under the so-called first and second limbs of the decision in *Barnes v Addy*[52] can be considered to be particular applications of the equitable principles referred to above, in the factual circumstances to which the two limbs relate. The first limb relates to third parties who receive property the subject of fiduciary obligations by the fiduciary in a dishonest and fraudulent breach of fiduciary obligations (knowing receipt). The second limb relates to third parties who assist the fiduciary in a dishonest and fraudulent breach of fiduciary obligations (knowing assistance). Both limbs turn on the state of knowledge of the third party, with whom the plaintiff will likely have had no dealings. Equity regards such conduct as being unconscionable such as to attract equitable remedies. The liability of a third party under either limb of *Barnes v Addy* is a personal, fault – based liability.[53] The third party and the fiduciary in breach will both be accountable to the plaintiff as constructive trustees.[54]

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51 [2019] SASCFC 151, [18]-[19].

52 (1874) LR 9 Ch App 244 at 251-252 per Lord Selborne LC.

53 *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC 6, [555].

54 *Lewis Securities Ltd (in liq) v Carter (Lewis Securities)* (2018) 334 FLR 9; [2018] NSWCA 118, [65] per Leeming JA.

49. The third party will not be liable to the plaintiff unless the fiduciary is also liable to the plaintiff. The liability of the third party is not free-standing. In *Barnes v Addy* cases, the principles specify what type of conduct by the fiduciary must have occurred, what conduct the third party must have engaged in, in relation to the fiduciary's conduct and the state of knowledge of the third party for it to be liable as a knowing assistant or a knowing recipient. As will be discussed, *Barnes v Addy* accessorial liability does not exhaustively identify the circumstances in which a third party will be liable to the plaintiff in relation to the conduct of the fiduciary. *Barnes v Addy* liability in non-fiduciary third parties commonly arises where the fiduciary was a director, or senior employee, of the plaintiff company. Hence, the provisions of the *Corporations Act* are relevant.

50. The applicable principles here were re-stated by Emmett AJA in *Lewis Securities*,[55] as follows:

> [183] There was no issue as to the relevant principles of liability based on *Barnes v Addy*. Thus, under the first limb, persons who receive trust property acquired in breach of trust become chargeable if it is established that they have received it with notice of the breach of trust. A claim on that basis may be made against not only a trustee who misapplies trust property but also a fiduciary who deals with property in respect of which he or she owes fiduciary obligations, in breach of such obligations. The elements of such a claim are as follows:
>
> (a) the existence of a trust or a fiduciary duty with respect to property;
>
> (b) the misapplication of such property by the trustee or beneficiary;
>
> (c) the receipt of such property by the third party; and
>
> (d) knowledge by the third party, at the time he or she received the relevant property, that it was property with respect to which a trust or fiduciary duty existed and that it was being misapplied or, in the case of breach by a fiduciary, that the property was transferred pursuant to a breach of fiduciary duty.
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> [184] The knowledge sufficient to attract liability under the first limb is:

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55 [2018] NSWCA 118.

(i) actual knowledge of the trust or the existence of fiduciary duty and the misapplication of the relevant property or transfer pursuant to a breach of fiduciary duty;

(ii) wilfully shutting one's eyes to those things;

(iii) abstaining in a calculated way from making such enquiries as an honest and reasonable person would make; or

(iv) knowledge of facts that to an honest and reasonable person would indicate the existence of the trust and the fact of misapplication.

51. These sub-paragraphs which I have numbered (i)-(iv), reflect categories (i), (ii), (iii) and (iv) concerning necessary *Barnes v Addy* first limb knowledge in the judgment of Peter Gibson J in *Baden v SG Development du Commerce SA*.[56] The Full Court in *Grimaldi*[57] explained in relation to *Baden* categories (iii) and (iv):

> The third involves such a calculated abstention from inquiry as would disentitle the third party to rely upon lack of actual knowledge of the trustees' or the fiduciary's wrongdoing. The fourth reflects what seems to have been accepted provisionally by three judges of the High Court in *Consul Developments*. It is, in essence, an understandable, objective, default rule designed to prevent a third party setting up his or her own "moral obtuseness" as the reason for not recognising an impropriety that would have been apparent to an ordinary person … It is the surrogate of actual knowledge."[58]

52. Emmett AJA in *Lewis Securities* continued:

> [185] Under the second limb, liability will also be imposed if the following are established:
>
> (a) the existence of a fiduciary duty;
>
> (b) a dishonest and fraudulent design by the fiduciary;
>
> (c) the assistance in that design by the person to be made liable with knowledge of that design.
>
> [186] The categories of knowledge that are necessary are as follows:
>
> (i) actual knowledge;
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> (ii) wilfully shutting one's eyes to the obvious;

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56 [1992] 4 All ER 161 at 250.

57 (2012) 200 FCR 296; [2012] FCAFC 6, [261].

58 These matters were applied by Lyons J in *Milfoil Pty Ltd v Commonwealth Bank of Australia Ltd* [2019] VSC 504, [443]-[452].

(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; or

(iv) knowledge of circumstances that would indicate the facts to an honest and reasonable person.

[187] Liability under the second limb of *Barnes v Addy* is confined to cases where the breach of fiduciary duty amounts to a dishonest and fraudulent design. Thus, there must be dishonesty on the part of the fiduciary. Dishonesty amounts to a transgression of ordinary standards of honest behaviour. It is not necessary to demonstrate that the person thought about what those standards were.

(citations omitted; sub-paragraph numbers added)

53. Importantly, concerning the second limb of *Barnes v Addy*, the High Court in *Farah Constructions*[59] held that constructive notice in the sense of knowledge of circumstances that would put an honest and reasonable man on inquiry, was not sufficient to meet the requirement of knowledge there.

54. Where the third party is a company which is the alter ego of an individual fiduciary, liability is imposed directly upon the company and not because of *Barnes v Addy* liability. Finn, Stone and Perram JJ explained this in *Grimaldi*.[60] Where the third party is the corporate creature, vehicle or alter ego of the fiduciary who uses it to secure profits or inflict loses by breach of fiduciary, the corporate vehicle is fully liable for those profits or losses. That is because the company had full knowledge of the facts; it is the alter ego of the fiduciary with transmitted fiduciary obligations, or jointly participated in the breach. Liability here does not turn on the plaintiff showing dishonesty by the company. Proof of the breach of the fiduciary suffices for the plaintiff establishing liability in the company. The liability of the director and/or the company is a joint liability.[61]

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59 *Farah Constructions* (2007) 230 CLR 89; [2007] HCA 22 at [171]-[177].

60 (2012) 200 FCR 296; [2012] FCAFC 6, [243].

61 See too *Farrah Constructions* (2007) 230 CLR 89; [2007] HCA 22, [128] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Australian Careers Institute Fitness Pty Ltd* [2016] NSWCA 347, [178] per Sackville AJA; *AHRKalimpa Pty Ltd v Schmidt* [2017] VSC 701, [272] per Elliot J; *Chickabo Pty Ltd v Sphere Pty Ltd* [2019] VSC 73, [197]-[199]per Sifris J; *Auscare Dairy (Aust) Pty Ltd v Huang (No 3)* [2019] FCA 412, [90] per Davies J.

55. In *Farah Constructions*,[62] the High Court rejected an apparent attempt by the respondent to reformulate the theretofore understanding of the second limb of *Barnes v Addy*, that such liability is confined to cases where the breach of duty amounts to a dishonest and fraudulent design. The Western Australian Court of Appeal in *Westpac Banking Corporation (No 3) v Bell Group Ltd (No 3)*,[63] took a different view of the decision in *Farah Constructions* in respect of which the High Court granted special leave, but the case settled before that application was heard.[64]

56. Sifris J in *Chickabo Pty Ltd v Sphere Pty Ltd*,[65] summarised the *Westpac v Bell* decision in these terms:

> [192] The circumstances of *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* ('Bell') arose out of the collapse of the 'Bell Group of companies' in the early 1990s. The plaintiff liquidators of the Bell Group sought to recover funds from various banks who had realised securities given by members of the group. Inter alia, the plaintiff alleged the banks had received these proceeds whilst knowing that by giving the securities, the directors had breached fiduciary duties owing to the member companies, giving rise to liability under *Barnes v Addy*. Drummond AJA (which whom Lee AJA agreed) extracted the following relevant principles regarding the phrase 'dishonest and fraudulent design' from *Farah*:
>
> (a) A mere finding of breach of duty by the fiduciary will not be sufficient to show a dishonest and fraudulent design; some additional feature will be required;
>
> (b) It is not necessary to demonstrate the breach of fiduciary duty occurred in circumstances where the fiduciary acted with a conscious awareness that what he was doing was wrong: the breach of duty can be characterised as dishonest or fraudulent according to equitable principles;
>
> (c) The 'additional feature' will exist if the breach of duty is 'more than a trivial breach and is also too serious to be excusable because the fiduciary has acted honestly, reasonably and ought fairly to be excused'. Findings of

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62 (2007) 230 CLR 89; [2007] HCA 22.

63 (2012) 44 WAR 1; [2012] WASCA 157.

64 Pauline Ridge, "Equitable Accessorial liability: Moving beyond *Barnes v Addy*" (2014) 8 Journal of Equity 28, 30.

65 [2019] VSC 73, [192]-[193].

> honest and reasonableness require a 'discretionary judgment having regard to all the circumstances of the case.' A person may be fraudulent in the eyes of equity, even though he acted with subjective honesty.

[193] Drummond AJA went onto find that Owen J, at first instance, had erred by holding 'conscious wrongdoing' on the part of the fiduciaries was required, and that the fiduciary's conduct must 'attract a degree of opprobrium raising it above the level of a simple breach'. According to Drummond AJA, such a finding 'suggests that there must be a level of misconduct on the part of the directors greater than I think Farah requires'.

57. In *Hasler v Singtel Optus Pty Ltd (Hasler)*,[66] Leeming JA, decided that *Westpac v Bell* should not be followed. After the judgment of Leeming JA in *Hasler*, the position, at least in New South Wales, was described by Sackville AJA in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd*[67] as follows:

> [183] In *Farah Constructions,* the High Court stated that the second limb of *Barnes v Addy,* as conventionally understood in Australia:
>
> > "makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary".
>
> [184] In *Hasler,* Leeming JA said that there was nothing in *Farah Constructions* to suggest that the High Court was substantially expanding the class of breaches of fiduciary duty which could attract the second limb of *Barnes v Addy*. His Honour pointed out that the High Court was at pains in *Farah Constructions* to preclude Australian courts from relaxing the meaning of "dishonest and fraudulent design". Leeming JA later reiterated that the liability of a third party who participates in, but does not procure or induce a breach of fiduciary duty, is confined to breaches which are dishonest. His Honour said that dishonesty "amounts to a transgression of ordinary standards of honest behaviour [and] it is not necessary to demonstrate that the person thought about what those standards were".
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> (citations omitted)

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66 (2014) 87 NSWLR 609; [2014] NSWCA 266; Barrett JA agreeing; Gleeson JA not deciding.

67 (2016) 116 ACSR 566; [2016] NSWCA 347, [183], [184].

58. It should incidentally be noted there is an unresolved issue concerning the meaning of "in good faith" in s 181(1)(a) of the *Corporations Act*. Section 181(1) provides that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. On one view the standard is subjective. There much more than negligence is required and the impugned conduct must have been deliberately engaged in by the director, knowing that it was not in the interests of the company. The other view is that the test is objective. On that view, breach of s 181(1) requires consciousness in the sense of knowledge of facts that make the conduct not in the interests of the company and it is not necessary to establish knowledge that the conduct constituted a breach of the law or was improper. The authorities either way are referred to by Ball J in *Vanguard Financial Planners Pty Ltd v Ale*[68] and by Elliott J in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*,[69] but in neither case was it necessary to resolve the issue.[70] I suggest that the objective view ought be preferred. It may be noted in this connexion that s 1318 of the *Corporations Act* provides that the Court can order that a director or other officer of the company be excused for breaches of duties because she had acted honestly and the circumstances of the case warranted it.

Inducement liability

59. Under *Barnes v Addy* knowing recipient and knowing assistance liabilities, the third party will have had the requisite knowledge of a dishonest and fraudulent design by the fiduciary. However, a Court of equity may also find the third party liable to the plaintiff, in some circumstances, where the fiduciary has acted innocently and without an improper purpose. The High Court in *Farah Constructions* recognised that:

> "Before *Barnes v Addy*, there was a line of cases in which it was accepted that a third party might be treated as a participant in a breach of trust where the third party had knowingly induced or immediately procured breaches of duty by a trustee where the trustee had acted with no improper purpose; these were not cases of a third party assisting the

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68 [2018] NSWSC 314, [133].

69 [2018] VSC 347, [630]-[639].

70 An application for leave to appeal from the decision of Elliott J was dismissed: *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15.

> trustee in any dishonest and fraudulent design on the part of the trustee".
>
> (citations omitted)

Such cases are sometimes referred to as *Eaves v Hickson* liability.[71]

60. Inducement liability of third parties of this kind also relates to circumstances where the defendant is a fiduciary, so that it is not confined to cases of breach of trust.[72] Other examples of wrongdoer third party participation include participation in a breach of confidence or the abuse of a relationship of confidence. Relevant matters will include:

(a) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant;

(b) the nature of the third party's role and participation; and

(c) the extent of the participant's knowledge of, or assumption of risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.[73]

61. The rationale for imposing inducement liability on third parties for knowingly inducing, or procuring innocent breaches by the fiduciary was explained by Leeming JA in *Hasler v Singtel Optus Pty Ltd*,[74] as follows:

> "There is no requirement that the breach of trust be of sufficient gravity to answer the description of 'dishonest and fraudulent design' … [but] there is no occasion for a principle pursuant to which the trustee would be liable for breaches of trust which are not dishonest or fraudulent, but the person who induced those breaches would escape liability".[75]

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71 (1861) 30 Bear 136 [54 ER 840]; [1861] Eng R 831 per Sir John Romilly. The authorities to 2014 were considered in detail by Sloss J in *Australian Super Developments Pty Ltd* [2014] VSC 464, [271]-[305].

72 *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC 6, [245] per Finn, Stone and Perram JJ.

73 *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC 6, [247].

74 (2014) 87 NSWLR 609; [2014] NSWCA 266 at [77].

75 See too *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397; [1975] HCA 8 per Gibbs J.

62. Sloss J in *Australian Super Developments Pty Ltd v Marriner*,[76] decided that the level of knowledge required in *Eaves v Hickson* cases was the same as under the second limb of *Barnes v Addy*. Sloss J held that:

> "… Accordingly, knowledge of circumstances which would put an honest or reasonable person on inquiry would not make a third person liable for inducing a dishonest breach of trust, but each of the following would be sufficient to establish the requisite knowledge: (1) actual knowledge; (2) a deliberate shutting of one's eyes to the breach; (3) a calculated abstention from making enquiries which an honest and reasonable person would make; or (4) actual knowledge of the facts which, to a reasonable person, would suggest a breach of trust. …"

Sloss J held that the third party had knowingly induced or immediately procured the fiduciary's breaches of fiduciary duty.[77] An appeal was dismissed.[78] Tate ACJ, Kyrou and Ferguson JJA there approved of the decision of Sloss J in relation to the requirements of *Eaves v Hickson* liability. Jackson J adopted and follows the analysis of Sloss J in *Sino Iron Pty Ltd v Palmer (No 3)*.[79] The liability of a third party who procures or induces a breach of fiduciary duty is distinct from *Barnes v Addy* third party liabilities.[80]

63. In *Chickabo v Zphere*,[81] Sifris J held that the elements of liability for knowingly inducing or procuring a breach of fiduciary duty were:

> "(a) the existence of a fiduciary duty owed by the fiduciary;
> (b) a breach of duty on the part of the fiduciary;
> (c) inducement or procurement of that breach by the third party; and
> (d) knowledge on the part of the third party of the breach of duty."

64. As to knowledge, Sifris J held:[82]

> "In relation to the fourth element, it is sufficient that an honest and reasonable person who had the same knowledge as Graco would have concluded that there was a breach of fiduciary duty. It is not necessary

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76 [2014] VSC 464, [305].

77 [2014] VSC 464, [301].

78 *Marriner v Australian Super Development Pty Ltd* [2016] VSCA 141.

79 [2015] 2 Qd R 574; [2015] QSC 94, [120].

80 *Harstedt Pty Ltd v Tomanek* [2018] VSCA 84, [68] per Santamaria, McLeish and Niall JJA.

81 [2019] VSC 73, [173].

82 [2019] VSC 73, [175].

> for the purposes of this form of equitable liability to establish that the breach of fiduciary duty amounted to a dishonest and fraudulent design, a finding which I am not prepared to make. However, I find that an honest and reasonable person who had the same knowledge as Graco would have concluded that there was a breach of fiduciary duty."
>
> (citation omitted)

65. *Barnes v Addy* third party knowing receipt and knowing assistance liability are two different types of accessorial or ancillary liability. *Eaves v Hickson* third party liability can, I suggest, be referred to as knowing inducement liability. Each of these three species of knowing third party liability in relation to the fiduciary's breach of duty can be considered different forms of *participatory* liability. In each the third party will have participated in the breaches of the fiduciary's duties owed to the plaintiff, albeit in different ways, such as to be considered by a Court of equity as to constitute unconscionable conduct potentially exposing the third party to equitable remedies.[83]

Joint and several, or several liability?

66. Where the Court finds breaches of fiduciary duty by the fiduciary, but also liability in third-party non-fiduciaries by reason of its or their participation in the fiduciary's breaches, is the liability between them for an account of profits to, or an award of equitable compensation in favour of, the plaintiff a joint and several liability, or a several liability? The answer is important particularly for two reasons.

67. First, if liability between the fiduciary and the third party is joint and several, the plaintiff can effectively choose against which defendant judgment is executed according to the solvency of defendants. Where the plaintiff is fully paid out by a solvent defendant, the liability of the other, possibly insolvent, defendant to the plaintiff will be released. The plaintiff will not be permitted to be paid twice. However, if the liability is several, the plaintiff can execute fully against each defendant to the extent of the respective judgments. Secondly, the distinction between joint and several and several liability matters where the plaintiff settles against one defendant but not the other. Receipt of the

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83 *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [71], [72], [76], [77] per Gageler J; The Hon WMC Gummow AC, "Knowing Assistance" (2013) 87 Australian Law Journal 311 at 318-319, cited by Sloss J in *Marriner* [2014] VSC 464, [300].

settlement sum will release the other defendant if the liability is joint and several,[84] but not if the liability is several.

68. Where the "third party" is the corporate alter ego of the fiduciary, the liabilities will be joint and several.[85]

69. The High Court in *Michael Wilson & Partners Ltd v Nicholls (Michael Wilson)*,[86] stated:

> [106] As MWP rightly pointed out, this Court has held that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an "accessorial" liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows, as MWP submitted, that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ.
>
> (citations omitted)

70. That passage is authority for the propositions set out in *Grimaldi*,[87] that:

> [557] [T]he fiduciary and the third party will ordinarily be only severally liable for the profits each makes in consequence of the breach of fiduciary duty or breach of trust in which it participated/was a recipient …
>
> Each is not responsible for the other's profits … [88]

71. An illustration of the matters stated in the cited passage in *Michael Wilson* is provided by the decision of the High Court in *Ancient Order of Foresters*.[89]

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84 *Edgewater Homes Pty Ltd v Donohoe* [2019] NSWSC 44, [47]-[60] per Stevenson J.

85 *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC 6, [556].

86 (2011) 282 ALR 685; [2011] HCA 48, [106] per Gummow ACJ, Hayne, Crennan and Bell JJ.

87 (2012) 200 FCR 296; [2012] FCAFC 6, [557].

88 *Edgewater Homes Pty Ltd v Donohue* [2019] NSWSC 44, [28] per Stevenson J.

89 (2018) 360 ALR 1; [2018] HCA 43.

Messrs Woff and Corby were employees of companies who engaged in a dishonest and fraudulent design which involved breaches of fiduciary duties. Messrs Woff and Corby became employees of Foresters and established a company of which they were the two directors and shareholders which provided services to Foresters for a commission. Foresters knowingly took advantage of that design in order to enhance its business by appropriating the business connections of its competitors. Kiefel CJ, Keane and Edelman JJ held that the third party, Foresters, was obliged to account to the plaintiff companies in the sum of $14,838,063. At trial, Besanko J,[90] ordered that Mr Wolf account to the plaintiff in the sum of $24,238 and Mr Corby in the sum of $24,198.[91]

72. However, if the fiduciary and the third party assistant or recipient acted in concert to secure a mutual benefit, then they will be jointly and severally liable: *Grimaldi*.[92] Whether that was so is a factual issue to be determined at trial. Finn, Stone and Perram JJ in *Grimaldi*[93] stated that:

> "One can readily understand why, when wrongdoers so entangle their affairs, that the law as a matter of legal policy might wish to make it their responsibility – and not a claimant's – to untangle them for accountability purposes."

73. Whatever be the position as between the fiduciary and the third party, the Court will be astute to prevent double recovery by the plaintiff for its loss.[94]

Pleading dishonesty

74. Where an allegation of dishonesty is made it must be specifically pleaded with sufficient particularity. In *Finance & Guarantee Company Pty Ltd v Auswild (No 2)*,[95] the allegations made included *Barnes v Addy* accessorial liability. At

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90 *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248, [458]; [2016] FCA 364.

91 Besanko J held at trial that Foresters knowingly participated in the breaches of fiduciary duty by Messrs Wolf and Corby, but did not order an account of profits against Foresters because profits that it had made were not attributable to Foresters' participation in the breaches. A Full Court on appeal ordered that Foresters account to the plaintiff in the sum of $6,558,495: *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters Friendly Society Ltd* (2017) 250 FCR 1; [2017] FCAFC 74, [89] per Allsop CJ, Middleton and Davies JJ. The sum of the account was increased in the High Court by the majority: Kiefel CJ, Gageler, Keane and Edelman JJ.

92 (2012) 200 FCR 296; [2012] FCAFC, [558].

93 (2012) 200 FCR 296; [2012] FCAFC, [558].

94 *Grimaldi* (2012) 200 FCR 296; [2012] FCAFC, [559].

95 [2016] VSC 559.

issue before Sifris J here was whether a proposed amended statement of claim sufficiently pleaded out dishonesty allegations. The judge, after detailed reference to the authorities[96] stated:[97]

> [40] Accordingly, in my opinion, if sufficient facts and circumstances are pleaded (with sufficient particularity) which if established by the evidence, might, or are capable of, supporting an inference of specific dishonest conduct, the pleading will be sufficient. It is not necessary to plead evidence or a path of reasoning. Of course the claim may fail if the facts are not made out, or other lesser remedies may be established, such as negligence. However, if the facts pleaded are only consistent with such lesser remedy, the pleading of dishonesty will not be sufficient. However, if the facts, circumstances and relevant context as pleaded might, if established by the evidence, rise to the level of dishonesty the pleading is sufficient whatever the result. In my view there is nothing in the authorities referred to that suggests otherwise.

75. Sifris J granted the plaintiffs leave to amend. In doing so, Sifris J stated:[98]

> [50] Particulars of the requisite knowledge, the usual foundation for a dishonesty claim of this kind, continue to cause difficulty for obvious reasons. First, one does not know what is in a person's mind or what that person knew. The state of mind of a person is almost always established by inference. Secondly, there is very rarely a 'smoking gun' admission type document. Consequently all facts and matters, historic and general, contextual and specific may be relevant to compelling the necessary inference.
>
> [53] Accordingly it is entirely appropriate to infer from the pleaded facts and particulars that at the very least he knew of the substantial benefits to Carlisle and the detriment to the relevant Plaintiff companies. Consequently and as a logical corollary it may be inferred that from the nature of the transaction and as a seasoned director he knew that this 'one sided transaction' may give rise to the pleaded (non-dishonest) breaches.
>
> [54] Dishonesty is the next step. It is not however a giant leap. If established at trial the matters pleaded in paragraph which refers back to numerous other paragraphs are sufficient to permit the drawing of the necessary inference of dishonesty. The facts pleaded are not consistent with innocence, honest incompetence or negligence. They go further. The critical issue in my opinion is that whatever his knowledge as a director of the relevant Plaintiff company, it is his specific knowledge (which may be inferred) of

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96 [2016] VSC 559, [32]-[39].

97 [2016] VSC 559, [40].

98 [2016] VSC 559, [50], [53], [54].

> the relevant company on the other side of 'the transaction', that sufficiently establishes directly and by inference his knowledge and involvement on the PMG side.[99]

Cessation of fiduciary obligations

76. As a general proposition, it can be stated that the duties attaching to a fiduciary relationship end when the relationship is terminated.[100] That will clearly enough be the position when a status-based fiduciary relationship, such as between solicitor and client, is terminated by one or both parties. However, in some circumstances, fiduciary duties may survive the termination of the relationship that first called those duties into being.[101] Examples can include directors of a company who resign their office and establish a competitive business and where joint venturers end their relationship, but one of them exploits a business opportunity that the joint venture had been pursuing.

77. In *Edmonds v Donovan*[102] six joint venturers proposed to purchase and develop a golf course. No formal joint venture agreement was reached. The joint venturers were to share the project's profits equally. Two of the joint venturers terminated their relationship and, without reference to the others, purchased the golf course using a different corporate vehicle than that which had been proposed between the joint venturers. The resigning joint venturers were led to the corporate opportunity by reason of their participation in the venture. Phillips JA importantly stated:[103]

> [60] Indeed it was the very intention of the respondents to pursue the opportunity, through the vehicle Disctronics, that caused the rupture between the parties. There can be no doubt but that, had Edmonds and Cahill continued as members of the joint venture, they would have been precluded from seizing for themselves … the opportunity that was being explored in respect of the Kingston Golf Course …

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99 See too, *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2015] WASC 105 per Le Miere J; *Nicholson Street Pty Ltd v Letten (No 2)* [2016] VSC 678 per Judd J.

100 *Bolkiah v KPMG* [1999] 2 AC 222 at 235 per Lord Millett.

101 *Edmonds v Donovan* (2005) 12 VR 485, [56] per Phillips JA.

102 (2005) 12 VR 485, [46]-[63] per Phillips JA.

103 (2005) 12 VR 513, [60].

78. The decision of Warren J at trial[104] to award equitable compensation to the plaintiffs was upheld by the Court of Appeal. Warren J noted[105], that the survival of the duty owed by a fiduciary has been held to occur particularly where the cessation of the relationship can be considered as having been prompted or influenced by an intention or desire to pursue an opportunity identified before cessation. In such circumstances, a voluntary cessation of the fiduciary relationship does not allow the fiduciary to avoid liability for breaches of duty.

Defences: Informed consent

79. Where a fiduciary is in a position of conflict of interest, if the defendant seeks to avoid a finding of breach and consequent remedies, it is for the fiduciary to show informed consent by the plaintiff, by way of defence. There is no positive duty on the fiduciary to obtain an informed consent from the plaintiff. Rather if there was such informed consent then that would go to negating what otherwise was a breach of duty.[106]

80. As to the content of the fiduciary obligation, the High Court said in *Maguire v Makovonis*,[107] cited with approval by Payne JA in *Coope*:[108]

> "… there is a long-standing principle whereby those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties labour under a heavy duty to show the righteousness of the transactions."

81. Besanko J in *Blackmagic Design Pty Ltd v Overliese*,[109] explained as follows:

> [105] The second matter raises a difficult question as to what constitutes the breach of the relevant fiduciary duty. On one view there is no duty to disclose a conflict and when judges refer to a duty to disclose in this context it is no more than a shorthand way of referring to the defence of fully informed consent by the principal. As I have said, the law in Australia is that fiduciary

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104 *Disctronics Ltd v Edmonds* [2002] VSC 464.

105 [2002] VSC 454 at [169].

106 *Maguire v Makovonis* (1997) 188 CLR 449 at 466; [1997] HCA 23 per Brennan CJ, Gaudron, McHugh and Gummow JJ; *Coope* (2016) 333 ALR 524; [2016] NSWCA 37, [110] per Payne JA.

107 (1997) 188 CLR 449, 465; [1997] HCA 23.

108 (2016) 333 ALR 524; [2016] NSWCA 37 [11].

109 (2011) 191 FCR 1; [2011] FCFA 24 at [105].

> duties are proscriptive and not prescriptive. On this view the breach of fiduciary duty is the conduct of the fiduciary in placing himself in a position of conflict. Disclosure is simply a means of avoiding a breach, not a duty. The loss which is recoverable by way of equitable compensation on this view is that which would not have occurred if the conflict had not arisen and not the loss which would not have occurred had disclosure been made. …

82. Besanko J continued:[110]

> [108] It seems to me the first view (that disclosure is a defence, not a positive duty) is correct. It seems to me to be the orthodox approach because there is undoubtedly a breach when the fiduciary places himself or herself in a position of conflict. The breach is excused or perhaps does not arise if the principal consents. In other words, it is not enough that there be disclosure, there must be consent. Disclosure is part of a defence.[111]

83. Obviously enough by the time of trial, what happened concerning any disclosure by the fiduciary and any alleged consent by the plaintiff will have already occurred. If the defendant argues that there was no disclosure because there was no reason for him to have done that, then that would be to contend that he was not in a position of conflict. If the defendant says that there was disclosure necessitated by him being in a conflicted position, the fiduciary will need to lead some strong evidence of informed consent by the plaintiff to avoid a finding of breach where he in fact went ahead and acted as he disclosed that he would.

84. *Farah Constructions*[112] is a case where the High Court held that a joint venturer would have been in breach of its fiduciary duties to its co-venturer, had there not been disclosure of and informed consent given by the plaintiff to exploitation by the fiduciary of a commercial opportunity. Farah Constructions and Say-Dee acquired land at 11 Deane Street Burwood. That land was transferred to them as tenants in common. Under a joint venture agreement, which only related to that land, Say-Dee was to arrange finance and Farah Constructions was to manage the development of the site. The Council rejected

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110 At [108].

111 See too generally cited, Beth Nosworthy, "A Director's Fiduciary Duty of Disclosure: The Case(s) Against" (2016) 39 UNSW Law Journal 1389.

112 (2007) 230 CLR 89; [2007] HCA 22.

the planning application as it considered that the site need to be amalgamated with adjacent sites.

85. As to breach, the Court[113] decided:

> [103] Contrary to proposition (c) in the trial judge's reasoning, Farah had a duty to disclose to Say-Dee the information that the Council saw amalgamation of the redevelopment of No 11 with adjoining properties as necessary in order to maximise its development potential, and the information that No 15 and No 20, and later No 13, were available for purchase. The information about the Council's attitude came to Farah in its fiduciary capacity; and while the other items of information did not, they represented opportunities which it was not open to Farah to exploit, consistently with its fiduciary duty, unless Say-Dee gave its informed consent to a contrary course. That is because to exploit those opportunities without informed consent would be to place Farah in a position of conflict between its self-interest and its duty to Say-Dee in relation to No 11.

86. It is necessary to emphasise what a strong holding this was by the Court, as the development of Nos 13, 15, 20 was not within the scope of the joint venture. Yet the information about them came about in the course of Farah acting as manager of the joint venture and hence was learned by Farah "in its fiduciary capacity".

87. However, the Court reinstated the finding of the trial judge that Farah had offered Say-Dee a chance to participate in the development of the sites together, but had received a rejection.[114] Accordingly, the plaintiff's case of breach of fiduciary duties failed.[115] The Court also stated:[116]

> [186] First, even if, contrary to the conclusion stated above, the disclosures found to have been made by Mr Elias did not constitute full disclosure sufficient to make the consent by Say-Dee to the acquisitions of Nos 13 and 15 informed consents, that dereliction of duty is insufficient to merit the description "dishonest and fraudulent". That is so particularly because a man like Mr Elias might not necessarily appreciate the difference between saying that No 13 "is a good proposition for

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113 (2007) 230 CLR 89; [2007] HCA 22, [103].

114 (2007) 230 CLR 89; [2007] HCA 22, [48]-[99].

115 Matthew Harding in "Two fiduciary fallacies" (2007) 2 Journal of Equity 1, provides a close examination of *Farah Constructions*.

116 (2007) 230 CLR 89; [2007] HCA 22 at [186].

> redevelopment in conjunction with" No 11 and saying that the view of the Council was that the only way No 11 could be redeveloped so to as to achieve its full development potential was to redevelop it with No 13. There is a difference, but the failure to appreciate it is not necessarily "dishonest and fraudulent". Secondly, even if Mr Elias's conduct amounted to a dishonest and fraudulent design, there is no evidence that Mrs Elias and her daughters had any sufficient notice or knowledge of it.

88. When is informed consent by the plaintiff sought and obtained? Payne JA in *Coope*,[117] answered in relation to the circumstances of the case as follows:

> [134] Turning then to the third submission, that if a conflict of interest had arisen (which I consider it did) Mr Coope was not yet required to disclose it, because the Separation Proposal was in draft, not final terms, and not capable of being accepted. I reject the submission.
>
> [135] A company is no less entitled to be asked to give its informed consent by a director under a conflict of interest and duty when looking at a proposal at a "conceptual" rather than a "decision" stage.
>
> [136] It is not correct as a matter of principle that informed consent to a conflict of interest and duty need only be sought by a director in the context of a final decision being made by a company. It will be recalled that in *Pilmer v Duke*, four members of the High Court described the relevant fiduciary obligation as being not to promote the personal interests of the fiduciary by, relevantly, 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. By putting a draft Separation Proposal before the LCM Board, Mr Coope was pursuing a gain in circumstances in which there was a real or substantial possibility of a conflict between his personal interests and those of LCM.
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> (citations omitted)

Defences: Limitation of Actions and Laches

89. A limitation of actions statutory defence may apply directly in respect of claims by the plaintiff against a fiduciary in relation to breaches of fiduciary duty, and against a third party participant in such breaches. That will be determined by

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117 (2016) 333 ALR 524; [2016] NSWCA 37, [134], [135], [136].

the Court as a matter of statutory construction in relation to the nature of the claims made by the plaintiff. The six year limitation period applies to these equitable claims under s 13 of the *Limitation Act 2005 (WA)*, or alternatively by operation of s 27 of that Act.[118] Section 27 imposes a six year limitation for actions, "*… in which the relief is sought in equity by analogy to the limitation period for any other cause of action*". The *Limitation Act 1985 (ACT)* has similar provisions, but the relevant Acts of the other States and Territories do not. For example under the Victorian *Limitation of Actions Act 1958*, s 5(1)(a) provides for a six year limitation period for contract, tort and breach of statutory duty damages claims. However s 5(8) provides that the section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief except insofar as any provision may be applied by the Court by analogy. Hence issues can arise as to whether a Court of equity ought apply relevant provisions of a limitation of actions statute by analogy.

90. Justice Leeming, writing extra-judicially, explained:[119]

> "Thus in Australia, if a limitation statute does not apply directly to an equitable claim, one asks whether the equitable claim 'corresponds' to a legal claim to which it does apply. If not, then no application by analogy is possible and the only question is whether some other equitable defence is available. If there is a corresponding legal claim to which the statute applies, then the statute is to be applied by analogy in its terms subject to any discretions it may contain, and subject to other doctrines precluding a party from relying on a statute,[120] but not subject to some further residual' discretion which lacks foundation in the statute. If that were not so, then to use Meagher JA's language, equity 'would not truly be acting by analogy and following the law'. "[121]

91. In *Lewis Securities*,[122] the relevant defendant had been sued as a constructive trustee for knowing assistance in the dishonest and fraudulent breach of duty by the fiduciary. Leeming JA held that the twelve year limitation provided for

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118 *Dewar v Ollier* [2020] WASCA 25, [161]-]169] per Beech J, Vaughan JJA, Archer J.

119 "Not Slavishly Nor Always" – Equity and Limitation Statutes, Chapter 14, Defences in Equity, P Davies, S Douglas and J Goudkamp eds Hart Publishing 2018, at 308.

120 Equity will prevent a defendant from relying on a statutory limitation if it would be unconscionable for the defendant to do so: *Gerace v Auzhair Supplies Pty Ltd (in Liq)* (2014) 87 NSWLR 435; [2014] NSWCA 181, [75] per Meagher JA; *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, [2014] WASC 102, [212] per Edelman J.

121 *Gerace v Auzhair Supplies* (2014) 87 NSWLR 435; [2014] NSWCA 181, [74]; noted [2014] 88 Australian Law Journal 621.

122 (2018) 334 FLR 9; [2018] NSWCA 118.

in s 47 of the *Limitation Act 1969 (NSW)* in respect of claims for fraud to recover trust property applied directly where a constructive trust was claimed,[123] but only by way of obiter dicta as a s 47 defence had not been pleaded. The relevant defendants contended that they could rely in equity by way of analogy upon the six year limitation period provided for in s 1317K of the *Corporations Act* in relation to a claim for knowing involvement in breaches of statutory duties under s 180 to s 183 under s 79 of the Act. Leeming JA held that the defendants could not rely in equity upon the s 1317K limitation period as the analogy was inapt. Principally that was because "dishonest and fraudulent design" in the claims made against them under the second limb of *Barnes v Addy* was different from the requirements for s 79[124] involvement, and because under the direct application of s 47 where the defendant was sued as a constructive trustee the limitation period was different: twelve years not six.[125] Sackville AJA agreed with Leeming JA on this issue,[126] but Emmett JA dissented.[127] Leeming JA went on to reject a laches defence.[128]

92. In *Finance & Guarantee Co Pty Ltd v Auswild (Auswild)*,[129] the relevant defendants in a second limb *Barnes v Addy* case also sought to rely by way of analogy in equity upon the *Corporations Act* six year limitation period[130] in relation to s 1317 claims for compensation for breaches of ss 180-182. Riordan J did not decide the point, noting the difference of opinion between Leeming and Emmett AJA in *Lewis* and the differences between the Victorian Act concerning constructive trust claims based on fraudulent conduct[131] compared to s 47 of the New South Wales Act.[132]

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123 (2018) 334 FLR 9; [2018] NSWCA 118, [52]-[59], [62]-[69], [72]-[75].

124 Under section 79, it is sufficient, inter alia, that the person has aided, abetted, counselled or procured the contravention.

125 (2018) 334 FLR 9; [2018] NSWCA 18, [71], [72].

126 (2018) 334 FLR 9; [2018] NSWCA 18, [98].

127 (2018) 334 FLR 9; [2018] NSWCA 18, [215].

128 (2018) 334 FLR 9; [2018] NSWCA 18, [79]-[84].

129 [2019] VSC 664. The decision in *Auswild* is subject to a pending application for leave to appeal to the Court of Appeal.

130 Ss 1317 HA(1) and 1317K CA.

131 *Limitation of Actions Act 1958*, s 21.

132 [2019] VSC 664, [545], [546].

Laches

93. Riordan J went on to decide whether the equitable doctrine of laches applied to bar the plaintiffs' claims. The Judge decided that the laches defence was made out by the defendants on the complex fact of the case. Riordan J had otherwise rejected all the various claims by the plaintiffs against the defendants. The central allegations of the plaintiffs were that directors caused the relevant companies to enter into transactions that were not in interests of the entities, or otherwise in breach of their fiduciary and equitable duties.[133] Riordan J held that the doctrine of laches is confined to equitable claims which are subject to no statutory bar either expressly or by analogy.[134] The Judge stated the principles of laches in these terms:[135]

> "[567] The defence of laches will preclude relief where 'the plaintiff has, by his inaction and standing by, placed the defendant or third party in a situation in which it would be inequitable and unreasonable to place him if the remedy were afterwards to be asserted'.
>
> [568] The elements of the defence of laches are:
>
> (a) knowledge of the wrong;
> (b) delay; and
> (c) unconscionable prejudice caused to the opponent by the delay.
>
> [569] With respect to the extent of knowledge, Lord Blackburn explained in *Erlanger v New Sombrero Phosphate Co*:
>
> > A Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been *such notice or knowledge as to make it inequitable to lie by*.
>
> [570] As Young JA observed in *Crawley v Short* '[t]hat general statement does not, of itself, assist in fixing the degree of knowledge required, but points to it being a question of fact and

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133 [2019] VSC 664, [4], [5].

134 [2019] VSC 664, [561].

135 [2019] VC 664, [567]-[575]. Another authoritative and useful statement and application of laches principles is provided by the decision of the Western Australian Court of Appeal in *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291; [2011] WASCA 17, [632]-[676] per McLure P.

degree in each case to be taken together with all the other facts of the particular case'.

[571] Further, with respect to knowledge:

(a) The time from which delay is measured is the time at which the plaintiffs have knowledge of the facts upon which the equitable remedy is based.

(b) If the plaintiffs have knowledge of the relevant facts, it is presumed that he or she also has knowledge of his or her rights to the cause of action.

(c) The availability of the means of knowledge is as good as knowledge.

[572] With respect to the relationship between delay and prejudice, the Court 'should not confine its attention to the additional and "marginal" prejudice attributable to the delay beyond the time at which proceedings should have been instituted. Rather, it should look at the detriment caused through the whole period of time since the cause of action accrued'.

[573] Delay in itself is not sufficient. In general terms, the delay must cause unconscionable prejudice, which is said to arise generally in circumstances where 'it would be practically unjust to give remedy'.

[574] In determining whether the delay has caused such unconscionable prejudice, the Court may have regard to the following:

(a) The prejudice to the defendants caused by the plaintiffs' delay must be substantial. A trivial inconvenience is insufficient.

(b) Such unconscionable prejudice may arise, in all the circumstances, where a plaintiff, in delaying to take or pursue an action, has:

(i) caused the defendants or a third party to alter their position in reasonable reliance on the plaintiffs' acceptance of the status quo or otherwise permitted a situation to arise that would be unjust to disturb; or

(ii) acquiesced to the defendants' conduct.

(c) These elements of delay and acquiescence were explained by Deane J in *Orr v Ford* as follows:

> Delay and acquiescence are invoked as part of the circumstances of the case which are said to found a defence of laches notwithstanding that Mr Orr's claim is that of a beneficiary for the enforcement of an alleged express trust. Delay is relied upon in the sense of the period during which there was inaction or standing by in the face of a challenge to rights or an assertion of adverse rights. Acquiescence is relied on in the sense of calculated (i.e. deliberate and informed) inaction or standing by which encouraged another reasonably to believe that his assertion of rights and consequent actions were accepted or not opposed.

(d) The question of prejudice arising from the unavailability of evidence is 'whether evidence which may have cast a different complexion on the matter has been lost'.[I]

(e) There may be an element of conjecture or speculation as to what defences would have been available if the defendants had acted with reasonable promptness. However, as Deane J observed in *Orr v Ford*:

> Equity is not so misguided as to recognize laches as a defence when it causes evidence to perish but to treat the defence as lost if the laches continues for so long that it not only obliterates evidence but produces conjecture or speculation as to what, if any, precise defences would have been available if proceedings had been instituted within a reasonable time.[I]

[575] In the final analysis, in determining whether the defence of laches is applicable, a court engages in an evaluative process; and will only uphold the defence of laches if, after considering all the elements in the circumstances of the particular case, it concludes that the traditional notions of equity and good conscience require that the plaintiff should be refused relief. As Young JA observed in *Crawley v Short*:

> Thus the degree of knowledge, the type of transaction and the prejudice to the defendant caused by the delay are all matters which need to be evaluated when assessing whether the defence of laches has been made out and it is an unrewarding task to search for some formula as to just what degree of knowledge must exist in any particular case."

(citations omitted)

94. It is perhaps noteworthy that the plaintiffs in *Auswild* made claims against the director defendants that were broader than breaches of fiduciary duties. The plaintiffs also made claims of breach of contractual, equitable and statutory prescriptive non-fiduciary duties to act in good faith in the best interests of the companies. Riordan J applied the equitable doctrine of laches in relation to those other claims as well. The distinction between the fiduciary and the non-fiduciary duties of directors is not without significance here. Regarding non-fiduciary duties owed by directors to the company, the statutory and general law standards are applied to the circumstances as they existed at the time, without the benefit of hindsight.[136]

Remedies: General principles

95. The Full Federal Court in *Grimaldi*, stated the general principles concerning a fiduciary's liability to account to the plaintiff as follows:[137]

> [513] The principle that a fiduciary is liable to account for a profit or benefit obtained in breach of his or her duty as a fiduciary is integral to the formulation of the fiduciary principle itself, as is evident in the formulations of it by Deane J in *Chan* at 198-199 and of Mason J in *Hospital Products* at 107-108. The relief which is appropriate to effectuate this liability can take a variety of forms – the imposition of a constructive trust on an asset which constitutes the benefit in question; compensating the fiduciary's principal for the loss inflicted on it, that loss being the commensurate with benefit derived; the avoidance of a transaction between the two; an account of profits; etc. In determining what is the appropriate relief and its extent require two questions to be answered: (i) what is the breach of fiduciary duty – the misappropriation of "trust" property; the improper diversion of an opportunity; an undisclosed personal interest in a sale or purchase, etc?; and (ii) what is the profit or benefit which the fiduciary has made in consequence of that breach.
>
> [514] There is an established jurisprudence which informs the answering of these questions both in general, and for particular contexts. As to the former, there are some well accepted propositions. Among these, are:

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136 *ASIC v Vines* (2005) 55 ACSR 617; [2005] NSWSC 738, [1077] per Austin J, cited by Riordan J in *Auswild* [2019] VSC 664, [84].

137 (2012) 200 FCR 296; [2012] FCAFC 6, [513], [514].

(i) the liability is not penal; "equity does not ... punish a fiduciary for misconduct by making him account for more than he actually received as a result of his breach of duty;

(ii) it is no answer to the liability that the fiduciary's principal suffered no actual loss as a result of the breach of duty; or that it was unwilling or unable to obtain the benefit or gain itself; or that it was not the fiduciary's duty to acquire the profit or benefit as an incident of his or her duty to the principal;

(iii) of fundamental importance, the remedy must be fashioned to fit the nature of the case and the particular facts. By way of corollary, a particular remedy will not be granted where it is inappropriate (eg a constructive trust) or where "it would be unconscientious to assert it" (eg an account of profits); and

(iv) the stringent rule requiring a fiduciary to account for profits ought not be carried to extremes: "the liability ... should not be transformed into a vehicle for the unjust enrichment of the plaintiff".

(citations omitted)

An account of profits

96. In *Ancient Order of Foresters*, Kiefel CJ, Keane and Edelman JJ[138] stated:

[23] It is well established that a liability to account for profits will include profits that have been made. However, Foresters submitted that this was the limit of the profits for which it could be called to account. In particular, Foresters submitted that the net present value of funeral bond contracts was an assessment of anticipated future profits rather than actual profits, and was therefore irrecoverable.

[24] This submission is not consistent with principle or authority. As to principle, to confine the account in this way would sever the process of accounting for, and disgorgement of, profit from its rationale in the principle of ensuring that the wrongdoer should not be permitted to gain from the wrongdoing. As to authority, the liability to account for a profit was described in *Warman* as concerned with "a profit or benefit" in language divorced from a confined conception of benefit as accrued profit in narrow accounting terms. In any event, it is artificial to require disgorgement of realised profits but not to allow unrealised

138 (2018) 360 ALR 1; [2018] HCA 43, [23], [24].

> profits that will be realised upon performance of the relevant contract where there is no reason to expect that performance will not occur.
>
> (citations omitted)

97. To like effect, Gageler J in *Ancient Order of Foresters* stated:[139]

> [75] The equitable remedy of account is a personal order. The order operates to require that a defendant pay to a plaintiff the monetary value of a benefit or gain to the defendant. Although commonly referred to as an "account of profits", there is no reason why a benefit or gain to be made the subject of an account must answer the description of a "profit" in conventional accounting terms. Nor is there any reason why that benefit or gain must answer the description of "property" or must have sufficient certainty as to be capable of forming the subject matter of a trust. The benefit or gain can be expectant or contingent. Indeed, it is commonplace that a benefit or gain the subject of an account might encompass an ongoing business. And it is commonplace that the benefit or gain to be made the subject of an order to account might extend to the whole of the ongoing business or be limited to a part of the business identified by reference to both a specified scope of commercial activities and a specified period of commercial activities which need not be confined to a past period but may be a period which extends into the future.

98. As to causation Gageler J stated:[140]

> [86] Despite an earlier influential formulation which can be read as indicating to the contrary, the causal connection which must exist for a knowing participant to be liable to account for a benefit or gain is not between the benefit or gain and the conduct which constitutes knowing participation. To require a causal connection of that nature would recast knowing participation as a free-standing head of liability divorced from the fiduciary obligations which it is the purpose of equity's imposition of liability on the knowing participant to enhance.
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> [87] Foresters' first ground of appeal therefore proceeds on too narrow an understanding of equitable principle in assuming that a knowing participant cannot be liable to account unless there is a causal connection between the benefit or gain and the conduct which constitutes knowing participation. Foresters' first ground

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139 (2018) 360 ALR 1; [2018] HCA 43, [75].

140 (2018) 360 ALR 1; [2018] HCA 43, [86]-[88]; Elliott J in *AHRKalimpa Pty Ltd v Schmidt (No 3)* [2019] VSC 194, [32] held that these statements concerning causation also applied in relation to equitable compensation.

> of appeal is equally mistaken insofar as it asserts a requirement for a court to determine the "real or effective cause of any profit derived".

99. Hence, the necessary causal connection is between the fiduciary's breach of obligation and a benefit or gain to the knowing third party participant.

100. Gageler J continued:

> [88] A causal connection between a fiduciary's breach of fiduciary obligation and a benefit or gain sufficient for the fiduciary or knowing participant to be liable to the equitable remedy of account will exist if the benefit or gain to the fiduciary or knowing participant would not have been obtained "but for" the breach, in the same way as a causal connection sufficient for the fiduciary to be liable to the equitable remedy of compensation will exist if a loss to the person to whom the fiduciary obligation is owed would not have been sustained but for the breach[94]. Because the concern of equity is to vindicate the equitable obligation that has been breached, the "but for" connection will be sufficient even though other contributing causes might be in play. That the fiduciary's breach of fiduciary obligation is dishonest and fraudulent is also good reason for treating a sufficient causal connection as existing if the dishonest and fraudulent breach can be concluded to have played a material part in contributing to the benefit or gain of the fiduciary or knowing participant even in circumstances where it cannot be concluded that the benefit or gain would not have been obtained but for the breach.
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> [89] Obviously enough, as with any other question of causation in equity, the causal connection between a fiduciary's breach of fiduciary obligation and a benefit or gain must be judged using common sense "with the full benefit of hindsight" …
>
> [93] The judgment ultimately to be made by the court from which the order to account is sought is correspondingly not only factual; fundamentally, it is evaluative …
>
> [94] Factors which might bear on the judgment to be made in an individual case cannot be catalogued exhaustively in advance. They will include the relative extent to which other causes which might include the skill and industry of the defendant can be assessed as having contributed to the benefit or gain that is causally connected to the breach of fiduciary obligation. They will also include whether, and if so to what extent, the defendant's gain reflects uncompensated loss on the part of the plaintiff. And although the purpose of the remedy is not to punish, consideration of what is just in the context of the

> equitable obligation to be vindicated by the remedy cannot exclude consideration of the severity of the breach of the fiduciary obligation and the extent of the defendant's own involvement and culpability in it . The judgment to be made must accommodate the stringency of the equitable obligation to be vindicated to the need to ensure that the remedy is not "transformed into a vehicle for the unjust enrichment of the plaintiff".
>
> (citations omitted)

101. The High Court in *Warman International Ltd v Dwyer*,[141] per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ, concerning a fiduciary's liability to account for profit, stated:

> [23] … A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position. 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.

102. In *Ancient Order of Foresters*,[142] the Court considered that what the third party participant obtained by reason of the breaches of duty by the former managers of the plaintiff was a business. That business was based on a five year plan that Messrs Wolff and Corby had prepared for the participant, which was implemented. Based on a joint expert report adduced in evidence before the Full Federal Court, the account ordered by the High Court awarded in favour of the plaintiff was in the sum of $14,838,063. That was a calculation of the value of the ongoing business of the participant, being the net present value of pre-tax cashflows over a ten year period. The calculation was made based upon

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141 (1995) 182 CLR 544; [1995] HCA 18.

142 (2018) 360 ALR 1; [2018] HCA 43, [17]-[24] per Kiefel CJ, Keane and Edelman JJ; [99]-[119] per Gageler J; Greenwood J applied *Ancient Order of Foresters* in ordering an account of profits against former employees of the plaintiff and their company in *Ultra Management (Sports) Pty Ltd v Zibara* [2020] FCA 31.

historical cashflows from January 2011 until June 2014, and projected cashflows thereafter for a period of ten years. The rates of interest which were applied reflected a discounted component for risk. That valuation was substantially higher than the valuation applied below in the Federal Court. The valuation there assumed that the participant ceased marketing the relevant funeral plan products by a particular date, but the valuation adopted in the High Court did not make that assumption. Kiefel CJ, Keane and Edelman JJ distinguished the case from *Warman International Ltd v Dwyer* where the profits awarded were limited to the first two years' exploitation of the business opportunity appropriated by the defendants.[143] Gagelar J found the award made to be consistent with the reasoning in *Warman*.[144]

103. The decision of the High Court in *Ancient Order of Foresters* as to the extent of the account of profits ordered against the third party participant in the fiduciaries' breach of duties is a strong one. It illustrates the evaluative judgment of a Court of equity as referred to by Gageler J. Importantly, Gageler J held that:[145]

> [114] Th[e] calculation of the net present value of the business, it must be acknowledged, made no allowance for risks which Foresters had already assumed in establishing and operating the business until the time of trial. But Foresters is hardly to be compensated for the risks it assumed in doing the very thing which constituted its participation in Mr Woff and Mr Corby's dishonest and fraudulent breaches of fiduciary duty.[146]

Equitable compensation

104. Equitable compensation is an alternative remedy to an account of profits and the plaintiff must elect between them. Obviously enough, the plaintiff will choose the remedy of greatest pecuniary advantage to it. In *AHRKalimpa Pty Ltd v Schmidt (No 3)*[147] stated relevant principles as follows:

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143 *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [22].

144 (2018) 360 ALR 1; [2018] HCA 43, [82], [83].

145 (2018) 360 ALR 1; [2018] HCA 43, [114].

146 Elliott J applied this in the circumstances of the case in *AHRKalimpa Pty Ltd v Schmidt (No 3)* [2019] VSC 197 [164], [165].

147 [2019] VSC 197, [27], [28] [31], [33], [34], [35].

[27] … The cases demonstrate that the policy of the law is to uphold the obligations of a fiduciary duty with respect to disloyal non-trustee fiduciaries in cases where loss is occasioned upon a breach arising from conflict between duty and self-interest.

[28] On a general level, any relief must be fashioned to fit the facts of the particular case at hand. Further, in contrast to an account of profits, equitable compensation is directed to restoring the claimant to the position it would have been in had the breach of duty not occurred. In order to achieve this, the assessment of loss is to be made at the time of judgment (as opposed to the date of the breach) using hindsight, essentially to ensure that the plaintiff is put into the presently correct position. …

[31] Unlike an account of profits, it is essential a loss has been suffered for equitable compensation to be awarded. Further, although equitable compensation is concerned with properly compensating the wronged person for loss suffered, profits earned by the wrongdoer may also be relevant to the quantification of loss in some cases. …

[33] As for the evidence that must be led by a plaintiff seeking to recover equitable compensation, again generally speaking, the position is not as onerous as that for a plaintiff at common law. Once a causal link to the loss claimed is established, the onus shifts to the defendant. Further, if a defendant has some proper basis for reducing the loss claimed because of the output of its skill, labour, investment and risk, then the onus is on the defendant to establish whether, and, if so, to what extent, these factors ought to be taken into account.

[34] Loss claimed is not limited by issues of remoteness or foreseeability of loss. Once the causal link is established, equity does not enquire as to whether the loss was also caused by other acts or omissions. Further, when assessing quantum and considering what would or ought to have happened if no breach had occurred, the court should not speculate against the plaintiff, or assume something might have occurred when, in fact, it did not. Naturally, if there is direct evidence on an issue then that evidence must be taken into account. All of this said, the role of the court is not to penalise the errant fiduciary. Equally, the remedy is to properly compensate a plaintiff, not provide it with a windfall.

[35] When dealing with a loss of an opportunity, a court is challenged with placing a monetary value on something that may be elusive and lacking precise measurement. In order to arrive at an appropriate award, the court is entitled to use common sense and general notions of justice and fairness.

(citations omitted)

105. Elliott J continued as to the facts:[148]

> [40] In short, as found in the Liability Judgment, the Business conducted after 25 November 2013 was a continuation of the same Business, rather than Schmidt setting up a new business in competition with the Business. Not only did Schmidt and Otway Livestock continue the Business, but they treated it as their own without paying any valuable consideration to the rightful owner of the Business for the "transfer". Further, it does not lie in the mouth of Schmidt (and Otway Livestock) "to say that they did not want to acquire the [B]usiness, for that is precisely what they did". Equally, it is of little moment that there may not have been many purchasers, or even any purchasers other than the defendants, interested in acquiring the Business; for, in those circumstances, the Business should be valued based on a notional sale to the defendants.
>
> [42] To elaborate, upon his resignation as a director of AHRKalimpa (whether or not Schmidt had engaged in breaches of duties before that time), if Schmidt had acted in good conscience and consistent with what had been resolved by the board, he would have refrained from conducting the Business, including treating existing prospective shipments as his, or Otway Livestock's, own. ...
>
> (citations omitted)

106. Elliott J acted upon expert evidence as to the equity value of the business using capitalisation of future maintainable earnings methodology, plus interest, in awarding equitable compensation to the plaintiff.[149]

107. In *Edmonds v Donovan*,[150] the Court of Appeal upheld the decision of Warren J to order equitable compensation rather than an account of profits. As a matter of principle, the Court stated:[151]

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148 *AHRKalimpa* [2019] VSC 197, [40], [42].

149 *AHRKalimpa* [2019] VSC 197, [56]-[166].

150 (2005) 12 VR 485, [64]-[83] per Phillips JA, Winneke P and Charles JA agreeing.

151 (2005) 12 VR 485, [78].

(a) in broad terms the remedy of an account looks to the gain made by the party in breach while the remedy of equitable compensation looks rather to the loss suffered by the aggrieved party;

(b) the aim of equitable compensation is to place the party who suffers following the breach of duty as nearly as possible in a position in which he would have stood had there been no breach; however

(c) it might be appropriate to compensate the plaintiff's loss by reference to the defendant's gain.

108. Phillips JA[152] held that it was inappropriate to order an account of the profits made by the two errant former joint venturers as they had made significant further investments, expended effort and skill over a significant period of time and the plaintiffs had stood by for two years having been exposed to none of the risks that the defendants had run. As the equitable compensation aimed to put the plaintiffs in the position they would have been in had there been no breach, that meant the profits ought be divided as if the venture had been pursued as originally planned. The two former joint venturers who took the commercial opportunity of the venture arrogated to themselves not the whole venture, but four-sixths of it. Hence two-sixths of the profit was allowed as a credit in their favour.

Constructive trusts

109. A remedial constructive trust was described by the High Court in *Giumelli v Giumelli*,[153] per Gleeson CJ, McHugh, Gummow and Callinan J in these terms:

> [3] A constructive trust of this nature is a remedial response to the claim to equitable intervention made out by the plaintiff. It obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties.
>
> [4] The term "constructive trust" is used in various senses when identifying a remedy provided by a court of equity. The trust institution usually involves both the holding of property by the trustee and a personal liability to account in a suit for breach of

152 (2005) 12 VR 485, [79]-[83].

153 (1999) 196 CLR 101; [1999] HCA 10, [3], [4].

> trust for the discharge of the trustee's duties. However, some constructive trusts create or recognise no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee. An example of a constructive trust in this sense is the imposition of personal liability upon one "who dishonestly procures or assists in a breach of trust or fiduciary obligation" by a trustee or other fiduciary.

110. Before a constructive trust is imposed, the Court should first decide whether having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a constructive trust.[154]

111. A claim for a remedial constructive trust can have particular application in the present context where there is evidence that the defendant has received, or will receive, property or monies and that there is a danger that a prospective personal judgment for an account of profits or equitable compensation would not be satisfied due to a diminution of the assets in the meanwhile, such as to justify the granting of a freezing order.[155]

Conclusion

112. The plaintiff requires a strong case to make good a claim for breach of fiduciary obligations. However, as is particularly demonstrated by the decision of the High Court *Ancient Foresters of Order*, a Court of equity will act decisively against the defendants and in favour of the plaintiffs where equity takes a clear view that unconscionable conduct by the defendants of the relevant kind has occurred.

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Aickin Chambers
March 2020

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154 *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10, [10], [49], [50] per Gleeson CJ, McHugh, Gummow and Callinan JJ; *John Alexander's Club Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19, [128] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ; *Farah Constructions* [2017] HCA 22, [200] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Ancient Order of Foresters* (2018) 360 ALR 1; [2018] HCA 43, [74] per Gageler J.

155 For a recent statement of the principles concerning freezing orders, see *Rozenblit v Vainer* [2019] VSCA 164, [10]-[19] per McLeish and Niall JJA.8