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Thesis Title: The Development of a Commercial Fiduciary Jurisprudence in the High Court of Australia: 1903 to 2009

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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CONTENTS

Introduction

Title

The title of this thesis is: "The Development of a Commercial Fiduciary Jurisprudence in the High Court of Australia: 1903 to 2009".

Thesis

This research will seek to prove the proposition that the High Court of Australia has developed a jurisprudence of the law relating to fiduciaries (in a commercial setting) that is distinctly Australian.

Objective

In undertaking this research the primary objective is to analyse every decision of the High Court of Australia from 1903 to 2009 in which the obligations of a fiduciary and the relationship between a fiduciary and a principal in a commercial setting are the substantial reasons for the matter being before the High Court of Australia. The purpose for carrying out this analysis is to prove a thesis (set out below).

A second objective is to make available to practitioners, academics and scholars a treatise that systematically analyses the main (commercial) fiduciary law cases since the establishment of the High Court of Australia and demonstrate how the jurisprudence of the law relating to fiduciary obligations and fiduciary relationships in Australia has developed within the High Court of Australia.

A third objective is a result of the writer being unable to find a publication showing how the jurisprudence of the law relating to the obligations of a fiduciary has developed chronologically and systematically by the High Court of Australia since

its foundation in 1903. The writer has taken the opportunity to undertake this research and provide such a reference material.

Methodology

A primary cause of the development of jurisprudence is the judiciary, that is, the Chief Justices and Justices of the High Court. This research looks at the development of a jurisprudence in the confined field of the obligations of a fiduciary and the relationship between a fiduciary and a principal within commercial transactions. There is an exception with the inclusion of Breen v Williams[1] due to its importance in the proscriptive/prescriptive dichotomy debate and also in the challenge to define the indicators of a fiduciary relationship.

The factors influencing the Chief Justices and Justices of the High Court in their judicial decision making processes include: precedent case law of the High Court itself; the superior courts of the United Kingdom and the Privy Council; other international jurisdictions such as Canada and New Zealand; the judicature legislation in Australia and overseas; the cessation of appeals to the Privy Council from Australia; the introduction of special leave applications in the High Court; the changing commercial, industrial, economic, financial, educational and social fabric of Australia; world wars; government policy and the personal traits and beliefs of the Justices and their interaction with each other and the Chief Justice of the time.

The jurisprudence of fiduciary obligations and relationships also evolves and develops with the way the Justices of the High Court develop their decision making process. It will be observed how the Justices do not hesitate to criticise individual Judges of the Courts of Appeal of the States or Territories of Australia when analysing the decisions of those superior courts.[2]

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[1] *Breen v Williams* (1996) 186 CLR 71.

[2] *Friend v Brooker* (2009) HCA 21. Criticism by majority of McColl JA in the New South Wales Court of Appeal.

The Hon. R.Meagher, a former Judge of the Court of Appeal of New South Wales writing ex curia, referred to Meagher, Gummow and Lehane, in the context of the grey area between fiduciary duties and common law duties where the learned authors said it (the grey area) is to be seen as an 'elision of fiduciary and other duties'.[3] Meagher explained this to mean an amalgamation of the duties recognised by equity as those properly appertaining to the relationship of a fiduciary with his or her principal, and 'other' duties whose breach would not attract the operation of equitable remedies, because they are not the subject of a relationship supervised by equity.[4] The thrust of the article is the way in which the judges in England, Canada and New Zealand have developed a fiduciary jurisprudence at the expense of Equity.

The judgment of Millett LJ in Bristol and West Building Society v Mothew[5] is of great importance to the views of Meagher and the learned authors in their commentary on the non fiduciary duties of fiduciaries. Mothew is referred to by the High Court in Maguire v Makaronis.[6]

All the cases in the High Court involving fiduciaries can be divided into four categories: cases where the Appellant's points of appeal involve a question of law directly relating to the fiduciary relationship and the obligation of a fiduciary in a commercial setting; cases where the High Court of Australia indirectly discuss the law relating to fiduciaries, also in a commercial setting; thirdly where the substantive field of law was not commercial, for example, indigenous peoples, family law and wills and probate and fourthly, cases where there is a very brief passing reference to fiduciaries which has no bearing on the decision making process of the High Court. The two latter categories of cases have not been taken into account in this research. The two former categories of cases have been

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[3] Meagher RP, Heydon, JD and Leeming, MJ "*Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*" 4th ed (2002), 210 ff.

[4] Meagher, The Hon Mr Justice RP; Maroya, A "Crypto-Fiduciary Duties" (2003) 2 *University of New South Wales Law Journal* 348, 349.

[5] *Bristol and West Building Society v Mothew* [1998] Ch 1.

[6] *Maguire v Makaronis* (1996) 188 CLR 449.

analysed and form the basis of this research. A total of 277 High Court of Australia cases were read for this research and a total of 38of those cases were selected to belong to the first and second categories mentioned above and have been analysed in detail to determine how the High Court has developed a fiduciary jurisprudence (of fiduciaries in a commercial setting).[7]

Although there are judgments of the High Court that interpret the powers of a fiduciary and the way in which that fiduciary power maybe fettered, these cases have not been taken into account in this thesis as the main aspect is the fetter as opposed to the development of the law relating to the fiduciary obligations and relationships.[8]

The research is limited to analysing cases of the High Court only. Except for three decisions in Appendix 1, the decisions of State and Federal Appellate Courts of Australia are not analysed. The three cases in Appendix 1 demonstrate the way in which superior State and Federal Court of Australia analyse the fiduciary case law to arrive at their decisions. The intention of the research is to trace the development of a fiduciary jurisprudence in the High Court. To reach a conclusion on the distinctiveness of an Australian fiduciary jurisprudence a comparison is made primarily with Canada and secondly with New Zealand. The comparison with Canada will show a fundamental difference in the underlying principles in fiduciary jurisprudence particularly in relation to the proscriptive/prescriptive dichotomy and as well (as in Canada) the comparison with New Zealand will show a propensity to the fusion of law and equity thus resulting in a different approach to finding a fiduciary relationship between parties to a commercial relationship. In the cases analysed, the High Court does not refer to any case law on fiduciaries from New Zealand.

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[7] See Appendix 2 for a full listing of all 277 cases.

[8] *Thorby v Goldberg* (1964) 112 CLR 597 and Swil, J and Forbes, R "Fettering the fiduciary discretion by agreement: Breach of duty or commercial reality?" (2010) 84 *Australian Law Journal* 32.

Judicature legislation has been introduced in all the countries from which the case law has been reviewed in this research, albeit later in New South Wales in comparison to other states of Australia and other countries. This legislation is discussed when it is referred to by the Justices in their judgments.

Structure

Chapters 1-8 are an in-depth analysis of the main fiduciary cases (in a commercial setting) during the term of each Chief Justice. At the end of each Chapter there is a summary of the main developments in the jurisprudence of the law relating to fiduciaries within that period.

Chapter 9 is an international comparison of Australia with Canada and New Zealand.

A Conclusion brings together the substantive developments in each period in a cumulative presentation with a statement on the contribution of these developments over the past 106 years to the establishment of a fiduciary jurisprudence by the High Court of Australia which can be described as distinctly Australian.

Appendix 1 is an analysis of three Australian State and Federal cases on fiduciaries and which refer to some of the decisions of the High Court of Australia in Chapters 1 to 8. The intention of including this appendix is to show how superior State and Federal courts analyse the law relating to fiduciaries in light of High Court of Australia precedent case law.

Appendix 2 is a listing of all High Court of Australia cases between 1903 and 30 June 2009 in relation to fiduciaries.

Definitions and Terminology

The terminology around the word 'fiduciary' includes obligations and relationships. For example, the word 'obligation' has been used to mean that a fiduciary must act honestly in what he/she alone considers to be the interests of his/her beneficiaries.[9] Over the years the core requirement of the obligation of a fiduciary has changed from 'loyalty'[10] to being 'faithful'[11] to 'undivided loyalty'[12] and a duty not to act in such a way that would result in a breach of that loyalty.

There is also a core requirement of the fiduciary relationship itself which changes, for example, from 'trust and confidence,'[13] 'confidential relations'[14]and 'implicit dependency.'[15] The fiduciary relationship is composed of a fiduciary and another party referred to in this thesis as the principal. Within the literature on fiduciary relationships the other party has also been referred to as the trusting party or a beneficiary.

It will be observed within the commentary that certain types of relationships are recognised as fiduciary relationships and as a result these relationships take on a form of assumed fiduciary character when the same type of relationship appears before the court again. In Australia, the current name given to such fiduciary relationships is generally 'status' based, whilst other relationships that are found to be fiduciary are derived from the facts of the case are known as 'fact' based fiduciary relationships.[16] In New Zealand, the two types of relationships are

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[9] Finn, PD *Fiduciary Obligations* (1977), 15.
[10] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 394 (Isaacs J).
[11] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395 (Dixon J) referring to Lord Cairns in *Parker v McKenna* 10 Ch App 96.
[12] *Breen v Williams* (1995) 186 CLR 71, 108 (Gaudron and McHugh JJ).
[13] *Dowsett v Reid* (1912) 15 CLR 695, 707 (Barton J).
[14] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97 (Mason J).
[15] Ong, D.S.K. "Fiduciaries: Identification and Remedies" (2004) *University of Tasmania Law Review* 312, 315 with particular reference to *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[16] *Breen v Williams* (1995) 186 CLR 71, 113 para [38] (Gaudron and McHugh JJ) where there is a reference to the doctor/patient relationship not being status based.

commonly known as inherent and particular[17] and in Canada, traditional and non-traditional.[18]

For the purpose of brevity only, in this thesis, the emergence of a jurisprudence in relation to the law covering fiduciaries, which in turn is viewed as a subset of the development of an overall equitable jurisprudence of the High Court is referred to as fiduciary jurisprudence.

The High Court of Australia is referred to as the High Court of Australia, except in cases or paragraphs where there is a further reference to the High Court of Australia this latter reference is shortened to the High Court.

Similarly, the Supreme Court of New South Wales Court of Appeal is referred to as the Supreme Court of New South Wales Court of Appeal, except in cases or paragraphs where there is a further mention to the Supreme Court of New South Wales Court of Appeal the reference is condensed to the Court of Appeal (NSW). This approach applies to other State and Federal courts as well.

Within this thesis I give my own views on certain matters and when doing so I preface such comments with words such as "it is the view of this writer."

[17] *Chirnside v Fay* [2006] NZSC 68, 90 at para [80] (Blanchard and Tipping JJ).
[18] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 592 and 596 (Sopinka J).

Abstract

A commercial fiduciary jurisprudence in the High Court of Australia has developed through the judicial decision making processes of the Justices in cases involving fiduciaries in a commercial setting.

Loyalty is established as the core obligation of a fiduciary. Trust and confidence are the generally accepted benchmarks of a fiduciary relationship. The foundation Chief Justice of the High Court, Sir Samuel Griffith, established an accepted methodology of detailed analysis of the 'circumstances of the case' to identify any fiduciary characteristics. Rules and constraints developed. The core rule of no conflict/no profit was analysed early in Reid v MacDonald.[19] Informed consent, disclosure and the proscriptive/prescriptive dichotomy evolved with the increase in trade and commerce. Categorisation of fiduciary relationships is subject to the detailed analysis of the scope of the relationship with commercial 'arm's length' relationship tending to negative a relationship.

The Chief Justices and the Justices have work cohesively together to maintain consistency in the development of a commercial fiduciary jurisprudence. The High Court first referred to its own decisions, in commercial fiduciary matters, in Ngurli's case in 1953, some 50 years after the establishment of the High Court in 1903.[20] The Appellate jurisdiction of the High Court has also allowed the High Court to correct the interpretation of fiduciary law by State and Federal appellate courts, thus contributing to the thesis of a distinctive Australian commercial fiduciary law.

The development of a fiduciary jurisprudence and the distinctiveness arises from a number of contributors which are detailed in the Conclusion herein and are generally comprised of the interpretation of precedent case law from within Australia and internationally; the cessation of appeals to the Privy Council;[21] the

[19] *Reid v MacDonald* (1907) 4 CLR 1572.
[20] *Ngurli Ltd v McCann* (1953) 90 CLR 425.
[21] *Australia Act 1986* (Cth).

effect of the fusion of law and equity in some jurisdictions; the introduction of consumer protection legislation covering misleading and deceptive conduct,[22] the individual and personal judicial decision making methodology of the Justices of the High Court of Australia and a comparison with the commercial fiduciary jurisprudence of Canada and New Zealand.

[22] *Trade Practices Act* 1974 (Cth), Part IVA Section 51 Unconscionable Conduct and Part V Section 52 Consumer Protection.