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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.

Chapter 1

- **1903 to 1919 – Griffith CJ**

Sir Samuel Griffith was the first Chief Justice of the High Court of Australia together with the foundation Justices, Sir Edmund Barton and Richard Edward O'Connor. Sir Samuel Griffith served as Chief Justice from 1903 to 1919 and the foundations of fiduciary jurisprudence were laid during the term of Sir Samuel Griffith. In the Commonwealth of Australia, Constitution Act (section 74) the Judicial Committee of the Privy Council was, until the Australia Act 1986 (Cth), the highest court in Australia and as a consequence the principles of English common law were adopted in Australia.

The effect of a High Court decision being appealed to the Privy Council on the Justices was reflected at the time in the following terms: "A more widely accepted view is that, while only a small portion of High Court decisions were ever successfully appealed to the Privy Council, the potential for appeal had a chilling effect on the reasoning of the High Court".[23] One consequence of this view is that the abolition of appeals to the Privy Council has infused the High Court with a sense of intellectual freedom and the development of a judicial attitude which the constraints of appeals to the Privy Council discouraged.[24]Sir Anthony Mason has attributed the metamorphosis that occurred in the High Court while he was Chief Justice, at least partly, to the abolition of appeals to the Privy Council:

> ".....it is unlikely that the long line of landmark judgments delivered by the High Court in the last decade ... would have been delivered if the appeal to the Privy Council had still been on foot or, if they had been

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[23] Groves, M and Smyth, R "A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001" 2004 *Federal Law Review* 11, 15. The most notable of later cases in which this occurred is *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, 563 (Barwick CJ) stressed the role of the High Court in declaring and advancing the common law of Australia. The decision was overruled by a majority of the Privy Council [1971] AC 793.

[24] Kirby, M "Sir Anthony Mason Lecture 1996: A F Mason — From Trigwell to Teoh" (1996) 20 *Melbourne University Law Review* 1087, 1095–6.

given, it is improbable that they all would have survived an appeal to that august body."[25]

The essence of precedence is that superior courts, generally through the appellate process, have made a definitive decision on an aspect of the law and courts below in their day to day work are bound to follow that decision of those superior courts[26]. During the early years of the High Court, Griffith CJ was the dominant Justice. We will see in Chapter 1 how the Chief Justice wrote most of the judgments, with the concurrence of his fellow Justices at least until the appointment of Justices Isaacs and Higgins when the independence of these two latter justices became apparent. The judgments in the early cases (1903 to 1919) on fiduciaries are not lengthy, in comparison to the period 1975 to 2009. The judicial interpretation during these early years relied principally on Privy Council and House of Lords decisions. We see the introduction of a vocabulary in relation to fiduciaries such as conflict, profit, reliance, trust, confidence and morality.

This period is important for the introduction of presumed categories of fiduciaries in Australia and the way in which the presumed categories have contributed to the development of a fiduciary jurisprudence.

The categorisation of fiduciaries has occupied a great amount of the literature on the law relating to fiduciaries. For example, Finn P set out eight duties of good faith which correspond to the type of relationship that could give rise to a fiduciary relationship and attempts to distinguish contractual good faith and the good faith required of a fiduciary.[27] Finn P later referred to the "unselfish and undivided " loyalty he would expect to find in a fiduciary.[28]

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[25] Mason, A "Reflections on the High Court of Australia" (1995) 20 *Melbourne University Law Review* 273, 280.

[26] See *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 where the Court of Appeal (NSW) castigated Palmer J in relation to an award of exemplary damages.

[27] Finn, P *Fiduciary Obligations* (1977) 78: 1. Undue influence 2. Misuse of property held in a fiduciary capacity 3. Misuse of information derived in confidence 4. Purchase of property dealt with in a position of a confidential character 5. Conflict of duty and interest 6. Conflict of duty and duty 7. Renewals of leases and purchases of reversions and 8. Inflicting actual harm on an "Employer's" business. Finn emphasises

Maxton suggests that ".... where fiduciary liability exists it demands, by way of the duty of loyalty, behaviour which abjures the pursuit of self-interest when it conflicts with the beneficiary's interests."[29]

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the term "duty of good faith" has been adopted for descriptive purposes only. No particular significance should be attributed to the words "good faith". It is also necessary to distinguish contractual "good faith".

[28] Finn, PD *Fiduciary Obligations* (1977) 90.

[29] Maxton, JK "Contract and Fiduciary Obligation" *Journal of Contract Law* (1997) 11 JCL 222, 234.

1903 to 1919 – High Court of Australia Cases Decided

- **New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd (1904)**

The first case involving the analysis of the obligations of a fiduciary (in a commercial setting) in the High Court of Australia was New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd. [30] The High Court was comprised of Griffith CJ, Barton and O'Connor, JJ. The case involved the refusal of company directors to register a transfer of shares in the company to the Respondent, namely, the London Bank of Australia. Griffith CJ gave the main judgment with Barton and O'Connor JJ concurring.

The importance of the judgment is the method of judicial analysis of the facts and the review of precedent case law. Griffith CJ referred to two cases, Ex parte Penney L.R. 8 Ch., 449, where James, L.J., said:

> "No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it" [31]

and In re Coalport China Company's Case (1895) 2 Ch., 404 citing Rigby, L.J. who said , of directors obligations:

> "Even though in terms the power is absolute, it is a fiduciary power, it is to be exercised for the benefit of the company, and with due regard to the rights of the transferee; so that no power is absolute in that sense." [32]

These two cases from the United Kingdom are important from a jurisprudence perspective for three reasons. Firstly, the directors of a company are referred to as

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[30] *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524.
[31] *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524, 540.
[32] *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524, 542.

being in a fiduciary relationship with the company (Ex parte Penney). In New Lambton the directors created their own conflict of interest when they refused to register a share transfer in favour of the Respondent. This is the first reference in the High Court, since it commenced hearing cases on 11 November 1903, to the word "fiduciary" and any type or category of fiduciary relationship.

Secondly, for the judicial reasoning methodology of Griffith CJ in utilising precedent cases from the United Kingdom. As mentioned earlier, with the Privy Council being the final Court of Appeal for the colonies, the High Court at that time, had no real alternative than to rely on decisions of the Privy Council in reaching their (the High Court) own decisions.[33]

Thirdly and importantly, although Griffith CJ referred to the above two mentioned cases he did not follow the reasoning of James, L.J or Rigby,L.J. Griffith CJ distinguished the two cases. He was of the view that because the directors (in New Lambton) flatly refused to give reasons for their refusal to register a transfer of shares, they had breached their fiduciary duty and obligations. The Chief Justice said:

> " The case in that respect differs from any of the others that have been referred to. The bank having shown that the nominees were officers of the bank, and having requested the company to say whether they had any objection to them personally, and to suggest any nominees in their place, the company simply say that they decline to register. Under these circumstances I think that the order of the learned Judge was right in directing that the share register be rectified by registering the transfers and entering the names of the bank's nominees as holders of the shares transferred.....The real reason is to be discovered from the evidence, and it amounted to a breach of trust on the part of the directors".[34]

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[33] Blackshield, T. "Precedent" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 551.

[34] *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524, 525.

In effect, Griffith CJ said that the directors were in breach of their fiduciary duty when they refused to register the transfers of shares in favour of the Respondent bank. The directors placed themselves in a position of having a conflict of interest of the perceived threat from the bank if the share transfer was registered.

The importance of this early case and the reference to fiduciary obligations (to avoid a conflict of interest) is best analysed in context. The context is the difficulty the judiciary have had in defining who is a fiduciary and this difficulty has extended to the present day. Griffith CJ emphasised that the directors (in New Lambton) had a duty to the company to register a bona fide share transfer and as a corollary the directors must exclude their own self interests.

As recently as 2003, Justice Paul Finn, a Judge of the Federal Court of Australia, in an extra-curia speech, offered a description of a fiduciary (as opposed to a definition) as follows:

> "A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he or she will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his or her own several interest."[35]

The context is also time. One hundred and five years has passed since the judgment of Griffths CJ in New Lambton. This research analyses the case law of the High Court during this period and the views and opinions of learned authors to show the challenges involved in trying to define and describe a fiduciary obligation and a fiduciary relationship.

- **Luke v Waite (1905)**

In Luke V Waite,[36]the High Court of Australia was comprised of Griffith CJ, Barton and O'Connor JJ. The facts of the case involved investments by subscribers (to a

[35] Finn, PD "Fiduciary Reflections" a paper presented at the *13th Commonwealth Law Conference* 2003, 2.
[36] *Luke v Waite* (1905) 2 CLR 252.

company) for specific purposes which did not materialise. The subscribers sought to recoup their loses through a claim of breach of trust. Griffith CJ reviewed the judgments of the trial judge and the Full Court of the Court of Appeal which both found a breach of trust. Griffith CJ, in all the circumstances, could not agree with these decisions.

In a significant statement the Chief Justice emphasised a step in the methodology for determining if there had been a breach of a fiduciary relationship which still exists at present in 2009, some 100 years later:

> "The question, as stated at the outset of this judgment, is as to the proper inference to be drawn from the facts. All the contemporaneous facts must be taken into consideration."[37]

Barton and O'Connor JJ agreed with Griffith CJ when his Honour said:

> "The objects of the company must be taken to have failed and come to an end many years ago; but, if there was no original contractual or fiduciary obligation, no ground for setting up such an obligation is afforded by the mere fact that the hopes and expectations of the parties were disappointed."[38]

In relation to the disappointment of the subscribers, the High Court followed Thurburn v Steward[39] and Rothschild v Hennings.[40]It is possible to interpret the comments of the Chief Justice to mean that if people take it upon themselves to invest (as subscribers) in a company they too must be willing to take the consequences should the investment not materialise. Whether this approach of Griffith CJ is limited to commercial transactions is something to which this research

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[37] *Luke v Waite* (1905) 2 CLR 252, 262.
[38] *Luke v Waite* (1905) 2 CLR 252, 265.
[39] *Thurburn v Steward* [1871] LR 3PC 478.
[40] *Rothschild v Hennings* (1829) 9 B & C 470.

will endeavour to provide an answer. The reluctance of the High Court to find a fiduciary relationship in the commercial relationship between the subscribers and the company is significant when viewed in the context of the future approach of the High Court.

The next case, Bayne v Blake[41] is the first case to come before the High Court involving a solicitor/client relationship in a contractual matter. The case is important for the way in which the High Court analysed the precedent case law of England in reaching its decision.

- **Bayne v Blake (1906)**

In Bayne v Blake, [42] the High Court of Australia was comprised of Griffith CJ, Barton and O'Connor JJ. The facts involved a solicitor acting for an administratrix and at the same time requested siblings of the administratrix to execute documents. Griffith CJ gave the main judgment with Barton and O'Connor JJ concurring in separate judgments. The decision of the High Court was reversed on appeal to the Privy Council.[43] The Privy Council were of the view that the relationship between the Respondent lawyers and the siblings of the Administratrix was not a fiduciary relationship.

It is important to see on what basis the High Court found the relationship to be fiduciary. Griffith CJ referred to all the Law Lords in Willis v Barron.[44] O'Connor J also agreed with the analogy with Willis' case as set out in the judgment of Griffiths CJ:

> Rigby LJ said:"But, even if he thought he was not acting as her solicitor, the important matter is whether she was placing confidence in him as her solicitor."[45]

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[41] *Bayne v Blake* (1906) 4 CLR 1.
[42] *Bayne v Blake* (1906) 4 CLR 1.
[43] *Bayne v Blake* (1908) 6 CLR 179.
[44] *Willis v Barron* (1902) AC 271.
[45] *Bayne v Blake* (1906) 4 CLR 1, 28.

The Earl of Halsbury LC said: "Here was a young woman without advice ... She goes to this gentleman and asks him for advice. He says he did not know she came to him as a solicitor..... He was a solicitor too, and he was her trustee..... He was under a duty as a friend, as a solicitor, and as her trustee, to take care that she thoroughly understood what was the supposed error which had been made in the first instance, and to make her understand the effect of what she was doing."[46]

Lord Macnaghten: " I must say I think, even if the person who was the ultimate remainderman had been no connection of Mr. Skinner (the Appellant solicitor), there would have been ample ground to set aside this deed, considering that Mr. Skinner was her family solicitor, the person to whom she would naturally go for advice, and that he was also her trustee."[47]

Lord Shand: "I think, looking at the circumstance that there was a great disadvantage to Mrs. Willis in the execution of this deed in which she was renouncing valuable interests—at the circumstance that at the same time a benefit was being given to Mr. Skinner's own son."[48]

Lord Davey: "Therefore, I take it to be clear that he was the only solicitor acting for her in the matter, and that he was the solicitor who prepared and perused and settled the deed on behalf of all parties. Indeed, Mr. Skinner seems to have accepted that situation, and to have taken some pains to explain the contents of the deed to the plaintiff. But, as Rigby L.J. says, that was not enough. She required not only

[46] *Bayne v Blake* (1906) 4 CLR 1, 29.
[47] *Bayne v Blake* (1906) 4 CLR 1, 29.
[48] *Bayne v Blake* (1906) 4 CLR 1, 30.

> explanation as to the meaning of the deed, but what she wanted was, or what she had a right to look for was, advice as to her rights."[49]

After referring to these judgments Griffith CJ said: "It follows in my opinion from the passages which I have quoted that it is sufficient, in order to establish the fiduciary relationship."[50]Griffith CJ made a detailed analysis of the relationship between the parties to determine the scope of the relationship.

The case is important because it shows how two superior appellate courts (the High Court of Australia and the Privy Council) can have a different opinion on the facts of a case. The Privy Council was comprised of Lord Loreburn L.C. Lord Macnaghten Lord Atkinson Lord Collins and Sir Arthur Wilson with Lord Macnaghten delivering the judgment on behalf of all Law Lords:

> "The law applicable to cases where benefits are obtained by persons standing in a fiduciary relation to the donor is well settled. The principles applicable to those cases are clear. But each case must depend upon its own circumstances; and their Lordships are unable to see an analogy between the present case and the cases cited in the judgment of the learned Chief Justice (*that is, the cases cited by Griffith CJ*). "[51] (italicised comment added)

At this early stage, of the decisions of the High Court, the development of a fiduciary jurisprudence in the High Court was limited by the influence of the decisions of the Privy Council on appeals from the High Court.[52]

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[49] *Bayne v Blake* (1906) 4 CLR 1, 30.
[50] *Bayne v Blake* (1906) 4 CLR 1, 13.
[51] *Bayne v Blake* (1908) 6 CLR 179, 193.
[52] Mason, A "Reflections on the High Court of Australia" (1995) 20 *Melbourne University Law Review* 273.

- **Perpetual Trustee Co Ltd v Orr (1907)**

In Perpetual Trustee Co Ltd v Orr[53] the High Court of Australia was comprised of Griffith CJ, Isaacs and Higgins JJ. The case involved a dispute between a landlord and tenant. Whilst the issues in dispute were complicated by claims for replication and apportionment, the High Court made some important statements about the application of fiduciary principles to the relationship of landlord and tenant.

Griffiths CJ said

> "....although there is no authority for saying that a fiduciary relationship arises between landlord and tenant from the mere fact of the existence of that relationship, Courts of Equity do not allow a *cestui que trust* to obtain from a trustee any benefit he has derived from the trust property by virtue of his position without indemnifying him against all liabilities incurred in respect of the trust, either already incurred or future."[54]

The case is important for two reasons. Firstly, based on the facts of the case, the High Court chose not to classify the relationship of landlord and tenant as a fact based category of fiduciary relationship and secondly, the High Court commented on the restriction of the Judicature legislation in NSW compared to the English Judicature Act where Higgins J said:

> "If I may be permitted to add that, in my opinion, fully one half of the time and labour which this case has involved could, in all probability, have been saved to the Court and to counsel if, as under the English Judicature Acts, the same Court could deal freely with equitable and legal rights, so as to do justice once and for all between the parties litigating."[55]

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[53] *Perpetual Trustee Co Ltd v Orr* (1907) 4 CLR 1395.
[54] *Perpetual Trustee Co Ltd v Orr* (1907) 4 CLR 1395, 1397.
[55] *Perpetual Trustee Co Ltd v Orr* (1907) 4 CLR 1395, 1401.

Although the jurisdictional issue (the separation of Common Law and Equity in the Supreme Court of New South Wales) referred to by Higgins J presented difficulties and unsatisfactory outcomes for some litigants, the actual impact of the separation on the development of a fiduciary jurisprudence in the High Court will be clarified over the next seventy (70) years.

- **Reid V MacDonald (1907)**

In Reid V MacDonald [56] the High Court of Australia was comprised of Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ. The Chief Justice and all Justices gave separate and concurring judgments. The case involved the Appellant, a consulting engineer who was employed by the Respondent, a refrigeration company. The Respondent was trying to secure a large contract for the construction of an ice skating rink. The Appellant sought to secure the best possible opportunity for himself in the commercial arrangements whilst still employed with the Respondent.

The case is significant for three reasons. Firstly, it is the first judgment of the High Court involving a detailed analysis of the law relating to a fiduciary relationship between principal and agent. Secondly, the judgments refer to many decisions of the superior courts of the United Kingdom and thirdly, as we shall observe in Chapter 6 the facts of the case are not too dissimilar from two of the most important fiduciary obligation cases in the history of the High Court and no reference is made in either of those cases to Redi v MacDonald.[57]

Griffith CJ gave the leading judgment where his Honour said:

> "This is an action brought by the plaintiff claiming the benefit of a secret profit which he alleges to have been made by the defendant, while in his service and engaged in his business, and obtained by reason of his employment. There is no doubt about the law applicable to such a case. It is stated as clearly as anywhere, I think, by Bowen

[56] *Reid v MacDonald* (1907) 4 CLR 1572.
[57] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 and *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

L.J. in the case of the Boston Deep Sea Fishing and Ice Co. v. Ansell".[58]

The Chief Justice went to great lengths in restating the facts and evidence of the relationship between the Appellant and Respondent. In a significant statement in relation to a principal consenting to or approving of the action of a fiduciary, Griffith CJ said:

> "The defendant, with the knowledge and approval of the plaintiff, proceeded to acquire this option and these easements. He acquired them in his own name, but with the moneys of the plaintiff, to which the plaintiff made no objection."[59]

In conclusion, Griffith CJ said: "I will conclude in the words of Lord Macnaghten in delivering the judgment of the Privy Council in the case of Trimble v. Goldberg[60]:— "In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity," to which I will add the words "or of common honesty."[61]

Barton J said "The matter of the consulting engineer to the company formed in Melbourne was so distinct from the fiduciary relationship that existed between the plaintiff and defendant that there was no necessity for any secrecy about it.

Barton J referred to a line of cases considered by Thesiger L.J. in Dean v. MacDowell[62] : namely, Burton v. Wookey[63], Gardner v. M'Cutcheon[64]; Somerville v. Mackay[65]; Lock v. Lynam[66]; Russell v. Austwick[67]. Dean v MacDowell was followed

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[58] *Reid v MacDonald* (1907) 4 CLR 1572, 1575 and referring to *Boston Deep Sea Fishing and Ice Co v Ansell* 39 Ch. D 339, 363.
[59] *Reid v MacDonald* (1907) 4 CLR 1572, 1574.
[60] *Trimble v Goldberg* (1906) AC 494, 503.
[61] *Reid v MacDonald* (1907) 4 CLR 1572, 1579.
[62] *Dean v MacDowe* 18 Ch. D 345.
[63] *Burton v Wookey* 26 Madd.367.
[64] *Gardner v M'Cutcheon* 34 Beav 534.
[65] *Somerville v Mackay* 1810 16 Ves 382.

in Aas v. Benham[68] and the line of cases from Dean v MacDowell to Aas v Benham which were followed in Trimble v. Goldberg[69], where Lord Macnaghten said:

> "It seems to their Lordships that the decision of the Supreme Court of the Transvaal in the present case cannot stand with the decision in Cassels v. Stewart[70]. There was at least as close a connection between the partnership and the partner's purchase in that case as there is in this. In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity.[71]"

Barton J concluded his judgment in favour of the Appellant engineer by saying:

> "I have said that, in one aspect, the understanding in ordinary language of the documents which are the turning point of this case establishes a relationship of a fiduciary character, but not in respect of the transaction with the Melbourne Ice Skating and Refrigerating Company. That is a distinct transaction....It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership".

The distinction and differentiation drawn by Barton J in this case is that even though the parties are in an (assumed) fiduciary relationship due to the circumstances of the principal/agent relationship, there was no breach of the relationship by the Appellant engineer according to equitable principles. The High Court also said that there may however be an action at law for breach of contract.[72]

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[66] *Lock v Lynam* 54 Ir. Ch 188.
[67] *Russell v Austwick* 11 Sim 52.
[68] *Aas v Benham* (1891) 2 Ch 244, 261.
[69] *Trimble v Goldberg* (1906) AC 494.
[70] *Cassels v Stewart* 26 App. Cas., 64.
[71] *Trimble v Goldberg* (1906) AC 494. 496.
[72] *Reid v MacDonald* (1907) 4 CLR 1572, 1598.

Isaacs J gave a separate and concurring judgment. His Honour referred to Aberdeen Railway Co. v. Blakie Brothers[73] which has been cited, referred to and applied by the High Court in subsequent fiduciary obligation cases.[74] His Honour continued:

> "The defendant certainly, and the plaintiff according to his own account, were promoters of the company, and were in the circumstances in a fiduciary relation to the company regarding this transaction. With reference to this aspect of the matter the case of Aberdeen Railway Co. v. Blakie Brothers tells strongly against the plaintiff. I quote one passage from the speech of Lord Cranworth L.C.:—"A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal."[75]

Isaacs J then discussed the dilemma being faced by the Respondent employer where the Respondent agreed that the Appellant occupied a fiduciary position with his (the Respondent's) full knowledge and confessed that he believed it to be dishonest, but took full advantage of it to get his (the Respondent's) works passed by the Appellant engineer.

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[73] *Aberdeen Railway Co v Blakie Brothers* 1 Macq HL Cas, 461. This case, it will be observed in the ensuring discussion of High Court of Australia cases, is an important exposition of the equitable fiduciary principle and in turn has been considered, referred to and applied as an authority by the High Court of Australia. In *Aberdeen Railway* the main question for the House of Lords was whether a director of a railway company is or is not precluded from dealing on behalf of the (railway) company with himself or with a firm in which he is a partner in relation to the supply of goods and/or equipment to the railway company. Lord Cranworth LC gave the main judgement. His Lordship discussed the relationship between being a director and agent of a corporation and in turn the fiduciary obligation resulting from that position by saying: " no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect." In addition, and importantly, as has been seen in subsequent cases, His Lordship reinforced the rule that: "a [confiding] party does not need to prove that the lost opportunity would have been a benefit to the company."

[74] Cited in *Maguire v Makaronis* (1997) 188 CLR 449.

[75] *Aberdeen Railway Co v Blakie Brothers* 1 Macq HL Cas, 461, 471.

Although this research does not include an in-depth analysis of remedies for breaches of fiduciary duty they are briefly discussed for the purpose of obtaining a better understanding of the overall development of a fiduciary jurisprudence. In particular the constructive trust and for what has been referred to as remedial abuse for the benefits a constructive trust can deliver to a successful party.

All Justices looked at the scope of the relationship between the Appellant and Respondent. The important principle to arise out this case is that even though parties maybe in a fiduciary relationship there may be components of the whole business relationship that fall outside of the scope of the fiduciary relationship.

- **Johnson V Friends Motor Co Ltd (1910)**

In Johnson V Friends Motor Co Ltd [76] the High Court of Australia was comprised of Griffith CJ, O'Connor and Isaacs JJ. The Appellant was a promoter of the Respondent company and entered into two contracts to purchase shares in the Respondent. Justices O'Connor and Isaacs discussed the standing of the Appellant in the context of the fiduciary relationship. The case is significant for the way in which company promoters can be classified as fiduciaries.

O'Connor J, on the face of it, from his judgment, decided the promoter in this case, stood in a fiduciary position to the company, without reference to any supporting case law. His Honour said:

> "He was not only a nominal trustee, but an active promoter. Under these circumstances it is clear that as promoter and as trustee he stood in a fiduciary position to the company and to every shareholder of the company, and that he had no more right to conceal from the company or from the syndicate promoting the company that he was

[76] *Johnson v Friends Motor Co Ltd* (1910) 10 CLR 365.

getting this advantage from the vendor of the property than an ordinary agent would have had who was making the purchase on behalf of the company."[77]

Isaacs J was of a similar view:

> "Was Mr. Johnston, who says he was deceived by the prospectus himself, a promoter or not? I cannot conceive any doubt whatever on the subject, and there are some words of Lord Cairns L.C., in Erlanger v. New Sombrero Phosphate Co 3 App. Cas., 1218, at p. 1236 , which apply very strongly to the present case. The Lord Chancellor says:—"It is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what stage, and under what supervision, it shall start into existence and begin to act as a trading corporation."[78]

The Justices looked at the scope of the relationship between the parties in great detail and referred to the relationship of company promoter and the company as being a fiduciary relationship. O'Connor J appeared to be accepting that the relationship of a company promoter to the company was a presumed or status based category of fiduciary. Although his Honour did not refer to case law it is suggested that his Honour's conclusion was reached through an acceptance of the approach in the case law of the English courts. This research will show how the status based and fact based categories of fiduciaries will be developed and expanded by the High Court over the next 100 years.

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[77] *Johnson v Friends Motor Co Ltd* (1910) 10 CLR 365, 373.
[78] *Johnson v Friends Motor Co Ltd* (1910) 10 CLR 365, 379-80.

- **Jones v Bouffier (1911)**

In Jones v Bouffier [79] the High Court of Australia was comprised of Griffith CJ, Barton, O'Connor and Isaacs JJ. This case was a real turning point in fiduciary jurisprudence in Australian commercial law cases. It was the first time the phrase "at arms length" was mentioned in a judgment in litigation involving parties to a commercial transaction in the context of a fiduciary relationship. Griffith CJ, Barton and O'Connor JJ allowed the appeal. Isaacs J dissented.

The case involved the Respondent beneficiaries of an estate agreeing with the Appellant to obtain the best price possible for property to which the Respondents had an entitlement. The question for the court was, whether the relationship of principal and agent existed between the parties.

The phrase 'at arms length' will also be used over the next 100 years by the High Court of Australia in fiduciary law cases. This research will show how the "arms length" test has been a prime determinant of the lack of a fiduciary relationship between the parties in a commercial relationship.

Griffith CJ was the first judge (as Chief Justice) of the High Court to use this phrase. His Honour said:

> "The terms of this letter (between the Appellant and Respondent) are inconsistent with the existence of a fiduciary relation at that time. The parties dealt with one another as equals and at arm's length.....Upon these facts, which are undisputed, I come to the conclusion that on 2nd April the plaintiffs and defendant were, to use the words of Wigram V.C., dealing "at arm's length and on an equal footing."[80]

Isaacs J, in dissent, also contributed significantly to the early development of fiduciary jurisprudence by ensuring that the existence of a fiduciary relationship

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[79] *Jones v Bouffier* (1911) 12 CLR 579.

[80] *Jones v Bouffier* (1911) 12 CLR 579, 595 and referring to Wigram VC in *Edwards v Meyrick* [1842] EngR 903, 912.

cannot simply be accepted because the parties are in a presumed category of fiduciary relationship. The status of the relationship, in this case agency, is not sufficient.

Isaacs J said:

> "The 'settled definition' of fiduciary wrong is therefore not so narrow as is contended. Fiduciary relation is nothing else than a confidential relation between the parties in which good faith demands of one of them some special duty towards the other, beyond what is required of complete strangers. The nature and extent of the duty depend upon the circumstances. Agency per se cannot be the test. The rule of equity is broad and cannot be exhausted by particular instances such as formal trustee and beneficiary, principal and agent, and so on. These are only examples of the application of the principle"[81].

Isaacs J was alluding to three important prerequisites to determine the existence of a fiduciary relationship. Firstly, one must look to the circumstances of the relationship to determine the nature and extent, if any, of the fiduciary relationship. In effect, one is attempting to define the scope of the relationship. Secondly, the categories of status based (or presumed) fiduciary relationships are not closed or as his Honour said "the rule of equity is broad and cannot be exhausted" by accepted categories such as formal trustee and principal, and principal and agent and thirdly, the requirement of confidence within the relationship.

The reference by Isaacs J to "good faith" in the fiduciary relationship is also significant. Finn P again took up the role of good faith in a fiduciary relationship some 66 years later in commenting that Equity, traditionally, has exacted certain standards of good conduct from persons who are so circumstanced in their relationships with other that they cannot be considered

[81] *Jones v Bouffier* (1911) 12 CLR 579, 613.

to be at arm's length.[82] Finn referred to the trust case of Keech v Sandford as the best example in this tradition.[83]Again in 1992, Finn P suggested, 'with fiduciary law being ordinarily an alien presence in commercial contracts . . . in some number of Commonwealth countries . . . debate is now being waged as to whether or not courts should commit themselves to a doctrine of good faith.'[84]

- **Dowsett v Reid (1912)**

In Dowsett v Reid[85] the High Court of Australia was comprised of Griffith CJ, Barton and Higgins JJ. The Appellant and Respondent entered into an agreement whereby the Appellant leased land with an option to purchase. The Appellant had to raise finance by way of a mortgage, improve the land and pay the Respondent a set amount each month for eighteen months. Subsequently, a dispute arose with the Respondent seeking specific performance and the Appellant counterclaiming for rescission based on a number of arguments one of which was that, at the time he and the Respondent signed the agreement, the parties were in fact in a fiduciary relationship.

The Appellant sought to base the fiduciary relationship on an agency agreement between the parties. In rejecting this claim Griffith CJ said:

> "On those facts, (in relation to the Respondent making some enquiries on behalf of the Appellant, in an attempt to see if any one was interested in purchasing the Appellant's property) it is said, there was an agency to sell, which created a fiduciary relation. There are two answers, it appears to me, to the argument. The first is, that the defendant himself denies the agency. It is true that in his pleadings

[82] Finn, PD *Fiduciary Obligations* (1977), 78.
[83] *Keech v Sandford* (1726) 2 Eq. Cas. Abr. 741.
[84] Finn, P "Fiduciary Law" in E McKendrick (ed) (1992) *Commercial Aspects of Trusts and Fiduciary Obligations*, Clarendon Press, p 16. Whether or not a doctrine of good faith sits alone as a cause of action in common law or equity is outside the scope of this research.
[85] *Dowsett v Reid* (1912) 15 CLR 695.

> he alleged the fiduciary relationship, but in his evidence at the trial, when he had to make his case on the counterclaim, he denied the existence of any agency.....The plaintiff mustsucceed*secundum allegata et probata.*"[86] (comment in parentheses added)

In support of his finding that there was no fiduciary relationship Griffith CJ referred to In re Coomber v Coomber and the observations of Fletcher Moulton L.J. as follows:

> "This illustrates in a most striking form the danger of trusting to verbal formulæ. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid."[87]

It is worthwhile reviewing the judgment of Fletcher Moulton LJ in In Re Coomber and the facts of that case within the context of the judgments of the High Court of Australia prior to and including Dowsett v Reid. The Coomber family had a business of selling beer in Battersea, London. The father relied on his second son a great deal in running the business and after the father's death, the second son continued to run the business. His mother shortly afterwards assigned both the licence and the premises to him. After the mother's death the older son asked the court to transfer the business and its premises brought back into her estate, saying that, as manager for his mother, the second son was in a fiduciary relationship with

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[86] *Dowsett v Reid* (1912) 15 CLR 695, 702.
[87] *Dowsett v Reid* (1912) 15 CLR 695, 703.

her and, as such, was presumed to have used undue influence in dealing with his beneficiary.

The House of Lords held that, as the mother was following what she took to have been her late husband's wishes, there was adequate ground for finding for the second son. Also the mother had received adequate legal advice. It was impossible to leap from the label 'fiduciary relationship' to the conclusion that all the incidents of an express trusteeship applied. All sorts of relations could be called fiduciary relations by reason of elements of confidence, trust and dependence.

The range of relationships, in which a fiduciary relationship can develop, as mentioned by Fletcher Moulton L.J is indicative of the need for a court to look a the scope of the relationship by analysing all the circumstances of the relationship, from the documents, if any, supporting the agreement between the parties, to the actions of the parties, in an endeavour to find the "intimate and confidential relations" and "infinite trust" in the other person and not be simply "trusting to verbal formulae."

In finding the absence of a fiduciary relationship Griffith CJ said:

> "In the present case the learned Judge at the trial, and the Supreme Court found upon the facts that there was no fiduciary relationship. I agree. Upon the evidence I think it clear that there was in fact not any confidence reposed by the defendant in Reid; the information which they had of the property was equal, except that probably the defendant knew more about it than Reid; they were dealing at arm's length. In my opinion, therefore, that is not a ground for setting the contract aside."[88]

Griffith CJ based his conclusion in part on the absence of both an "intimate and confidential relations" between the parties and the existence of an "arm's length"

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[88] *Dowsett v Reid* (1912) 15 CLR 695, 704-5.

element in the relationship which the Chief Justice referred to in Jones v Bouffier.[89] In effect, the Chief Justice emphasised the strength of the contractual bargain struck between the parties.

Barton J, also confirmed the need for trust and confidence to exist in a relationship before it could be considered as a fiduciary relationship. His Honour in deciding there was no fiduciary relationship was of the opinion that there was a proper firmly negotiated "hard bargain" contract on foot and said:

> "To establish such a relationship there must either be, as in the case of a solicitor or a trustee, something in the relation itself which necessarily implies such trust and confidence, or there must be some evidence of its actual existence between the parties....Though the counterclaim for rescission must fail, yet I think the contract is a hard bargain"[90]

In relation to the contractual bargain struck between the parties both Griffith CJ and Barton J found the Appellant and Respondent to be acting at arm's length.

Dowsett v Reid, in the context of the development of a fiduciary jurisprudence, has demonstrated that the High Court will not disturb a commercial bargain unless the circumstances are sufficient to do so. The High Court could not find either a relationship of agency or a relationship of trust and confidence. The case followed closely after Jones v Bouffier. The High Court, at this early stage, was clearly indicating a reluctance to find a fiduciary relationship within a commercial relationship, where on the evidence, shows the parties struck a "hard bargain".

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[89] *Jones v Bouffier* (1911) 12 CLR 579.
[90] *Dowsett v Reid* (1912) 15 CLR 695 ,707.

- **Spong v Spong (1914)**

In Spong v Spong, [91] the High Court of Australia was comprised of Griffith CJ, Isaacs, Gavan Duffy, Powers and Rich JJ. The Appellant caused his father to transfer real property to himself (the son) without the father realising what he (the father) was doing. The Respondent claimed undue influence by the son and the High Court discussed the confidence between the parties when deciding in favour of the Respondent father. All Justices gave a separate judgment in dismissing the appeal. In confirming the approach of the High Court in not limiting the types of relationship which can be fiduciary, Rich J said:

> "But the Courts have refrained from defining what constitutes such a relation. There are endless variations of the fiduciary position which do not fall under any strictly defined head. The facts in this case to which the Chief Justice has referred establish the existence of such a fiduciary relation as justified Hood J in inferring undue influence. The evidence given on behalf of the defendant does not, in my opinion, rebut that presumption." [92]

In concurring with Rich J, Isaacs J said:

> "Equity does not tie itself down to any formal classes of relationships. The various cases of solicitor and client, physician and patient, &c., are instances of the necessary relationship, but the real question always is: Was there a fiduciary relationship, no matter how it was created?"[93]

Spong's case clearly falls into the first category of "good faith" proposed by Finn, P. The two central requirements to establish a claim based on undue influence are

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[91] *Spong v Spong* (1914) 18 CLR 544 ("Spong").
[92] *Spong v Spong* (1914) 18 CLR 544, 552.
[93] *Spong v Spong* (1914) 18 CLR 544, 551.

the presence of actual influence and a rebuttable presumption in the person exercising a dominion over the other party (the donee).[94]

Isaccs J in referring to Wright J in Morley v Loughnan:

> "The learned Judge says (1):--"Or the donor may show that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances."[95]

The facts supporting undue influence were clearly made out. The father was clearly in an emotional state where he placed the utmost confidence in his son. One needs to keep in mind the distinction that is drawn between the fiduciary obligation of loyalty and the equitable doctrines of undue influence and unconscionable conduct adds to this statement that theses doctrines are there to protect persons who are vulnerable.[96] In a case involving undue influence the main issue to ascertain is the sufficiency of consent. The distinguishing factor in to establish is a reliance by the subordinated party to the guidance and advice of the stronger party. In a fiduciary relationship it is not necessary to establish the reliance. The relief is granted based on the presumption of undue influence and is not based on the fiduciary obligation of loyalty.

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[94] Although Finn, PD refers to Dixon J in *Johnson v Buttress* (1936) 56 CLR 113, 134, Isaccs J referred to Wright J in *Morley v Loughnan* (1893) 1 Ch., 736 where Wright J in turn referred to "a line of cases" from the leading case of *Huguenin v Baseley* 14 Ves, 273 and continuing down to the case of *Allcard v Skinner* 36 Ch D, 145.

[95] *Spong v Spong* (1914) 18 CLR 544, 551.

[96] Cope, M *Equitable Obligations: Duties, Defences and Remedies* (2007), 29.

The High Court were of the view that the relationship between the father and son in Spong's case was clearly one where both undue influence and the trust and confidence establishing a fiduciary relationship were both present.

- **Ford v Andrews (1916)**

In Ford v Andrews [97] the High Court of Australia was comprised of Griffith CJ, Barton, Isaacs and Gavan Duffy JJ. The Appellant was a director of a company and also an alderman on the local council. A conflict arose from contractual arrangements between the two entities. The Justices referred to various authorities in support of their own view of the law relating to fiduciary obligations in allowing the appeal (with Isaacs J dissenting).

Griffith CJ referred the following authorities:

Lord Cranworth in Aberdeen Railway Co v Blaikie, where his Lordship said:

> "Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule." [98]

Sir Richard Baggallay of the Judicial Committee of the Privy Council in North-West Transportation Co v Beatty, said:

> "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to

[97] *Ford v Andrews* (1916) 21 CLR 317.
[98] *Ford v Andrews* (1916) 21 CLR 317, 322.

> protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."[99]

Swinfen Eady LJ in Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co, who, in delivering the judgment of the Court of Appeal (Lord Cozens-Hardy M.R., Pickford L.J. and himself), referred to the same reference of Lord Cranworth in Aberdeen Railway Co. v. Blaikie.[100]

Barton J gave similar reasons to Griffith CJ. His Honour went into detail of the facts in finding for the Appellant and said:

> "There is no evidence of personal effort to obtain the contract. Indeed, at the time that the overseer of works obtained quotations from three brickyards and found that the Enfield Park Company's price was the lowest, the appellant was unaware that a quotation had been obtained from his company, and he was equally unaware of that fact when the Council resolved to accept the overseer's estimate and to do the work. He did not know that the work was being carried out with the Company's bricks until the contract had been partly performed. See his affidavit, which there is no reason to doubt".[101]

In Ford v Andrews the relationship of company director was recognised as a status based category of fiduciary.[102] The determining factor in not finding the Appellant responsible was the fact that he did not have knowledge or an interest in the contract that was entered into between the Council (of which he was an alderman) and the Enfield Park Brick Co (of which he was a director).[103]

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[99] *Ford v Andrews* (1916) 21 CLR 317, 321.
[100] *Ford v Andrews* (1916) 21 CLR 317, 324.
[101] *Ford v Andrews* (1916) 21 CLR 317, 320.
[102] *Ford v Andrews* (1916) 21 CLR 317, 321 (Griffith CJ) and 324 (Barton J).
[103] *Ford v Andrews* (1916) 21 CLR 317, 322-323 (Griffith CJ).

Developments

1903 to 1919

The purpose of the Developments section is to synthesise the reasoning within the judgments delivered during the period to show how the jurisprudence of the law of fiduciary obligations and relationships has been developed by the High Court of Australia.

The Developments section of subsequent Chapters do not accumulate the Developments of the previous periods. An overall analysis of all the Developments sections is undertaken in the Conclusion where the substantial contributors to the development of a fiduciary jurisprudence in Australia are discussed to come to a decision on whether the fiduciary jurisprudence developed over the previous 106 years is in fact distinctly Australian. The distinctiveness is also derived from a comparison with Canada and New Zealand.

Griffith CJ undertook a formidable task as the first Chief Justice of the High Court. The cases analysed in Chapter 1 are indicative of Griffith CJ exercising an influential role. The Chief Justice appeared in every case (analysed in this research), even after the number of Justices (in total) was increased from three to five in 1906 and wrote the main leading judgment in every matter in which he appeared.

The reasoning of the Justices completely relied upon decisions of the superior courts of the United Kingdom. The High Court did not refer to any of its own decisions during this period. The Aberdeen Railways case was referred to as a precedent for the fiduciary obligations of directors and officers of companies. We will see how the High Court will continue to make reference to and consider Aberdeen Railways as an important precedent in the decades to follow with particular reference to the judgment of Lord Cranworth. The continuing reference to Aberdeen Railways is no doubt due to the number of cases involving directors,

officers and promoters of companies before the High Court on fiduciary law matters.

The core requirements of a fiduciary relationship were expressed in differing terminology, such as, "confidential relations" (Jones v Bouffier)[104], "infinite trust" and "trust and confidence" (Dowsett v Reid, citing In re Coomber v Coomber).[105]

In the future we will see the core personal requirements of the fiduciary change in name, however, it is this writer's view that the various names are intended to have the same meaning as, "loyalty." The same could not be said in relation to the core requirements of the fiduciary relationship itself. It will be observed that words such as vulnerability, representative, trust and confidence have been used to define the actual fiduciary relationship. We will observe how the meaning of these descriptions has been debated and discussed in the case law.

In this period, under Chief Justice Griffiths, the scope of the fiduciary relationship was analysed in great detail. This approach is possibly due to the decision making process of Griffith CJ who wrote judgments incorporating a detailed analysis of the facts and circumstances of the relationship between the parties.

The limitations placed on fiduciaries started to develop. Principles and rules such as a fiduciary not acting with a conflict of interest or obtaining an improper advantage were expressed a number of times with reference to precedent case law of the United Kingdom, for example, in New Lambton,[106] Reid v MacDonald[107] and Jones v Bouffier.[108]

The High Court emphasised it was not limiting the possible categories of fiduciary relationships. They were not closed. Directors and officers of companies (Reid v

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[104] *Jones v Bouffier* (1911) 12 CLR 579, 582-583.
[105] *Dowsett v Reid* (1912) 15 CLR 695, 707.
[106] *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524, 525.
[107] *Reid v MacDonald* (1907) 4 CLR 1572, 1601.
[108] *Jones v Bouffier* (1911) 12 CLR 579, 598 (Griffith CJ).

MacDonald) and company promoters (Johnson v Friends Motor Co Ltd) were discussed in the context of a status based fiduciary. For parties in commercial transactions the test of "arm's length" was introduced by Griffith CJ in Jones v Bouffier without reference to precedent case law.[109]This test acted as a limitation on the establishment of a fiduciary relationship. That is to say, it is still possible to find a fiduciary relation within a commercial relationship, however, the presence of a commercial relationship does tend towards negativing the finding of a fiduciary relationship.

In 1906 Isaacs and Higgins JJ were appointed to the High Court. All five Justice sat together for the first time in a fiduciary obligations matter in Reid v MacDonald and gave separate concurring judgments. This case is a good example of the way the Justices worked together. Griffith CJ provided a very detailed judgment examining the scope of the relationship; Barton J referred to a great number of United Kingdom cases; O'Connor J went into detail of the facts and the law of the constructive trust; Isaacs' J judgment was divided between addressing the reasoning of the trial judge and referring to Aberdeen Railways in support of his overall judgment and Higgins J examined the scope of the relationship with little reference to case law. Isaacs J, in referring to the Respondent, said "Finally, he appeals to the high standards of fidelity established in Equity in order to obtain the Court's assistance to gather in the remaining benefits of his improper arrangement." In effect, his Honour was telling the Appellant that his claim should not have been based on equitable relief with a reliance on a fiduciary relationship. The important principles of undue influence,[110] rebuttable presumptions[111] and the role of public policy[112] were discussed for the first time.

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[109] *Jones v Bouffier* (1911) 12 CLR 579, 594 (Griffith CJ).
[110] *Dowsett v Reid* (1912) 15 CLR 695, 704.
[111] *Spong v Spong* (1914) 18 CLR 544, 551.
[112] *Spong v Spong* (1914) 18 CLR 544, 551.

The next period, 1919 to 1935, will show how the Justices of the High Court seek to express their independence by not relying to such a great degree on cases from the United Kingdom (or elsewhere) as they did in this first period.

Chapter 2

- **1919 to 1930 - Knox CJ**
- **1930 to 1931 - Isaacs CJ**
- **1931 to 1935 - Gavan Duffy CJ**

Sir Adrian Knox was Chief Justice of the High Court of Australia from 1919 to 1930. It would appear that Knox was one of the few early Justices to come to the High Court of Australia with experience in Equity. In 1888-90 he reported equity cases for the NSW Law Reports and he was a consummate advocate in the Court of Appeal in equity matters.[113] Knox came to the High Court of Australia as Chief Justice. When Sir Samuel Griffith retired, Sir Isacc Isaacs had been a Justice of the High Court of Australia for 13 years and could have been expecting to take over as Chief Justice from Griffith CJ. However, the Prime Minister, Billy Hughes, took up the recommendation of Griffith CJ to consider Sir Adrian Knox for the position of Chief Justice.[114]

On the retirement of Knox CJ in March 1930 Sir Isacc Isaacs became Chief Justice, albeit for 13 months, when he resigned in January 1931 to become Governor General.

Sir Frank Gavan Duffy succeeded Sir Isacc Isaacs as Chief Justice in 1931 and served until 1935, having previously been a Justice of the High Court of Australia since 1913. When Gavan Duffy became Chief Justice he was 78 and it has been

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[113] Fricke, G and Rutledge, M "Adrian Knox" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 400-401.

[114] Fricke, G and Rutledge, M. "Adrian Knox" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 400-401.

suggested that there was a lack of collegiality, judicial conferences or exchange of draft judgments, particularly his own.[115]

The development of a fiduciary jurisprudence depends on the way the Justices of the High Court of Australia interact with each other in the preparation and presentation of their judgments. The extent of the formal or informal collegiate system of conferencing is guided by the Justices and the role and influence of the Chief Justice. For example, in 1924, Gavan Duffy described to Higgins the procedure in the Knox Court: "Isaacs and Rich retire to their tents (or perhaps I should say to Isaacs tent) and excogitate judgments which I never see till they are delivered."[116] Sir Hayden Starke commented that there was a total lack of conferencing during the term of Gavan Duffy.[117]

Sir Isaac Isaacs has been recognised as being one of the earliest Justices of the High Court to give explicit recognition to social implications within his decision making. In addition, he is viewed as a man who found it very difficult to see the merit in other views which contrasted to his own.[118]

In Chapter 2 the case analysis will show how the High Court continued to develop fiduciary jurisprudence generally following the pattern of the first two decades of the High Court. It was not until 1925 in Thornley v Tiley[119] that the High Court again heard a case involving substantial issues of fiduciary obligations.

1919 to 1935 – High Court of Australia Cases Decided

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[115] Fricke, G "Gavan Duffy Court", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 298.

[116] Fricke, G "Gavan Duffy Court", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 298, 299.

[117] Simpson, T "Conferences", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 131.

[118] Cowen, Z "Isaac Alfred Isaacs" in in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001) 360.

[119] *Thornley v Tiley* (1925) 36 CLR 1. There were two previous cases, *Woods v Little* (1921) 29 CLR 564 and *Wicks v Bennett* (1921) 30 CLR 80 where brief mention was made of the fiduciary principle.

- **Thornley v Tiley (1925)**

In Thornley v Tiley (1925)[120]the High Court of Australia was comprised of Knox C.J., Isaacs, Higgins and Rich JJ. The Appellant, an investor client of the Respondent stockbrokers, claimed entitlement to a profit made by the Respondents on shares purchased by the Respondents on behalf of the Appellant.

The Chief Justice and each Justice gave a separate judgment. The striking aspect of al the judgments is the way in which the Justices found in favour of the Appellant investor without substantial reference or analogy to precedent fiduciary case law, either from Australia or the United Kingdom. Knox CJ said:

> "They (*the Respondent share brokers*) had, in my opinion, no right to use or deal with the scrip so obtained by them for their own benefit; and as they admit having made profit by dealing with such scrip or the shares represented thereby in breach of their duty to the Appellant, and as such dealings were in fact without his knowledge or authority, they are, in my opinion, liable to account to the Appellant for the profits so made."[121] (italicised emphasis added)

Notably, Knox CJ in coming to this conclusion, did not refer to any case law or equitable principles. In granting the equitable remedy of an account of profits to the Appellant, Knox CJ was of the view that the Respondent sharebrokers had breached their fiduciary duty by breaching the "no conflict/no profit" rule. Similarly, in separate judgments, Isaacs, Higgins and Rich JJ, in allowing the appeal, all relied on a breach by the Respondent share brokers of the fiduciary obligations of the principal-agent relationship. The other Justices also did not refer to any precedent fiduciary case law in support of this part of their judgments.

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[120] *Thornley v Tiley* (1925) 36 CLR 1 ("Thornley").
[121] *Thornley v Tiley* (1925) 36 CLR 1, 9.

Isaacs J said:

> "The employment of the Respondents by the Appellant was one of agency at their discretion to buy and carry shares for him at an agreed rate of interest, he then being bound to repay them and to receive from them shares representing what they had bought. Normally and essentially such an employment acted on constitutes a fiduciary relation, and the consequence of that is, unless displaced by special circumstances, that the agent cannot make profit for himself out of the principal's investments."[122]

Higgins J said:

> "It is surely not too much to say that if a broker wants to get the profits from sales of shares as well as his interest and commission he ought to make an express stipulation to that effect."[123]

Rich J said:

> "The pleadings, the documents and the brokers' books, in my opinion, are opposed to it (the Respondent's argument that they were entitled to make as much profit out of the Appellants shares for themselves). It is possible that the identical scrip is not always to be required, but that is not enough to justify the right claimed of making profit from the shares belonging to the client."[124] (parenthesised words added)

Thornley has been considered and applied in Daly v Sydney Stock Exchange Ltd [125] where Gibbs CJ said:

> "Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to

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[122] *Thornley v Tiley* (1925) 36 CLR 1, 11.
[123] *Thornley v Tiley* (1925) 36 CLR 1, 19.
[124] *Thornley v Tiley* (1925) 36 CLR 1, 19.
[125] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371. See Chapter 6 herein.

make to the client a full and accurate disclosure of the broker's own interest in the transaction: In re Franklyn; Franklyn v. Franklyn (1913) 30 TLR 187; Armstrong v. Jackson (1917) 2 KB 822; Thornley v. Tilley (1925) 36 CLR 1, at p 12."[126]

Thornley highlights the difficulty for share brokers when they engage in what is commonly known as dual capacity trading, that is, buying shares for clients then selling the shares (on instructions) and then utilising the proceeds of sale for their own benefit. In an article in the Australian Stock Exchange Journal, John Wilson of brokers Pring Dean McNall reiterated the view that there was an inherent conflict of interest and "it is difficult for a broker to give a value judgment if he has a position" associated with simultaneously trading as principal and as agent.[127]

Thornley falls into the second category of good faith postulated by Finn P, namely, the misuse of property held in a fiduciary capacity[128] and the essential characteristics of a fiduciary relationship of "trust and confidence" will be present in such a relationship.[129]

- **Manning v Federal Commissioner of Taxation (1928)**

In Manning v Federal Commissioner of Taxation [130] Knox CJ sat as a single judge. The Appellant claimed she was a Trustee as defined in the Income Tax Assessment Act 1922-1925 (the Act). It is important to observe the definition of "trustee" in section 4 of the Act which includes a person acting in any fiduciary capacity:

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[126] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 377.
[127] Wilson, J in the *Australian Stock Exchange Journal*, (October 1991), pp 6-7 in Aitken, MJ and Latimer, "Principal Trading by Stockbrokers" (1995) 5 *Australian Jnternational Journal of Corporate Law* 1.
[128] Finn, P *Fiduciary Obligations* (1977), 89.
[129] Finn, P *Fiduciary Obligations* (1977), 93 with reference to *King v Hutton* (1900) 83 L.T. 68, 70. (property delivered to an agent for sale); *Re Hallet's Estate* (1879) 13 Ch.D.696 (property given to a bailee for safekeeping) and *Shallcross v Oldham* (1862) 2 J.&H.609 (to an agent to be used by him in the course of performing a service for his principal).
[130] *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506.

> "Trustee in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a Court, or by operation of law, includes (a) an executor or administrator, guardian, committee, receiver or liquidator, and (b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability."

Knox CJ then took the definition further and by implication found that an essential obligation of a fiduciary was the liability to account to a principal as soon as requested to do so. The Chief Justice said:

> "Wide as this definition is, it requires at least as an essential ingredient in the position of "trustee" under the Act, that is, the existence of a fiduciary obligation towards some other person. The existence of a fiduciary obligation to another person must, I think, always involve a liability to account at the instance of that other person, and if I am right in thinking that the gift of income to the appellant involves no such liability it seems to me to follow that she is not a trustee of the income within the meaning of the Act".[131]

In his judgment Knox J expanded on the meaning of the word "fiduciary" within the statutory definition of a trustee. An example of a person in such a position would be a trustee of a superannuation fund having the responsibility of managing a principal's account and at the same time having an obligation to account to the principal should the principal so request. The trustee of the superannuation fund also has a responsibility under the Income Tax Assessment Act to pay tax on a principal's' contributions.

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[131] *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506, 508.

- **Birtchnell v The Equity Trustees, Executors and Agency Co Ltd (1929)**

In Birtchnell v The Equity Trustees, Executors and Agency Co Ltd [132] the High Court of Australia was comprised of Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ. Each Justice gave a separate judgment. Birtchnell's case was the first fiduciary obligations case in Justice Dixon's long career in the High Court and the case was heard in his Honour's first year as a Justice of the High Court. As will be observed, the judgment of Dixon J in Birtchnell is a comprehensive in-depth analysis of the law relating to the obligations of a fiduciary and indicative of his Honour's judgments in the decades that follow until his retirement in 1952.

The Appellants alleged a deceased partner (Porter) breached his fiduciary duty to the partnership by concealing from his partners his actions in turning profits, due to the partnership, to himself.

Isaacs, Rich and Dixon JJ allowed the appeal. Dixon J, concentrated on the scope of the business of the partnership by going into extraordinary detail and analysis of the business transactions, for example:

> "A consideration of the terms of the partnership articles, the contents of the balance-sheet, and the evidence as to the manner in which the transactions were dealt with in the books, a comparison of this material with the entries of the cash book put in for the period commencing July, 1924, and a collation of the entries in Porter's diaries which are in evidence for the six years 1921-26...."[133].

His Honour set out clearly the equitable principles which encapsulated the wrongs perpetrated by the Respondent. Firstly, the doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties and

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[132] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384. ("Birtchnell").
[133] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 397.

forbid a partner from withholding from the firm any opportunity of advantage which falls within the scope of its undertakings.

Secondly, a duty of present materiality which requires a fiduciary to refrain from engagements which conflict, or which may possibly conflict, with the interests of those to whom he is bound to protect, (per Aberdeen Railway Company v Blakie, (1854) 1 Macq. 461) and thirdly, as a necessary corollary, the partner is responsible to his firm for profits, although his firm could not itself have gained them –(per Costa Rica Railway Company Ltd v Forwood, (1901) 1 Ch 746 at p 761)[134] or even if the principal has not suffered a loss. This rule, cited and introduced into Australian law by Dixon J is significant because the rule is utilised in future High Court cases analysed in this research.[135]

Dixon J proposed a test to determine if a fiduciary relationship (i.e mutual confidence) extends over a certain subject matter as follows: firstly, ascertain the character of the venture or undertaking for which the partnership exists by examining the express agreements of the parties and the course of dealing actually pursued by the firm and secondly, apply the inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealing with third parties (in breach of their duty).[136]

In this case the duty of the Appellant was to not withhold from the firm any opportunity of advantage to which it (the firm) was entitled and direct that advantage to the Appellant. Dixon J, as well as referring to Cassels v Stewart[137]for the judgment of Lord Blackburn where his Lordship stated that a partnership is built on "mutual confidence" and Parker v McKenna[138]for the judgment of James LJ who relied on the "inflexible rule" of no conflict/no profit within a partnership and in addition his Honour also referred to Aberdeen Railway Company v Blakie [139] for the proposition that a fiduciary

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[134] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 409 (Dixon J).
[135] See Chapter 3 herein: *Furs Ltd v Tomkies* (1936) 54 CLR 583.
[136] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 409.
[137] *Cassels v Stewart* 6 App Cas 79.
[138] *Parker v McKenna* 10 Ch App 96.
[139] *Aberdeen Railway Company v Blakie* [1843-1860] All ER Rep 249.

must not act so as to give rise to an act " which would conflict, or which may possibly conflict, with the interests of those whom he is bound to protect".[140]

Starke J was of the view that the partnership agreement entitled each partner, without being bound, to suggest to the partnership particular transactions for consideration of the firm. His Honour dismissed the appeal.

Isaacs J referred to Parker v McKenna[141] when his Honour said:

> " Porter, by reason of that agreement, placed himself in the position that his interest conflicted, or might conflict, with his duty. On the one hand he had a distinct interest in devoting special attention to the difficulties of Spreckley's land, and to that extent of disregarding other clients' affairs and the general welfare of the firm in relation to those affairs.....".[142]

His Honour (Isaacs J) referred to Parker v McKenna in relation to two principles firstly as to the conflicts rule, where Cairns LC said:

> "Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an

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[140] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 396.

[141] *Parker v McKenna* 10 Ch App 96. The Court of Appeal in Chancery was comprised of the Lord Chancellor, Lord Cairns, LC; Sir W M James LJ and Sir G Mellish LJ. The Lord Chancellor stated his view of the equitable obligations of an agent in respect of the qualities of morality and the need to avoid conflict: "Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict." Sir W. M. James, L.J reinforced the view of the Lord Chancellor of the equitable obligations of an agent: "I desire to add but little to what the Lord Chancellor has said. I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that".

[142] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 388.

agent, be allowed to put himself into a position in which his interest and his duty will be in conflict"[143].

And secondly, about the fundamental equitable principle of the maintenance of the fiduciary obligations between partners:

> "Founding on that principle, the responsibility of agents to be faithful to their principals has been insisted on. And that being established, partners have been regarded for this purpose as agents, and forbidden to make profits out of the concerns of their principals, namely, their co-partners -- see, per Lord Blackburn, in Cassels v Stewart 6 App Cas 79 where His Lordship said: " If he (a partner), as an agent, makes a profit out of the concerns of his principal, and as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself".[144]

The next part of Isaacs J judgment has been of great importance in the development of a fiduciary jurisprudence in Australia. Isaacs J was seeking a touchstone principle upon which to ground the fiduciary obligation. In seeking this principle Isaacs J referred to Ormond v Hutchinson[145]and Peacock v Peacock[146] for support in saying that the principle (upon which to ground the fiduciary obligation) is the maintenance of fiduciary loyalty:

> "In Parker v. McKenna (1874) L.R. 10 Ch. 96, Lord CairnsL.C. (1874) L.R. 10 Ch., at p. 118, JamesL.J. (1874) L.R. 10 Ch., at pp. 124, 125 and MellishL.J. (1874) L.R. 10 Ch., at pp. 125, 126 state the relevant propositions of law with respect to a still current agency. Sec. 33, though now standing as a statutory regulation, is only an instance of

[143] *Parker v McKenna* 10 Ch App 96.
[144] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 388.
[145] *Ormond v Hutchinson* 13 Ves 47, 52.
[146] *Peacock v Peacock* 16 Ves 49, 51.

> the fundamental principle enunciated by equity and illustrated by the cases. The principle is the maintenance of fiduciary loyalty (see Lady Ormond v. Hutchinson (1806) 13 Ves. 47, at p. 51; Peacock v. Peacock (1809) 16 Ves. 49, at p. 51. Founding on that principle, the responsibility of agents to be faithful to their principals has been insisted on."[147]

Birtchnell's case was heard in 1929 and this is the first reference to loyalty as a fundamental component of the fiduciary obligation within a fiduciary relationship by the High Court of Australia.

The statement by Isaacs J is important because this research will show that, it will not be another 50 years that the requirement for loyalty is mentioned by the High Court and unfortunately no reference is made to the judgment of Isaacs J.[148]

Isaacs J then proposed a test in support of the principle of fiduciary loyalty and no profit rule as follows: firstly, a fiduciary must ensure that he or she is being loyal and not be tempted to make a deliberate default (towards a partner). Secondly, if, however, a partner wants to proceed to acquire a benefit to him or herself then the level of communication (to the other partner/s) must be higher than a 'mere' communication. Thirdly, equity has always imposed an obligation on the fiduciary to justify any private advantage he or she may obtain in the course of his or her trust, or by reason of an actual or potential conflict of interest and fourthly, in relation to whether or not any harm was suffered by the principal, the applicable rule was stated by Lord James and Lord Selbourne in Parker v McKenna as follows:

> "the court is not entitled to receive evidence or suggestion or argument as to whether the principal did or did not suffer injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no

[147] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395.
[148] See *Breen v Williams* (1996) per Dawson and Toohey JJ who refer to Finn PD in Youdan ed, *Equity, Fiduciaries and Trusts* (1989) and Gaudron and McHugh JJ who refer to *Bray v Ford* (1896) AC 44.

agent shall be able to put his principal to the danger of such an inquiry as that".[149]

All justices of High Court in Birtchnell relied on English decisions. Although the judgment in the case was given on 15 October 1929 no decisions of the High Court or Courts of Appeal of the Australian states were considered notwithstanding the High Court decision in Jones v Bouffier .[150]

Finn refers to Birtchnel's case as support for the proposition that "the all-important matter is the undertaking actually given by the fiduciary. Until the scope and ambit of the duties assumed by the fiduciary have been ascertained, until the "subject matter over which the fiduciary obligations extend" has been defined - no question of conflict of duty and interest can arise".[151]

Birtchnell demonstrated the dilemma faced by the judiciary with a claim of breach of fiduciary duty. The breach may well be considered to fall within the terms and conditions of the partnership agreement and not a breach of the fiduciary obligations of the partners towards each other. However, that depended on the establishment of a breach of the fiduciary relationship according to the tests proposed by Dixon and Isaacs JJ.

- **Sewell v Agricultural Bank of Western Australia (1930)**

In Sewell v Agricultural Bank of Western Australia [152] the High Court of Australia was comprised of Gavan Duffy, Rich, Starke and Dixon JJ. The case involved an officer of the Respondent mortgagee bank purchasing the defaulting Appellant's property whilst the Respondent exercised its power of sale. The officer's role was one of a district inspector and in this role he had

[149] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 396.
[150] *Jones v Bouffier* (1911) 12 CLR 579.
[151] Finn PD *Fiduciary Obligations* (1977), 233.
[152] *Sewell v Agricultural Bank of Western Australia* (1930) 44 CLR 104 ("Sewell").

no direct role in the mortgagee's sale process. On the face of it such a purchase could well be expected to be in breach of the no conflict rule within a fiduciary relationship which could be found to exist between a mortgagee bank and the defaulting mortgagor.

The Respondent bank had been trying for some time to sell the property unsuccessfully; the district in which the land was situated was not considered a good one; persons were unwilling to undertake the responsibility of holding land in it and that very many other properties were for sale in the area in which the property was located were not sold. The officer did not have a direct role in the selling process, his role was more peripheral.

Gavan Duffy, Rich and Dixon JJ referred to case law precedent that a mortgagee cannot sell to itself: cf. Farrar v. Farrars Ltd,[153] Hodson v. Deans,[154] Daniell v. Griffiths,[155](a decision of the Court of Appeal of New Zealand) and Orme v. Wright.[156] The Respondent bank sold the property to the wife of the bank officer (district inspector) and this private sale was found not to have come within the no conflict rule on the basis of the limited and restricted role of district inspector because of the peripheral role of the district inspector.[157]

Sewell's case reinforces the exceptions to the general rule that Equity has long recognised that where a person has acted for another in some way in the management or disposition of that other's property – in a position of "a confidential character" – he is in a somewhat privileged position if he contracts to purchase property dealt with in that position.[158]

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[153] *Farrar v Farrars Ltd* (1888) 40 Ch. D. 39.
[154] *Hodson v Deans* (1903) 2 Ch 647.
[155] *Daniell v Griffiths* (1883) 1 NZLR (CA) 340, 353.
[156] *Orme v Wright* (1838-1839) 3 Jur 19, 972.
[157] *Sewell v Agricultural Bank of Western Australia* (1930) 44 CLR 104, 111.
[158] Finn, PD *Fiduciary Obligations* (1977), 169 and referring to Lord Eldon in *Ex parte James* (1803) 8 Ves. 337, 345.

- **Para Wirra Gold & Bismuth Mining Syndicate v Mather (1934)**

In Para Wirra Gold & Bismuth Mining Syndicate v Mather [159] the High Court was comprised of Rich, Starke, Dixon and McTiernan JJ. The Appellant was a company promoter and allotted shares in the new company to itself. The Respondents entered into option agreements with the Appellant for shares in the new company and alleged a breach of fiduciary duty when the shares were not allotted. Angas Parsons J in the Supreme Court of South Australia found in favour of the Respondents due to the existence of a fiduciary relationship.

Rich, Dixon and McTiernan JJ gave a joint judgment allowing the appeal. Starke J gave a separate judgment also allowing the appeal. The most significant reason for allowing the appeal was that the majority were of the view that the parties were in a commercial relationship dealing with each other at arm's length. The decision is part of an emerging trend within the fiduciary jurisprudence of the High Court of not extending the standing of a fiduciary relationship to parties in certain forms of commercial transactions. The approach is not a blanket approach to commercially based transactions.

The reason why the majority did not agree with the Respondents argument, that there was a fiduciary relationship between the parties, can be seen from the following part of their judgment:

> "Their (*the Respondent*) complaint is not as shareholders in a company which has suffered from a breach of fiduciary duty. It is as contracting parties, vendors to the new company and persons contracting with the old company. It is true that, under the contract, they are entitled to shares in the new company. That is part of the consideration bargained for..... The *(fiduciary)*principle has no application to a contract made between parties at arm's length. Merely because the agreement provides that one of them shall promote a company, shares in which

[159] *Para Wirra Gold & Bismuth Mining Syndicate v Mather* (1934) 51 CLR 582 ("Para Wira Gold").

shall form part of the consideration received by the other, they cannot thus suddenly be placed in a fiduciary relation."[160] (Italicised words added).

The majority did not refer to any case law in their judgment, notwithstanding the decision of the High Court in Jones v Bouffier where the arm's length principle was first raised by the High Court.

The lack of precedent case law in a case such as Para Wira Gold is not surprising when the methodology of establishing if a fiduciary relationship exists is taken into account. The analysis required is a question of fact.

[160] *Para Wirra Gold & Bismuth Mining Syndicate v Mather* (1934) 51 CLR 582, 584.

Developments

1919 to 1935

The core personal requirement of the loyalty of the fiduciary was discussed in Birtchnell's case. Isaacs J referred to the requirement of "loyalty" by a fiduciary towards a principal.[161] The requirement of loyalty by Isaacs J is significant because the same principle is not confirmed until some 67 years later in Breeen V Williams[162] and is also suggested by learned authors as the essential core personal requirement of a fiduciary[163]. Isaacs J referred to Ormond v Hutchinson[164] and Peacock v Peacock[165] for support in saying that the principle upon which to ground the fiduciary relationship is the maintenance of fiduciary loyalty.

In 2003 Justice Finn J of the Federal Court of Australia, ex curia, said "...the path of the fiduciary principle...is achieved through a regime designed to secure loyal service .... a loyalty that is unselfish and undivided."[166]This reference by Finn J is directed at the personal quality of the fiduciary.

The importance of the scope of the fiduciary relationship was furthered by Dixon J in Birtchnell's case where his Honour proposed a two part test to examine the express agreements and course of dealings between the parties and then apply the inflexible no conflict/no profit rule to determine the accountability of fiduciaries for gains obtained within the partnership.[167] A partner can be regarded as an agent and inturn they cannot make a profit out of their principal's business for themselves

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[161] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395.
[162] *Breen v Williams* (1996) 186 CLR 71 (see Chapter 7 page 140 herein) (Dawson and Toohey JJ) who refer to Finn PD in Youdan ed, *Equity, Fiduciaries and Trusts* (1989) and Gaudron and McHugh JJ who refer to *Bray v Ford* (1896) AC 44.
[163] Finn PD "Fiduciary Reflections" in a paper presented at *the 13th Commonwealth Law Conference* 2003, 3.
[164] *Ormond v Hutchinson* 13 Ves 47, 52.
[165] *Peacock v Peacock* 16 Ves 49, 51.
[166] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference* 2003, 3.
[167] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 409.

unless the intention is communicated to the other partners at a level greater than a mere communication (per Isaacs J).[168]A principal does not have to prove his or her loss (per Dixon J and Isaacs J).[169]

The scope of the fiduciary relationship was examined in detail in Thornley v Tiley[170] in which the High Court found the Respondent stockbrokers had breached their fiduciary relationship with an investor. Except for reference to two United Kingdom cases on interest rates, the High Court did not refer to any other precedent fiduciary case law. It is this writer's view that this approach (of not referring to case law on fiduciary obligations) is a real milestone in the development of a fiduciary jurisprudence in and by the High Court.

The judicial view that parties at arms length in a commercial relationship should not be granted relief was applied in Parra Wirra Gold[171]following the approach taken in Jones V Bouffier by Griffith CJ[172].

In Manning's case Knox CJ introduced a common law extension to the definition of "trustee" in the Income Tax Assessment Act (1936), which includes a person or entity acting as a fiduciary, with a requirement for the "trustee" to be "liable to account" in the context of the equitable remedy of account for a breach of a fiduciary obligation.[173]

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[168] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395 referring to *Casels v Steward* ,6 App Cas 79 (Lord Blackburn.).
[169] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395.
[170] *Thornley v Tiley* (1925) 36 CLR 1.
[171] *Para Wirra Gold & Bismuth Mining Syndicate v Mather* (1934) 51 CLR 582.
[172] *Jones v Bouffier* (1911) 12 CLR 579, 595.
[173] *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506, 508.

Chapter 3

- **1935 to 1952 – Latham CJ**

Sir John Latham has been described as having highly developed powers of logical analysis, a clear grasp of legal principles, and a generally conservative cast of mind developed in part from his years as a member and President of the Rationalist Society of Victoria[174].

The first (and most substantial) fiduciary case during the term of Latham CJ was heard in the first year of his Honour's term as Chief Justice. In Furs Ltd v Tomkies ,[175] Latham CJ gave a separate judgment to the remainder of the Court. Dixon J was in the majority with Rich and Evatt JJ, where their Honours said "This appeal is governed by the inflexible rule." [176]The Justices were referring to the no conflict/no profit rule.

[174] Douglas, R, "John Grieg Latham", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 131.
[175] *Furs Ltd v Tomkies* (1936) 54 CLR 583.
[176] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592.

1935 to 1952 – High Court of Australia Cases Decided

- **Furs Ltd v Tomkies (1936)**

In Furs Ltd v Tomkies [177] the High Court of Australia was comprised of Latham CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ. The Respondent, Tomkies, was the managing director of the Appellant and a person with full knowledge of the tanning and dyeing processes of the business. The company decided to sell the business and unbeknown to the board of directors, the Respondent entered into a side deal with the purchaser company for his (the Respondent's) own financial benefit. In allowing the appeal, all Justices were of the view that the Respondent had breached his fiduciary duty to the Appellant.

Latham CJ gave a separate concurring judgment and said:

> "The defendant was in a position where his interest conflicted with his duty. As director of the company entrusted with negotiations for the sale of assets of the company, it was his duty to do his best for the company by obtaining the best price it was possible to obtain upon the sale of the business, including the plant and the formulae
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> It has been said that the position was a difficult one for the defendant. In a sense this was the case. But there is really nothing unusual in the requirement that a person occupying a position of trust and confidence should subordinate his own interests to the interests of another person to whom he stands in a fiduciary relation."[178]

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[177] *Furs Ltd v Tomkies* (1936) 54 CLR 583.
[178] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 591.

Latham CJ did not refer to any High Court cases on the obligations of a fiduciary. This in itself is significant. Latham CJ, without referring to the same concept as stated by Dixon J in Birtchnell, said that it is irrelevant if a principal has not suffered a loss as a result of a breach of a fiduciary obligation. It was unnecessary for the Appellant to prove that it has suffered a loss directly equivalent to the gain of the Respondent:

> "It is impossible to say that the loss to the company is measured by the profit to the defendant. Such an inquiry is a mere matter of conjecture. But the obligation to account for such a profit does not depend upon the possibility of showing that the person entitled to complain of the breach of duty has suffered pecuniary damage to an equivalent extent."[179]

This aspect of loss to the principal referred to by Latham CJ will appear again in High Court decisions with reference to a decision of the Supreme Court of Canada.[180] It is significant because the concept was first introduced into fiduciary jurisprudence law in Australia by Dixon J in Birtchnell's case.

Rich, Dixon and Evatt JJ gave a joint concurring judgment allowing the appeal.

The Justices said:

> "In our opinion the decision of this appeal is governed by the inflexible rule that, except under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so, or all the shareholders acquiesce. An undisclosed profit

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[179] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 587 (Latham CJ).

[180] *Kak Loui Chan v Zacharia* (1984) 154 CLR 178 (Deane J citing the judgment of Laskin J in *Canadian Aero Services v O'Malley* [1974] 40 DLR (3d) 371where Laskin J refers to *Furs v Tomkies* (1936) 54 CLR 583.

which a director so derives from the execution of his fiduciary duties belongs in equity to the company. The Justices then referred to Lord Eldon in Ex parte James [1803] Eng R 536 where His Lordship said:

"The general interests of justice" require " it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."[181]

Starke J said:

"Persons in fiduciary positions are not permitted to acquire any personal benefit in the execution of their trusts or agencies. Thus agents may not acquire any personal benefits in the course of or by means of their agency without the knowledge and consent of their principals. Directors and officers of companies cannot retain any personal benefits acquired in the conduct of the companies' business unless the particulars of such benefits are disclosed to and approved by the shareholders".[182]

His Honour then referred to Parker v McKenna(1874) L.R. 10 Ch. 96 as authority on accounting for profits.

McTiernan J agreed with Rich, Dixon and Evatt JJ:

"I agree with the judgment of my brothers Rich, Dixon and Evatt, and would add only a reference to some observations of the Vice-Chancellor (Sir J. L. Knight Bruce) in Benson v. Heathorn, (1842) 1Y.& C.C.C. 326 "It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in

[181] *Furs Ltd v Tomkies* (1936) CLR 583, 593.
[182] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 588.

> the case of trustees and all parties whose character and responsibilities are similar (for there is no magic in the word), induces the Court .....to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced".[183]

In general, the courts have never permitted a fiduciary, in the course of the same transaction, to approbate and reprobate on his undertaking by acting as a fiduciary on one side, and as an undisclosed principal in his private capacity on the other.[184] The issue for the Respondent managing director was really one of full disclosure and the proper course for the defendant to adopt, if the negotiations went on, was to make a full disclosure to the shareholders of the arrangements which he had made on his own behalf with the company to which the plaintiff was selling its business.[185]

The case is also important for the remedial relief granted to the Appellant company by ordering the Respondent managing director to account to the Appellant. [186] The comments in the judgment of Knight Bruce VC are not too dissimilar from the comments of Gleeson CJ in McCann v Switzland Insurance when the actions of the fiduciary are fraudulent.[187]

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[183] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 595.
[184] Finn, PD *Fiduciary Obligations* (1977), 222.
[185] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 593 (Dixon J).
[186] In 1937 the High Court of Australia heard the case of *Richard Brady Franks v Price* (1937) 58 CLR 112 and provided a presumption of propriety in the fiduciary. Latham CJ said "A court, however, does not presume impropriety (*in the fiduciary*). In this case there is no doubt that the issue of the debentures was within the powers of the directors. The onus is on the plaintiff who challenges the action of the directors to establish that they did not act bona fide for the benefit of the company." (italicised words added).
[187] See Chapter 7 herein: *McCann v Switzerland Insurance* (2000) 203 CLR 579, 581.

- **Peninsular Oriental Steam Navigation Company v Johnson & Ors (1938)**

In Peninsular Oriental Steam Navigation Company v Johnson& Ors[188] the High Court of Australia was comprised of Latham CJ, Dixon and McTiernan JJ. The case involved the Respondents, Walter Johnson, and Johnson and Lynn Ltd. Walter Johnson was the managing director of the Appellant. Johnson and Lynn Ltd was also the managing agent of the Appellant. Walter Johnson purchased second hand machinery for the Respondent on its own account which was later resold to the Appellant at a profit. The Appellant claimed the benefit of the original purchase and repayment of the profit obtained by the Respondents on the basis that Johnson voted on a transaction which benefited himself financially while he was a director of the Appellant.

The High Court dismissed the appeal. The Chief Justice and both Justices gave separate judgments. Latham CJ referred to Imperial Mercantile Credit Association v. Coleman[189] in support of the fiduciary responsibilities of a director. The Chief Justice said:

> "A director as such, whether he be a managing director or not, is not an accounting party. Merely in his capacity of director he is not a trustee for the shareholders (per Percival v. Wright(1902) 2 Ch. 421). But in the exercise of his powers he is a trustee for the company and is in a fiduciary in relation to the company." [190]

In addition, the Chief Justice referred to Cook v Deeks (1916) 1 A.C. 555, at 563and the judgment of Lord Buckmaster. Latham CJ said:

> "In referring to the judgment of the Supreme Court of Ontario, their Lordships say "that in their opinion that court has insufficiently

[188] *Peninsular Oriental Steam Navigation Company v Johnson & Ors* (1938) 60 CLR 189 ("Peninsular Oriental").
[189] *Imperial Mercantile Credit Association v Coleman* (1873) L.R. 6 H.L. 204.
[190] *Peninsular Oriental Steam Navigation Company v Johnson* (1938) 60 CLR 189, 201.

> recognized the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. The cases of North-West Transportation Co. v. Beatty(1887) 12 App. Cas. 589 and Burland v. Earle (1902) A.C. 83 both belonged to the former class". [191]

The Chief Justice referred to Cook v Deeks because of the legal and equitable ownership rights the Respondent had in the property sold to the Appellant. In essence the Chief Justice was analysing the scope of the fiduciary relationship between the Appellant and the Respondent.

Dixon J also concentrated on United Kingdom fiduciary precedent case law. His Honour relied to a great extent on the same part of the joint judgment of the English Court of Appeal decision in Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co [1914] 2 Ch. 488 as Griffith CJ did in Ford v Andrews (1916) 21 CLR 317.

Dixon J said:

> "The defendant Walter Johnson was a fiduciary agent of that company and with Lumb, who was also a fiduciary agent, assumed to effect a sale to their principal of property belonging to a company of which they were both directors and in which the defendant Walter Johnson was very largely interested.....But in my opinion, no facts have been established which would support the conclusion that Johnson & Lynn Ltd acquired the assets from the receiver in such circumstances that

[191] *Peninsular Oriental Steam Navigation Company v Johnson* (1938) 60 CLR 189, 220.

they became trustees thereof for the Amalgamated Collieries company."[192]

Peninsula Oriental was heard in 1938 and notwithstanding the High Court had itself given decisions in similar cases going back to Ford v Andrews in 1916 the High Court was still reluctant to follow its own decisions.[193]

After analysing the commercial relationship and business dealings between the Appellant and the Respondent, Dixon J determined that there was no "satisfactory proof that Johnson had determined that the machinery should be acquired by the Appellant."[194]

The reason why the original purchase was not tainted by a conflict of duty and interest seems to lie in the fact that, notwithstanding the manager's general authority to purchase land, he had not, at the time of his own purchase, any specific duty or authority to effect a purchase for the company. An approach which although a narrowing the conflict of duty and interest rule appears to be realistic.[195]

- **Visbord v Federal Commissioner of Taxation (1943)**

In Visbord v Federal Commissioner of Taxation [196]the High Court of Australia was comprised of Latham C.J., Rich, Starke and Williams JJ. All Justices gave a separate judgment. In dismissing the appeal the fiduciary standing of a Receiver was discussed in the context of a taxation case. The Respondent Tax Commissioner argued that the moneys which came into the Receiver's account as

[192] *Peninsular Oriental Steam Navigation Company v Johnson* (1938) 60 CLR 189, 246-7.
[193] *Mills v Mills* (1938) 60 CLR 150; *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112; *Furs v Tomkies* (1936) 54 CLR 583; *A.M. Spicer and Sons* (1931) 47 CLR 151 and *Ford v Andrews* (1916) 21 CLR 317.
[194] *Peninsular Oriental Steam Navigation Company v Johnson* (1938) 60 CLR189, 247.
[195] Finn, PD *Fiduciary Obligations* (1977), 238.
[196] *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354.

a result of a mortgagee power of sale was income in the hands of the Appellant. Starke J discussed the fiduciary standing of the Receiver as follows:

> "It has been held that a receiver appointed by the court occupies a fiduciary position (In re Gent; Gent-Davis v. Harris[197] and In re Magadi Soda Co. Ltd[198]); and there would appear to be no distinction in principle in this respect between the position of a receiver appointed by the court and a receiver appointed by the mortgage deed. In each case he holds a particular fund in which, whether it consists of principal or of interest or partly of one and partly of the other, both the mortgagor and the mortgagee are interested, the mortgagee having the prior claim and the balance belonging to the mortgagor after these claims have been satisfied. In the case of principal it has been held that an agent of the mortgagor is in a fiduciary position (*Marris v. Ingram)*[199] and there is no reason why he should not be in the same position with respect to the interest".[200]

Whilst the decision was not favourable to the Appellant, Latham CJ, Rich, Starke and Williams JJ all agreed that the Receiver was an agent of the Mortgagor.

The reference to a Receiver holding a fiduciary position is the first time the High Court has made this association. This reference by Starke J was not a finding that the relationship between the Mortgagor and the Receiver was a fiduciary relationship. The association, as expressed by Starke J, is not interpreted as being a "presumed" category of fiduciary in Australia in light of the statement being from a single Justice without direct reference or support from the Chief Justice or his brother Justices.

It is, however, important to observe the judicial analysis of Starke J in reaching his conclusion. In referring to the decisions of the Court of Chancery in In re Gent-

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[197] *In re Gent; Gent-Davis v Harris* (1888) 40 Ch. D. 190.
[198] *In re Magadi Soda Co. Ltd* (1925) 94 L.J. Ch. 217, 219.
[199] *Marris v Ingram* (1879) 13 Ch. D. 338.
[200] *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354, 369.

Davis and In re Magadi Soda Co in concluding the fiduciary status of the Receiver, this analysis and conclusion adds to the development of the fiduciary jurisprudence and to the possibility of the extension of the principal/agent relationship to both court and creditor appointed receivers.

Developments

1935 to 1952

The core qualities of a fiduciary relationship were further developed in Furs V Tomkies where Latham CJ said a fiduciary in a position of trust and confidence should subordinate his own interests to the interests of another person to whom he stands in a fiduciary relation.[201] The reference to "trust and confidence" reinforces the approach in Dowsett v Reid which in turn cited In re Coomber v Coomber.

The scope of the relationship was discussed by Latham CJ and Dixon J in Peninsular Oriental, where their Honours went into detail about the legal and equitable ownership of equipment purchased by the managing director of Peninsular Oriental. The analysis is a detailed study of the scope of the role of the managing director's business activities in the context of the Appellant and the Respondent. [202]

The parameters of the scope of the fiduciary relationship were also reinforced in Furs v Tomkies where Rich, Dixon and Evatt JJ jointly said directors must disclose material facts to the shareholders and failing to do so any undisclosed profit belongs in equity to the company. Starke J separately expressed these same comments. [203]

The Justices were in effect setting a benchmark for the officers of companies and principals and agents in which to operate their businesses.

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[201] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 591.
[202] *Peninsular Oriental Steam Navigation Company v Johnson* (1938) 60 CLR189, 191 (Latham CJ) and 246 (Dixon J).
[203] *Furs Ltd v Tomkies* (1936) CLR 583, 593 (majority).

Dixon CJ, speaking ex curia to the American Bar Association in Detroit USA in 1942, foreshadowed the possibility of Australia (through the High Court) seeking to develop its own form of private law jurisprudence. His Honour said:

> "On the side of private law, we follow closely the developments in England. We are studious to avoid establishing doctrine which English courts would disavow. Australian lawyers may, therefore, fairly claim to occupy a mid position, a position of great importance in Anglo-American jurisprudence. From it they can see that, fundamentally, it represents but one system of legal conceptions. But never have they stood in such jeopardy. Surely, the first duty of the peoples who share in the possession of the common law is to stand resolute in its defence and to hold fast to the conception of the essential unity of the culture which it gives them."[204]

It is this writers view that it is possible to extract from the last sentence of this section of his Honour's speech that his Honour was suggesting, in the context of the mid position that Australia held between England and the United States of America, the High Court standing in possession of the common law of Australia, could look to the future where the mid position of Australia was to be maintained through the decision making processes of the Justices of the High Court itself and that this process will involve the Justices looking more to the decisions of the High Court itself in initiating this process. In the next chapter Dixon J takes this process a step further.

Although this research does not include an in-depth analysis of the equitable remedies for breach of fiduciary obligations, the remedy of an account of profits in the context of a breach of fiduciary obligations was first awarded by the High Court during this period with Latham CJ stating: " In my opinion, the defendant is bound to account for the paid up shares and the promissory notes or the proceeds thereof because they were an undisclosed profit received by him in the course of a transaction in which he occupied a fiduciary relationship to the company and by

[204] Dixon, Sir Owen "Two Constitutions Compared" in *Jesting Pilate* (1965), 104.

reason of his breach of the obligation upon which the rules of equity insist in such a case."[205]

[205] *Furs v Tomkies* (1936) 54 CLR 583, 592 (Latham CJ).

Chapter 4

- **1952 to 1964 – Dixon CJ**

Sir Owen Dixon was a Justice of the High Court of Australia from 1929 to 1952 and Chief Justice from 1952 to 1964.[206] His court was generally recognised as having exhibited a form of jurisprudence which adhered to precedent combined with a literal interpretation.[207] Importantly, Sir Owen Dixon directly indicated this approach himself at his swearing in as Chief Justice of the High Court in 1952 when he said: "There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".[208] It has been suggested (in relation to this statement) that Sir Owen Dixon meant the resolution of conflicts should be devoid of political influence, however, it would be wrong to understand this statement as advocating a mechanistic approach to the law.[209] This research investigates whether the form of jurisprudence, referred to by Sir Owen Dixon, filters through into his judgements in fiduciary jurisprudence.

Judicial interpretation involving reasoning by analogy[210] and adherence to the doctrine of precedent[211] is indicative of judges exercising a technical role in

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[206] Sir Owen Dixon was a Justice of the Court under the following Chief Justices: Sir Adrian Knox, 1919 to 1930 (Chief Justice); Sir Isaac Isaacs 1906 to 1930 (Justice) and 1930 to 1931 (Chief Justice); Sir Gavan Duffy 1913 to 1931 (Justice) 1931 to 1935 (Chief Justice) and Sir John Latham 1935 to 1952 (Chief Justice). Sir Owen Dixon was a member of the High Court of Australia at the same time as the following Justices: Sir George Rich 1913 to 1950; Sir Hayden Starke 1920 to 1950; Herbert Vere Evatt 1930 to 1940; Sir Edward McTiernan 1930 to 1976; Sir Dudley Williams 1940 to 1958; Sir William Webb 1946 to 1958; Sir Wilfred Fullagar 1950 to 1961; Sir Frank Kitto 1950 to 1970; Sir Alan Taylor 1952 to1969; Sir Douglas Menzies 1958 to 1974 and Sir Victor Windeyer 1958 to1972.

[207] Galligan, B "Politics of the High Court of Australia": *A Study of the Judicial Branch of Government in Australia* (1987), 30.

[208] (1952) 85 CLR xi-xiv. It is essential to keep in mind that these comments by Sir Owen Dixon were made in the context of the decision in the Communist Party Case where legislation banning the Communist Party was invalidated.

[209] Hayne, K "Owen Dixon", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 219.

[210] Posner, R "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 *University of Chicago Law Review* 433.

[211] Zines, L. *The High Court of Australia and the Constitution* (1997) 4th Ed, 435.

determining the law and applying the law to the facts void of moral inputs.[212] In effect, judges were thought simply to declare pre-existing law rather than engage in law making; law was regarded as being objectively embodied solely in the text of legislation and precedent; legal reasoning consisted largely of strict induction, deduction and analogy from existing rules of law without regard to "non legal" factors such as economic, social and political conditions and "policy" considerations.[213] As mentioned in the Introduction herein, it is not the intention of this research to classify the Justices according to a school of judicial interpretation.

The professional work of Sir Owen Dixon was not limited to the High Court. During the Second World War he served on a number of war-related committees; in 1942 he was appointed Australian Minister to Washington (taking leave of his judicial duties) and in 1950 he spent time as a UN representative.[214]

Importantly, the rule of law, played a very large part in the decision making process of Sir Owen Dixon which loosened the attachment to the doctrine of precedent. It was in 1963 that the High Court for the first time refused to follow a decision of the House of Lords.[215] Sir Owen Dixon is noted for having maintained a substantial diary during his time on the High Court for each of the years from 1935 to 1965. The diaries are revealing in the way Sir Owen Dixon refers to his fellow Justices, both in derogatory and complimentary ways.[216]

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[212] Galligan, B. *A Federal Republic* (1995) 182-3.

[213] Horrigan, B "Jurisprudence" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 386.

[214] For example: the Central Wool Committee (1940-42); the Australian Shipping Control Board (1941-42) and the Salvage Board (1942) see Hayne, K "Dixon, Owen", in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 219.

[215] *Parker v The Queen* (1963) 111 CLR 610.

[216] Ayres, P, "Dixon Diaries" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 224. For example, the diaries reveal a Court compromised by divided personalities. Starke's antipathy towards Rich and McTiernan (making it difficult to form a Court). Dixon CJ considered Latham to be coarse in sensibility with a condoning view of political immorality.

1952 to 1964 – High Court of Australia Cases Decided

- **Van Rassel v Kroon (1953)**

In Van Rassel v Kroon[217] the High Court of Australia was comprised of Dixon CJ, Webb and Taylor JJ. The case involved a dispute about the purchase of a lottery ticket and the prize money. Although the case was decided on the terms and conditions of the agreement between the parties, Dixon CJ discussed the possible fiduciary obligations arising out of the relationship of trust between the parties, one of whom purchased a lottery ticket for their joint benefit. In this case the High Court did not refer to any case law at all.

Dixon CJ was the only member of the High Court to discuss the fiduciary standing of the purchaser of a lottery ticket on behalf of a syndicate. The High Court for the first time discussed the important principle of keeping property subject to the trust separate from the ticket purchaser's own personal property (relevant in tracing actions). Fortunately the Appellant purchased a separate ticket for the syndicate involving the Appellant and the Respondent and a separate ticket for the Appellant and his wife. On the relationship of trust between the parties, Dixon CJ said:

> "The fiduciary is at perfect liberty before the drawing to acquire for himself beneficially any number of tickets in the same lottery as that in which he holds a ticket on behalf of others or of himself and others. It is evident that before the drawing the identity of the ticket which is held for others or for himself and others ought, if he fulfils his duty, to be ascertained so that it is clearly distinguished from those he holds for himself. If there is any confusion, the burden must be upon him of showing which is his property. It could not be otherwise where the duty rests upon him as a fiduciary not to confuse his own beneficial property

[217] *Van Rassel v Kroon* (1953) 87 CLR 298.

> with that which is subject to hisfiduciaryobligations and where at the same time his are the hands in which are placed the means of identifying the property.
>
> The peculiarity of the present case is that the defendant, standing as he does in the position of afiduciary, does offer proof that he did identify a ticket as that which he acquired on the joint account and that he identified it in conformity with the terms of his mandate".[218]

In relation to the fiduciary duties of the Appellant, Dixon CJ said:

> "It is not a trust or afiduciary agency involving many duties or burdens. It is of the simplest kind and thefiduciaryobligations flowing from it are few and for the most part negative, that is to say he must do nothing to impair the rights of the persons for whom he holds the ticket".[219]

The use of the word "negative" by Dixon CJ is significant for two reasons. Firstly, the reinforcement of the need for the fiduciary not to act with any conflict of interest and not to obtain an advantage to the detriment of the principal. Secondly, in the context of the present day debate about the proscriptive/prescriptive dichotomy the word "negative" is a reference to the need to distinguish the approach by the High Court from the "positive" obligations of a fiduciary within the prescriptive approach in Canada.

Regardless of the value of the property in the control and possession of the fiduciary, the duty nevertheless exists and must be adhered to so as not to produce a conflict of interest for the fiduciary.

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[218] *Van Rassel v Kroon* (1953) 87 CLR 298, 303.
[219] *Van Rassel v Kroon* (1953) 87 CLR 298, 303.

- **Tracy v Mandalay Pty Ltd (1953)**

In Tracy v Mandalay [220] the High Court of Australia was comprised of Dixon CJ, Williams and Taylor JJ. The Appellants were company promoters and entered into contracts with the Respondent without disclosing this to the directors of the Respondent. The High Court delivered a joint judgment and set out the obligations of company promoters when their relationship with their principals is a fiduciary relationship:

> "Promoters may sell their property to the new company but they are under a fiduciary duty to disclose to the new company that they are doing so and under a duty to place it in a proper position to decide whether to accept the offer or not by appointing an independent board and fully disclosing the whole position to that board."[221].

In making this statement the joint judgment relied on the judgments of Lord Penzance and Lord Cairns in Erlanger v. New Sombrero Phosphate Co. (1878) 3 App Cas 1218 where Lord Penzance said:

> "It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests...."[222].

and Lord Cairns said:

> .... it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the

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[220] *Tracy v Mandalay* (1953) 88 CLR 215.
[221] *Tracy v Mandalay* (1953) 88 CLR 215, 220.
[222] *Tracy v Mandalay* (1953) 88 CLR 215, 240.

company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position."[223]

This clear statement by Lord Penzance on the requirement for "adequate disclosures" by a fiduciary is significant in the developing law of fiduciary obligations in Australia. Importantly, informed consent of the principal will be developed further by the High Court in the decades to follow.[224]

In Tracy, the consideration of Erlanger's case and in particular the judgments of Lords Penzance and Cairns demonstrates the reliance the High Court placed on precedent case law from England, notwithstanding the High Court decision in Johnson V Friends Motor Co where the fiduciary obligations of company promoters were discussed by Isaacs J including a consideration of Lord Cairns judgment in Erlanger's case.

The joint judgment also set out a principle relating to the sale by a fiduciary of their own property to a company they are promoting and in which the fiduciary holds a responsible position:

> "It is clear from these passages, and there are many others to the same effect, that in the absence of approval by an independent board after full disclosure, sales by a promoter of his property to the new company are in the same position as any other sales by a trustee of his property to a person towards whom he stands in a fiduciary relation. That is to say they are voidable at the mere option of the purchaser. But if the purchaser decides to affirm the transaction he must affirm it according to its terms. He cannot ask the Court "to fix a proper price between vendor and purchaser, and estimate the damage with

[223] *Tracy v Mandalay* (1953) 88 CLR 215, 240-241.
[224] *Maguire v Makaronis* (1997) see Chapter 7 herein.

reference to such price. This the Court cannot do" per Lord Parker of Waddington in Marler's Case (1913) 114 LT 640 (n), at p 641."[225]

For a promoter to overcome a potential conflict of interest it is essential to properly disclose their proposed actions to the intended members of the company as a whole, this form of disclosure is usually in the prospectus or Articles.[226]

It is to be noted that the High Court proceeded upon the assumption that the principle (as set out in the joint judgment above) is the same for other fiduciaries as well as directors and promoters. That is, whenever a fiduciary sells property to the principal which in equity belongs to the fiduciary, the principal may elect to rescind; but if he does not, or cannot, rescind, he cannot have an account.[227]

- **Ngurli Ltd V McCann (1953)**

In Ngurli v McCann[228]the High Court of Australia was comprised of Williams ACJ, Fullagar and Kitto JJ. The High Court had to decide the validity of share allotments in the Appellant companies. The Respondent claimed these allotments were made to their (the Respondent's) detriment. The High Court delivered a joint judgment dismissing the appeal and ordered a reversal of the allotment. In Ngurli, the High Court started the process of referring to its own decisions in support of its judgment. This step is fundamentally important to the fiduciary jurisprudence of the High Court.

In Ngurli, the joint judgment said:

> "In Mills v. Mills (1938) 60 CLR 150 the present Chief Justice said: "Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one

[225] *Tracy v Mandalay* (1953) 88 CLR 215, 241.
[226] Finn, PD *Fiduciary Obligations* (1977), 227 citing *Tracy v Mandalay Pty Ltd.*
[227] Meagher R.P, Heydon, J.D and Leeming, M.J *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* 4th ed (2002), 188.
[228] *Ngurli v McCann* (1953) 90 CLR 425.

> application of the general doctrine expressed by Lord Northington in Aleyn v. Belchier [1758] EngR 208; (1758) 1 Eden 132, at p 138 [1758] EngR 208; (28 ER 634, at p 637): 'No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void'" [229]

The reference to Mills' case in the joint judgment is a fundamental step change contributing to the development of a jurisprudence in relation to fiduciary law in Australia.

Ngurli is important for the development of the law of the fiduciary obligations of company directors. Finn (citing Ngurli) has suggested a fine line can be drawn for the fiduciary obligations of a director vis a vis the shareholders:

> "...perhaps the most extraordinary feature of the conventional view of directors' duties is that courts have attempted in some measure to obviate its more incongruous results by defining "the interests of the company" so as to mean "the interests of the present and future members of the company" and not the interests of the company as a legal and commercial entity....If it can be proved that the board (of directors) has exercised a power with the sole or principal purpose in mind of advantaging or disadvantaging some only of the shareholders, then judicial intervention maybe forthcoming."[230]

In Ngurli, the High Court, through the use of precedent law in Mills case, reinforced the principle that the powers entrusted to directors by the company's articles which are to be exercised on behalf of the company are fiduciary powers and where the validity of acts of directors exercising a fiduciary power is questioned, a higher standard is required than in the case of shareholders who do not, when voting at meetings, exercise any power of a fiduciary nature.

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[229] *Ngurli v McCann* (1953) 90 CLR 425, 433.
[230] Finn, PD *Fiduciary Obligations* (1977), 66 and 70.

- **W P Keighery Pty Ltd v Federal Commissioner of Taxation (1957)**

In W P Keighery Pty Ltd v Federal Commissioner of Taxation[231] the High Court of Australia was comprised of Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ. The hearing was an appeal to the Full Court from a decision of Williams J sitting alone in the High Court. Although the case was about the "control" of a company within the meaning in the federal income tax legislation, Williams J made a supporting statement about the fiduciary standing of company directors and referred to Ngurli:

> "The powers conferred on the directors of the company are fiduciary powers to be exercised bona fide for the benefit of the company and not of themselves: Ngurli Ltd v McCann (1953) 90 CLR 425."[232]

The Full Court of the High Court did not comment on this statement in the appeal and neither did it reject it. The approach of Williams J, in referring to Ngurli' case in support of directors being in the position of fiduciaries demonstrates how the Justices of the High Court are continuing to refer to the Court's own judgments (without reference to courts outside of Australia, principally within the United Kingdom) in support of their own decision making process.

- **Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958)**

In Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd[233] the High Court of Australia was comprised of Dixon CJ, McTiernan and Fullagar JJ who delivered a joint judgment. The Appellant was an importer of hog casings from three suppliers in Ireland. The Respondent carried on the supply of butchers requisites, including hog casings. The Respondent asked the Appellant if it (the Respondent) could import hog casings under the Appellant's import licence. As the Appellant did not

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[231] *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66.
[232] *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66, 72.
[233] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342.

respond to the Respondent, the Respondent traded directly with the same suppliers in Ireland for hog casings. An issue arose about the quantities of hog casings imported by the Respondent being allocated by the Customs Department to the account of the Appellant.

The Appellant attempted to bring its claim within the equitable principle laid down in Keech v Sandford.[234] The High Court responded that the rule (in Keech v Sandford) is not confined to cases of express trusts and referred to its own decision in Birtchnell v The Equity Trustees, Executors and Agency Co Ltd [235] as an example of the application of the rule in Keech v Sandford.

In response to the Appellant's reference to Keech v Sandford, Dixon CJ, McTiernan and Fullagar JJ said:

> " The doctrine of Keech v. Sandford (1726) Sel Cas Ch 61 (25 ER 223) is shortly stated by saying that a trustee must not use his position as trustee to make a gain for himself: any property acquired, or profit made, by him in breach of this rule is held by him in trust for his cestui que trust. The rule is not confined to cases of express trusts. It applies to all cases in which one person stands in a fiduciary relation to another: it has been applied as between partners, as between principal and agent, and as between master and servant."[236]

Meagher, Gummow and Lehane suggest that this approach by the High Court (in Keith Henry) appears to imply that as an agent is in a fiduciary relationship with his principal he or she holds in trust for the principal all property acquired and profits

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[234] A trustee must not use his position as trustee to make an improper gain for himself or herself. In Keech *v Sandford* it was held that any property acquired, or profit made, by a trustee, in breach of this rule, is held by the trustee in trust for the cestui que trust.

[235] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929)42 CLR 384.

[236] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350.

gained as a result of the use of his or her position: which indeed, is the conclusion reached in Phipps v Boardman. [237]

The High Court could not find any evidence of a fiduciary relationship and was of the view that the parties were engaged in an ordinary commercial relationship with each other, i.e dealing at arms length and accordingly, could not apply the test in Birtchnell's case and as well distinguished Keech v Sandford.

The joint judgment in Keith Henry continued:

> "But there is no room here for the application of any such rule *(in Keech v Sanford)*. It cannot be suggested that the plaintiff and the defendant at any stage stood in any fiduciary relationship one to the other. The position is simply that of business men - or business firms - were engaged in ordinary commercial transactions with each other, dealing with each other, as the saying goes, at arm's length. Nor is there, in any case, any ground for saying that the advantage gained by the defendant was gained by any misuse of its position vis-a-vis the plaintiff."[238] (italicised emphasis added)

It is important to note at this stage of the development of fiduciary jurisprudence that Deane J in Kak Loui Chan v Zacharia[239], referring to Keith Henry, made the important point that the rule in Keech v Sandford creates an irrebuttable presumption in the case of trustees and a rebuttable presumption in the case of fiduciaries.

The statement in the joint judgment that the relationship was an "ordinary commercial transaction" is also of great importance in the development of fiduciary jurisprudence in Australia. It is a clear recognition by the High Court that a finding of a fiduciary relationship in a standard commercial relationship will involve a great

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[237] *Meagher R.P, Heydon, J.D and Leeming, M.J Meagher, Gummow and Lehane's Equity: Doctrines and Remedies 4th ed (2002), 191.*
[238] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 347.
[239] *Chan v Zacharia* (1984) 154 CLR 178.

deal more scrutiny than would say a solicitor/client relationship where there is a greater possibility of dominance or ascendancy by the fiduciary.

- **Carter Bros v Renouf (1962)**

In Carter Bros v Renouf [240] the High Court of Australia was comprised of Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ. The case was an appeal from Justice Fullagar acting as a single Justice of the High Court, however, his Honour passed away before delivering his already prepared judgment. Under the rules of the High Court, Dixon CJ delivered the judgment of Fullagar J as his own (that is, as Dixon CJ). The Appellant then appealed to the Full Court of the High Court . The case involved partners in an earth moving business and a dispute as to the assignment of a life insurance policy to a creditor of the partnership.

The Full Court referred to Keith Henry in support of a general fiduciary principle in relation to partners and the assets of a partnership:

> "It could not be otherwise, for the general principle of equity applies between partners that a person in afiduciary relation to another is not permitted to keep for himself a gain which he has made by the use of hisfiduciary position : Keith Henry & Co. Pty. Ltd. v. Stuart Walker & Co. Pty. Ltd. [1958] HCA 33; (1958) 100 CLR 342, at p 350; Hugh Stevenson & Sons v. Aktiengesellschaft fur Carton-Nagen-Industrie (1918) AC 239, at pp 250, 251."[241]

The reference to the Keith Henry case, although only one prior High Court decision, is significant in the development of a fiduciary jurisprudence. The methodology being adopted by the High Court of including its own decisions in its judicial reasoning processes is the commencement of a long trend and pattern

[240] *Carter Bros v Renouf* (1962) 111 CLR 140.
[241] *Carter Bros v Renouf* (1962) 111 CLR 140, 163.

where the High Court over time can be observed to increase the frequency of referring to its own decisions.

The Full Court utilised the logic within the judgment in Keith Henry's case and other partnership cases to find that as partnership moneys were used to buy the life insurance policy it beneficially belonged to the partnership.

Developments

1952 to 1964

The obligations and responsibilities of a fiduciary were discussed in Van Rassel v Kroon, where Dixon CJ emphasised the need for the separation of property subject to a fiduciary relationship thus avoiding confusion with the personal property of a fiduciary.[242] The disclosure obligations of company promoters and the sale of their own property into a company were set out in Tracy v Mandalay.[243]

The doctrine in Keech v Sandford was not to be confined to cases of express trusts such as the trustee/cestui que trust relationship. In Keith Henry v Stuart Walker, Dixon CJ expanded this doctrine to all cases in which one person stands in a fiduciary relation to another.[244] This is a major milestone in the development of fiduciary jurisprudence in Australia as it applied the express trust relationship to the fiduciary/principal relationship. However, this approach was qualified by Deane J in Kak Loui Chan v Zacharia with the introduction of the rebuttable/irrebuttable presumption.[245]

The period is significant for the way the High Court considered its own decisions. In Ngurli Ltd v McCann the joint judgment referred to Mills v Mills[246]; in W P Keighery Pty Ltd v Federal Commissioner of Taxation, Williams J (as a singe judge) referred to Ngurli Ltd v McCann; in Keith Henry &Co Pty Ltd v Stuart Walker & Co Pty Ltd the Court referred to Birtchnell's case and in Carter Bros v Renouf the Full Court referred to Keith Henry's case. These references are a real milestone in the development of a fiduciary jurisprudence and establish an important precedent for the future. The change does show an emerging independence in the High Court.

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[242] *Van Rassel v Kroon* (1953) 87 CLR 298, 303.
[243] *Tracy v Mandalay* (1953) 88 CLR 215, 220.
[244] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350.
[245] See Chapter 6 herein.
[246] *Mills v Mills* (1938) 60 CLR 150.

Chapter 5

- **1964 to 1981 – Barwick CJ**

Sir Garfield Barwick was Chief Justice of the High Court of Australia from 1964 to 1981 and has been the longest serving Chief Justice. During this period there were fundamental changes to the administration of justice. Appeals to the Privy Council in federal matters were abolished in 1968 and appeals from the High Court of Australia in 1975. In Mutual Life & Citizens' Assurance Co Ltd v Evatt Barwick CJ said: it was the duty of the High Court of Australia to "declare the common law for Australia" and "it will not necessarily be identical to that of England".[247]

The system of judicial conferences was not strong during the term of Barwick CJ. It has been suggested that Justices continued to work on their own, generally, with a lack of collegiality. This latter observation was made, in particular, in the context of constitutional and income tax law decisions.[248]

To date, during the terms of Griffiths, Latham and Dixon CJ this suggestion of a lack of collegiality has not been apparent, at least in fiduciary cases. It is this writer's observation that, in the main, the personal issues between Justices (and the Chief Justice) do not exhibit themselves openly in the judgments of the High Court in the fiduciary cases reviewed for this research. There certainly are criticisms by the Justices of the Judges of the superior courts of the States. In the fiduciary cases reviewed to date there has not been any criticism by Justices of each other in the High Court in the way they have interpreted the law and facts of the matter before them. This is particularly so with individual judgments (as opposed to joint judgments).

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[247] *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

[248] Mason, A. " Barwick Court" in Blackshield, T, Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia of Australia* (2001), 59.

1964 to 1981 – High Court of Australia Cases Decided

- **Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL (1968)**

In Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL[249]the High Court of Australia was comprised of Barwick CJ, McTiernan and KittoJJ. The case involved the bona fide exercise of a director's power in relation to the issue of new shares. The Appellant claimed the directors acted in breach of their fiduciary duty when they allotted shares to a corporate entity, Burmah. In a joint judgment the High Court dismissed the appeal.

The Chief Justice and the Justices looked only to decisions of the High Court in support of their view about any improper uses of the fiduciary powers of a director in issuing new shares. The Court said:

> "... that ultimate question must always be whether in truth the issue was made honestly in the interests of the company : Richard Brady Franks Ltd. v. Price [1937] HCA 42; (1937) 58 CLR 112, at p 142 ; Mills v. Mills [1938] HCA 4; (1938) 60 CLR 150, at pp 163, 169 ; Ngurli Ltd. v. McCann [1953] HCA 39; (1953) 90 CLR 425, at pp 438-441 ..... But if, in making the allotment, the directors had an actual purpose of thereby creating an advantage for themselves otherwise than as members of the general body of shareholders, as for instance by buttressing their directorships against an apprehended attack from such as Harlowe, the allotment would plainly be voidable as an abuse of the fiduciary power."[250]

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[249] ***Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483.**

[250] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 487.

The High Court found that the directors were not acting in their own personal interests or in breach of their fiduciary duty but were acting in the interests of the company.

This case is one of the first cases heard by Barwick CJ involving a claim for breach of fiduciary duty. The import of the decision goes to the derivation of any benefit to a director from the exercise of the powers of a director and whether those benefits were proper. The High Court based its analysis on two questions: What is the nature of the suggested benefit to the company resulting from the exercise of the power.? Is it such a benefit as the company would have pursued in the ordinary course of its business?[251]

As mentioned in the introduction to this Chapter, Barwick CJ wanted the common law for Australia to be distinct and not identical to that of England. When considered in the context that appeals could still be made to the Privy Council, it is this writer's view that this approach by Barwick CJ is a fundamental paradigm shift for the High Court.[252]

The approach by the High Court in Harlowe's case under Barwick CJ is certainly indicative of a court seeking to show it is capable of being independent, particularly of the United Kingdom by referring substantially to decisions of the High Court itself.

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[251] Finn, PD *Fiduciary Obligations* (1977), 72.

[252] *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556,563. The full text of this section of the judgment of Barwick CJ is: "The matter so far as this Court is concerned is free of any binding authority. The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the Court's task is to express what is the law on this subject as appropriate to current times in Australia. This will not necessarily be identical with the common law of England: see *Australian Consolidated Press Ltd. v Uren* [1967] UKPCHCA 2; (1967) 117 C L R 221, though it may always be preferable if substantial divergence between the two can be avoided. This inevitably means that the common law is what the Court, so informed, decides that it should be, subject of course to correction by the Judicial Committee in a case in which Her Majesty's Privy Council retains jurisdiction. For the future, even where an existing decision of the House of Lords currently governs a matter which comes before it, it would seem that the House of Lords will be in the same situation as is this Court where no precise decision of the Privy Council governs the matter in hand. It will be free to overrule its own decision in order properly to express the common law".

- **Ashburton Oil NL v Alpha Minerals NL (1971)**

In Ashburton Oil NL v Alpha Minerals NL[253]the High Court of Australia was comprised of Barwick C.J., Menzies, Windeyer, Walsh and Gibbs JJ. Gibbs J gave the main judgment which was his Honour's first judgment in a case involving fiduciary obligations. The Appellants had purchased shares equal to approximately 51% of the Respondent. The directors of the Respondent refused to have the shares registered and instead went ahead and issued further shares in an attempt to dilute the (proposed) shareholding of the Appellant below 50%.

Barwick CJ, Windeyer and Walsh JJ agreed with the judgment of Gibbs J in allowing the appeal. Menzies J, appearing in the only fiduciary case analysed in this research gave a short judgment in which his Honour allowed the appeal and referred to Dixon CJ in Mills v Mills:

> "As Dixon J. said in Mills v. Mills (1938) 60 CLR, at pp 185-186:Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one application of the general doctrine expressed by Lord Northingtonin Aleyn v. Belchier [1758] EngR 208." [254]

Justice Menzies in the remainder of his judgment referred only to High Court decisions (on non fiduciary issues).

Gibbs J referred, substantially, to decisions of the High Court (including Mills v Mills) on fiduciary obligations:

> "However, powers conferred on directors by the articles of association of a company must be used bona fide for the benefit of the company as a whole and not to obtain some private advantage. Directors are not

[253] *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614.
[254] *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614, 622.

> entitled to use their power of issuing and allotting shares merely for the purpose of defeating the wishes of an existing majority of shareholders or maintaining their own control of the company: Punt v. Symons & Co. Ltd. (1903) 2 Ch 506; Piercy v. S. Mills & Co. Ltd. (1920) 1 Ch 77; Mills v. Mills (1938) 60 CLR, at pp 163, 175, 185-186; Ngurli Ltd. v. Mc Cann [1953] HCA 39; (1953) 90 CLR 425, at pp 438-440; Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L. [1968] HCA 37; (1968) 121 CLR 483, at pp 492-494....This evidence gave rise to a very strong prima facie inference that at least a substantial purpose of the allotment was the protection of the directors' own positions and that they abused their fiduciary power."[255]

The reference and consideration by Gibbs J to the line of High Court decisions from Mills, Ngurli to Harlowe's Nominee is a further indication of a pattern emerging and becoming a systematic part of the judicial reasoning process of the High Court.

Ashburton's case is also important in the development of fiduciary jurisprudence as it begins the establishment of a line of cases referred to as the "side of line" cases forming the basis and reasoning to establish when a decision of a director disadvantages a shareholder or existing defacto majority resulting in a breach of fiduciary obligations (amongst other corporate law breaches).[256]

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[255] *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614, 642.

[256] Finn, PD *Fiduciary Obligations* (1977), 72. See further on the "side of line" cases in the Developments section at end of this Chapter 5.

Developments

1964 to 1981

There were no new developments in the fundamental core requirements of a fiduciary.

The scope of the fiduciary relationship was reviewed in Harlowe's case where the High Court, in a joint judgment, looked in detail at all the facts surrounding a share issue by the directors of the Appellant who were in a fiduciary relationship with the Appellant.

Gibbs J used forceful language to describe the actions of the directors of the Respondent in Ashburton's case as being with "indecent haste and scramble" (in referring to Fraser v. Whalley (1864) 2 H. & M. 10, at p. 29) when they proceeded with meetings to allot new shares in an attempt to dilute the shareholding of the Appellants.[257] Ashburton is an important contributor to the "side of line" cases which set a benchmark for the way in which directors of companies must adhere to their fiduciary obligations. Finn has proposed five questions as a benchmark for such a determination:

1. At the time when the power was exercised, was there already an existing de facto majority of shareholders ? (Ashburton Oil v Alpha Minerals (1971) 123 CLR 614; Teck Corporation v Millar (1972) 33 DLR (3rd) 288 (Can); Punt v Symonds & Co [1903] 2 Ch 506).

2. Before the power was exercised, had that majority expressed opinions hostile to the board ? (Abbotsford Hotel v Kingham (1910) 101 LT 777; Anglo-Universal Bank v Baragnon (1881) 45 LT 362)

3. What is the nature of the suggested benefit to the company resulting from the exercise of the power ? (Harlow Nominees v Woodside Lake's Entrance Oil Co (1968) 121 CLR 483; Howard Smith v Ampol [1974] AC 821)

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[257] *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614, 642.

4. If there is no existing majority hostile to the board ... has the actions of the directors placed obstacles in the way of the purchasing shareholder? (Savoy Corporation v Development Underwriting (1963) 80 WN (NSW) 1021).

5. Was the power exercised in transient circumstances which were singularly advantageous to the board? (Cannon v Trask (1875) LR 20 Eq 669; Walker v Willis [1969] VR 778).[258]

The approach of the High Court in Ashburton also reflects strongly the interface between commercial transactions, morality and public policy. It has been suggested that the basis of the fiduciary principle can be found in public policy. It reflects a commitment to social behaviour considered desirable and necessary in circumstances where one party acts in the service of another party's interests. It aims to uphold the integrity and utility of those relationships by insisting upon a high degree of loyalty from the fiduciary.[259]This is certainly vindicated by the approach of Gibbs J in Ashburton. The morality of the further allotment of shares by the directors could be seen as repugnant by everyday standards of morality and against the public policy of the government.

The trend of the High Court referring to its own decisions continued in Harlowe's case with reference to Richard Brady, Mills and Ngurli. In Ashburton with references to Mills, Ngurli and Harlowe's cases. This trend is significant because it follows, in a substantial way, the trend established in the term of Dixon CJ (per Nugurli, W.P.Keighery and Carter Bros).

During this period, although Sir Garfield Barwick was the Chief Justice Gibbs J was a prominent Justice in fiduciary obligations cases. However the foresight in the comments by Barwick CJ, in relation to Australia having its own common law and not the law of England, was certainly advanced during this period.

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[258] Finn, PD *Fiduciary Obligations* (1977), 72.

[259] White, S "Commercial Relationships and the Burgeoning Fiduciary Principle" *Griffith Law Review* (2000) Vol 9 No 1, 98, 99 referring to Finn, P "The Fiduciary Principle" in T Youdan (ed) (1989) *Equity, Fiduciaries and Trusts*, Carswell, p 27 and Finn, P "Contract and the Fiduciary Principle" (1989) 12 *University of New South Wales Law Journal* 76, 84.

Chapter 6

- **1981 to 1987 – Gibbs CJ**
- **1987 to 1995 – Mason CJ**

Sir Harry Gibbs, was a Justice of the High Court of Australia from 1970 to 1981 and Chief Justice from 1981 to 1987. His Honour's approach to participants in commercial enterprises is clearly shown in Hospital Products International Pty Ltd v United States Surgical Corporation:

> "What is attempted in this case is to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions. It is not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for fraud and breach of contract were available to USSC...."[260]

The period of Gibbs CJ in the High Court was one of great procedural change. At the beginning of his Honour's term as Chief Justice most civil appeals were as of right.In 1984 the requirement of special leave became mandatory. Generally, special leave falls into two categories, either, where a sufficiently important legal issue is involved or where there has been a significant irregularity in the court below. The Chief Justice favoured following precedent unless very clearly persuaded that they were wrong. In relation to precedent the Chief Justice once said: "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own decision as though the pages of the law

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[260] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 61.

reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court."[261]

Significantly, in Caltex Oil v XL Petroleum[262] the High Court held that a contemporaneous order of the Privy Council would not prevail over an order of the High Court of Australia with respect to the same subject matter.

Sir Harry Gibbs (after his retirement from the High Court) has suggested that, in almost all cases, "it is not wise to have only one (joint) judgment in an appellate court dealing with an important question of law" because "sometimes a joint judgment may lead to compromise, or to the omission of something that might have been useful to state, but that does not command universal agreement".[263]

As mentioned in the Introduction herein, jurisprudence of the High Court develops through the Chief Justice and the Justices. It is suggested that the independence and impartiality of the Justices, whilst being influenced by external influence, demonstrates "that no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions".[264]

It is suggested that the approach of Gibbs CJ in Hospital Products is a good example of the Chief Justice demonstrating such judicial independence where his Honour commented on the disrespect of the Appellant, towards the Court."

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[261] *Second Territory Senators Case* (1977) 139 CLR 201, 213.
[262] *Caltex Oil v XL Petroleum* (1984) 155 CLR 72.
[263] Gray, R. *Constitutional Jurisprudence and Judicial Method of the High Court of Australia* (2008), 120 citing Sir Harry Gibbs, "Judgment Writing" (1993) 67 *Australian Law Journal* 494, 501.
[264] Gray, R. *Constitutional Jurisprudence and Judicial Method of the High Court of Australia* (2008), 145 citing Sir Harry Gibbs, response to interviewer, in Gary Sturgess and Phillip Chubb, *Judging the World, Law and Politics in the World's Leading Courts* (1988), 353.

Sir Anthony Mason was a Justice of the High Court of Australia from 1972 to 1987 and Chief Justice from 1987 to 1995.[265]. It has been suggested that the term of Mason CJ exhibited the emergence of judicial interpretation within a social, cultural and political contextual framework.[266] This form of jurisprudence has also been described as conceptualising law as something which has a social purpose. [267]

In an extra curia speech, Sir Anthony Mason indicated his perception of a changing society when he said: "the High Court of Australia needs to balance the interests of the individual with those of the government of the day".[268]

[265] Sir Anthony Mason was a Justice of the High Court of Australia under the following Chief Justices: Sir Garfield Barwick 1964 to 1981 (term as Chief Justice); Sir Harry Gibbs 1970 to 1981 (Justice) and 1981 to 1987(Chief Justice) and Sir Gerard Brennan 1981 to 1995 (Justice) and 1995 to 1998 (Chief Justice). In addition Sir Anthony Mason was a fellow Justice of Sir Douglas Menzies 1958 to 1974; Sir Victor Windeyer 1958 to 1972; Sir William Owen 1961to 1972; Sir Cyril Walsh 1969 to 1973; Sir Ninian Stephen 1972 to 1982; Sir Kenneth Jacobs 1974 to 1979; Lionel Keith Murphy 1975 to 1986; Sir Keith Aickin 1976 to 1982; Sir Ronald Wilson 1979 to 1989; Sir William Deane 1982 to 1995; Sir Daryl Dawson 1982 to 1997; John Leslie Toohey 1987 to 1998; Mary Genevieve Gaudron 1987 to 2003; Michael Hudson McHugh 1989 to 2005.

[266] Davies, M *Asking the Law Question* 2nd Ed (2002) 142, 148.

[267] Stone, J *Social Dimensions of Law and Justice* (1966) 164ff, 199.

[268] Gray, R *The Constitional Jurisprudence and Judicial Method of the High Court of Australia* (2008), 61.

1981 to 1995 – High Court of Australia Cases Decided

- **Kak Loui Chan v Zacharia (1984)**

In Kak Loui Chan v Zacharia [269]the High Court of Australia was comprised of Gibbs CJ, Murphy, Brennan, Deane and Dawson JJ. The Appellant and Respondent were partners in a medical practice. The practice was carried on from leased premises in Mansfield Park, South Australia. The lease contained an option for renewal. The partnership was dissolved and a receiver appointed. The Appellant refused to exercise the option for renewal with the Respondent and sought, and obtained, a new lease for himself of the same premises.

Mitchell J, in the Supreme Court of South Australia, held that the lease was an asset of the partnership and was held by the Appellant as a constructive trustee. That decision was confirmed by the Full Court of the Supreme Court of South Australia and the Appellant appealed to the High Court.

Deane J, with whom Gibbs CJ, Brennan, and Dawson JJ agreed, gave the main judgement for the majority in dismissing the appeal. Murphy J gave a dissenting judgment.

Deane J stated two different issues the High Court had to consider. Firstly, whether the Appellant held any interest in the new lease of the Mansfield Park premises as a constructive trustee, and secondly, whether the Appellant was entitled to decline to join in an exercise of the option for a further lease and to obtain and retain the benefit of a new lease of the premises for himself.

In relation to the question of fiduciary obligations, his Honour approached the issue as follows:

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[269] *Kak Loui Chan v Zacharia* (1984) 154 CLR 178. ("Chan v Zacharia").

> "If there be a trust of such rights (within the new lease), it must be a constructive trust arising under applicable principles of equity as a consequence of the existence or breach of some fiduciary obligation binding Dr Chan in the particular circumstances in which he was placed."[270]

His Honour proposed a test to determine if the subject matter in the case gave rise to a fiduciary obligation in the partnership:

> "Look at the character of the venture or undertaking for which the partnership exists, which in turn is ascertained, not merely from the express agreement of the parties, whether embodied in a written instrument or not, but also from the course of dealing actually pursued by the firm." [271]

In support of this test Deane J referred to the statement of Dixon J in Birtchnell v Equity Trustees Executors and Agency Co Ltd (1929) 42 CLR 384 at 407-8 to ascertain the scope encompassed within the partnership agreement. The express written terms of the partnership agreement between the Appellant and the Respondent, embodied the following: "each doctor devote his whole time (subject to annual leave) to the medical practice, and be just and faithful to the other partner in all transactions relating to the partnership."[272]

According to Deane J, the partnership was a relationship of confidence between the two doctors. Each doctor, by reason of his position as a former partner, remained under fiduciary obligations (to each other) in respect of the realization and distribution of the partnership property (after the dissolution of the partnership).

On the issue of the Appellant holding the lease as a constructive trustee and acquiring a benefit for himself of a new lease of the Mansfield Park premises, his Honour referred to Birtchnell v Equity Trustees and Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, at 394) for the application of the

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[270] *Chan v Zacharia* (1984) 154 CLR 178, 189.
[271] *Chan v Zacharia* (1984) 154 CLR 178, 191.
[272] *Chan v Zacharia* (1984) 154 CLR 178, 196.

principle that a person is liable to account for a benefit or gain as a constructive trustee to a principal which includes partners in relation to their dealings with partnership property.

According to Deane J, as a matter of fact, the Appellant was introduced to the premises through the partnership and he obtained any rights in respect of a new lease of the premises through the use -- or misuse -- of his position as a trustee of the former tenancy and as a former partner.[273] Accordingly, his Honour held that the Appellant held any rights to or under a new lease of the premises as a constructive trustee for the partnership.

The judgment of Deane J is also important to the development of fiduciary jurisprudence. His Honour reviewed the interpretation of the rule in Keech v Sandford, which was previously reviewed by the High Court in Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd, a commercial fiduciary case,. In Keith Henry, Dixon CJ, McTiernan and Fullagar JJ said that a trustee cannot make a gain for himself in breach of his obligations to the cestui que trust and that this rule also applied to fiduciaries.[274]Deane J (in Chan v Zacharia) expanded on this interpretation by introducing the concept of a rebuttable/irrebuttable dichotomy. His Honour said:

> "Prima facie, the rule in Keech v. Sandford has a dual operation in the present case: there is an irrebuttable presumption that any rights in respect of a new lease of the Mansfield Park premises were obtained by Dr Chan by use of his position as a trustee of the previous tenancy and there is a rebuttable presumption of fact that any such rights were obtained by use of his position as a partner in the dissolved partnership whose assets were under receivership and in the course of realization. There is no logical inconsistency between the two presumptions in that

[273] *Chan v Zacharia* (1984) 154 CLR 178, 198.
[274] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350.

a single benefit may well be obtained by the use of two distinct fiduciary positions."[275]

In effect, Deane J qualified the interpretation of the rule in Keech v Sandford in Keith Henry to mean that where a trustee obtains for his own use a lease which he had previously held for the benefit of others there is an irrebuttable presumption of law that he obtained it by use of his fiduciary position. Where a fiduciary, such as a partner, obtains such a lease there is a rebuttable presumption that he acquired it by use of his position. The Appellant partner in Chan v Zacharia fell into both categories.

Deane J concluded his judgment stating that there was a need to exercise caution when dealing with inflexible rules and doctrines of equity and "being over-enthusiastic (in relation to inflexibility) as to destroying the vigour which it is intended to promote and could exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases."[276] In support of this statement it is important to note that his Honour referred to a Canadian case: Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371.

The reference by Deane J to the Canadian Aero Service case is significant because it is the first time the High Court has referred to a Canadian case in judgments (of the High Court on fiduciaries).

In Canadian Aero Service Laskin J wrote a judgement referred to by Waters as "the tour de force" and hailing it as a definitive exposition on the subject of the conflict of interest and duty rule.[277] Laskin J was unequivocal about the flexibility of equity: Whilst equitable principles had grown out of older cases (not necessarily

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[275] *Chan v Zacharia* (1984) 154 CLR 178, 198.
[276] *Chan v Zacharia* (1984) 154 CLR 178, 198.
[277] Waters, D "The Reception of Equity in the Supreme Court of Canada" (1875 -2000), (2001) 80 *Canadian Bar Review* 620.

involving company directors) his Honour did not regard these older cases as providing a rigid measure whose literal terms must be met in assessing succeeding cases, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting. In effect, the reliance on precedent cases was not strict, if the circumstances warranted a different approach. [278]

The essential issue in Canadian Aero was the fact that the business opportunity to the employee was the same as sought by the employer. The employee resigned and in conjunction with a third party took up the business opportunity.[279]

There are distinct similarities between Chan v Zacharia and the judgment and reasoning of Laskin J in Canadian Aero. Laskin J was of the view that the strict rule of no conflict/no profit could not be considered as the "exclusive touchstone of liability."[280] His Honour, Laskin J, went onto to say an employee would:

> " .....be precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating and especially if this is so where the director or senior officer is a participant in the negotiations on behalf of the company."[281]

Laskin J referred to the High Court of Australia decision in Furs v Tomkies for the principle 'that it was no answer to a breach of fiduciary duty that no loss was caused to the company or that any profit made was of a kind which the company could not have obtained.'[282]

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[278] *Canadian Aero Service Ltd v O'Malley* [1974] 40 DLR (3d) 371, 380.
[279] *Warman International Ltd v Dwyer* (1995) in Chapter 6 herein.
[280] *Canadian Aero Service Ltd v O'Malley* [1974] 40 DLR (3d) 371 at 383.
[281] *Canadian Aero Service Ltd v O'Malley* [1974] 40 DLR (3d) 371, 392.
[282] *Canadian Aero Service Ltd v O'Malley* [1974] S.C.R. 592, 611.

The statement by Laskin J that the strict rule of no conflict/no profit could not be considered as the exclusive touchstone of liability is significant in the context of the inflexible (no conflict/no profit) rule in Australian jurisprudence. Deane J explained the need for flexibility to take into account other equitable doctrines such as estoppel, laches and unconscionability.

Gibbs CJ briefly covered two important issues. Firstly, the heavy onus required to rebut a rebuttable presumption within the rule in Keech v Sandford. Applying the principle to the present case the Chief Justice said:

> ".....the presumption could not be rebutted unless the partner who had obtained the renewal could at least show that it was obtained without any breach of the obligations which were cast on him by the partnership." [283]

Secondly, the Chief Justice emphasised the inequitable actions of the Appellant:

> (*the Appellant*) "refused to exercise the option because he wished to obtain a new lease for himself. He made it impossible for the partnership to exercise the option, and in those circumstances it is inequitable that he should be permitted to retain for himself the new lease which could not have been granted if the option had been exercised". [284] (words in italics added)

Murphy J, being the sole dissent, was of the view that because the Appellant obtained a new lease after the expiration of the option period the new lease could not be considered an asset of the (dissolved) partnership and allowed the appeal.

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[283] *Chan v Zacharia* (1984) 154 CLR 178, 182.
[284] *Chan v Zacharia* (1984) 154 CLR 178, 183.

- **Hospital Products International Pty Ltd v United States Surgical Corporation (1984)**

In Hospital Products International Pty Ltd and Others v United States Surgical Corporation [285] the High Court of Australia was comprised of Gibbs CJ, Mason, Wilson, Deane and Dawson JJ. The Appellant and Respondent agreed that the Appellant was to act as an agent of the Respondent in Australia for the sale and distribution of the Respondent's products. The contract included a term that the Appellant would devote its best efforts to distributing the Respondents products, and build up a market for those products, in Australia, to the common benefit of the Appellant and Respondent.

Gibbs CJ gave the main judgment together with Wilson and Dawson JJ. Mason J and Deane J gave separate dissenting judgments. The Chief Justice took a very pragmatic and almost simplistic "commercial" approach to the appeal from the New South Wales Court of Appeal. Gibbs CJ reviewed the terms and conditions of the contract between the Appellant and the Respondent, saying:

> ".....the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose: see Jones v Bouffier (1911) 12 CLR 579 at 599-600, 605; Dowsett v Reid (1912) 15 CLR 695 at 705; Para Wirra Gold & Bismuth Mining Syndicate (NL) v Mather (1934) 51 CLR 582 at 592; Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958) 100 CLR 342 at 351. A similar view was taken in Canada in Jirna Ltd v Mister Donut of Canada Ltd (1971) 22 DLR (3d) 639 ; affirmed (1973) 40 DLR (3d) 303.....The argument that a fiduciary relation was created with regard to the

[285] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41.

goodwill of the products in my opinion quite deserts the reality of the situation".[286]

The Canadian case, Jirna Ltd v Mister Donut of Canada Ltd is a further example of the consideration, given by the High Court to jurisdictions other than England. The parties in Jirna were in a commercial franchise agreement with both parties experienced in commercial, contractual and business matters. In the Court of Appeal (Ontario, Canada), Brooke JA delivered the judgement of the Court. Brooke JA said (in relation to commercially orientated disputes):

> " Perhaps it may be in some cases that the Court can and should find that the relationship between the parties is something other than what they themselves have provided for, such as in exceptional circumstances where there is a real disparity amounting to a serious inability on the part of one of the parties to effectively negotiate and so protect his interest. Surely the long-term business relationship which the agreement contemplates and the necessity for one of the parties, which is accepted by the other, of imposing strict terms and conditions for the protection of goodwill, integrity of product, trade techniques, trade marks and marketing methods are not sufficient to add the character of a fiduciary to either of the parties.....The Court must give full effect and recognition to the express intention of the terms of the agreement made between parties on equal footing and at arm's length."[287]

Notably, Jirna (in the Court of Appeal) was heard some 13 years prior to Hospital Products.

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[286] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.

[287] *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639, para 23&24.

In the opinion of the Chief Justice, the test applied by the New South Wales Court of Appeal could not stand because the Appellant did not undertake, whether by representation or contractual provision, to act solely in the interest of the Respondent and not in its own interest. Citing Phipps and Boardman as support for this conclusion, the Chief Justice said " it must be remembered that any test can only be stated in the most general terms and that all the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists".[288]

In a significant contribution to the development of a distinctly Australian fiduciary jurisprudence Gibbs CJ also referred to English and United States of America case law to which his Honour gave little weight (or time).

As to English law, Gibbs CJ referred to Reading v The King (1949) 2 KB 232 at 236, and the two part test for the existence of a fiduciary relationship, proposed by Asquith L.J. where his Lordship said:

> "A consideration of the authorities suggests that for the present purpose a ' fiduciary relation 'exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise ... and(b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available."[289]

Although the decision in Reading v The King was approved by the House of Lords, Gibbs CJ held that first branch of Lord Asquith's test had no application in Hospital

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[288] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 59 *and Phipps and Boardman* [1967] 2 AC 46, 123 and 127.

[289] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.

Products and queried if the decision applied to Australian fiduciary law at all. Gibbs CJ also dismissed the second part of Lord Asquith's test saying:

> "The second branch of Lord Asquith's statement, if regarded as enunciating a general rule divorced from its context, seems to me, with all respect, to be far too wide; the fact that there is a duty to be performed - a job to do - cannot in every case create a fiduciary obligation."[290]

As to the law of the United States of America, Gibbs CJ referred to the following decisions (cited by Counsel for the Respondent): Flexitized, Inc. v. National Flexitized Corporation [1964] USCA2 517; (1964) 335 F 2d 774.. Distillerie Fili Ramazzotti, S.P.A. v. Banfi Products Corporation (1966) 276 NYS 2d 413, Sapery v. Atlantic Plastics, Inc. [1958] USCA2 489; (1958) 258 F 2d 793; Arnott v. American Oil Co. [1979] USCA8 562; (1979) 609 F 2d 873.Gibbs CJ said these cases were of little assistance:

> "In truth those decisions provide no assistance in deciding the questions that now arise. The fact that they are relied on illustrates "the danger of trusting to verbal formulae" of which Fletcher Moulton L.J. spoke in In re Coomber. Coomber v. Coomber, at p 728. If the distributors were properly described as " fiduciaries " for the purposes of the American cases to which I have referred, it does not follow that they were fiduciaries who owed duties of the kind sought to be enforced against H.P.I. The judgments in those cases throw no light on the questions that now fall for decision".[291]

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[290] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 71.

[291] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 62.

Finally, Gibbs CJ was of the opinion that the Respondent had (incorrectly and possibly in disrespect to the Court) sought to impose "equitable sanctions" on the Appellant in deference to seeking relief under the contract. The Chief Justice said:

> What is attempted in this case is to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions. It is not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for damages for fraud and breach of contract were available to U.S.S.C. although it did not choose to pursue the former, but in any case the equitable doctrines sought to be invoked have no application to the present circumstances.[292]

In relation to the way the High Court is dealing with claims of a fiduciary relationship between commercial astute parties Dawson J said:

> "To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them".[293]

Mason and Deane JJ dissented with both holding, for different reasons, the Appellant liable for monetary compensation to the Respondent. It is of benefit to look at the judicial reasoning and logic Mason J used in his Honour's analysis of the facts and evidence of the relationship between the Appellant and the

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[292] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41,82.

[293] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 118.

Respondent to understand and determine the existence of a fiduciary relationship and the scope of that relationship. His Honour set out to determine, firstly, if HPI was a fiduciary; secondly, the scope of the fiduciary duty and thirdly, if there was a breach of that fiduciary duty?

Mason J defined a fiduciary relationship as follows:

> "The critical feature of these relationships 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. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal."[294]

Mason J recognised that the contract set the framework and regulated the responsibilities and obligations of the parties. If a fiduciary relationship existed between the parties to a contract, that relationship needed to mould itself to the terms of that contract. Mason J could see that because the Appellant was able to make some decisions in respect of its (the Appellant) own way of conducting business in Australia, his Honour was of the view that a fiduciary relationship could be established in respect of some obligations of the Appellant. His Honour referred to Birtchnell's case in support of this proposition.[295]

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[294] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 80.

[295] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.

It has been suggested that the definition of a fiduciary relationship proposed by Mason J in Hospital Products sets out criteria not too dissimilar to the essential characteristics of a non-economic fiduciary relationship as proposed by Wilson J in the Canadian case of Frame v Smith[296] and it is for the reason that Hospital Products was a dispute between commercially experienced parties that the definition by Mason J needs to be viewed with caution when attempting to apply it to a dispute between a fiduciary and a principal in a commercial setting.

Importantly, Mason J also referred to the co-existence of obligations of fiduciaries and contractors:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship." [297]

The next step in the analysis by Mason J looked at the scope of the fiduciary relationship. In determining the scope his Honour set out eight criteria required to establish a fiduciary relationship. Essentially, the criteria looked at the way in which the Appellant promoted the Respondent's goods in the Australian market; the goodwill of the Respondent in the Australian market; the general discretion of the Appellant; the vulnerability of the Respondent to that discretion and the effect on the Respondent's market share by the way in which the Appellant exercised its discretion. It is this discretion (of the Appellant) that Mason J found to be subject to a fiduciary obligation.

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[296] Joyce, R "Fiduciary Law and Non Economic Interests" *Monash University Law Review* (Vol 28, No 2 2002) referring to *Frame v Smith* (1987) 42 DLR (4th) 81.

[297] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 97.

In relation to commercial transactions and in deference to the majority, Mason J was less reluctant to restrict the application of the fiduciary relationship in commercial transactions:

> "There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship."[298]

Deane J, also dissenting, awarded the Respondent a constructive trust over the assets of the Appellant, not due to breach of a fiduciary obligation but due to a breach of contract. Deane J was of the view that the relationship was one of manufacturer and distributor and was not a fiduciary relationship. This award is important in light of the ongoing fusion fallacy debate.

The comparison and contrast between the statements of Dawson J and Mason J in relation to commercial relationships demonstrates the differing views and opinions of the Justices. In commerce there is a need for certainty and security of the terms and conditions of the contractual documentation between the parties which can involve very large financial investments, employment of many people and contribute to the growth of the nation.

Finn has suggested that a fiduciary relationship should only be found when and to what extent this is necessary and appropriate to give effect to the expectations of

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[298] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 81.

the parties in consequence of: (a) their contract and its terms, (b) the particular business setting and (c) the self serving actions lawfully open to each party under, and notwithstanding, their contract.[299]

Vulnerability of the principal was also discussed in Hospital Products. Gibbs CJ referred to the judgment of McLelland J where his Honour set out a two part test to establish the existence of a fiduciary relationship which included the vulnerability of the principal.[300] Mason J included 'vulnerability' as a test to ascertain the existence of a fiduciary relationship and found that the Respondent (USSC) was vulnerable to the Appellant.[301] Dawson J was of also of the opinion that 'vulnerability' was part of a test for the ascertainment of a fiduciary relationship, however, his Honour could not find a fiduciary relationship between the parties.[302] In the High Court of Australia, the importance of vulnerability of the principal (in commercial matters) as a test for the presence of a fiduciary relationship has not been as critical as its use in Canada and it does not carry the hallmark of such relationships.[303]

- **Moorgate Tobacco Co Ltd v Philip Morris Ltd (1984)**

In Moorgate Tobacco Co Ltd v Philip Morris Ltd (1984)[304]the High Court of Australia was comprised of Gibbs C.J., Mason, Wilson, Deane and Dawson JJ. The Appellant claimed that the Respondent acted in breach of its fiduciary obligation when, on 12 July 1977, it made an application to the Australian Trade Marks Office to register the trade mark "Golden Lights" in respect of tobacco and tobacco

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[299] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference 2003,* 7.

[300] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 68.

[301] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 97, 98 and 100.

[302] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 142 and 146.

[303] Carlin, TM "Fiduciary Obligations in Non-traditional Settings – An Update" (2001) *Australian Business Law Review* Vol 29, 65 and 67. Cf Canada - Chapter 9 herein.

[304] *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 .

products. In their business dealings the Appellant and Respondent were in a commercial relationship.

Deane J gave the main judgment in dismissing the appeal, with Gibbs CJ, Mason, Wilson and Dawson JJ concurring. His Honour, whilst unable to find a fiduciary relationship between the parties, set out the indicators to identify the existence of a fiduciary relationship. The judgment explains the intricate aspects of a commercial relationship or the 'circumstance of the case' which assist a Court in deciding if the relationship is of a fiduciary nature. His Honour said:

> That does not, however, preclude the possibility that, within or arising from that general relationship, duties of a fiduciary nature might well exist. The general relationship between licensor and licensee..... the continuing relationship between the parties under the agreements - involving shared objectives, accounting obligations and the provision of information - provided a context in which it would be easier to imply an undertaking by one party to act on behalf of the other in relation to a particular matter or venture than would be the case if that relationship had not existed".[305]

This review by Deane J is a progressive step in judicial explanation of the indicators the Court would expect to see in a fiduciary relationship. It is, of course, not exhaustive or limiting.

- **United Dominions Corporation Ltd v Brian Pty Ltd and Ors (1985)**

In United Dominions Corporation Ltd v Brian Pty Ltd and Ors [306] the High Court was comprised of Gibbs CJ, Mason, Brennan, Deane and Dawson JJ. The Appellant, United Dominions Corp, entered into an agreement with the Respondent and eventually documented the arrangement. Unbeknown to the Respondent,

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[305] *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414, 427.
[306] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1.

within the documentation, the Appellant had "cross-collateralized" a financing arrangement in favour of the Appellant and to the detriment of the Respondent. The Respondent claimed the collateralization clause breached the fiduciary obligations owed to the Respondent by the Appellant.

All Justices had little trouble in finding a fiduciary relationship between the parties. Gibbs CJ referred to Hospital Products holding the Appellant had an obligation of "mutual confidence" to the Respondent and had breached their obligation:

> "Once it is held that UDC was in a fiduciary relationship to Brian, there can be no doubt that UDC was in breach of its fiduciary obligations. It obtained for itself an advantage at the expense of and without the knowledge or consent of Brian, and is therefore bound to account to Brian for the improper advantage which it obtained."[307]

Gibbs CJ was of the opinion that the relationship between the parties was one of partnership:

> "... there was, in the circumstances of the present case, a relationship between UDC and Brian based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed". [308]

Mason, Brennan and Deane JJ gave a joint judgment. Their Honours did not refer to or mention the Hospital Products decision and held that the relationship between the parties was one of partners as opposed to joint venturers and said:..

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[307] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 8.

[308] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 7.

> "The policy of the joint enterprise was ultimately a matter for joint decision. Apart from the absence of any reference in the agreement to "partnership" or "partners", the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership (cf. Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd. [1974] HCA 22; (1974) 131 CLR 321, at pp 326-327)."[309]

Although the relationship had not been formalised as a partnership (or joint venture) the majority judgment said it was still possible to identify a fiduciary relationship and attendant obligations:

> "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".[310]

Their Honour's also referred to the judgment of Dixon J in Birtchnell v Equity Trustees, Executors and Agency Co Ltd in support of the propositions that parties to a commercial relationship such as a partnership or joint venture were

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[309] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 10.

[310] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 12.

"associated for a common end" and the relationship between them is "based ... upon a mutual confidence" that they would "engage in [the] particular ... activity or transaction for the joint advantage only."[311]

It is no coincidence that the Chief Justice and Justices referred to the need for mutual confidence and further, that this indicator was the basis of the Hospital Products and Birtchnell cases.

The decision in United Dominions established the position that a fiduciary relationship can exist between parties to a prospective joint collaboration who have undertaken tasks associated with the intended relationship even though a formal written agreement has not been entered into by the parties.

In addition, the principle enunciated in United Dominion is that each party was under a fiduciary duty to refrain from pursuing or obtaining or retaining any collateral advantage in relation to the proposed project without the knowledge and informed consent of the other participant. Gibbs CJ said:

> "It (the Appellant) obtained for itself an advantage at the expense of and without the knowledge or consent of Brian, and is therefore bound to account to Brian for the improper advantage which it obtained."[312] (emphasis added)

Informed consent was an issue in United Dominions. There is no precise formula as to what is required to establish a fully informed consent. It is a question of fact in all the circumstances of each case. In some cases there maybe a need for independent advice.[313]As a defence to a breach of fiduciary duty "one answer to

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[311] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 13.

[312] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 8.

[313] *Maguire v Makaronis* (1997) 188 CLR 449, 446-7.

what would otherwise be a breach of duty is the presence of informed consent".[314]In United Dominions, the joint judgment said:

> "In combining to apply the property to their own collateral purposes and in giving and obtaining those collateral advantages without the knowledge or consent of Brian, SPL and UDC each acted in breach of its fiduciary duty to Brian. "[315]

The Appellant sought to rely on the contract, however, the High Court found that because there was a fiduciary relation between the Appellant and the Respondent and that the Appellant had breached that relationship it could not rely on the contract.

- **Daly v Sydney Stock Exchange Ltd (1986)**

In Daly v Sydney Stock Exchange Ltd [316]the High Court of Australia was comprised of Gibbs CJ, Wilson, Dawson and Brennan JJ.

The Appellant's husband, Dr Daly, received certain advice from an employee of Patrick Partners, a firm of stockbrokers. As a result of this advice he deposited money with the firm. At the time, Patrick Partners were in a precarious financial situation. Later, Dr Daly assigned the deposits to the Appellant (his wife).

In July 1975 the Patrick Partners ceased trading and was unable to repay the Appellant the amounts advanced on deposit. The Appellant claimed compensation from the fidelity fund of the Sydney Stock Exchange.

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[314] *Breen v Williams* (1996) 186 CLR 71, 111 (Gummow J).
[315] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 13.
[316] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.

For the Appellant to succeed she had to prove a fiduciary relationship existed between her late husband and the Respondent and further, that the Respondent had committed a "defalcation" as set out in S.97 of the Securities IndustryAct 1975.

The Appellant was able to prove a fiduciary relationship and a breach of that relationship but was unable to prove the defalcation.

In relation to the fiduciary obligations owing by the Appellant to the Respondent, Gibbs CJ, with Wilson and Dawson JJ concurring, held that, although Patrick Partners breached their fiduciary duty to Dr Daly (by failing to disclose the disadvantageous financial information in their possession) they did not receive the moneys as trustees. In relation to the financial transaction between the Appellant and Respondent, Gibbs CJ found the relationship to be one of debtor and creditor, that is, the Respondent, through its breach of fiduciary obligation obtained a loan of moneys from the Appellant.

The fiduciary duty of Patrick Partners arose because of the confidence in the relationship between the parties. That is, Patrick Partners should have disclosed their difficult financial position to Dr Daly. For support in the finding of confidence in the relationship the Chief Justice referred to and applied the principles enunciated by Lord Chelmsford L.C in Tate v Williamson(1866) 2 Ch App 55, 60:

> "I am satisfied that the Defendant had placed himself in such a relation of confidence, by his undertaking the office of arranging the intestate's debts by means of a mortgage of his property....".[317]

and to his Honour's own judgment in Hospital Products:

> "However, an actual relation of confidence - the fact that one person subjectively trusted another - is neither necessary for nor conclusive of the existence of a fiduciary relationship; on the one hand a trustee will stand in a fiduciary relationship to a beneficiary notwithstanding that

[317] *Daley v Sydney Stock Exchange* (1986) 160 CLR 371, 384.

the latter at no time reposed confidence in him, and on the other hand an ordinary transaction for sale and purchase does not give rise to afiduciaryrelationship simply because the purchaser trusted the vendor and the latter defrauded him."[318]

The Appellant, although proving a fiduciary relationship and a breach of that relationship could not prove a defalcation. Daley is important for the principle of disclosure by a fiduciary and the consent by a principal for a fiduciary to act, notwithstanding that a fiduciary may have a potential or actual conflict of interest. Consent can occur prospectively, and ratification of a breach can occur retrospectively, and can be by either word or conduct.[319] It is possible for a principal/client to consent to an actual or potential conflict of interest by a fiduciary on condition that the fiduciary puts information barriers (or "Chinese walls") between officers within the organisation handling the principal's work.[320]

- **Attorney-General (UK) v Heinemann Publishers Pty Ltd Australia ("Spycatcher case") (1988)**

In the "Spycatcher case"[321] the High Court of Australia was comprised of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ. The case involved the Government of the United Kingdom seeking equitable restraints in the form of an injunction against the Respondent who was seeking to publish a book. The Respondent was a publisher for a former member of the United Kingdom Security

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[318] *Daley v Sydney Stock Exchange* (1986) 160 CLR 371, 377 referring to *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 67-75.

[319] Battaglia, V "Dealing with Conflicts: The equitable and statutory obligations of financial services licensees" (2008) 26 *Company and Securities Law Journal* 483, 487 and referring to *Parker v McKenna* (1874) LR 10 Ch App 96 at 118, 124; *Armstrong v Jackson* [1917] 2 KB 822 at 824; *New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 2 All ER 1222 at 1227; *Chan v Zacharia* (1984) 154 CLR 178 at 204; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 103; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377, 385; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 223; *Aequitas Ltd v AEFC Ltd* (2001)19 ACLC 1006 at 1059, 1065; *Kirwan v Cresvale Far East Ltd (in liq)* (2003) 44 ACSR 21 at 95.

[320] Battaglia, V "Dealing with Conflicts: The equitable and statutory obligations of financial services licensees" (2008) 26 *Company and Securities Law Journal* 483, 487 and referring to *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (No 4) (2007) 160 FCR 35 at 355, 361.

[321] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (Spycatcher case) (1988) 165 CLR 30.

Service, Peter Maurice Wright. The Appellant sought an injunction based on a breach of Mr Wright's fiduciary obligations; a breach of contract and that the actions of Mr Wright were contrary to public policy (of the United Kingdom). The Chief Justice and all Justices, except Brennan J, gave a joint judgment dismissing the appeal. Brennan J gave a separate concurring judgment.

In relation to the claim of a breach of fiduciary obligation the joint judgment was caustic in its assessment of the Appellant's case:

> "The appellant's case, to the extent to which it rests on breach of fiduciary duty, is that, by reason of the trust, faith and confidence reposed in Mr Wright, he became subject to and bound by a fiduciary duty not, without authority, to disclose or use any information obtained by him in the course of his service otherwise than for the purposes of the Crown. …The appellant argues that the obligations sought to be enforced here are private, not public, obligations in that they have their source in equitable principle, the fiduciary relationship and the common law of contract..... The appellant's arguments to that effect do not, however, withstand close examination. "

The joint judgment concluded that the High Court was not in a position to make decisions on the appeal due to the constraints of international law and the exercise of the Executive powers of the Australian government.

The contribution of this case to fiduciary jurisprudence is really the decisions of the two lower courts.

The matter was first heard before Powell J in the Supreme Court of New South Wales where his Honour quoted Meagher Gummow & Lehane and Finn PD as follows:

> "It has been said (see Meagher Gummow & Lehane: Equity - Doctrines & Remedies 2 Ed. (1984) p.123 para. 501; see also Finn: Fiduciary

> Obligations (1977) p.1) "that (the term) 'fiduciary' is perhaps one of the most ill-defined and misleading terms in English law", an observation with which I wholeheartedly agree, as also do I agree with Professor Finn's observations (ibid) that "... it is meaningless to talk of fiduciary relationships as such. Once one looks at the rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person - or for that matter a power - as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used. These rules are everything. The description 'fiduciary', nothing. It has gone much the same way as did the general descriptive term 'trust' one hundred and fifty years ago"[322].

In the New South Wales Court of Appeal Kirby J (as his Honour then was), after commenting on the reference of Powell J to Fletcher Moulton LJ on the issue of fiduciary relationships, expressed in Re Coomber [1911] 1 Ch 723 at 728, said

> "By reason of the trust, faith and confidence reposed in Mr Wright by MI5, pursuant to which he had access to much secret and confidential information, a fiduciary relationship undoubtedly came into existence. But so far as this case is concerned, the precise duty owed and the limits of it are not defined by a mere finding of the existence of the relationship. They are defined by a detailed consideration of the nature of that relationship as disclosed in the evidence. From that consideration, it is appropriate to conclude that the obligation owed is the same, relevantly, as that imposed by the equitable obligation of confidence". [323]

McHugh AJ agreed with Kirby J that confidence was an integral indicator of a fiduciary relationship . His Honour said:

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[322] *Attorney-General (UK) v Heinemann Publishers Australia Pty. Limited & Anor* (1987) 10 NSWLR 86, 243.

[323] *Attorney-General (UK) v Heinemann Publishers Australia Pty. Limited & Anor* (1987) 10 NSWLR 86, 92.

> "I agree with Mr F Gurry (Breach of Confidence (1984)) (at 159) that it is "meaningless to speak of fiduciaries as a separate category of confidants amongst those who are generally bound by the obligation of confidence". As he points out, the existence of an obligation of confidence creates a fiduciary relationship for its own purposes. If the Attorney-General cannot establish a case of breach of an equitable obligation of confidence, he cannot establish a case of breach of fiduciary duty."[324]

In effect, both the Supreme Court and Court of Appeal said that it was necessary to establish a relationship of confidence encompassing loyalty and trust before you call that relationship fiduciary.

- **Warman International Ltd v Dwyer (1995)**

In Warman International Ltd v Dwyer [325] the High Court of Australia was comprised of Mason CJ, Brennan, Deane, Dawson and Gaudron JJ. The Respondent had worked for the Appellant as a senior manager overseeing a distribution agreement between the Appellant and the Bonfiglioli Group of companies for the distribution of gearboxes in Australia. Whilst still employed by the Appellant, the Respondent (and two associated corporate entities, BTA and ETA), entered into a distribution agreement with Bonfiglioli for the distribution of the same gear boxes in Australia.

The Appellant claimed the Respondent had breached his fiduciary duty. The Trial Judge ordered an account of profits against the three respondents. The Court of Appeal of the Supreme Court of Queensland found the correct remedy was equitable compensation.

The case is significant for the joint judgment of the High Court confirming the obligations of fiduciaries through consideration of some of the cases discussed in this research to date. No new cases were considered. To put this case into

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[324] *Attorney-General (UK) v Heinemann Publishers Australia Pty. Limited & Anor* (1987) 10 NSWLR 86, 106.

[325] *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

perspective, Warman was heard some 10 years after the Hospital Products case.The High Court referred to In re Coomber; Coomber v. Coomber where Fletcher Moulton LJ observed:

> "Fiduciary relations are of many different types ... and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case ... than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them."[326]

This same reference to In re Coomber was also referred to in Dowsett v Reid.[327]

In Warman, it is important to bear in mind that the Appellant, intended to stop importing gear boxes from Bonfiglioli in the near future. The principle that a breach of a fiduciary relationship does not have to cause financial loss was discussed by the High Court with reference to the judgment of Gibbs J in Consul Development Pty. Ltd. v. DPC Estates Pty. Ltd where his Honour said:

> "Where the rule (*no conflict/no profit*) applies, the liability of the person in a fiduciary position does not depend on the fact that the person to

[326] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 553.
[327] *Dowsett v Reid* (1912) 15 CLR 695, 703.

whom the duty is owed has suffered injury or loss."[328] (italicised comments added)

The joint judgment then said a fiduciary must account for a profit or benefit if it was obtained either, firstly, where there was a conflict or possible conflict between his fiduciary duty and his personal interest, or secondly, by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position.[329]

The High Court was also critical of the Court of Appeal of the Supreme Court of Queenslandfor its lack of applying a strict and rigorous standard required to be met by a fiduciary.

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"The trial judge awarded an account of profits made by BTA and ETA during the four year period preceding the hearing, but permitted the respondents to retain an allowance of 50 per cent of those profits. The Court of Appeal by majority overturned the trial judge's decision, stating: "The cheat may have to pay nothing, or a great sum, depending on whether or not he was a fiduciary. The defendant who in a marginal case is held to have breached a fiduciary duty may think it odd that his mistake - for it may be no more than that - is more expensive than simple fraud would have been."
This passage overlooks the strict and rigorous standards which the courts have applied to fiduciaries and the critical and essentially undisputed fact that Dwyer was a fiduciary in breach of his obligations to Warman."[330]

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[328] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557 referring to Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 389.
[329] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557.
[330] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 556.

Developments

1981 to 1995

The core requirements of the fiduciary relationship were referred to by Deane J in Chan v Zacharia. His Honour looked to the express agreement between the partners where it was stated that each partner had to be "just and faithful" to the other partner.[331]

In Hospital Products, Mason J (in dissent) set out the critical features of the fiduciary relationship and which have been referred to in many case both in Australia and overseas. The key features stated by Mason J were: "agree to act for; on behalf of; in the interests of; exercise a power; or a discretion; affecting the legal interests of a person; exercise of power to the detriment of other person; who is vulnerable; and acts in a representative character."[332]

The core requirements in the United Dominion case were "mutual confidence and trust"[333] which relied on the core requirements set out in Birtchnell's case and Hospital Products.

The scope of the fiduciary relationship was considered by Deane J in Chan v Zacharia where his Honour said one needs to look at the character of the venture and the course of dealing actually pursued by the firm. In support of this approach Deane J referred to Dixon J Birtchnell's case. [334]

In Hospital Products Gibbs CJ was of the view that although the scope of the relationship was commercially based this was not a determining factor of the lack

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[331] *Chan v Zacharia* (1984) 154 CLR 178, 196.
[332] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 97.
[333] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 7.
[334] *Chan v Zacharia* (1984) 154 CLR 178, 191.

of a fiduciary relationship, it was an indication only.[335] Mason J said that even though parties are in a commercial relationship that should not allow the Court to make a generalization.[336]

The rules regulating the actions of the fiduciary were analysed in detail by Deane J in Chan v Zacharia. His Honour felt that the application of equitable principles to inflexible rules and doctrines needs to be exercised with caution. In effect, his Honour was saying that the present application by the High Court of the no conflict/no profit rule was inflexible and in support referred to the judgment of Laskin J in Canadian Aero Service Ltd v O'Malley.[337]

In Hospital Products, Dawson J said it was not proper for the High Court to too easily invoke equitable remedies in disputes involving parties to a commercial enterprise because it would send the wrong message to the business community. His Honour was expressing his opinion that the parties to a commercial agreement need certainty and security. [338]

In Chan v Zacharia the High Court referred to the Canadian case of Canadian Aero Service Ltd v O'Malley in relation to the comments by Laskin J of the inflexibility of Equity in fiduciary matters. This use of case law from Canada is the first time the High Court, in a fiduciary relationship case, has referred to a decision from Canada. In Hospital Products, Gibbs CJ referred to predominantly High Court of Australia decisions and importantly one Canadian case, Jirna Ltd v Mister Donut of Canada Ltd, and in particular the judgment of Brooke JA in the Court of Appeal (affirmed by the Supreme Court of Canada). In addition, in Hospital Products there was a clear denunciation of English and United States of America case law by Gibbs CJ.[339] In United Dominions the High Court referred to Birtchnell's case and

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[335] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.
[336] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 81.
[337] *Chan v Zacharia* (1984) 154 CLR 178, 198.
[338] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 118.
[339] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 62.

Hospital Products for precedent case law on the core requirements of the fiduciary relationship. Gibbs CJ continued the trend of the High Court referring to its own decisions by citing Jones V Bouffier; Dowsett v Reid v MacDonald; Para Wirra and Keith Henry.

Chapter 7

- **1995 to 1998 - Brennan CJ**
- **1998 to 2008 – Gleeson CJ**

Sir Gerard Brennan was a Justice of the High Court of Australia from 1981 to 1995 and Chief Justice from 1995 to 1998. Importantly, his Honour sat on six important fiduciary cases, namely, Chan v Zacharia; Hospital Products; United Dominions; Daly; Breen v Williams and Maguire v Makoronis, the last two cases as Chief Justice.

Breen V Williams is notable for the proscriptive/prescriptive debate in fiduciary jurisprudence, importantly, the interpretation of international judgements, particularly from Canada and the United Kingdom.

Sir Gerard Brennan was also a strong adherent of the rule of law, believing that a Justice was limited in his or her ability to engage in judicial law making. In addition it has been suggested that together with Justices Mason and Deane, Brennan played a prominent role within the Court of Mason CJ. Unlike Mason and Deane, Brennan saw no place for social policy in the development of the law.[340]

Murray Gleeson was Chief Justice of the High Court of Australia from 1998 to 2008.[341]

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[340] Baker, B and Gageler, S "Brennan, Gerard" in Blackshield, T; Coper, M and Williams, G (eds) *The Oxford Companion to the High Court of Australia* (2001), 66.

[341] Murray Gleeson did not serve as a Justice. All the present Justices of the High Court of Australia (as at July 2009, excepting Chief Justice French) were members of the High Court of Australia at the same time as Gleeson CJ, namely: William Montague Charles Gummow (appointed April 1995), Kenneth Madison Hayne (1997), (John) Dyson Heydon (2003), Susan Maree Crennan (2005) and Susan Mary Kiefel. The following past Justices were members of the High Court of Australia at the same time as Murray Gleeson: Mary Genevieve Gaudron 1987-2003, Michael Hudson McHugh 1989-2005, Ian David Francis Callinan 1998-2007 and Michael Donald Kirby 1996-2009.

Although substantive fiduciary case law has not, to a great extent, been prominent in the High Court since Pilmer &Ors v Duke Group Ltd in 2001, the Justices who have sat with Gleeson CJ have had a profound impact on the fiduciary jurisprudence of the High Court of Australia.

1995 to 2008 – High Court of Australia Cases Decided

- **Breen v Williams (1996)**

In Breen v Williams (1996)[342]the High Court of Australia was comprised of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. The Appellant, a patient of the Respondent medical practitioner contended that, based on a fiduciary relationship, she had a right of access to her medical records kept by the Respondent for the purposes of inspection and/or copying those records. Although the relationship between the Appellant and Respondent was medical practitioner and patient and not of the typical "commercial" relationship, the case is important for the analysis by the High Court, for the first time, of the proscriptive/prescriptive dichotomy. The relationship between the Appellant and Respondent was held to be of a contractual nature.[343]

The appeal was dismissed without any dissenting judgments. Brennan CJ and Gummow J gave separate judgements, Dawson and Toohey JJ gave a combined judgment as did Gaudron and McHugh JJ. However, Gummow J was alone in finding a fiduciary relationship but did not agree with the request by the Appellant for access to her medical records.

In relation to the law of fiduciary obligations, although all the Justices covered similar case law and legal principles, there were subtle differences in their judgments. Brennan CJ set out the process of how to work out if a fiduciary duty exists and the source of that fiduciary duty. His Honour was the view that there are only two sources of a fiduciary duty. Firstly, agency, as per Dixon J in Birtchnell v Equity Trustees, Executors and Agency Co Ltd where his Honour (Dixon J) said, when working out if a fiduciary duty exists "it is necessary to identify the subject

[342] *Breen v Williams* (1996) 186 CLR 71.
[343] *Breen v Williams* (1996) 186 CLR 71, 78 (Brennan CJ).

matter over which the fiduciary obligations extend"[344], and secondly, a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other (per Johnson v Buttress).[345]

Brennan CJ also referred to a number of cases in support of the general principles of the fiduciary relationship. Firstly, In Re Coomber; Coomber v Coomber where Fletcher Moulton LJ said:

> "The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the court on those facts, than cases which relate to fiduciary and confidential relations and the action of the court with regard to them".[346]

Secondly, in Hospital Products v United States Surgical Corp where Mason J said: "it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case".[347]

Thirdly, a reference to Gibbs CJ in Hospital Products v United States Surgical Corp where the Chief Justice said: "Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose".[348]

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[344] *Breen v Williams* (1996) 186 CLR 71, 82 referring to *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408-9 (Dixon J).

[345] *Breen v Williams* (1996) 186 CLR 71, 133 referring to *Johnson v Buttress* (1936) 56 CLR 113, 134-5 a Testator Family Maintenance case. Although relevant to the meaning of a fiduciary the case falls outside the commercial group of cases analysed in this research.

[346] *Breen v Williams* (1996) 186 CLR 71, 82 referring to *In Re Coomber; Coomber v Coomber* (1911) 1 Ch 723 at 728-9.

[347] *Breen v Williams* (1996) 186 CLR 71, 82-83 referring to *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41, 102 (Mason J).

[348] *Breen v Williams* (1996) 186 CLR 71, 83 referring to *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41, 69 (Gibbs CJ).

Additionally, Gibbs CJ did not agree with the approach taken by the Supreme Court of Canada in McInerney v MacDonald in holding that a doctor/patient relationship was fiduciary and neither with the prescriptive approach in relation to fiduciary obligations in Canada in general where La Forrest J said:

> "In my view, however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment."[349]

In response to the decision of the Supreme Court of Canada in McInerney v McDonald, Gibbs CJ said:

> "In basing the duty upon a fiduciary relationship, La Forest J was giving expression to the view that it is the duty of the doctor to act with "utmost good faith and loyalty" . Such a duty hardly fits with the undoubted duty of a doctor in this country to exercise reasonable skill and care in the giving of treatment and advice. It is, perhaps, reflective of a tendency, not found in this country, but to be seen in the United States and to a lesser extent Canada, to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong (Finn, "The Fiduciary Principle" in Youdan (ed), Equity, Fiduciaries and Trusts(1989) 1, at pp 28-29; Parkinson, "Fiduciary Law and Access to Medical Records: Breen v Williams", Sydney Law Review, vol 17 (1995) 433, at p 442)."[350]

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[349] *Breen v Williams* (1996) 186 CLR 71, 94 referring to *McInerney v MacDonald* [1992] 2 SCR 138, 150 (La Forrest J).

[350] *Breen v Williams* (1996) 186 CLR 71, 95 referring to *McInerney v MacDonald* [1992] 2 SCR 138, 148-149 (La Forrest J).

The clear difference between the opinion of the High Court of Australia and the Supreme Court of Canada is that the physician-patient relationship in Australia is considered to be a combination of contractual and a duty of care (tortious) whereas in Canada it is in addition considered to be fiduciary.

Dawson and Toohey JJ referred to an additional line of authorities to Brennan CJ in support of their decision to dismiss the appeal. Firstly, Mason J in Hospital Products v United States Surgical Corp for the definition of a fiduciary relationship. Secondly, Nourse LJ in the English Court of Appeal decision in R v Mid Glamorgan Family Health Services Authority [351]where Nourse LJ referred to the well-known passage in the speech of Lord Templeman in Sidaway v Governors of Bethlem Royal Hospital [352] where his Lordship said the doctor/patient relationship was contractual.

Thirdly and significantly, Dawson and Toohey JJ referred to the need for loyalty in a fiduciary relationship where their Honours referred to Finn P, and said:

> "It has been observed that what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that." [353]

In addition, their Honours cited and disapproved of the prescriptive implications in the approach of the Supreme Court of Canada in McInerney v MacDonald [354].

Gaudron and McHugh JJ gave a joint judgment referring to similar authorities as the other Justices and the Chief Justice:

Firstly, Mason J in Hospital Products v United States Surgical Corp:

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[351] *R v Mid Glamorgan Family Health Services Authority* (1995) 1 WLR 110.
[352] *Sidaway v Governors of Bethlem Royal Hospital* (1985) AC 871.
[353] *Breen v Williams* (1996) 186 CLR 71, 93 referring to Finn, PD "The Fiduciary Principle" in Youdan (ed) *Equity, Fiduciaries and Trusts*, (1989) , 28.
[354] *Breen v Williams* (1996) 186 CLR 71, 95 referring to *McInerney v MacDonald* (1992) 93 DLR (4th) 415 (La Forrest J).

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship".[355]

Secondly, Gibbs CJ in Hospital Products v United States Surgical Corp (also referred to by Brennan CJ):

> "I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose."[356]

Thirdly, the same statement of Dixon J as referred to by Brennan CJ herein with the comment that if the relationship between the Appellant and Respondent was fiduciary it (the relationship) must exhibit the characteristics of trust, confidence and vulnerability (per Daly v Sydney Stock Exchange Ltd).[357]

Fourthly, Matthew 6:24: their Honours referred to the Bible for an authority or guide on the law of fiduciary duties. "The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that "[n]o man can serve two masters". Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful."[358]

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[355] *Breen v Williams* (1996) 186 CLR 71, 109 referring to *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 (Mason J).

[356] *Breen v Williams* (1996) 186 CLR 71, 106 referring to *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41, 69 (Gibbs CJ).

[357] *Breen v Williams* (1996) 186 CLR 71, 82 referring to *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408-9 (Dixon J) and *Daly v Sydney Stock Exchange* (1986) 160CLR 371, 384-385 (Gibbs CJ and Brennan J).

[358] *Breen v Williams* (1996) 186 CLR 71, 108.

Fifthly, Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve. In support of this principle their Honours referred to Lord Herschell in Bray v Ford where his Lordship said:

> 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the Respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality."[359]

Sixthly, Sopinka J in Norberg v Wynrib where his Honour said:
"Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."[360]

Seventhly, counsel for the Appellant referred to the decision of the Supreme Court of Canada in McInerney v MacDonald,in particular to La Forest J, who delivered the judgment of that Court, after holding that a doctor owed a duty to his or her patient "to act with utmost good faith and loyalty".Their Honours criticised not only the judgment of La Forest J but also the general approach of the Supreme Court of Canada in relation to the law of fiduciaries.[361]

Gummow J referred to similar authorities as the Chief Justice and other Justices: Dixon J in McKenzie v McDonald[362] and Johnson v Buttress[363]; La Forest in Hodkinson v Simms[364]; Gibbs CJ and Brennan J in Daly v Sydney Stock Exchange Ltd[365]; Deane J in Chan v Zacharia[366] and Viscount Haldane LC in Nocton v Ashburton[367] to arrive at the conclusion that there was a fiduciary relationship

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[359] *Breen v Williams* (1996) 186 CLR 71, 108 referring to *Bray v Ford* (1896) AC 44, 51-52.
[360] *Breen v Williams* (1996) 186 CLR 71, 110 referring to *Norberg v Wynrib* (1992) 2 SCR 226, 312.
[361] *Breen v Williams* (1996) 186 CLR 71, 111.
[362] *McKenzie v McDonald* [1927] VLR 134, 146-148.
[363] *Johnson v Buttress* (1936) 56 CLR 113.
[364] *Hodkinson v Simms* [1994] 3 SCR 377, 406.
[365] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 37, 377& 384-385.
[366] *Chan v Zacharia* (1984) 154 CLR 178, 198-199.
[367] *Nocton v Ashburton* [1914] AC 932, 956.

between the Respondent to the Appellant. However, His Honour could not agree that the Appellant should be provided access to her medical records.

The deductive logic used by his Honour was as follows:

What is the extent of any fiduciary obligations in a particular case? That is, as stated in Birtchnell v Equity Trustees, Executors and Agency Co Ltd : "(what is) the subject matter over which the fiduciary obligations extend"?

In Breen's case, the subject matter is the provision of medical treatment after, or in the course of, consultation with the patient; there is informed consent; there is no gain or benefit in the Respondent doctor at the expense of the Appellant (except the agreed fee);there is no conflict of interest; the general principles associated with the administration of trusts are not a proper foundation for the imposition upon fiduciaries in general of a quasi-tortious duty to act solely in the best interest of their principals and the interests of the Appellant are protected by the general law and a new category of (doctor/patient) fiduciary relationship should not be established.

Breen v Williams is significant to the development of fiduciary jurisprudence for the way the High Court rejected the prescriptive approach of Canada to fiduciary obligations within the doctor/*patient* relationship. In summary, the prescriptive approach imposes obligations on the fiduciary in favour of the principal. Just as important is the way the Justices referred to numerous High Court cases to arrive at their decision which continues, reinforces and consolidates the trend initiated by Dixon J in Ngurli's case. In addition, the obligation of loyalty was considered by Dawson and Toohey JJ to be fundamental thus continuing the understanding of the Justices (including Isaacs J in Birtchnell) in previous cases that loyalty is a core requirement of the obligation of a fiduciary.

- **Maguire v Makaronis (1997)**

In Maguire v Makaronis [368] the High Court of Australia was comprised of Brennan CJ, Gaudron, McHugh, Gummow,JJ who gave a joint judgement and Kirby J, who gave a separate concurring judgment.

The Appellants were solicitors. The Respondents instructed the Appellants on the purchase of a poultry farm. In addition, the Appellants provided finance for the purchase with the Respondents providing a mortgage over an additional property. The Respondents defaulted on the mortgage and the Appellants sought to exercise their rights as mortgagees. An appeal by the Respondent mortgagors to the Supreme Court of Victoria was dismissed.

The joint judgment of the High Court looked at the way particular fiduciary obligations are ascertained and considered what acts and omissions amounted to failure to discharge those obligations. In taking this approach the majority followed similar process of deduction by the High Court in Hospital Products and Breen V Williams.

The majority referred to a judgment of Lord St Leonards LC in Lewis v Hillman (referred to by the Privy Council in Clark Boyce v Mouat [1994] 1 AC 428) for the proposition supporting proper disclosure (of a personal interest) of a fiduciary, and particularly a solicitor. The Lord Chancellor said:

> "The classic case of the [fiduciary] duty arising is where a solicitor acts for a client in a matter in which he has a personal interest. In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction,

[368] *Maguire v Makaronis* (1997) 188 CLR 449.

> however favourable it may be to the client, may be set aside at his (the client) instance."[369]

The majority reinforced the importance of this statement of the Lord Chancellor by saying that it underlies decisions of the High Court (and the Privy Council) and as to the core requirement of loyalty of the fiduciary the High Court said:

> "What one might call that heightened concern is manifested also, as we have ought to indicate earlier in these reasons, in the treatment of disloyalty by non-trustee fiduciaries."[370]

The joint judgment also referred to Millett LJ in Bristol and West Building Society v Mothew ("Mothew') where his Lordship acknowledged the contribution by Paul Finn and said:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."[371]

The reference to Finn P by Lord Millett in Mothew is significant because the obligations of loyalty and fidelity were the main obligations of the fiduciary propounded by Finn in "Fiduciary Obligations".

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[369] *Maguire v Makaronis* (1997) 188 CLR 449, 465 referring to Lord St Leonards LC in *Lewis v Hillman* (1852) 3 HLC 607.

[370] *Maguire v Makaronis* (1997) 188 CLR 449, 465 referring to *Johnson v Buttress* (1936) 56 CLR 113, 134-5; *Blomley v Ryan* (1956) 99 CLR 362, 405; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 394; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 475; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557; cf *National Westminster Bank Plc v Morgan* [1985] AC 686, 704; *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 207-9.

[371] *Maguire v Makaronis* (1997) 188 CLR 449, 473-474 referring to *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.

The majority then elaborated on this proposition enunciated in Bristol. Firstly, equity intervenes to uphold the high duty owed by a fiduciary. In support, the High Court referred to its own decision in Warman International Ltd v Dwyer.[372] Secondly, it is necessary to consider public policy that a fiduciary labours under a heavy duty to show the righteousness of the transaction.[373]

Thirdly, a practitioner should have informed consent (from a client) and this was a question of fact in all the circumstances. Brennan CJ, Gaudron, McHugh and Gummow JJ all said that it is a question of fact from all the circumstances of the case to determine if fully informed consent has been given when they said:

> "..... if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty(Birtchnell v Equity Trustees, Executors & Agency Co Ltd (1929) 42 CLR 384 at 398). What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given: (Life Association of Scotland v Siddal (1861) 3 De G F & J 58 at 73 [1861] EngR 300; [45 ER 800 at 806]; In re Pauling's Settlement Trusts [1962] 1 WLR 86 at 108; [1961] 3 All ER 713 at 730; Spellson v George (1992) 26 NSWLR 666 at 669-670, 673-675, 680).
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> The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party: (Commonwealth Bank v Smith [1991] FCA 375; (1991) 42 FCR 390 at 393). On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of

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[372] *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

[373] *Maguire v Makaronis* (1997) 188 CLR 449, 465 referring to *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 209 (Lord Browne-Wilkinson).

> breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty."[374] (Cases names in parenthesis referred to by the High Court added)

The High Court was also scathing of the inability of the Appellants to show, by way of defence, that the Respondents provided informed consent to the Appellants acting on their (the Respondents) behalf in the refinancing.

The importance of the decision in Maguire v Makaronis is the continued application of the proscriptive approach in Australia. The High Court emphasised that there was no duty on the Appellants to obtain an informed consent.[375] If this was a requirement of the fiduciary then it would be equivalent to a prescriptive approach which the High Court has held to be unacceptable.

The majority found the Appellants had breached their fiduciary duty to the Respondents by not fully explaining the circumstances of the benefits the Appellants received from the mortgage provided by the Respondents. However, the majority discussed the need for "doing equity."[376] In Maguire, the Respondent borrowers had obtained a previous order setting aside the mortgage. The High Court did not hesitate to say the Respondent borrowers had to do equity to obtain equity (a rescission order). Accordingly, the Respondents were ordered to either repay the mortgage debt or in default the Appellants were entitled to possession. The majority referred to the Canadian case of Canson Enterprises Ltd v Boughton & Co, where the principal claimed for the recovery of pecuniary loss from their solicitors based on a breach of fiduciary duty rather than for breach of contract or in tort (for negligence or deceit) because of the apprehension that on none of those other bases could there be the recovery of a substantial sum.

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[374] *Maguire v Makaronis* (1997) 188 CLR 449, 466.
[375] *Maguire v Makaronis* (1997) 188 CLR 449, 467.
[376] *Maguire v Makaronis* (1997) 188 CLR 449, 474-475.

Unlike the Canadian Supreme Court, the High Court rejected the application of common law principles of causation to remedies for breach of fiduciary duty[377].

- **McCann v Switzerland Insurance (2000)**

In McCann v Switzerland Insurance [378] the High Court of Australia was comprised of Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ. The facts of the case involved the loss of more than $8.5m of a client's money by a former partner of the Appellant law firm. The firm's insurers refused to pay the claim relying on an exclusion clause covering dishonest and/or fraudulent conduct. The Appellant, namely, the partners of the law firm, sought to argue that the exclusion clause did not apply.

The High Court held that the actions of the former partner were dishonest. The appeal was dismissed. Callinan J was the sole dissenting judgment allowing the appeal. Gleeson CJ said:

> There was a direct causal connection between his dishonest and fraudulent breach of that obligation and the liability of Allens to the Nauru Trust. The liability resulted from the breach of duty. The breach of duty was not merely negligent. The acts and omissions constituting the breach were dishonest and fraudulent. "
>
> "The principle that a solicitor "shall not be permitted to make a gain for himself at the expense of his client" was said by the Lord Chancellor, Lord Westbury, in Tyrrell v Bank of London (1862) 10HLC 26, 39 & 44, to be one strictly requiring a faithful and honourable observance.[379]

[377] *Maguire v Makaronis* (1997) 188 CLR 449, 467-470.
[378] *McCann v Switzerland Insurance* (2000) 203 CLR 579.
[379] *McCann v Switzerland Insurance* (2000) 203 CLR 579, 587-588.

Hayne J said

> "There is no doubt that, by the time Nauru Trust transferred $US8.7m to the US dollar account, Mr Powles owed Nauru Trust fiduciary obligations. Equally clearly, at least by the time of the transfer, Mr Powles had put himself in a position where his duty to Nauru Trust conflicted with his interest in secretly taking a profit from this and subsequent transactions."
>
> "This was not only a breach of his fiduciary duty, it was a breach (either by act or perhaps by omission) properly characterised as dishonest or fraudulent..... He therefore owed Nauru Trust fiduciary duties, including property he held in his fiduciary capacity and a duty not to put himself in a position where his interest and duty conflicted". [380]

Justice Hayne referred to the following cases in support of this latter comment: Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 67 per Gibbs CJ, 103 per MasonJ; Bray v Ford [1896] AC 44 at 51 per Lord Herschell; NZ Netherlands Society v Kuys [1973] 1 WLR 1126 at 1129 per Lord Wilberforce; [1973] 2 All ER 1222 at 1225; Phipps v Boardman [1966] UKHL 2; [1967] 2 AC 46 at 123 per Lord Upjohn. "[381]

The case is important in the development of the fiduciary jurisprudence in that it clearly explained the causal link when a fiduciary acts dishonestly and fraudulently and has been suggested to be an example of a solicitor not merely paying away client moneys negligently, but doing so in deliberate pursuit of his own advantage.[382]

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[380] *McCann v Switzerland Insurance* (2000) 203 CLR 579, 611.
[381] *McCann v Switzerland Insurance* (2000) 203 CLR 579, 582.
[382] Meagher RP, Heydon, JD and Leeming, MJ *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* 4th ed (2002), 271 at para [5-325].

- **Pilmer v The Duke Group Ltd (In Liquidation) (2001)**

In Pilmer v The Duke Group Ltd (In Liquidation) [383]the High Court of Australia was comprised of McHugh, Gummow, Kirby, Hayne and Callinan JJ.
The Appellant, a firm of Accountants, prepared a report for the Respondent on the value of shares in a company known as Western United as at September 1987. In October 1987 the share market experienced a drop in value and notwithstanding this loss in value, the Respondent went ahead with the purchase of Western United at the price set out in the report of the Appellants. As a consequence the Respondents suffered a financial loss. (The Respondent was previously known as Kia-Ora Gold Corp NL)

The Trial Judge held the Appellants owed the Respondent a common law duty of care and a like duty under the contract of retainer, but did not owe the Respondent a fiduciary duty. The Full Court of the South Australian Court of Appeal held that the Appellants, by providing a report to the Respondent, with whom the Appellant had a prior association, owed fiduciary obligations to the Respondent which they had breached.

McHugh, Gummow, Hayne and Callinan JJ delivered a joint judgment allowing the appeal (in respect of a breach of a fiduciary duty by the Appellant) with Kirby J dissenting.

The joint judgment referred to, with approval, the authorities cited by the Trial Judge as follows: Hospital Products v United States Surgical Corporation; Daly v Sydney Stock Exchange Ltd; Breen and Williams and a decision of the Supreme Court of Canada, Norberg v Wynrib

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[383] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165.

> "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 ...."[384]

The majority agreed with the Trial Judge when he referred to Daly's case citing the principle that, in some instances, contractual and fiduciary relationships can co-exist and gave as an example, a financial adviser possibly owing a fiduciary obligation to a client:

> "There is no evidence to suggest that the *[Appellants]* gave any advice, or made any representation to, *(the Respondent)* Kia Ora about the efficacy or wisdom of the takeover. Indeed, there is no evidence to suggest that the *[Appellants]* advised, or even suggested to *(the Respondent)* Kia Ora, that the takeover of Western United be undertaken ... [T]hose controlling *(the Respondent)* Kia Ora were determined that *(the Respondent)* Kia Ora takeover Western United and the *[Appellants]* were required to undertake the valuation and having done so were to give a report under the listing rule".[385] (*italicised* emphasis added).

It was submitted at trial that when the Appellants stated the price proposed to be offered was "fair and reasonable in all the circumstances" this was equivalent to giving advice to the Respondent to enter into the takeover transaction. The Trial Judge cited the following statement of Gaudron and McHugh JJ in Breen v Williams in support of his rejection of this proposition:

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations -- not to obtain any

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[384] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 185.
[385] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 186.

unauthorised benefit from the relationship and not to be in a position of conflict."[386]

The majority referred to the judgments of McLachlinJ and SopinkaJ in the Canadian case of Norberg V Wynrib, where their Honours (in Norberg) discussed the distinction between tort, contract and fiduciary obligations. McLachlin J said:

> "The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other."[387]

And Sopinka J said:

> "Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."[388]

Justice Heydon, writing ex-curia, asked the question: are the common law and equitable duties of fiduciaries always identical? His Honour referred to the judgment of McLachlin above, and said:

> " it suggests a further reason why the equitable duty of care and skill owed by fiduciaries is distinct from any common law duty, and in particular from any duty that exists in the tort of negligence". [389]

The reasoning for this distinction, his Honour said:

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[386] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 186.
[387] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 201.
[388] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 186.
[389] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 186.

> "it is of the essence of the duties which a fiduciary is to perform ....subject to the principal's consent , the self-interest of the fiduciary is to be suppressed. In contrast, in assessing whether there has been a breach of a common law duty of care in the tort of negligence, the self interest of the defendant is a relevant consideration and not something that the defendant is under a duty to suppress." [390]

In Pilmer the High Court reinforced its own position in relation to the proscriptive/prescriptive dichotomy:

> "The trial judge was correct in principle in taking this approach. In Breen v Williams, the point was made, by way of contrast to what is said in some of the Canadian judgments, that fiduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals."[391]

The majority of the High Court, in finding the Appellant had no conflict of interest in providing a report said:

> "The conflicting duty or interests must be identified. Conflict is not shown by simply pointing to the fact that there had been past dealings between the appellants and interests associated with the Kia Ora directors. No real or substantial possibility of conflict was demonstrated"[392].

The High Court confirmed the essential characteristics of a fiduciary relationship by saying that the Appellants were not agents of Kia Ora, there was no relationship of

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[390] Heydon, JD "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in Degeling, S and Edelman, J *Equity in Commercial Law* (2005), 225.
[391] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 187.
[392] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 188.

ascendancy or influence by the appellants over Kia Ora, nor one of dependence or trust on the part of Kia Ora in the relevant sense.[393]

The High Court also took the opportunity in the case to comment on the question of compensation for breach of fiduciary duty. In relation to any reduction in compensation for contributory negligence on behalf of the Respondent, the High Court referred to Maguire v Makaronis and McCann v Switzland Insurance for support and the majority summed up their position as follows (with Kirby J agreeing):

> "With respect to question(c), concerning "contributing fault", it is sufficient to say that the decision in Astley v Austrust Ltd(1999) 197 CLR 1 indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty".

The suggestion that Equity should seriously consider a reduction in equitable compensation for the wrong of the principal has been steadfastly rejected:

> "The one thing that does seem relatively clear, though, is that a notion akin to contributory negligence will have no part to play in reducing the award of equitable damages in this country."[394]

Pilmer's case is a significant milestone in fiduciary jurisprudence in Australia in relation to the professional consulting industry. Pilmer has introduced the "multi-function business and large professional partnership" to fiduciary jurisprudence in modern Australia[395].

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[393] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 188.
[394] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference 2003,* 9-10.
[395] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference 2003,* 8.

Finn J, ex-curia commented on the impact of the implications of Pilmer's case on the professional services industry. The areas of commercial activity giving rise to potential issues with fiduciary obligations are firstly, the growth in the number of clients of large professional services firms such as legal and accounting, and financial services with the latter operating through an agent or broker network leading to the increased chance of a client conflict. Secondly, the amount of information accumulated by firms about each client by different service departments of the same professional firm. Thirdly, businesses need to protect their own market share and loyalty of their staff through commissions, bonuses, career prospects and retention schemes. Fourthly, the need to maintain public confidence in these institutions can be achieved in part by the courts but ultimately the need for legislation will need to be considered.[396]

[396] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference 2003,* 9.

Developments

1995 to 2008

The fundamental core requirement of a fiduciary was referred to in Breen V Williams where Justices Dawson and Toohey (referring to Finn P)[397] and Gaudron and McHugh (referring to Lord Herschell in Bray v Ford) stated that an uncompromising and undivided loyalty was an important requirement.[398]The requirement of loyalty within a fiduciary was continued in Maguire v Makaronis where the High Court indicated its concern for any disloyalty by a fiduciary. The High Court referred to the approach in the English case of Bristol and West Building Society v Mothew where Millett LJ (also quoting Finn P) said that the fundamental obligation of a fiduciary is the obligation of loyalty.[399]

The scope of the fiduciary relationship was discussed in Breen V Williams where the High Court went into detail as to how the High Court would workout if a fiduciary duty exists and the source of that duty. For example, Brennan CJ stated that there were only two sources of the fiduciary duty, namely, agency and ascendancy with the latter encompassing influence and dependence.[400]This is to be compared to the position in Canada where dependency cases are essentially non commercial (per Norberg v Wierib and Fame v Smith). Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ all agreed the relationship was contractual which is reflected in the scope of the relationship. In Breen V Williams, Brennan CJ set out a six step, Gaudron and McHugh JJ a seven step and Gummow J an eight step process to assess the evidence to determine if a fiduciary relationship existed and its scope. In Breen v William, Gummow J found the presence of a fiduciary

[397] *Breen v Williams* (1996) 186 CLR 71, 93.
[398] *Breen v Williams* (1996) 186 CLR 71, 108 referring to *Bray v Ford* (1896) AC 44, 51-52.
[399] *Maguire v Makaronis* (1997) 188 CLR 449, 473-474 referring to *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.
[400] *Breen v Williams* (1996) 186 CLR 71, 133.

relationship between a doctor and patient, however, would not agree to grant the Appellant access to her medical records.

The scope of the relationship between the fiduciary and principal was also discussed at length in Pilmer v The Duke Group Ltd (In Liq). The High Court took the approach that because the Appellant were not agents of the Respondents; there was no relationship of ascendancy or influence by the Appellants over the Respondent nor was the relationship one of dependence or trust on the part of the Respondent (in the relevant sense). It is important to note that the Respondent in Pilmer's case was commercially experienced.

The proscriptive/prescriptive dichotomy which was first raised by the High Court during this period in Breen v Williams and confirmed in Pilmer's case that Australia follows the proscriptive approach.[401] The High Court disapproved of the prescriptive approach adopted by the Supreme Court of Canada (in McInerney v MacDonald). Also, in Breen v Williams Gaudron and McHugh JJ stated that a party cannot superimpose a fiduciary relationship on a commom law remedy for a better result with their Honours referring to the Canadian case of Norberg v Wynrib.[402]

The duty of a fiduciary were also analysed in McCann v Switzland Insurance where the breach by a lawyer of his fiduciary duty was held to be dishonest. Both Gleeson CJ and Hayne J said that the lawyer involved had breached the fundamental no conflict/no profit rule to a point where the breach was dishonest.[403] Hayne J referred to Hospital Products, Bray v Ford, NZ Netherlands Society v Kuys and Phipps v Boardman in support of his Honour's conclusion.

In light of the decision in Pilmer v The Duke Group, Justice Finn has commented on the need for the "multi function business and large professional partnerships" to take notice of the huge growth in agents within the financial services industry; the

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[401] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 187.
[402] *Breen v Williams* (1996) 186 CLR 71, 110 referring to *Norberg v Wynrib* (1992) 2 SCR 226, 312.
[403] *McCann v Switzerland Insurance* (2000) 203 CLR 579, 587-588 (Gleeson CJ) and 611 (Hayne J).

accumulation of data about the same client in the same large firm and the protection of markets by firm through commissions and bonuses and the like.[404] In respect of the Court of Appeal decision in Pilmer, Heydon J, ex-curia said that a reduction in compensation for contributing fault of the principal was considered to present "severe conceptual difficulties" (per Pilmer) with Justice Finn confirming the same approach (as Heydon J) by saying: "The one thing that does seem relatively clear, though, is that a notion akin to contributory negligence will have no part to play in reducing the award of equitable damages in this country."[405]

[404] Finn, PD "Fiduciary Reflections" in a paper presented at the *13th Commonwealth Law Conference* 2003, 9-10.

[405] Heydon, JD "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary ? in Degeling, S and Edelman, J *Equity in Commercial Law* (2005), 225.

Chapter 8

- **2008 to – French CJ**

Robert French was appointed Chief Justice of the High Court of Australia on 1 September 2008. The Chief Justice's career has included Presidency of the Australian Competition Tribunal, President of the National Native Title Tribunal and a judge of the Federal Court of Australia for 22 years. Between the date of appointment of French CJ and 30 June 2009 there was one fiduciary case of a commercial nature heard by the High Court.

2008 to 2009 – High Court of Australia Cases Decided

- **Friend v Brooker (2009)**

In Friend v Brooker [406] the High Court of Australia was comprised of French CJ, Gummow, Hayne, Heydon and Bell JJ. The Appellant and the Respondent were directors of a company providing engineering consulting services. The Appellant, Friend, in the Court of Appeal of the Supreme Court of New South Wales was found to be liable for payment of certain moneys in accordance with the equitable doctrine of contribution where McColl JA held that there had been a fiduciary obligation which required each director to meet an equal share of capital contributions.

The decision of the High Court is significant for its pronouncement on the proscriptive obligations of a fiduciary. The Chief Justice and all Justices agreed that the Court of Appeal (NSW) was in error. Although Heydon J agreed with the majority decision (of the High Court), his Honour gave a separate judgment

[406] *Friend v Brooker* (2009) 239 CLR 129.

criticising the Court of Appeal (NSW) for the way in which it conducted the hearing of the appeal.

The majority judgment (in the High Court) said:

> "McColl JA held that Mr Brooker and Mr Friend were subject to a fiduciary obligation "to be equally and personally liable to each other for losses flowing from personal borrowings.... In this Court, the appellant correctly emphasises that such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court.
>
> The appellant and the respondent were not, after the formation of the Company in 1977, in a relationship of partnership. Nor were their business dealings pursued pursuant to any agreement in the nature of a joint venture."[407]

The Appellant also submitted to the High Court that because he (the Appellant) and the Respondent (Mr Brooker) deliberately adopted a corporate structure (which essentially set out their personal liabilities in relation to the company) for their business it was now totally improper for the Respondent to seek contribution from the Appellant for moneys the Respondent lent the company. The High Court agreed with this submission and responded as follows:

> "The appellant also submits that equity does not impose fiduciary duties between the parties to a deliberate commercial decision to adopt a corporate structure in which they would owe duties, but to the corporation and as directors. Why, it is asked, should equity intervene in such a fashion when the Company, by which Mr Brooker and Mr Friend carried on the business, failed and, in the result, their personal

[407] *Friend v Brooker* (2009) 239 CLR 129, 146.

> losses will not be in equal amounts? That submission is to be accepted".[408]

Although the High Court would have looked at the totality of the arrangement between the Appellant and Respondent to determine if there was in fact a fiduciary relationship one of the main concerns of the High Court would have been the statement or inference by McColl JA as follows:

> "In this Court the appellant correctly emphasises that such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court [409]

Her Honour was actually saying that notwithstanding the approach of the High Court to the limitations of the proscriptive nature of the obligations imposed upon a fiduciary, the Court of Appeal (NSW) was entitled to exceed these limitations. The High Court did not accept this interpretation by McColl JA.

The decision is also significant because it is the first decision for French CJ involving fiduciary obligations in a commercial setting. Importantly the High Court agreed with and continued the approach of the High Court in Breen v Williams and Pilmer's cases in respect of the proscriptive obligations of a fiduciary. The High Court was unable to identify a fiduciary relationship between the Appellant and Respondent within their commercial and corporate arrangements.

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[408] *Friend v Brooker* (2009) 239 CLR 129, 147.
[409] *Friend v Brooker* (2009) 239 CLR 129, 147.

Developments

2008 to 2009

In Friend v Brooker the High Court accepted the Appellant's submission of the inequity of the Respondent's submissions related to the corporate structure of the parties. The Respondent could possibly have sought relief under breach of contract, if at all.

In addition, the High Court emphasised (to the Court of Appeal (NSW)) that the proscriptive obligations of a fiduciary have been established by the High Court over a number of years and it is incumbent on State and Federal Superior Courts (particularly Courts of Appeal) to adopt and follow the law as decided by the High Court.

The approach taken by the High Court is consistent with the trend that has been established within the High Court, in the above two areas, over the past thirty (30) years. That is, the High Court viewed the corporate structure as something the parties should accept and respect within the commercial environment of their business plans and secondly, the High Court viewed the decision of the Court of Appeal as imposing prescriptive obligations when such an approach has long been unacceptable to the High Court.

Chapter 9

An International Comparison

Canada

The number of cases from Canada which have been taken into account by the High Court of Australia in the fiduciary cases analysed in this thesis has been relatively small in the context of the number of years since 1984 when the High Court first started referring to Canadian case law and in particular, the Supreme Court of Canada.

Because of the importance of Breen v Williams in the development of a fiduciary jurisprudence in Australia (albeit a non commercial case), the development of fiduciary jurisprudence in Canada is to be analysed within the division of commercial and non commercial cases, both in chronological order.

Commercial Cases

- **Jirna v Mister Donut of Canada (1973) - Supreme Court of Canada**

In the Ontario Court of Appeal in Jirna Ltd v Mister Donut of Canada Ltd[410] Brooke J dismissed an appeal by Mister Donut of Canada Ltd from a finding of a fiduciary relationship between the parties by the Trial Judge. Brooke J based his decision on two factual conclusions. Firstly, the terms and conditions of the agreement between the parties explicitly provided that "the relationship between the parties is only that of independent contractors. No partnership, joint venture or relationship of principal and agent is intended."[411] In particular, Brooke J emphasized that this conclusion was particularly relevant to parties who negotiated on equal footing and at arm's length.

Secondly, members of the Appellant were experienced in commercial transactions combined with professional management.[412]

On appeal, the Supreme Court of Canada, in Jirna v. Mister Donut of Canada[413]affirmed the decision of Brooke J in a four page judgment. Martland J, in delivering the judgment of the Supreme Court, added one further factual conclusion. The agreement (in paragraph 7) between the parties caused the

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[410] *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639.
[411] *Jirna v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639, 643.
[412] *Jirna v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639, 646.
[413] *Jirna v Mister Donut of Canada Ltd* (1973) 40 DLR (3d) 303.

Appellant to purchase ingredients from the Respondent, this requirement did not prevent the Appellant from making a profit.

The High Court of Australia is in general agreement with the approach of the Supreme Court of Canada in Jirna and the decision of Brooke J in the Court of Appeal in relation to the standing of parties to commercial agreements negotiated on equal footing and at arm's length.[414] In effect, Jirna exhibited a proscriptive approach to fiduciary jurisprudence.

- **Canadian Aero Services Ltd v O'Malley and Ors (1974) - Supreme Court of Canada**

In Canadian Aero Services Ltd v O'Malley and Ors[415] the Appellant undertook preparatory work in seeking a contract with the Government of Guyana. The Respondents (Thomas O'Malley, George Zarzycki and James Wells) who were directors of the Appellant and a further Respondent, Terra Surveys Limited, set up the latter company to compete with the Appellant for the Guyanan contract.

The Supreme Court of Canada was comprised of Martland, Judson, Ritchie, Spence and Laskin JJ with Laskin J delivering the judgment of the Court.

Laskin J, in a methodical manner, firstly set out what his Honour expected to find in a fiduciary relationship; secondly reviewed case law from England, Australia, New Zealand and the United States and thirdly applied that case law to the present case. His Honour was of the view that because O'Malley and Zarzycki were senior officers of the Appellant (and not mere servants) they stood in a fiduciary relationship to the Appellant "which in its generality betokens loyalty, good faith and

[414] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70 (Gibbs CJ).
[415] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 593.

avoidance of a conflict of duty and self interest."[416] The actual fiduciary duty invoked by the Appellant, and emphasised by Laskin J, was the existence of a strict ethic that disqualifies a director or senior officer from usurping for themselves a business opportunity which their company is actively pursuing. In effect, the Respondents were found to owe fiduciary duties by their status of being senior officers of the Appellant.

As to English case law, Laskin J referred to Viscount Sankey and Lord Russell Killowen in Regal (Hastings) Ltd v Gulliver with a comment that the no conflicts/ no profit tests are not the "exclusive touchstone of liability."[417] In support of this comment Laskin J referred to Phipps v Boardman for the proposition that "liability to account does not depend on proof of actual conflict of duty and self interest."[418]

As to Australian law, Laskin J referred to Furs Ltd v Tomkies[419]for the principle that it was no answer to the breach of fiduciary duty that no loss was caused to the company or that any profit made was a kind which the company could not have obtained.[420]

Some of the factors used by Laskin J to test the standards of loyalty, good faith and avoidance of a conflict of duty and self interest included the position or office held; the nature of the corporate opportunity; its ripeness; its specificness and the director's or managerial officer's relation to it; the amount of knowledge possessed; the circumstances in which it was obtained and the circumstances under which the senior officers left the company.[421] Laskin J also found that the Respondents, after leaving the employ of the Appellant, were under a fiduciary duty to respect Canaero's priority, which in all likelihood, is a reference to the equitable first priority

[416] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 593.
[417] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 607.
[418] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 609.
[419] *Furs Ltd v Tomkies* (1936) 54 CLR 583.
[420] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 611.
[421] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 620.

of the Appellant due to the substantial preparatory work the Appellant had undertaken.[422]

As to New Zealand law, Laskin J referred to the case of G.E. Smith Ltd v Smith [1952] N.Z.L.R. 470 which relied on Regal (Hastings) Ltd v Gulliver [1942] 1 All E.R. 378 and in addition to the statement by Lord Cranworth in Aberdeen Railway Co v Blakie Bros (1854), 1 Macq. 461 that a possible conflict of personal interest and duty will establish abasis for relief.The use of the term "good faith" by Laskin J has also been used by the High Court when describing the obligations of a fiduciary. In Jones v Bouffier, Isaccs J said:

> "The "settled definition" of fiduciary wrong is therefore not so narrow as is contended. Fiduciary relation is nothing else than a confidential relation between the parties in which good faith demands of one of them some special duty towards the other, beyond what is required of complete strangers."[423]

There is a need to exercise caution when referring to "good faith" as the term is also applicable to the common law expectation of parties to a contract. However, as discussed earlier herein, Finn P set out eight duties of good faith which correspond to the type of relationship that could give rise to a fiduciary relationship with a cautionary note about interpreting "good faith" in the context of contractual responsibilities.[424]

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[422] *Canadian Aero Services Ltd v O'Malley* (1974) SCR 592, 619.
[423] *Jones v Bouffier* (1911) 12 CLR 579, 613.
[424] Finn, PD *Fiduciary Obligations* (1977), 78 and Chapter 1 herein.

- **LAC Minerals Ltd v International Corona Resources Ltd (1989) - Supreme Court of Canada**

In LAC Minerals Ltd v International Corona Resources Ltd[425]the Supreme Court of Canada, comprised of McIntyre, Lamer, Wilson, La Forest and Sopinka JJ, found a breach of confidence by the Appellant, Lac Minerals Ltd and not a breach of fiduciary duty (except for La Forest Jwho found a breach of fiduciary duty "albeit of a limited scope" by Lac Minerals). Both the trial judge and the Court of Appeal found that Lac Minerals conduct constituted a breach of confidence and fiduciary duty. The judgments of Sopinka for the majority, La Forest and to a lesser extent Wilson JJ gave detailed reasoning of the law of the fiduciary relationship.

Sopinka J relied on the three determinants of a fiduciary relationship as set out by Wilson J in Frame v Smith[426]and emphasized that the majority of the Supreme Court in Frame's case did not disapprove of the statement by Wilson J.[427]Sopinka J was of the view that although some fiduciary relationships may not have all these determinants it was essential for a fiduciary relationship to possess the features of dependency or vulnerability.[428]His Honour agreed with Dawson J in Hospital Products where his Honour (Dawson J) said:

> "There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place

[425] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574.
[426] *Frame v Smith* (1987) 2 SCR 99, 136.
[427] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 593.
[428] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 593.

> reliance upon the other and requires the protection of equity acting upon the conscience of that other . . ."[429]

It is suggested that Sopinka J may have interpreted this part of the judgment of Dawson J in a more liberal way than is warranted. It is doubtful that Dawson J sought to express that vulnerability was an 'essential' feature of a fiduciary relationship, as stated by Sopinka J.[430]Sopinka J found the Trial Judge and the Court of Appeal both erred in finding a fiduciary relationship by giving too much weight to criteria other than dependency and vulnerability. His Honour was almost derisory of the way the Court of Appeal dealt with the issue (where the Court of Appeal said):

> "In those circumstances, it is only just and proper that the court find that there exists a fiduciary relationship with its attendant responsibilities of dealing fairly, including, but not limited to, the obligation not to benefit at the expense of the other from information received by one from the other."[431]

Sopinka J was of the view that the Court of Appeal had erroneously applied the dependency factor to two commercially orientated mining companies who both had professionals in many fields at their disposal and concluded that if the Respondent, Corona, placed itself in a vulnerable position (which he found it did not) then it would have done so because of its (Corona) own gratuitous action in giving Lac Minerals confidential information and accordingly allowed the appeal. The majority

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[429] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 593 referring to Dawson J in *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41.

[430] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 593.

[431] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 598.

judgment led by Sopinka J has been criticised by commentators.[432] And similarly, the High Court of Australia has not placed such importance on vulnerability.[433]

La Forest J, found a breach of confidence and a breach of fiduciary duty and dismissed the appeal. His Honour recognised the dilemma presented by the fiduciary principle and the difficulty which the judiciary and commentators have experienced in trying to define the term "fiduciary," and took the opportunity that this case presented to consider the principle further.[434]

La Forrest J commenced his consideration by seeking a broad umbrella conceptual understanding and referred to the fiduciary obligation as being the law's blunt tool for the control of the fiduciary's discretion.[435] As Sopinka J relied on the characteristics of a fiduciary relationship propounded by Wilson J in Frame v Smith, so did La Forest J in saying the propositions therein were "helpful"[436] and tried to rein in "the confusion" surrounding the term "fiduciary" by suggesting a fiduciary conceptual framework consisting of a duty of loyalty, an avoidance of conflict and duty and a duty not to profit at the expense of the beneficiary.[437]

La Forest J was of the opinion that people are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. However, it is important to note that fiduciary obligations can be breached without harm being inflicted on the beneficiary, [438] an example of this is Keech v Sandford.[439]La Forest J was of the view that actual harm was not a prerequisite to establishing the fiduciary duty and

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[432] Rotman, L " The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada (1996) 24 (1) *Manitoba Law Journal* 60,76 and Millett, P "Equity's Place in the Law of Commerce (1998) 114 *Law Quartley Review* 214.

[433] Per Gibbs CJ: "inequality in bargaining power is not a requirement of fiduciary relations: *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.

[434] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 622-623.

[435] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 590 referring to Wienrib, E "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1, 7.

[436] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 624.

[437] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 624.

[438] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 635.

[439] *Keech v Sandford* (1726) Sel Cas T King 61.

as a corollary, vulnerability was therefore not an essential ingredient of the establishment of a fiduciary relationship and in taking this approach his Honour was directly opposed to Sopinka J. La Forest J found a fiduciary duty in Lac Minerals based on trust and confidence; industry practice and vulnerability and that it was breached by Lac Minerals. The factors were taken as a whole. If vulnerability was not present there could still be a fiduciary relationship.[440]

In comparison to the approach of the High Court of Australia, Lac Minerals shows the difference of importance the justices of the Supreme Court of Canada placed on vulnerability. In the High Court vulnerability has not been prominent in determining a fiduciary relationship. The principle is more associated with cases relating to unconscionable dealing.[441]

- **Hodgkinson v Simms (1994) Supreme Court of Canada**

In Hodgkinson v Simms[442] the Supreme Court of Canada was comprised of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ. The Appellant, a stockbroker, in following the advice of the Respondent, an accountant, invested in real property tax shelter schemes and suffered a loss when there was a general economic downturn. The Trial Judge found in favour of the Appellant; the Court of Appeal allowed an appeal by the Respondent accountant.

In the Supreme Court the majority, La Forest, L'Heureux-Dubé and Gonthier JJ (La Forest J delivering the judgment) and Iacobucci J, allowed the appeal. The minority was comprised of Sopinka, McLachlin and Major JJ.

La Forest J described the dual interpretation of the term fiduciary to mean:

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[440] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574, 635. 696.
[441] Carlin, TM "Fiduciary Obligations in Non-traditional Settings – An Update" (2001) *Australian Business Law Review* Vol 29, 67.
[442] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161.

1. Some relationships have as their essence: discretion, influence over interests, and an inherent vulnerability, that is, the corollary of the ability to cause harm, viz., the susceptibility to harm. This view of vulnerability is similar to that expressed by La Forest J in LAC Minerals, that is, vulnerability is not the deciding indicator of a fiduciary relationship.

2. Where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship then in such a case the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.[443] This reasonable expectation test has been criticised.[444]

In relation to the reasonable expectation of a client, his Honour said:

> 'The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all[business] relationships are characterized by a dynamic of mutual I autonomy, and that the marketplace cannot always set the rules."[445]

It has been suggested that this influence of social policy is equivalent to considering the morality of the actions of a fiduciary[446] and this interpretation has been furthered by Waters when he said'"....courts in Canada today,

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[443] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 178-9.
[444] Waters, D "LAC Minerals v International Corona Resources Ltd" (1990) 96 *The Canadian Bar Review* 455 and Farquhar, K "Hodgkinson v Simms: The Latest on the Fiduciary Principle" (1995) 29 *University of British Columbia Law Review* 384, 385.
[445] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 191.
[446] White, S "Commercial Relationships and the Burgeoning Fiduciary Principle" (2000) *Griffith Law Review* Vol 9 No 1, 98, 103.

reflecting as they do contemporary society's concern with "community standards of commercial morality", are turning to the fiduciary concept ... Canadian courts are not prepared to accept that community standards are for the legislature, not for the courts, to adopt."[447]

One the main issues in the case for La Forest J was the lack of disclosure by the Respondent thus resulting in a discretion or power in the fiduciary to affect the client's legal or practical interests. LAC Minerals was distinguished on the facts and the caution exercised in LAC Minerals, in respect of commercial parties on equal footing, were not transferable to a case such as Hodgkinson.[448]

The minority judgment of Sopinka, McLachlin and Major JJ was delivered by Sopinka J and relied to a great extent on the proposition of the need for vulnerability to be present before a fiduciary relationship can be found.
The remedial compensation awarded by the Court in Hodgkinson is also important in the context of the interaction, in Canada, of Equity and Law. La Forest J agreed with the interpretation of damages by the Trial Judge when her Honour awarded damages flowing from both breach of fiduciary duty and breach of contract. She found the quantum of damages to be the same under either claim, namely the return of capital (adjusted to take into consideration the tax benefits received as a result of the investments), plus all consequential losses, including legal and accounting fees.

In Canson Enterprises Ltd v Boughton & Co[449] the Supreme Court of Canada held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. La Forest, in Canson, said this latter ratio was in accordance

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[447] Waters, D "LAC Minerals v International Corona Resources Ltd" (1990) 96 *The Canadian Bar Review* 455, 481.
[448] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 181.
[449] *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 ("Canson").

with the fusion of law and equity that occurred near the turn of the century under the auspices of the old Judicature Acts in England.[450]

- **Strother v 3464920 Canada Inc (2007) - Supreme Court of Canada**

In Strother v 3464920 Canada Inc [451]the Full Court of the Supreme Court of Canada was comprised of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. The Appellant was a lawyer who acted for the Respondent under a retainer to provide on going advice on tax shelter schemes. The retainer was for the 1998 year. Subsequently in the following years the Appellant commenced providing similar legal advice to another client. During these later years the tax law changed which, if the Respondent was made aware of these changes, would have changed their tax arrangements and as a result of not being aware of the changes the Respondents suffered loss and claimed the Appellant was in breach of his fiduciary duty.

The majority, Binnie, Deschamps, Fish, Charron and Rothstein JJ , held that Strohter had breached his fiduciary duty to the Respondent. The majority judgement was delivered by Binnie J. The source of the fiduciary duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency.[452]

The majority introduced an aspect of public policy into their decision by applying the decision in R v Neil {2002} 3 S.C.R. 631 when they said: "fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. The

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[450] Supreme Court of Judicature Act, 1873 (Eng.).
[451] *Strother v 3464920 Canada Inc* [2007] 2 SCR 17.
[452] *Strother v 3464920 Canada Inc* [2007] 2 SCR 177, 181.

foundation of this branch of the law is the need to protect the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained".

As to a conflict of duty, the majority found comfort in a commentary when they said: "fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence and reflected in the Rules of Practice of the Law Society of British Columbia. As the late Hon. Michel Proulx and David Layton state, "the leitmotif of conflict on interest in the broader duty of loyalty".[453]

The majority also reinforced the prescriptive approach of the duties of a fiduciary taken by the Canadian judiciary. However, this was an area of dispute between the majority and the Chief Justice, who was in the minority. Binnie, J in presenting the majority judgment said, " In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate US studio film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled Monarch to be told that Strother's previous negative advice was now subject to reconsideration."[454]

The minority, comprised of McLachlin CJ, Bastarache, LeBel and Abella JJ, proposed a test to determine if a fiduciary duty is owed to a particular client. The test is to look to the contract between the parties (in the event there is an express or implied agreement). As a basis for this test the Chief Justice referred to a judgement of La Forest J in Hodgkinson v Simms[455]where his Honour (La Forest J) J said:

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[453] The majority referred to a quote from Proulx, M and Layton, D *"Ethics and Canadian Criminal Law* (2001), 287.
[454] *Strother v 3464920 Canada Inc and Ors* [2007] 2 SCR 177, 183.
[455] *Hodgkinson v Simms* [1994] 3 S.C.R. 377 at p 407.

> "....many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see Johnson v Birkett (1910), 21 O.LR. 319 (H.C.); McLeod v Sweeney [1944} S.C.R. 111; P.Finn, "Contract and the Fiduciary Principle" (1989) 12 U.N.S.W L.J. 76"[456]

McLachin C.J. viewed a retainer between a lawyer and client as being similar to an agency agreement "albeit a special one attracting a duty of loyalty."[457] The use of the words "albeit a special one" are significant because her Honour acknowledged that the relationship of solicitor/client is one of the presumed classes of a fiduciary relationship.

The Chief Justice found that Strother did not have a conflict of interest. The retainer with Monarch only required Strother to provide continuing advice on developments of interest and Strother was free to take on further clients and/or go into business with a client there was no violation of the duty of loyalty or breach of fiduciary duty.

Non Commercial Cases (and the Prescriptive Approach)

- **Frame v Smith (1987) Supreme Court of Canada**

The importance of 'vulnerability' in Canadian fiduciary jurisprudence emerged in the dissenting judgment of Wilson J in the non commercial case of Frame v Smith[458] where the Supreme Court dismissed an appeal by a husband against his

[456] *Strother v 3464920 Canada Inc and Ors* [2007] 2 SCR 177, 230.
[457] *Strother v 3464920 Canada Inc and Ors* [2007] 2 SCR 177, 193.
[458] *Frame v Smith* (1987) 2 SCR 99. ("Frame").

former wife preventing him from seeing his children. Wilson J, in dissent, found a fiduciary relationship between the wife and husband and set out three general characteristics that her Honour said form the basis of a fiduciary relationship:

> "(1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."[459]

Although Wilson J was in dissent, the three criteria set out by Willson J have been referred to extensively in Canadian fiduciary case law and the importance of vulnerability in Canadian fiduciary law is apparent in Lac Minerals Ltd v International Corona Resources Ltd (commercial relationship);[460] Hodgkinson v Simms (commercial relationship)[461] and Norberg v Weinrib (non-commercial doctor/patient relationship)[462].

- **McInerney v McDonald (1992) - Supreme Court of Canada**

The second aspect of fiduciary law in Canada which is different in comparison to Australia is the way in which the Supreme Court has endorsed a prescriptive requirement within the fiduciary obligation. In McInerney v McDonald[463] a non-commercial case involved a claim by a patient for access to her all her medical records held by her medical practitioner. The importance of the case to the comparison of Australian and Canadian fiduciary law is the way in which the

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[459] *Frame v Smith* (1987) 2 SCR 99, 136.
[460] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 2 SCR 574. ("LAC Minerals").
[461] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161.
[462] *Norberg v Weinrib* [1992] 2 SCR 226.
[463] *McInerney v McDonald* [1992] 2 SCR 138.

Supreme Court of Canada found a prescriptive duty in the Appellant medical practitioner to provide access to all of the Respondent's medical records.

La Forest J delivered the judgment of the Supreme Court which was comprised of La Forest, L'Heureux-Dubé, Gonthier, Stevenson and Iacobucci JJ:

> "The physician-patient relationship also gives rise to the physician's duty to make proper disclosure of information to the patient... In my view, however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment."[464]

This prescriptive approach in non-commercial matters as set out in Frame v Smith is opposite to the proscriptive approach endorsed by the High Court of Australia in Breen v Williams where Gibbs CJ said:

> "It (*the prescriptive approach*) is, perhaps, reflective of a tendency, not found in this country, but to be seen in the United States and to a lesser extent Canada, to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong."[465] (*emphasis added*)

La Forest J was also a member of the Supreme Court of Canada in Hodgkinson v Simms. It has been suggested that the two judgments (in LAC and Hodgkinson) are irreconcilable when La Forest recognised that claims related to undue influence, unequal bargaining power, duty of care and fiduciary duty will often arise "side by side".

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[464] *McInerney v McDonald* [1992] 2 SCR 138, 148.
[465] *Breen v Williams* (1995) 186 CLR 71, 95.

A third comparator between Australia and Canada is the greater tendency of the Supreme Court of Canada to find a fiduciary relationship for the purposes of providing equitable relief. Although the cases falling into this category are not commercially based they do have an important impact on the overall fiduciary jurisprudence of Canada, just like Breen v Williams has had in Australia. This category has been referred to as "remedial abuse", that is, the imposition of a fiduciary relationship on fact situations which would normally not suggest the existence of such a relationship, to allow access to a broad range of equitable remedies where available common law remedies were viewed as being inadequate.[466]

Although the terminology of categories of fiduciaries in Canada is different to that of Australia it is this writers view that it has parallels with the status based/fact based fiduciary terminology in Australia. In Canada there are two high level categories of fiduciaries, the "per se" and "ad hoc". The "per se" category is equivalent to the status based and the "ad hoc" category is equivalent to the fact based category in Australia.

In Canada, the cases falling into the "remedial abuse" description have had the underlying relationship referred to as one of "power dependency" and in turn, the fiduciary relationship has been categorized as "*ad hoc*".[467]

Although there are three prominent cases falling into the power dependency category, namely, Norberg v Wynrib,[468]Mustaji v. Tjin[469] and Goodbody v Bank of Montreal, [470] the Supreme Court of Canada has recently, in Galambos v. Perez,[471] clarified its position on such relationships.

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[466] Carlin, TM "Fiduciary Obligations in Non-traditional Settings – An Update" (2001) *Australian Business Law Review* Vol 29, 67.
[467] *Galambos v Perez* (2009) SCC 48.
[468] *Norberg v Wynrib* [1992] 2 SC.R. 226. ("Norberg").
[469] *Mustaji v Tjin* (1996), 25 B.C.L.R. (3d) 220. ("Mustaji").
[470] *Goodbody v Bank of Montreal* (1974) 47 DLR (3rd) 335. ("Goodbody").

- **Norberg v Wynrib (1992) - Supreme Court of Canada**

Norberg involved a claim by a patient for assault and battery against her doctor who provided her with drugs in return for sexual favours. The Supreme Court were of the opinion that the remedies under tort and/or contract could not provide sufficient compensation and found a fiduciary relationship for remedial purposes.

The Supreme Court was comprised of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ (Stevenson J took no part in the judgment). La Forest, Gonthier and Cory JJfound the actions of the Appellant constituted a battery. L'Heureux-Dubé and McLachlin JJfound a breach of fiduciary duty where the exercise of power by a fiduciary can affect the legal interests of the principal. Sopinka J was of the view that the actions of the Appellant were answerable by remedies in tort.

La Forest J delivered a judgment on behalf of Gonthier and Cory JJ and in allowing the appeal, said:

> "There was a marked inequality in the respective powers of the parties.....That the appellant's need for drugs placed her in a vulnerable position is evident from the comments of the trial judge."[472]

In relation to the broadening of the parameters of the facts and circumstances of the case, the headnote attributable to L'Heureux-Dubé and McLachlin JJ stated:

> "Treating this case on the basis of breach of fiduciary duty adds a great deal, besides perhaps a duty of confidence and non-disclosure, to an

[471] *Galambos v Perez* (2009) SCC 48. (prior to publication in final form in the Canada Supreme Court Reports). ("Galambos").
[472] *Norberg v Wynrib* (1992) 2 S.C.R. 226, 247.

> action in tort or contract. The scope of the fiduciary obligation is not narrowly confined to matters akin to the duty not to disclose confidential information. Fiduciary obligations "must be reserved for situations that are truly in need of the special protection that equity affords", and the situation here is precisely one that is "truly in need of the special protection that equity affords". [473]

The judgment of L'Heureux-Dubé and McLachlin JJ referred to the three parameters outlined by Wilson J in Frame v Smith[474] when their Honours said:

> "Closer examination of the principles enunciated by Wilson J. in Frame confirms the applicability of the fiduciary analysis in this case. The possession of power or discretion needs little elaboration."[475]

McLachlin J based her decision on the basis that the fiduciary relationship gave rise to an obligation to exercise power solely for the benefit of the patient. Sopinka J was of the opinion that: "Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."[476]

Goodbody involved a finding that a thief owed a fiduciary obligation to his victim and Mustaji involved a claim by a nanny brought to Canada under the Foreign Domestic Movement Program. There were findings of fact that the defendants in Mustaji had taken over the affairs of the nanny concerning her immigration and employment in Canada, that they had the opportunity to exercise power or discretion over her, were capable of using that power or discretion without her knowledge or consent so as to affect her legal and practical interests and that she was especially vulnerable to that exercise of discretion and control. The latter three reasons satisfying the three tests of Wilson J in Frame v Smith.

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[473] *Norberg v Wynrib* (1992) 2 S.C.R. 226, 230.
[474] *Frame v Smith* (1987) 2 SCR 99, 136.
[475] *Norberg v Wynrib* (1992) 2 S.C.R. 226, 257.
[476] *Norberg v Wynrib* (1992) 2 S.C.R. 226, 278.

The decision in Norberg has been criticised on the basis that it is difficult to regard the "duties" established in this way as specifically as the result of any expectation of loyalty and fidelity which arises out of any undertaking to act on behalf of another.[477] And the decision in Goodybody has been described as an abandonment of the guiding principle of fiduciary relationships.[478]

- **Galambos v Perez (2009) Supreme Court of Canada**

Galambos involved a claim by the Respondent, a legal bookkeeper, for moneys she has given the Appellant legal practitioner to help him and his legal firm out of financial difficulties. The Appellant, Galambos did not seek the moneys and when the Appellant went bankrupt the Respondent sought the status of a creditor based on a fiduciary relationship involving a power dependency argument (amongst other allegations based on contract and tort).

The Supreme Court of Canada was comprised of McLachlin CJ Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Cromwell J delivered the judgment of the court in allowing the appeal and heavily criticized the Court of Appeal. Cromwell J relied on the three criteria established by Wilson J in Frame v Smith to show that the Appellant at no time satisfied these criteria. Firstly, the finding that the Appellant was in a position of power and influence relative to the Respondent is directly at odds with the clear findings of fact at trial.[479]

Secondly, it is fundamental to all ad hoc fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied that the

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[477] Cope, M *Equitable Obligations: Duties, Defences and Remedies* (2007), 58 and no doubt referring to the decision of McLachlin J.
[478] Carlin, TM "Fiduciary Obligations in Non-traditional Settings – An Update (2001) *Australian Business Law Review* Vol 29, 67.
[479] *Galambos v Perez* (2009) SCC 48, 49.

fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The critical point is that in both per se and ad hoc fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. This was not present in the Appellant.[480]

It is this writers view that, in relation to "power dependency" claims, the Supreme Court of Canada in Galambos, indicated that it was determined to see that a claimant demonstrate a proper basis to such claims, and as a minimum satisfy the three criteria established by Wilson J in Frame v Smith which in turn is keeping the trend towards "remedial abuse claims" under a tight reign.

[480] *Galambos v Perez* (2009) SCC 48, 63.

Overview of Canada

In Canada there are several factors contributing to the way in which a fiduciary jurisprudence has developed. Firstly, there is the integration of equity and common law. In both Hodgkinson and Canson fusion of law and equity was discussed in the context where the fusion permits the introduction of common law concepts such as causation and remoteness into the assessment of equitable compensation. In appropriate cases full restitution for a breach of fiduciary duty was available.

Secondly, the prescriptive approach found currency in Strother, a case dealing with the obligation of professional advisers in a commercial setting. The prescriptive approach was also advanced in the "dependency" line of cases, however, the recent decision of Galambos did not follow the trend (in dependency cases) as the facts and circumstances did not warrant such a conclusion.

Thirdly, the expansion of the fiduciary duty into the relationship of commercial parties has been suggested by Finn P as'if one cannot find a specific doctrine appropriate to the circumstances, but if one is committed to exacting a protective responsibility, the lure to fiduciary law becomes almost irresistible.'[481]Also, the fiduciary maybe a basis of attack where the elements necessary to contract or tort are lacking'[482]or alternatively, the fiduciary principle will be relied on in near-contract or near tort situations where no specific doctrine is available.[483]

Fourthly, the Canadian judiciary is split on the use of the concept of vulnerability of the principal in the fiduciary relationship. This was made clear in the split decisions in Hodgkinson and LAC Minerals where La Forest J was of the opinion that

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[481] Finn, PD "The Fiduciary Principle" in T Youdan (ed) (1989) *Equities Fiduciaries and Trusts*, Carswell, p 24 - Finn argues that La Forest J implicitly recognises this point in his judgment in Lac Minerals when he warns that an implied term of good faith can offer relief only when there is a contract between the parties.

[482] Klinck, D "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on International Corona Resources Ltd v Lac Minerals Ltd" (1988) 33 McGill Law Journal 600, 602.

[483] White, S "Commercial Relationships and the Burgeoning Fiduciary Principle" *Griffith Law Review* (2000) Vol 9 No 1, 98, 104.

vulnerability was not decisive of the presence of a fiduciary relationship and the opposite opinions of Sopinka J where the presence of vulnerability was essential (as stated in both LAC Minerals and Hodgkinson).

New Zealand

As stated previously, the High Court of Australia has not cited or referred to any decisions of the Supreme Court of New Zealand in the cases analysed in this research. The comparison with New Zealand is important for this fact alone and in addition, to understand how and why, the fiduciary jurisprudence has developed in New Zealand.

New Zealand is part of the Commonwealth and as a result there has been a great reliance on decisions of the Privy Council in New Zealand fiduciary law. Appeals existed to the Privy Council until 2004.[484]

- **Elders Pastoral Ltd v Bank of New Zealand (1989) Court of Appeal, New Zealand[485]**
- **Watson v Dolmark Industries Ltd (1992) Court of Appeal, New Zealand[486]**
- **Liggett v Kensington (I993) Court of Appeal, New Zealand[487]**
- **Artifakts Design Group Ltd v NP Rigg Ltd (1993) High Court of New Zealand[488]**

In Elders, the Appellant, a stock and station agent acted as a go between in securing a loan for a farmer from the Respondent bank. The Court of Appeal found the Appellant satisfied the role of a fiduciary and awarded a constructive

[484] Supreme Court Act 2003 (NZ).
[485] *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180. ("Elders").
[486] *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311. ("Watson").
[487] *Liggett v Kensington* [I993] 1 NZLR 257. ("Liggett").
[488] *Artifakts Design Group Ltd v NP Rigg Ltd* [1993] 1 NZLR 196. ("Artifakts").

trust against the Appellant in favour of the Respondent bank. To reach this remedial decision the Court relied on the intermingling of law and equity.[489]

In Watson, the facts were similar to Hospital Products. The Respondent manufactured and distributed plastic trays for the Appellant. After a period of time the Respondent began manufacturing the trays for its own benefit and sale. The Respondent was found to be in breach of its fiduciary obligation to the Appellant with the Court of Appeal referring to the reasoning of Mason J in Hospital Products. The indicator of 'vulnerability' was said to be a 'cardinal' feature of the fiduciary relationship.[490] This approach is similar to the development of fiduciary jurisprudence in Canada, particularly the ongoing differences between Justices La Forest (with vulnerability not being critical) and Sopinka (with vulnerability being a primary requirement). Loyalty was central to the breach in Watson's case.

The opposite conclusion was reach in Liggett's case. The case involved a trader of gold bullion who conducted both a retail and wholesale business. The retail purchasers could leave their bullion with the trader for five days before collecting it. The New Zealand Court of Appeal found a fiduciary relationship existed between the trader and the retail purchasers. This decision was overturned by the Privy Council on the basis that the relationship was of a contractual nature.[491]

Atifakts also concerned a distributorship agreement. The Respondent began producing its own stationary and selling the same to the client/customers of the Appellant. The High Court of New Zealand referred to Hospital Products and closely followed the reasoning of the majority justices in that case and could not find a fiduciary relationship between the parties for the main reasons that the parties operated at arm's length; there was no inequality in bargaining power or conflict of interest.

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[489] *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 186. The decision is also questioned by Meagher RP, Heydon, JD and Leeming, MJ "*Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*" 4th ed (2002), 79 para 2-310 and 175 para 5-020.

[490] *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311, 315 per Cooke P.

[491] *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385.

- **Chirnside v Fay (2006) - Supreme Court of New Zealand**

In Chirnside v Fay[492] the Supreme Court was comprised of Elias CJ, Gault, Keith, Blanchard and Tipping JJ. The Appellant and Respondent were involved in pre-contractual joint venture tasks for the development of real property. The Appellant went ahead with the development without telling the Respondent, notwithstanding that each of the parties had concluded various tasks towards the development in the context of a commercial relationship. All Justices found the Appellant, Chirnside, had breached his fiduciary duty to the Respondent, Fay.

The finding of a fiduciary relationship between the parties by Elias CJ was concluded within one paragraph of her Honour's judgment commencing with the reinforcement of the recognition of "inherently fiduciary" categories of fiduciaries. The basis of her Honour's conclusion on this point was that where two parties join together to undertake a task (e.g. development of real estate) and share the profits then that relationship is inherently fiduciary. For this conclusion her Honour referred to a case from the United States of America:

> "Where parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture (referring to Meinhard v Salmon 164 NE 545 at 546 (NY CA, 1928)[493](case citations added)

Subsequently, her Honour looked at the facts of the relationship between the parties and was of the view that the interpretation of the commercial relationship between the Appellant and Respondent led her to conclude that the relationship was comparable to that of a partnership:

> "In my view the venture to acquire and develop the Speights site was indistinguishable from a single transaction partnership between Mr Fay and Mr Chirnside." [494]

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[492] *Chirnside v Fay* [2006] NZSC 68. ("Chirnside").
[493] *Chirnside v Fay* [2006] NZSC 68, 73 at para 14.
[494] *Chirnside v Fay* [2006] NZSC 68, 73 at para 14.

The view of the Chief Justice in categorizing the parties as equivalent to partners referred to the United Dominions case in support of the proposition that what was important was the "character of the relationship already established" between the parties:

> "The fact that the parties may have expected to settle their arrangements later more formally through a corporate structure (as they had done in their earlier joint venture), or through a partnership agreement, does not alter the character of the relationship already established and underway (referring to United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1 at 5-6 per Gibbs CJ; 12 per Mason, Brennan and Deane JJ; 14-16 per Dawson J."[495](case citations added)

Similarly to Australia, within the fiduciary obligation, the requirement of loyalty is fundamental. For support to this conclusion her Honour referred to the English Court of Appeal :

> "Not every breach of duty by a fiduciary is a breach of a fiduciary duty (referring to Bristol and West Building Society v Mothew [1998] Ch 1 at 16 (CA) per Millett LJ) .The distinguishing obligation of a fiduciary is the obligation of loyalty (referring to Bristol at 18 per Millett LJ)".[496]

In Australia, the judgment of Millett LJ was referred to in Maguire v Makaronis for the quality of "loyalty" as being fundamental to the fiduciary obligation. [497]

Blanchard and Tipping JJ agreed with Elias CJ (as did Gault and Keith JJ). Their Honours also referred to the inherent categories of fiduciary relationships and included the doctor/patient relationship as an inherent fiduciary relationship:

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[495] *Chirnside v Fay* [2006] NZSC 68, 73 at para 14.
[496] *Chirnside v Fay* [2006] NZSC 68, 73 at para 15.
[497] *Maguire v Makaronis* (1997) 144 ALR 729, 736.

> These include the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.[498]

The nomination of the doctor/patient as an inherent fiduciary category is different to Australia where the High Court said in Breen v Williams that such a relationship is based on contract and tort and does not inherently possess the fiduciary quality of loyalty.[499] Their Honors then relied on decisions of the Privy Council and Court of Appeal (NZ) and the High Court of Australia to mould the relationship between the Appellant and Respondent as fiduciary.[500]

Chirnside's case is a good example of the review and analysis of case law by a superior appellate court. Blanchard and Tipping JJ commenced their analysis with the statement of Lord Wilberforce in the "Oranjie" case where his Lordship said in relation to when fiduciary obligations will apply:

> ".....whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship.[501]

An "implied" trust was a vehicle used by their Honours in finding the existence of fiduciary relationship and in response to the Counsel for the Appellant, Chirnside that the relationship needed to be express between the parties to consider a fiduciary relationship, their Honours responded:

> "The simple answer to this submission is that equity imposes an obligation to eschew self-interest when the circumstances require. The obligation does not arise only when expressly undertaken."[502]

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[498] *Chirnside v Fay* [2006] NZSC 68, 73 at para 15.
[499] *Breen v Williams* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ).
[500] *Chirnside v Fay* [2006] NZSC 68, 89 at para 76 referring to *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC); *Day v Mead* [1987] 2 NZLR 443 (NZCA) and *Arklow Investments Ltd v MacLean* [2000] 2NZLR 1 (PC).
[501] *Chirnside v Fay* [2006] NZSC 68, 89 at para 76 referring to Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC).
[502] *Chirnside v Fay* [2006] NZSC 68, 90 at para 82.

Their Honours accordingly, by implication, found the existence of a trust and a fiduciary relationship between the Appellant and Respondent.

Their Honours next referred to the High Court of Australia decision in United Dominions case for the proposition that a fiduciary relationship can exist where the parties have not reached agreement.[503]The judgment of Casey J in the Court of Appeal (NZ) decision in Day v Mead was also of assistance to their Honours for the proposition that the relationship between the parties in Chirnside "generated that degree of confidence and trust which in my view justifies the intervention of equity".[504]

Support was also found in the High Court of New Zealand decision in Estate Realities v Wignall where Tipping J said:

> "The cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other, either generally or in the particular transaction..."[505]

Their Honours were seeking to reinforce the trust that the Respondent had reposed in the Appellant and sought further assistance from a decision of the Privy Council in Arklow Investments Ltd v MacLean[506] which introduced an expectation in the principal that a fiduciary would not act in a way which is contrary to the interests of the principal:

> "..... all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in Arklow as a legitimate expectation) of one party to place trust and confidence in the other.

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[503] *Chirnside v Fay* [2006] NZSC 68, 92 at para 89 referring to *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 12 (Mason, Brennan and Deane JJ).
[504] *Chirnside v Fay* [2006] NZSC 68, 89 at para 77 referring to *Day v Mead* [1987] 2 NZLR 443 (Casey J).
[505] *Chirnside v Fay* [2006] NZSC 68, 89 at para 77 referring to *Estate Realities v Wignall* [1991] 3 NZLR 482 at 492 (Tipping J).
[506] *Arklow Investments Ltd v MacLean* [2000] 2 NZLR 1 ("Arklow").

That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests."[507]

In Chirnside the Supreme Court of New Zealand relied on the established fiduciary relationship of a partnership (per Elias CJ) and secondly, the use of an implied trust between the parties to find the elements of trust and confidence reposed by the Respondent, Fay to the Appellant, Chirnside (per Blanchard and Tipping JJ).

- **Mark Moncrief Stevens v Premium Real Estate Ltd (2009) Supreme Court of New Zealand**

In Mark Moncrief Stevens & ors v Premium Real Estate Ltd [508] ("Stevens") the Supreme Court of New Zealand was comprised of Elias CJ, Blanchard, Tipping, McGrath and Gault JJ. The Appellant, a vendor of a property, engaged the Respondent real estate agents to sell it. Unbeknown to the Appellant, the Respondents sold the property at an under value to a purchaser known to the Respondent who subsequently sold the same property, within a very short time, at a price in excess of $690,000 for which the purchaser paid the Appellant. The Appellant claimed the Respondent real estate agents breached their fiduciary obligations to the Appellants.

In allowing the appeal all the Justices relied on the fundamental requirements of the obligations of a fiduciary as stated by Lord Millet in in Bristol and West Building Society v Mothew with his Lordship saying that the distinguishing obligation of a fiduciary is the obligation of loyalty:

"The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the

[507] *Chirnside v Fay* [2006] NZSC 68, 90 at para 80.
[508] *Mark Moncrief Stevens & ors v Premium Real Estate Ltd* [2009] NZSC 15.

> benefit of a third person without the informed consent of his principal."[509]

The Respondent found itself acting for both the Appellant as vendor and the purchaser, the latter with whom the Respondent had a long standing commercial relationship. The Supreme Court found that the Respondent placed itself in a position of substantial conflict and in support referred to a decision of the Privy Council:

> "As the House of Lords forcefully pointed out in Hilton v Barker Booth & Eastwood (a firm),if someone puts himself in a position of having two irreconcilable duties, it is his own fault. He cannot prefer one principal to another".[510]

The actions of the Respondent real estate agent were summed up by Elias CJ:

> "Concealment of material information, thereby perpetuating a misleading impression given by the agent, was a breach of the obligation of loyalty."[511]

Informed consent was also an issue. Although the Respondent real estate agents had an actual conflict of interest they failed to obtain the informed consent of the Appellants. For precedent support the Supreme Court relied on the Privy Council decision in Clark Boyce v Mouat.[512]

In Stevens, the difference with the development of fiduciary jurisprudence is shown in the manner in which compensation is viewed by the Supreme Court of New Zealand. Although this research is not looking in detail at remedies for a breach of a fiduciary duty it is importance to note the opinion of Cooke P of the Court of

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[509] *Mark Moncrief Stevens & ors v Premium Real Estate Ltd* [2009] NZSC 15, 35 at para 67 (Blanchard, McGrath and Gault JJ) referring to *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

[510] *Mark Moncrief Stevens & ors v Premium Real Estate Ltd* [2009] NZSC 15, 35 at para 67 (Blanchard, McGrath and Gault JJ) referring to *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

[511] *Mark Moncrief Stevens & ors v Premium Real Estate Ltd* [2009] NZSC 15, 25 at para 29.

[512] *Clark Boyce v Mouat* [1994] 1 AC 428 at p 435 (PC).

Appeal (NZ) and referred to in Stevens case in relation to the remedies of account and equitable compensation:

> "In Day v Mead, Cooke P observed that the traditional characterisation of compensation in equity as aiming at restoration or restitution and common law damages as compensation for harm done was, in many cases, "a difference without a distinction". And in Aquaculture Corp v New Zealand Green Mussel Co Limited, speaking of the line of judgments in the Court of Appeal accepting that "monetary compensation (which can be labelled damages)" can be awarded for breach of duties derived from equity, he expressed the view that:
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> For all purposes now material, equity and common law are mingled or merged."[513]

In Stevens case the Supreme Court relied completely on the beach of the fiduciary obligation of loyalty to establish a breach of the fiduciary relationship and this was achieved within a proscriptive approach.

Overview of New Zealand

There are several factors shaping the development of fiduciary jurisprudence in New Zealand. Firstly, the introduction of Section 9 of the Fair Trading Act 1986 (NZ),1986. This legislation is similar to Section 52 of the Trade Practices Act (Cth) in Australia which provides relief in relation to misleading and deceptive conduct.

Secondly, as a result of the decisions of the Court of Appeal (NZ) and the pronouncements of a fusion between law and equity has allowed the courts in New Zealand to consider a larger array of remedies regardless if the equitable or common law duty or obligation originates in equity, common law or under a statutory provision.[514]

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[513] *Mark Moncrief Stevens & ors v Premium Real Estate Ltd* [2009] NZSC 15, 25 at para 33.

[514] *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [I9901 3 NZLR 299, 301 (Cooke P). See also *Day v Mead* [I9871 2 NZLR 443 and *Mouat v Clark Boyce* [I9921 2 NZLR 559.

Thirdly, appeals to the Privy Council from New Zealand ceased in January 2004.[515] It is the view of this writer that not enough time has elapsed since the cessation of appeals to detect a change in the decision making process of the Supreme Court of New Zealand. In the most recent case of Stevens heard in 2007 the Supreme Court of new Zealand relied on two decision of the Privy Council to support its (the Supreme Court) statements on loyalty of a fiduciary.

Fourthly, as in Canada, vulnerability is important in New Zealand fiduciary jurisprudence. In Watson, a commercial case, vulnerability was a held to be a 'cardinal' factor in the fiduciary relationship.[516] In addition there is an ongoing application of the proscriptive approach to commercial relationships.[517]

[515] The Supreme Court of New Zealand was established on 1 January 2004 with the passing of the *Supreme Court Act* 2003 (NZ) and became the final court of appeal.
[516] *Watson v Dolmark* [1992] 3 NZLR 311, 315 (Cooke P).
[517] This approach is apparent in *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180; *Watson v Dolmark* [1992] 3 NZLR 311 and *Artifakts Design Group v N P Rigg Ltd* [1993] 1 NZLR 196.

Conclusion

The development of a fiduciary jurisprudence by the High Court of Australia during the period 1903 to 2009 can be observed through several major and minor milestones within this case law analysis.

The fundamental core requirements are divided into the core personal obligation/s expected of a fiduciary and the core requirements expected to be found in a fiduciary relationship.

The core personal obligation of a fiduciary was first referred to in Birtchnell's case where Isaacs J said "loyalty" by a fiduciary towards a principal was an essential requirement of a fiduciary.[518] This statement by Isaacs J is significant because it would be another 67 years before the requirement of 'loyalty' would be referred to again in the High Court in Breeen V Williams and without reference to Isaacs J in Birtchnell.[519]Isaacs J referred to two English cases, Ormond v Hutchinson[520]and Peacock v Peacock[521] for the core requirement of loyalty.

In Breen v Williams, Justices Dawson and Toohey (referring to Finn P) and Gaudron and McHugh (referring to Lord Herschell in Bray v Ford) stated that an 'uncompromising and undivided loyalty' was an important requirement that their Honours expected to find in a fiduciary. The requirement of loyalty within a fiduciary was continued in Maguire v Makaronis where the High Court indicated its concern for any disloyalty by a fiduciary.[522] In addition, in Maguire v Makaronis the High Court referred to the judgment of Millett LJ in Bristol and West Building

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[518] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 395.
[519] *Breen v Williams* (1996) 186 CLR 71, 93 referring to Finn, PD "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), 28.
[520] *Ormond v Hutchinson* 13 Ves at p 52.
[521] *Peacock v Peacock* 16 Ves at p 51.
[522] *Maguire v Makaronis* (1997) 188 CLR 449, 465 referring to *Johnson v Buttress* (1936) 56 CLR 113, 134-5; *Blomley v Ryan* (1956) 99 CLR 362, 405; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 394; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 475; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557; *cf National Westminster Bank Plc v Morgan* [1985] AC 686, 704; *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 207-9.

Society v Mothew ("Mothew") where Millett LJ quoting Finn P in the same paragraph of his Lordship's judgment said the distinguishing obligation of a fiduciary is loyalty.[523]

During the intervening years from 1929 to 1997 the High Court generally looked at the fiduciary relationship more than the obligation of the fiduciary. However, the combination of decisions by the High Court and contributions by learned Australian authors has maintained loyalty as a substantive core requirement of the fiduciary obligation within Australia.

The core requirement of the fiduciary relationship itself has developed along two strands. Firstly, what is the composition of the 'relationship', for example, is the relationship composed of either or both of trust and confidence or is it a relationship of morality? Secondly, in what position do the fiduciary and the principal stand towards each otherfor example, is there ascendancy by the fiduciary over the principal?.

As to the indicia of confidence, during the term of Griffith CJ, the High Court concentrated on the core requirements of the fiduciary relationship (as opposed to the obligations of the fiduciary). For example, in a number of cases the relationship was referred to as: "confidential relations" (Jones v Bouffier), "infinite trust"[524] and "trust and confidence" (Dowsett v Reid, citing In re Coomber v Coomber). [525]

This approach was continued during the term of Latham CJ. In Furs V Tomkies Latham CJ said "a fiduciary in a position of trust and confidence should subordinate his own interests to the interests of another person to whom he stands in a fiduciary relation." The reference to "trust and confidence" reinforces the approach in Dowsett v Reid.As to morality, in Birtchnell's case Isaacs J referred to

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[523] *Maguire v Makaronis* (1997) 188 CLR 449, 473-474 referring to *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.
[524] *Jones v Bouffier* (1911) 12 CLR 579, 582-583.
[525] *Dowsett v Reid* (1912) 15 CLR 695 ,707.

the relationship as one of 'morality'[526] and Dixon J said the relationship was one of 'mutual confidence'.

Deane J in Kak Loui Chan v Zacharia looked to the express agreement between the partners saying that each partner had to be "just and faithful" to the other partner.[527] Deane J was of the view that the relationship was one of confidence.

In Hospital Products, Mason J (in dissent) sought to define the powers of a fiduciary as opposed to the requirements of the relationship.[528] Gibbs CJ in Hospital Products was not inclined to follow the propositions about a fiduciary relationship put forward in Reading v The King.[529] The core requirements in the United Dominion case were held to be 'mutual confidence and trust' which relied on the core requirements set out in Birtchnell's case and Hospital Products.[530]

In the Spycatcher case Brennan J said the fiduciary obligation encompassed 'by reason of the trust, faith and confidence reposed in Mr Wright, he became subject to and bound by a fiduciary duty'; Kirby J in the Court of Appeal (NSW) said that 'the obligation owed is the same, relevantly, as that imposed by the equitable obligation of confidence'[531] and McHugh J said that 'fiduciaries are generally bound by the obligation of confidence.'[532]

As can be seen from the above line of High Court cases the most used and followed terms to describe the core requirement of the fiduciary relationship are 'trust and confidence'. This approach has been the trend of the High Court since it commenced during the term of Chief Justice Griffith in Dowsett v Reid and it is clear that the fiduciary jurisprudence of the obligation of a fiduciary and the relationship between the fiduciary and the principal has been built upon the three

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[526] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 388 referring to Parker v McKenna 10 Ch App 96 (Lord Cairns).
[527] *Chan v Zacharia* (1984) 154 CLR 178, 196.
[528] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 80.
[529] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 70.
[530] *United Dominions Corporation Ltd (known as Amev-UDC Finance Ltd) v Brian Pty Ltd and Ors* (1985) 157 CLR 1, 7.
[531] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 92.
[532] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 106.

fundamental principles of loyalty, trust and confidence by the High Court through continuing reference to its own decisions, certainly from the term of Chief Justice Dixon onwards.

The scope of the fiduciary relationship has undergone a distinct pattern of detailed analysis commencing from the term of Griffith CJ. The term 'all the circumstance of the case' has been widely mentioned and practised in the decision making process to determine the extent of the scope of the relationship and to ascertain any elements of that relationship which may constitute a fiduciary relationship.Some examples are: Griffith CJ in Luke v Waite;[533]Isaacs J in Jones v Bouffier;[534] Deane J in Kak Loiu Chan v Zacharia[535] and Dixon J in Birtchnell's case where his Honour proposed a two part test to examine the express agreements and course of dealings between the parties.[536]

Rules and constraints within which the fiduciary must act were also developed, namely, the no conflict/no profit rules and the need for disclosure by a fiduciary and informed consent from a principal.

The no conflict/no profit rule was first discussed in this research in New Lambton which is the first case analysed. Griffith CJ clearly set out the way in which the directors of New Lambton placed themselves in a position of conflict resulting in a breach of their fiduciary duty. During the term of Griffith CJ there was a detailed explanation of the no conflict/no profit rule in Reid v MacDonald and Jones v Bouffier. This rule was referred to as the "inflexible rule" by Rich, Dixon and Evatt JJ in Birtchnell's case.[537] Although the terminology to the rule does change over the years the underlying rule is found to be strictly enforced. The no conflict/no profit rule could not be negatived if a principal did not suffer a monetary loss. This

[533] *Luke v Waite* (1905) 2 CLR 252, 262.
[534] *Jones v Bouffier* (1911) 12 CLR 579, 613.
[535] *Chan v Zacharia* (1984) 154 CLR 178, 191.
[536] See Chapter 2 herein.
[537] *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 396 (Dixon J).

principle was first raised in Birtchnells case[538] and then referred to in Furs v Tomkies[539]and Chan v Zacharia.

Importantly, in Keith Henry v Stuart Walker the doctrine in Keech v Sandford was held not to be confined to cases of express trusts such as the trustee/cestui que trust relationship and applied to all cases in which one person stands in a fiduciary relation to another.[540]Deane J qualified this approach in Chan v Zacharia.

The importance of disclosure started to emerge. In Tracy v Mandalay the responsibility of a fiduciary to disclose their interest to a principal was discussed in the context of company promoters and the sale of their own property into the company they were promoting.[541]

The proscriptive/prescriptive dichotomy which was first raised by the High Court in Breen v Williams and confirmed in Pilmer's case that Australia follows the proscriptive approach where the High Court disapproved of the prescriptive approach adopted by the Supreme Court of Canada (in McInerney v MacDonald) and endorsed the proscriptive approach.[542]

Fiduciary relationships fall within the categorisation of status based or fact based. This categorisation allows a Court to assume that a particular type of relationship is fiduciary (status based). Notwithstanding this assumption and categorisation, the case law analysis has shown that it is still necessary for each relationship to be fully analysed to determine the extent, if any, of a fiduciary relationship.

The early High Court adopted status based categories of fiduciaries from the United Kingdom and although these categories have been referred to and considered in subsequent cases throughout many of the cases reviewed, the High Court still analysed each and every relationship to determine its fiduciary status.

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[538] *Birtchnell v The EquityTrustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 409 (Dixon J) citing *Costa Rica Railway Company Ltd v Forwood,* (1901) 1 Ch 746, 761.
[539] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 587 (Latham CJ).
[540] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350.
[541] *Tracy v Mandalay* (1953) 88 CLR 215, 220.
[542] *Pilmer v The Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 187.

Parties in commercial transactions were less likely to be categorised as a fiduciary relationship because of the "arm's length" test which was introduced by Griffith CJ in Jones v Bouffier, without reference to precedent case law. This principle was applied in Parra Wirra Gold[543] and Hospital Products.[544]The High Court commenced referring to its own cases during the term of Sir Owen Dixon in Ngurli and Keith Henry. The same trend continued during the term of Sir Garfield Barwick in Ashburton and has continued through to 2009.

In addition to the High Court referring to its own decisions, the High Court also referred to decisions from Canada. In Chan v Zacharia Deane J cited Canadian Aero Serice Ltd v O'Malley; Gibbs CJ in Hospital Products referred to Jirna Ltd v Mister Dounut of Canada Ltd with the latter case affording assistance in the approach adopted by the High Court in disputes where the parties are in a commercially based arrangement. As mentioned previously, this research is limited to the decisions of the High Court between 1903 and 2009 and the contribution of any cases referred to by the High Court in those decisions. During this period the High Court did not refer to any decisions from New Zealand of a fiduciary nature.

Overall, the following factors have been major contributors to the development and shaping of a fiduciary jurisprudence in the High Court of Australia. Firstly, the early foundational work of Griffith CJ in setting a benchmark of detailed analysis of the core requirements and scope of a fiduciary relationship. Griffiths CJ also aimed at making the High Court a successful judicial institution in Australia and the world. Secondly, the practice of the High Court commencing with Dixon CJ in referring to its own decisions from the 1950's and continuing this practice to the present whilst looking to retain the meaning and intention of the parties in commercial matters. Thirdly, the adherence to a proscriptive approach for fiduciaries.

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[543] *Para Wirra Gold & Bismuth Mining Syndicate v Mather* (1934) 51 CLR 582, 584.

[544] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 59 with reference to *Boardman v Phipps* [1967] 2 AC 46 at 123 & 127 (Gibbs CJ).

Fourthly, the acknowledgment of the contribution of learned authors, in particular, Justice Paul Finn and the seminal equity text, Meagher Gummow and Lehane's "Equity – Doctrines and Remedies and other commentators, who have been referred to by the Justices of the High Court in their judicial decision making processes. Fifthly, the introduction of consumer protection legislation. Sixthly, the resistance, in Australia, to the fusion of law and equity which has been summed up as follows: those who commit the fusion fallacy announce or assume the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite different from its components.[545]This approach was particularly evident in the judgments of Gibbs CJ and Dawson J in Hospital Products.[546]Seventhly, the cessation of appeals to the Privy Council and eightly, the introduction of special leave applications in the High Court.

Comparison with Canada and New Zealand

Both Canada and New Zealand have commonality with the fusion of law and equity; the cessation of appeals to the Privy Council and in relation to vulnerability, Canada is more reliant than New Zealand on vulnerability as a factor in establishing a fiduciary relationship.

New Zealand is different to Canada in the area of the proscriptive and prescriptive approach in commercial cases. The New Zealand approach demonstrates a trend to deciding commercial fiduciary cases along a proscriptive approach whilst in Canada although the commercial cases prior to 2007 have been indicative a proscriptive approach the recent case of Strother indicates that the Supreme Court has interpreted the responsibility of a fiduciary in a commercially orientated case to be prescriptive.

The main differences between Australia and both Canada and New Zealand are firstly, the disapproval by the High Court of Australia of the fusion of law and equity.

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[545] Meagher RP, Heydon, JD and Leeming, MJ *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* 4th ed (2002), 54.

[546] *Hospital Products International Pty Ltd and Others v United States Surgical Corporation* (1984) 156 CLR 41, 82 (Gibbs CJ) and 118 (Dawson J).

In both New Zealand and Canada the effect of the fusion has been referred to herein in a number of cases. The judicial view and opinions of learned authors is that the fusion provides a litigant with a larger window of remedies in a successful claim based on a breach of a fiduciary relationship.

Secondly, the prescriptive/proscriptive dichotomy. Canada has a greater propensity to the prescriptive approach, particularly in dependency relationships and to a lesser extent in commercial matters, however, this was very recently in Strother's case in 2007. In New Zealand in the commercial cases examined there was a tendency to the proscriptive approach. The High Court of Australia, in Breen v Williams has definitively stated that the prescriptive is not to be followed in Australia.

In addition, the High Court reduced its reliance on United Kingdom case law initially from the 1930's and then more comprehensively from the 1950's where the High Court started to refer to its own decisions.

These differences between the High Court of Australia and the fiduciary case law of Canada and New Zealand and the way in which a fiduciary jurisprudence has been developed by the High Court of Australia has allowed the High Court of Australia to development a jurisprudence of the law relating to fiduciaries which is distinctly Australian.

Appendix 1

Judicial Interpretation of Fiduciary Jurisprudence of the High Court of Australia by Australian State and Federal Superior Courts

The purpose of this Appendix is to examine the way in which State and Federal Courts of Australia have utilised and interpreted the decisions of the High Court of Australia to enable those courts to undertake their decision making processes within the parameters of the fiduciary jurisprudence established by the High Court.

This writer has chosen three cases and for the following reasons: Harris v Digital Pulse for the underlying theoretical juridical methods of the Court of Appeal of the Supreme Court of New South Wales; Rawley Pty Ltd v Bell, a decision of Finn J in the Federal Court of Australia with an explanation of what his Honour would look for in a fiduciary relationship and The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9), for the recent decision of Owen J in the Supreme Court of Western Australia where his Honour also analysed the fundamentals within a fiduciary relationship.

- **Harris v Digital Pulse Pty Ltd (2003) Court of Appeal (NSW)**

The jurisprudence of Equity was discussed at great length by the Court of Appeal of the Supreme Court of New South Wales in Harris v Digital Pulse Pty Ltd.[547] The purpose of reviewing this case is to observe the understanding and interpretation of the principles of Equity adopted by the Court of Appeal (NSW) which was comprised of Spigelman CJ, Mason P and Heydon JA

[547] *Harris v Digital Pulse Pty Ltd* (2003) NSWCA 10.

The Appellants and Respondents were parties to an employment agreement. In the New South Wales Supreme Court, Palmer J awarded the Respondent exemplary damages for a breach of a fiduciary duty. The appeal to the Court of Appeal was principally about the correctness of the award of exemplary damages for a breach of a fiduciary duty. Spigelman CJ and Heydon JA allowed the appeal holding that the trial judge had no power to award exemplary damages as this form of relief was not available for a breach of fiduciary duty. Mason P dismissed the appeal.

Spigelman CJ commented on the development of the jurisprudence of Equity in Australia and New South Wales. The overriding fundamental issue concerning the Chief Justice was the need to continue the way Equity had been developing over the last two hundred years. The Chief Justice was particularly annoyed at the way the trial judge arrived at his conclusions in relation to exemplary damages. The Chief Justice commenced the review by looking at judicial and extra judicial comments which have demonstrated the need to continue to apply accepted principles.

Firstly, an ex curia speech of Sir Owen Dixon:

> "... It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning

traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change."[548]

Secondly, the well referenced comment of Bagnall J in Cowcher v Cowcher was also referred to by the Chief Justice:

> "... I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts.
> So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit."[549] and

Thirdly, the continuing importance placed on established equitable principles and the logic of legal reasoning of how to work out if a legal principle is "legitimate" was found in a judgment of Deane J in Muschinski v Dodds (1985):[550]

> "... The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning,

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[548] Dixon, Sir Owen, "Concerning Judicial Method" in *Jesting Pilate* (1965) Sydney, Law Book Co, 158.
[549] *Cowcher v Cowcher* [1972] 1 WLR 425,430.
[550] *Muschinski v Dodds* (1985) 160 CLR 583.

by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles."[551]

It can be seen that the principle of legitimacy is central to the logic of legal reasoning promoted by the Chief Justice and is encompassed in a statement by his Honour as follows:

> "The application of the traditional judicial method for decision making – in the way identified by Dixon CJ, Bagnall J and Deane J -- is the principal underpinning of the institutional legitimacy of the judicial function of developing the law. Reasoning by analogy, induction and, deduction, some times leads to a result which differs substantially from the pre-existing understanding of the law. It is the process that is incremental, not necessarily the result".[552]

The Chief Justice stressed the need for "historical continuity" in the decision making process in Equity and referred to a statement by Lord Simonds in Chapman v Chapman [1954][553]

> "... the range of [Equity's] authority can only be determined by seeing what jurisdiction the great equity judges of the past assumed and how they justified that assumption ... It may well be that the result is not logical, and it may be asked why, if the jurisdiction of the court extended to this thing, it did not extend to that also. "[554]

The second half of the judgment of the Chief Justice looked at the reason behind whether the development of equity jurisprudence should proceed by way of analogy with the law of tort or by way of analogy with the law of contract. The Chief Justice found the analogy with the law of Contract and found reliance in the following authorities:

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[551] *Muschinski v Dodds* (1985) 160 CLR 583, 615.
[552] *Harris v Digital Pulse Pty Ltd* (2003) NSWLR 298, 305.
[553] *Chapman v Chapman* [1954] AC 429.
[554] *Chapman v Chapman* [1954] AC 429, 444.

Finn J who was persuasive when he (Finn J) pointed to an expectation interest on the part of a principal and stated the expectation in terms reminiscent of contract law and in the context of a fiduciary relationship where one person is "entitled to expect" another to act in his or her interests to the exclusion of his or her own interests.[555]

Mason J in Hospital Products Ltd v United States Surgical Corporation which has been referred to previously in this research:

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations ... The critical feature of these relationships 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."[556]

The adoption of the above statement of Mason J in Concut Pty Ltd v Worrell (2000)[557] in the joint judgment of Gleeson CJ, Gaudron J and Gummow J and in Pilmer v Duke Group Ltd (In Liq) in the joint judgment of McHugh J, Gummow J, Hayne J and Callinan J

Lord Hoffman in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998]:[558] "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust".[559]

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[555] Finn, PD "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (1989) Toronto, Carswell, 46-47; Finn, PD "Fiduciary Law and the Modern Commercial World" in E McKendrick, ed, *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) New York, Clarendon Press, 9.
[556] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97.
[557] *Concut Pty Ltd v Worrell* (2000)75 ALJR 312, 315.
[558] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.
[559] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15.

Consequently, the Chief Justice concluded that the logic of legal reasoning was to utilise the techniques of analogy, induction and deduction, because the essential basis of the fiduciary duty is a contractual relationship, the Supreme Court,..... should not for the first time develop a remedy which is not already available in the law of contract.

Mason P gave a judgment dismissing the appeal and differing from the Chief Justice. Mason P also discussed various aspects of equitable jurisprudence applicable to the case. The President disagreed with the Chief Justice's observations about a "balancing exercise "between equitable doctrine and remedies with Mason P saying that a plaintiff does not have to demonstrate that the remedy will somehow restore the parties to a right balance.

The President did not agree with the Appellant's submission that, to uphold the trial judge would involve "fusion fallacy ". The President was particularly critical of Meagher, Gummow and Lehane's view of the fusion fallacy debate. Mason P concluded his comments on the debate with the statement: " the dream has been a long time coming. Hopefully principled integration will develop apace".[560]

The importance of this part of the judgment of Mason P, in relation to fusion fallacy, is that the development of equitable jurisprudence is developing in New South Wales within a framework where the President of the Court of Appeal is favouring an approach opposed by the other two members of the Court of Appeal, the Chief Justice and Heydon J. The approach, of the President, is based on consistency and coherence. His Honour referred to and disagreed with the view of the Chief Justice that there was a "conceptual incompatibility between equitable and contractual "doctrine that would arise if the orders of Palmer J stood."[561]

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[560] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 328 and referring to Burrows, A "We Do This At Common Law But That in Equity" 22 *Oxford Journal of Legal Studies* 51.
[561] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 334.

In addition to the prevalence of Equity over common law, deriving from the Judicature legislation, the President felt that coherence could also be achieved by the appropriate continued assimilation of law and equity through the principled development of equity so that it comes into line with common law if it thinks fit.

Heydon J, agreed with the Chief Justice that the appeal (in part) should be allowed. His Honour was also of the view that a remedy just cannot be created to suit a cause of action if a remedy does not exist. For an example, his Honour referred to the minority judgment of McLachlin J, with L'Heureux-Dubé J concurring, in Norberg v Wynribwhere her Honour (in finding a breach of fiduciary duty in Dr Wynrib) said: "Namely, that it was "logical", because of the reprehensible conduct of Dr Wynrib and others like him called for punishment and deterrence and the award signalled community disapprobation of the conduct. In a nutshell, the "reasoning" takes the form: "It would be good if this remedy existed, therefore it exists."

The importance of the judgments in Harris' case is that it is a good example of the way in which the Supreme Court of New South Wales and the Court of Appeal (NSW) can function notwithstanding the disparate philosophical views on the administrative functioning of the Supreme Court in its common law and equitable jurisdictions.

The impact of the judicial decision making process and the development of a fiduciary jurisprudence by the High Court of Australia can be observed in the precedent case law of the High Court and the reference to Finn J by the Chief Justice.

- **Rawley Pty Ltd v Bell (No 2) (2007) FCA**

In Rawley Pty Ltd v Bell (No 2) (2007)[562] Finn J sat as a single Judge in the Federal Court of Australia

The Applicant, Rawley Pty Ltd claimed that the Respondent, Bell, breached his fiduciary duty as as a promoter of Tiltform Australia causing loss to the Applicant. Finn J set out six criteria that his Honour would look for and/or utilise to determine the existence of a fiduciary relationship:

"Firstly, the distinguishing characteristic of a fiduciary relationship is that "its essence, or purpose, is to serve exclusively the interests of a person or group of persons" (which, as in the case of a partnership or joint venture, can include the fiduciary).

Secondly, a relationship may be fiduciary in part and non-fiduciary in part: Hospital Products Ltd v United States Surgical Corporation at (1984) CLR 97-8.

Thirdly, in so far as the fiduciary relationship is claimed to be founded on mutual trust and confidence, the circumstances must nonetheless be such that the parties to the relationship can reasonably expect loyalty from the other, that is, the subordination of self interest to joint interest: Gibson Motorsport Merchandise Pty Ltd 149 FCR 569 at [11]-[13].

Fourthly, a person who provides information, suggestion or advice to another upon which that other may reasonably be expected to rely is not for that reason alone necessarily in a fiduciary relationship with that other: compare Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165 ; 180 ALR 249 ; 38 ACSR 122 ; [2001] HCA 31; Commonwealth Bank of Australia v Smith (1991) 42 FCR 390 ; 102 ALR 453.

Fifthly, the loyalty obligation imposed on a fiduciary is that he or she cannot: (a) in any matter within the scope of the fiduciary relationship (see Birtchnell v Equity Trustees Executor & Agency Co Ltd (1929) 42 CLR 384 at 408 ; [1929] ALR 273 296-7) have a personal interest or an inconsistent engagement with a third party;

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[562] *Rawley Pty Ltd v Bell* (No 2) [2007] FCA 583.

or (b) use his or her own position to gain a possible advantage, unless this is freely and informedly consented to by the person(s) to whom the loyalty is owed, or is authorised by law: Chan v Zacharia (1984) 154 CLR 178 at 199 ; 53 ALR 417 at 433; Breen v Williams (1996) 186 CLR 71 at 113 ; 138 ALR 259 at 289 ; 43 ALD 481 at 508 ; [1995] HCA 63.

Sixthly, outside of commercial agency, partnership and trust relationships, care needs to be taken in concluding that commercial parties are in a fiduciary relationship for some or all purposes -- not because a commercial relationship cannot be fiduciary, but because such a relationship, commonly, possesses characteristics (for example, known adversarial interests, the reasonable expectation of self-reliance etc) which negative a fiduciary finding: Gibson Motorsport Merchandise Pty Ltd, at [2]-[18]; News Ltd v Aust Rugby Football League Ltd (1996) 64 FCR 410 at 539-41 ; 139 ALR 193 at 311-14 ; 21 ACSR 635 754-6 ; 35 IPR 446 at 565-7".

The criteria utilised by Finn J can be related to the stages in the development of a fiduciary jurisprudence within the High Court. The first, third criteria and the loyalty aspect of the fifth criteria relate directly to the core requirement of a fiduciary. The second, fourth and the balance of the fifth criteria relate to the scope of the relationship between the parties.

In addition, Finn J emphasised the need to exercise caution when concluding if a fiduciary relationship exists between parties to a commercial relationship which in great part is extracted from the terms and conditions of the contract and the evidence of the way in which the contract has been performed by the parties. This form of analysis is apparent in many of the cases within this research, Hospital Products and Pilmer are examples.

- **The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9) (2008)**

In The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)[563] Owen J sat as a single Judge in the Supreme Court of Western Australia over some 404 hearing days. The case involved a claim by the Liquidator of the Plaintiff, Bell Group Ltd, against the Defendant, who was a banker to the Plaintiff.

Early in 1990, in response to concern about the solvency of the Plaintiff, various banks took security over assets of the Plaintiff to support existing borrowings. In 1991 the various corporate entities of the Plaintiff were placed in receivership with the banks realising their securities.

The Plaintiff (through the Liquidator) argued that at the time the parties entered into the refinancing transactions (including the securities), the main companies in the Plaintiff (group of companies) were insolvent and accordingly, the directors breached their duties (including fiduciary duty) to those companies by causing them to enter into the transactions.

The Plaintiff's main argument in relation to the breach of fiduciary duty was based on the rule in Barnes v Addy, in that, the banks knowingly assisted the directors of the Plaintiff to breach their duties (including fiduciary duties), and that they knowingly received property arising from the breach of those duties and they perpetrated an equitable fraud on the companies and their creditors. The banks denied all liability.

The judgment in this case went for some 2,450 pages. Owen J had to decide two questions applicable to fiduciary law: "Were the duties that were breached fiduciary in nature? and are the banks liable under the first limb of Barnes v Addy, that is, did they receive trust property knowing that it arose from a breach of the directors'

[563] *The Bell Group Ltd (In Liq) v Westpac Banking Corporation* (No 9) (2008) WASC 239.

fiduciary duties?" Owen J sought to resolve the questions by undertaking the following analysis of the facts and the case law.

Firstly, to ascertain whether there was a fiduciary relationship (between the directors of the Plaintiff and the Plaintiff). His Honour said:

> "It is common ground that the relationship between a director and the company of which he or she is a director is a fiduciary one. But it does not follow that each and every duty owed by the director to the company is fiduciary".

Owen J referred to the statement of Mason J in Hospital Products where Mason J discussed the 'representative character' of the fiduciary office:

> "The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility",

This expression was also adopted by Gaudron and McHugh JJ in Breen v Williams.

Secondly, another way of approaching this problem is to look at what equity demands of a person who is a fiduciary rather than trying to define the fiduciary relationship

Owen J felt the answer to this question was that a fiduciary is required to give loyalty and relied on the statement of Gaudron and McHugh JJ in Breen v Williams, where their Honours said: "...equity insists that fiduciaries give undivided loyalty to the persons whom they serve".

Owen J then looked at the proscriptive/prescriptive dichotomy debate as the Defendant banks argued that the duty to act in the interests of the company and the duty to exercise powers properly are prescriptive, not proscriptive and, accordingly, are not fiduciary.

In dismissing this argument Owen J relied on the judgment of Gaudron and McHugh JJ in Breen V Williams in rejecting the trend in Canadian decisions to impose on fiduciaries some positive duties and to classify those duties as fiduciary. Owen J noted that the dicta of Gaudron and McHugh JJ was approved in Pilmer v Duke Group Ltd by McHugh, Gummow, Hayne and Callinan JJ.

Owen J then referred to a series of High Court of Australia cases in support of his decision making process: Mills v Mills: where directors in the exercise of their powers are in a fiduciary position and must exercise those powers for the benefit of the company. (per Starke J at 175); Richard Brady Franks, at 142 - 143 per Dixon J: "Directors are fiduciary agents and their powers must be exercised honestly in furtherance of the purposes for which they are given ..."; Ngurli v McCann, per the Court: "The powers entrusted to the directors by the articles of association to be exercised on behalf of the company are fiduciary powers" and Harlowe's Nominees Pty Ltd, per the Court: "the fiduciary power of directors must be exercised in a bona fide manner for the benefit of the company as a whole.[564]

Owen J found the Defendant banks liable under the first limb (knowing receipt) of the rule in Barnes v Addy based on the following circumstances of the case: the banks knew of the existence of the directors' fiduciary duties; they knew that the duties covered the assets over which they were to take security; and they knew that in taking the securities they were receiving property that arose from a breach of fiduciary duty.

In the context of the development of fiduciary jurisprudence, the judgment of Owen J is important for the way in which his Honour analyses and applies the precedent cases law of the High Court of Australia.

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[564] *Harlowes Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co Ltd* (1968) 121 CLR 483, 492.

Appendix 2

All High Court of Australia Cases on Fiduciaries - 11 November 1903 to 30 June 2009

Case Name	Included in Research
1. Friend v Brooker [2009] HCA 21	**Yes**
2. Kennon v Spry; Spry v Kennon [2008] HCA 56	No
3. Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42	No
4. Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29	No
5. Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20	No
6. Foots v Southern Cross Mine Management Pty Ltd [2007] HCA 56	No
7. SZFDE v Minister for Immigration and Citizenship [2007] HCA 35	No
8. Black v Garnock [2007] HCA 31	No
9. Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board [2007] HCA 23; (2007) 234 ALR 618; 81 ALJR 1155	No
10. Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 81 ALJR 1107	No
11. Bennett v Commonwealth [2007] HCA 18; (2007) 234 alr 204; 81 ALJR 950	No
12. Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd [2006] HCA 55; (2006) 231 ALR 663; (2006) 81 ALJR 352	No
13. Central Bayside General Practice Association Limited v Commissioner of State Revenue [2006] HCA 43; (2006) 229 ALR 1; (2006) 80 ALJR 1509	No
14. Campbells Cash and Carry Pty Ltd v Fostif Pty Limited [2006] HCA 41; (2006) 229 ALR 58; (2006) 80 ALJR 1441	No

15. Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd [2006] HCA 42; (2006) 229 ALR 51	No
16. Harriton v Stephens [2006] HCA 15; (2006) 226 CLR 52; (2006) 226 ALR 391; (2006) 80 ALJR 791	No
17. Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates [2005] HCA 69; (2005) 224 CLR 627; (2005) 222 ALR 263; (2006) 80 ALJR 183	No
18. Willett v Futcher [2005] HCA 47; 221 CLR 627; 221 ALR 16; 79 ALJR 1523	No
19. Palgo Holdings Pty Ltd v Gowans [2005] HCA 28; 221 CLR 249; 215 ALR 253; 79 ALJR 1121	No
20. Angas Law Services Pty Ltd (In liquidation) v Carabelas [2005] HCA 23; (2005) 215 ALR 110; (2005) 79 ALJR 993	No
21. Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation) [2005] HCA 20; (2005) 220 CLR 592; (2005) 215 ALR 1; (2005) 79 ALJR 913	No
22. Wilkie v Gordian Runoff Ltd [2005] HCA 17; 221 CLR 522; 214 ALR 410; 79 ALJR 872	No
23. D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755	No
24. Griffith University v Tang [2005] HCA 7; (2005) 221 CLR 99; (2005) 213 ALR 724; (2005) 79 ALJR 627; (2005) 82 ALD 289	No
25. ZHU v Treasurer of NSW [2004] HCA 56; 218 CLR 530; 211 ALR 159; 79 ALJR 217	No
26. Re Woolleys [2004] HCA 49; (2004) 225 CLR 1; (2004) 210 ALR 369; (2004) 79 ALJR 43	No
27. Rich v Australian Securities and Inverstments Commission [2004] HCA 42; 220 CLR 129; 209 ALR 271; 78 ALJR 1354	No
28. Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16; 216 CLR 515; 205 ALR 522; 78 ALJR 628	No
29. Alexander v Perpetual Trustees WA Ltd [2004] HCA 7; 216 CLR 109; 204 ALR 417; 78 ALJR 411	No
30. Tanwar Enterprises Pty Ltd v Cauchi [2003] HCA 57; 217 CLR 315; 201 ALR 359; 77 ALJR 1853	No
31. Macleod v R [2003] HCA 24; 214 CLR 230; 197 ALR 333; 77 ALJR 1047	No
32. Trust Company of Australia Ltd v Commissioner of State Revenue [2003] HCA 23; (2003) 197 ALR 297; (2003) 77 ALJR 1019	No

33. Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18; 214 CLR 51; 197 ALR 153; 77 ALJR 926	No
34. Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; 212 CLR 484; 196 ALR 482; 77 ALJR 895	No
35. Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd [2003] HCA 10; (2003) 196 ALR 257; (2003) 77 ALJR 768	No
36. Barns v Barns [2003] HCA 9; 214 CLR 169; 196 ALR 65; 77 ALJR 734	No
37. New South Wales v Lepore [2003] HCA 4; 212 CLR 511; 195 ALR 412; 77 ALJR 558	No
38. Hot Holdings Pty Ltd v Creasy [2002] HCA 51; 210 CLR 438; 193 ALR 90; 77 ALJR 70	No
39. Tame v New South Wales [2002] HCA 35; 211 CLR 317; 191 ALR 449; 76 ALJR 1348	No
40. Western Australia v Ward [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098	No
41. Maggbury Pty Ltd v Hafele Aust Pty Ltd [2001] HCA 70; 210 CLR 181; 185 ALR 152; 76 ALJR 246	No
42. Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68; 208 CLR 516; 185 ALR 335; 76 ALJR 203	No
43. ABC v Lenah Game Meats Pty Ltd [2001] HCA 63; 208 CLR 199; 185 ALR 1; 76 ALJR 1	No
44. Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31; 207 CLR 165; 75 ALJR 1067; 38 ACSR 122	**Yes**
45. Scott v Davis [2000] HCA 52; 204 CLR 333; 175 ALR 217; 74 ALJR 1410	No
46. Clay v Clay [2001] HCA 9; 202 CLR 410; 178 ALR 193; 75 ALJR 528	No
47. Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] HCA 1; 204 CLR 559; 177 ALR 329; 75 ALJR 363	No
48. Concut Pty Ltd v Worrell [2000] HCA 64; 75 ALJR 312	No
49. McCann v Switzerland Insurance [2000] HCA 65; 203 CLR 579; 176 ALR 711; 75 ALJR 325	**Yes**
50. Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337; 176 ALR 644; 75 ALJR 277	No
51. Re Macks [2000] HCA 62; 204 CLR 158; 176 ALR 545; 75 ALJR 203	No

52. Hancock Family Memorial Foundation Limited v Porteous [2000] HCA 51; 201 CLR 347; 175 ALR 1; 74 ALJR 1536	No
53. Associated Alloys v ACN 001 452 106 Pty Ltd [2000] HCA 25; 202 CLR 588; 171 ALR 568; 74 ALJR 862	No
54. Barwick v NSW Law Society [2000] HCA 2; (2000) 169 ALR 236; (2000) 74 ALJR 419	No
55. Esso Australia Resources v Commissioner of Taxation [1999] HCA 67; 201 CLR 49; 168 ALR 123; 74 ALJR 339	No
56. Boland v Yates Property Corporation Pty Limited [1999] HCA 64; 74 ALJR 209; 167 ALR 575	No
57. Giumelli v Giumelli [1999] HCA 10; 196 CLR 101; 73 ALJR 547	No
58. Perre v Apand Pty Ltd [1999] HCA 36; 198 CLR 180; 64 ALR 606; 73 ALJR 1190	No
59. Walsh v NSW Law Society [1999] HCA 33; 198 CLR 73; 164 ALR 405; 73 ALJR 1138	No
60. Cardile v Led Builders Pty Ltd [1999] HCA 18; 198 CLR 380; 162 ALR 294; 73 ALJR 657	No
61. Bass v Permanent Trustee Co Ltd [1999] HCA 9; 198 CLR 334; 161 ALR 399; 73 ALJR 522	No
62. State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq [1999] HCA 3; (1999) 160 ALR 588; (1999) 73 ALJR 306	No
63. Bridgewater v Leahy [1998] HCA 66; 194 CLR 457; 158 ALR 66; 72 ALJR 1525	No
64. Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49; 194 CLR 247; 155 ALR 684; 72 ALJR 1270	No
65. Garcia v National Australia Bank Ltd [1998] HCA 48; 6 CCL 81; 194 CLR 395; 155 ALR 614; 72 ALJR 1243	No
66. Commonwealth v SCI Operations Pty Limited [1998] HCA 20; 192 CLR 285; 152 ALR 624; 72 ALJR 687	No
67. Bank of South Australia Limited v Ferguson [1998] HCA 12; 192 CLR 248; 151 ALR 729; 72 ALJR 551	No
68. Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151	No

ALR 1; 72 ALJR 243	
69. Pyrenees Shire Council v Day [1998] HCA 3; 192 CLR 330; 151 ALR 147; 72 ALJR 152	No
70. Sheahan v Carrier Air Conditioning Pty Ltd [1997] HCA 37; (1997) 189 CLR 407; (1997) 147 ALR 1; (1997) 71 ALJR 1223	No
71. IW v City of Perth [1997] HCA 30; 191 CLR 1; (1997) 94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943	No
72. Maguire Tansey v Makaronis [1997] HCA 23; (1997) 188 CLR 449; (1997) 144 ALR 729; (1997) 71 ALJR 781	**Yes**
73. Thorpe v Commonwealth (No 3) [1997] HCA 21; (1997) 144 ALR 677; (1997) 71 ALJR 767	No
74. Parker v R [1997] HCA 15; (1997) 186 CLR 494; (1997) 143 ALR 293; (1997) 71 ALJR 598	No
75. Hill v Van Erp [1997] HCA 9; (1997) 188 CLR 159; (1997) 142 ALR 687; (1997) 71 ALJR 487	No
76. Wik Peoples v Queensland ("Pastoral Leases case") [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173	No
77. Breen v Williams ("Medical Records Access case") [1996] HCA 57; (1996) 186 CLR 71	**Yes**
78. Cummings v Claremont Petroleum [1996] HCA 19; (1996) 185 CLR 124; (1996) 137 ALR 1; (1996) 70 ALJR 616	No
79. Reid v Howard [1995] HCA 40; (1995) 184 CLR 1	No
80. Re McJannet; Ex Parte Minister for Employment Training Industrial Relations (Qld) [1995] HCA 31; (1995) 184 CLR 620	No
81. Nelson v Nelson [1995] HCA 25; (1995) 184 CLR 538	No
82. R v Byrnes Hopwood [1995] HCA 1; (1995) 130 ALR 529; (1995) 17 ACSR 551; (1995) 13 ACLC 1488; (1995) 69 ALJR 710; (1995) 183 CLR 501	No
83. Vadasz v Pioneer Concrete (SA) Pty Ltd [1995] HCA 14; (1995) 130 ALR 570; (1995) 69 ALJR 678; (1995) 184 CLR 102	No
84. Warman International Ltd v Dwyer [1995] HCA 18; (1995) 182 CLR 544; (1995) 128 ALR 201; (1995) 69 ALJR 362	**Yes**
85. Gambotto v WCP Ltd [1995] HCA 12; (1995) 182 CLR 432; (1995) 13 ACLC 342; (1995) 69 ALJR 266)	No

86. Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd [1994] HCA 61; (1994) 182 CLR 51; (1994) 126 ALR 1; (1994) 94 ATC 4960; (1994) 29 ATR 173; (1994) 69 ALJR 51	No
87. Coe v Commonwealth [1993] HCA 42; (1993) 68 ALJR 110; (1993) 118 ALR 193	No
88. Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation (Cth) [1993] HCA 69; (1993) 178 CLR 145	No
89. Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation [1993] HCA 1; (1993) 178 CLR 145; (1993) 117 ALR 27; (1993) 67 ALJR 922	No
90. Johns v Australian Securities Commission [1993] HCA 56; (1993) 178 CLR 408	No
91. Commonwealth v Northern Land Council [1993] HCA 24; (1993) 176 CLR 604	No
92. Bennett v Minister of Community Welfare [1992] HCA 27; (1993) 176 CLR 408; (1992) 107 ALR 617; (1992) 66 ALJR 550	No
93. Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1	No
94. Chew v R [1992] HCA 18; (1992) 173 CLR 626	No
95. Department of Health Community Services v JWB SMB ("Marion's Case") [1992] HCA 15; (1992) 175 CLR 218	No
96. Northside Developments Pty Ltd v Registrar-General [1990] HCA 32; (1990) 170 CLR 146	No
97. Hungerfords v Walker [1989] HCA 8; (1989) 171 CLR 125	No
98. Mabo v Queensland [1988] HCA 69; (1989) 166 CLR 186	No
99. Trident General Insurance Co Ltd v McNiece Bros Pty Ltd [1988] HCA 44; (1988) 165 CLR 107	No
100. Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd ("Spycatcher case") [1988] HCA 25; (1988) 165 CLR 30; (1988) 78 ALR 449; (1988) 62 ALJR 344; (1988) 10 IPR 385	**Yes**
101. Northern Land Council v Commonwealth [1987] HCA 52; (1987) 75 ALR 210; (1987) 61 ALJR 616	No

102. Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [1987] HCA 45; (1987) 75 ALR 461; (1987) 61 ALJR 612; (1987) 10 IPR 261	No
103. Whitehouse v Carlton Hotel Pty Ltd [1987] HCA 11; (1987) 162 CLR 285)	No
104. Daly v Sydney Stock Exchange Ltd [1986] HCA 25; (1986) 160 CLR 371	**Yes**
105. Muschinski v Dodds [1985] HCA 78; (1985) 160 CLR 583	No
106. United Dominions Corporation Ltd v Brian Pty Ltd [1985] HCA 49; (1985) 157 CLR 1	**Yes**
107. Moorgate Tobacco Co Ltd v Philip Morris Ltd [1984] HCA 73; (1984) 156 CLR 414	**Yes**
108. Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 (25 October 1984)	**Yes**
109. Kak Loui Chan v Zacharia [1984] HCA 36; (1984) 154 CLR 178 (7 June 1984)	**Yes**
110. Stack v Coast Securities (No 9) Pty Ltd [1983] HCA 36; (1983) 154 CLR 261 (12 October 1983)	No
111. Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447 (12 May 1983)	No
112. Fencott v Muller ("O'Connors Winebar case") [1983] HCA 12; (1983) 152 CLR 570 (28 April 1983)	No
113. O'Brien v Komesaroff [1982] HCA 33; (1982) 150 CLR 310 (21 May 1982)	No
114. DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) [1982] HCA 14; (1982) 149 CLR 431 (21 April 1982)	No
115. Commercial General Acceptance Ltd v Nixon [1981] HCA 70; (1981) 152 CLR 491 (16 December 1981)	No
116. Shaddock Associates Pty Ltd v Parramatta City Council (No 1) [1981] HCA 59; (1981) 150 CLR 225 (28 October 1981)	No

117. Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd [1981] HCA 4; (1981) 146 CLR 336 (10 February 1981)	No
118. Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd [1981] HCA 7; (1981) 148 CLR 457 (10 February 1981)	No
119. Ascot Investments Pty Ltd v Harper [1981] HCA 1; (1981) 148 CLR 337 (2 February 1981)	No
120. Moorgate Tobacco Co Ltd v Philip Morris Ltd [1980] HCA 32; (1980) 145 CLR 457 (2 September 1980)	No
121. Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd [1980] HCA 28; (1980) 143 CLR 646 (12 August 1980)	No
122. Boyd v Carah Coaches Pty Ltd [1979] HCA 56; (1979) 145 CLR 78 (22 November 1979)	No
123. R v Dovey; Ex parte Ross [1979] HCA 14; (1979) 141 CLR 526 (3 April 1979)	No
124. Federal Commissioner of Taxation v Lutovi Investments Pty Ltd [1978] HCA 55; (1978) 140 CLR 434 (19 December 1978)	No
125. Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq) [1978] HCA 45; (1978) 141 CLR 335 (24 November 1978)	No
126. Stephens v R [1978] HCA 35; (1978) 139 CLR 315 (8 September 1978)	No
127. London Australia Investment Co Ltd v Federal Commissioner of Taxation [1977] HCA 50; (1977) 138 CLR 106 (20 September 1977)	No
128. Equity Trustee Executors Agency Co Ltd v Commissioner of Probate Duties (Vic) [1976] HCA 34; (1976) 135 CLR 268 (25 June 1976)	No
129. Walker v Wimborne [1976] HCA 7; (1976) 137 CLR 1 (3 March 1976)	No
130. Federal Commissioner of Taxation v Barnes [1975] HCA 61; (1975) 133 CLR	No

483 (22 December 1975)	
131. Consul Development Pty Ltd v DPC Estates Pty Ltd [1975] HCA 8; (1975) 132 CLR 373 (26 February 1975)	No
132. Laybutt v Amoco Australia Pty Ltd [1974] HCA 49; (1974) 132 CLR 57 (15 November 1974)	No
133. Bonds Securities (Trading) Pty Ltd v Australian Foundation Investment Co Ltd (No 2) [1974] HCA 15; (1974) 131 CLR 50 (8 May 1974)	No
134. Ord Forrest Pty Ltd v Federal Commissioner of Taxation [1974] HCA 57; (1974) 130 CLR 124 (7 March 1974)	No
135. Federal Commissioner of Taxation v Cappid Pty Ltd [1971] HCA 79; (1971) 127 CLR 140 (2 June 1971)	No
136. Ashburton Oil NL v Alpha Minerals NL [1971] HCA 5; (1971) 123 CLR 614 (12 March 1971)	**Yes**
137. Gregory v Federal Commissioner of Taxation [1971] HCA 2; (1971) 123 CLR 547 (8 February 1971)	No
138. Lutheran Church of Australia South Australia District Incorporated v Farmers' Co-operative Executors Trustees Ltd [1970] HCA 12; (1970) 121 CLR 628 (1 May 1970)	No
139. Smith Kline French Laboratories Ltd v Inter-Continental Pharmaceuticals (Australia) Pty Ltd [1969] HCA 34; (1969) 123 CLR 514 (6 August 1969)	No
140. Mutual Life Citizens' Assurance Co Ltd v Evatt [1968] HCA 74; (1968) 122 CLR 556 (11 November 1968)	No
141. Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL [1968] HCA 37; (1968) 121 CLR 483 (21 June 1968)	**Yes**
142. Compton v Federal Commissioner of Taxation [1966] HCA 1; (1966) 116 CLR 233 (30 November 1966)	No
143. Thorby v Goldberg [1964] HCA 41; (1964) 112 CLR 597 (29 July 1964)	No

144. Scott v Scott [1963] HCA 65; (1963) 109 CLR 649 (20 December 1963)	No
145. Federal Commissioner of Taxation v Card [1963] HCA 52; (1963) 109 CLR 177 (19 November 1963)	No
146. Colyton Investments Pty Ltd v McSorley [1962] HCA 44; (1962) 107 CLR 177 (29 August 1962)	No
147. Carter Bros v Renouf [1962] HCA 67; (1962) 111 CLR 140 (20 July 1962)	**Yes**
148. Church Property Trustees Diocese of Newcastle v Ebbeck [1960] HCA 88; (1960) 104 CLR 394 (6 December 1960)	No
149. Keith Henry Co Pty Ltd v Stuart Walker Co Pty Ltd [1958] HCA 33; (1958) 100 CLR 342 (13 August 1958)	**Yes**
150. Federal Commissioner of Taxation v Snowden Willson Pty Ltd [1958] HCA 23; (1958) 99 CLR 431 (15 May 1958)	No
151. W P Keighery Pty Ltd v Federal Commissioner of Taxation [1957] HCA 2; (1957) 100 CLR 66 (19 December 1957)	**Yes**
152. Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd [1957] HCA 1; (1957) 100 CLR 95 (19 December 1957)	No
153. Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld) [1956] HCA 75; (1956) 96 CLR 131 (3 December 1956)	No
154. Fysh v Page [1956] HCA 13; (1956) 96 CLR 233 (13 April 1956)	No
155. Palmos v Wilson [1955] HCA 65; (1955) 99 CLR 94 (29 November 1955)	No
156. Permanent Trustee Company of NSW Ltd v Commissioner of Stamp Duties (NSW) [1954] HCA 34; (1954) 91 CLR 1 (19 August 1954)	No
157. Charles v Federal Commissioner of Taxation [1954] HCA 16; (1954) 90 CLR 598 (23 April 1954)	No

158. War Assets Pty Ltd v Federal Commissioner of Taxation [1954] HCA 81; (1954) 91 CLR 53 (3 March 1954)	No
159. Ngurli Ltd v McCann [1953] HCA 39; (1953) 90 CLR 425 (3 July 1953)	**Yes**
160. Tracy v Mandalay Pty Ltd [1953] HCA 9; (1953) 88 CLR 215 (12 March 1953)	**Yes**
161. Van Rassel v Kroon [1953] HCA 3; (1953) 87 CLR 298 (4 March 1953)	**Yes**
162. Jenyns v Public Curator (Qld) [1953] HCA 2; (1953) 90 CLR 113 (27 February 1953)	No
163. Hall v Job [1952] HCA 57; (1952) 86 CLR 639 (30 October 1952)	No
164. Armenian General Benevolent Union v Union Trustee Company of Australia Ltd [1952] HCA 47; (1952) 87 CLR 597 (21 August 1952)	No
165. Oakes v Commissioner of Stamp Duties NSW [1952] HCA 22; (1952) 85 CLR 386 (8 May 1952)	No
166. Nelungaloo Pty Ltd v Commonwealth [1952] HCA 11; (1952) 85 CLR 545 (14 March 1952)	No
167. McVicar v Commissioner for Railways (NSW) [1951] HCA 50; (1951) 83 CLR 521 (3 October 1951)	No
168. Ritchie v Trustees Executors Agency Co Ltd [1951] HCA 38; (1951) 84 CLR 553 (6 July 1951)	No
169. Tatham v Huxtable [1950] HCA 56; (1950) 81 CLR 639 (11 December 1950)	No
170. Maslen v Perpetual Executors Trustees Agency Co (WA) Ltd [1950] HCA 55; (1950) 82 CLR 101 (11 December 1950)	No
171. Grant v John Grant Sons Pty Ltd [1950] HCA 54; (1950) 82 CLR 1 (4 December 1950)	No

172. Ballarat Trustees Executors Agency Co Ltd v Federal Commissioner of Taxation [1950] HCA 19; (1950) 80 CLR 350 (20 June 1950)	No
173. Way v Commissioner of Stamp Duties (NSW) [1949] HCA 37; (1949) 79 CLR 477 (18 August 1949)	No
174. Farnsworth v Federal Commissioner of Taxation [1949] HCA 27; (1949) 78 CLR 504 (4 August 1949)	No
175. Grimwade v Federal Commissioner of Taxation [1949] HCA 9; (1949) 78 CLR 199 (28 July 1949)	No
176. Bank of NSW v Commonwealth ("Bank Nationalisation case") [1948] HCA 7; (1948) 76 CLR 1 (11 August 1948)	No
177. Re Richard Foreman Sons Pty Ltd; Uther v Federal Commissioner of Taxation [1947] HCA 45; (1947) 74 CLR 508 (2 December 1947)	No
178. Partridge v Equity Trustees Executors Agency Co Ltd [1947] HCA 42; (1947) 75 CLR 149 (29 October 1947)	No
179. Registrar of Titles v Crowle [1947] HCA 23; (1947) 75 CLR 191 (23 June 1947)	No
180. Mayne v Public Trustee [1945] HCA 38; (1945) 70 CLR 395 (13 December 1945)	No
181. Abrahams v Federal Commissioner of Taxation [1944] HCA 32; (1944) 70 CLR 23 (23 November 1944)	No
182. Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation [1944] HCA 31; (1944) 70 CLR 362 (10 November 1944)	No
183. Fell v Federal Commissioner of Taxation [1944] HCA 25; (1944) 69 CLR 250 (12 September 1944)	No
184. Durack v West Australian Trustee Executor Agency Co Ltd [1944] HCA 21; (1944) 72 CLR 189 (9 August 1944)	No

185. Visbord v Federal Commissioner of Taxation [1943] HCA 4; (1943) 68 CLR 354 (15 April 1943)	**Yes**
186. Perpetual Trustee Co Ltd v Commissioner of Stamp Duties (NSW) [1941] HCA 15; (1941) 64 CLR 492 (1 May 1941)	No
187. Bank of NSW v Rogers [1941] HCA 9; (1941) 65 CLR 42 (21 April 1941)	No
188. National Trustees Executors Agency Company of Australasia Ltd v Dwyer [1940] HCA 5; (1940) 63 CLR 1 (30 March 1940)	No
189. Peters' American Delicacy Co Ltd v Heath [1939] HCA 2; (1939) 61 CLR 457 (9 February 1939)	No
190. Peninsular Oriental Steam Navigation Company v Johnson [1938] HCA 16; (1938) 60 CLR 189 (25 March 1938)	**Yes**
191. Mills v Mills [1938] HCA 4; (1938) 60 CLR 150 (17 February 1938)	
192. Birmingham v Renfrew [1937] HCA 52; (1937) 57 CLR 666 (2 September 1937)	No
193. Richard Brady Franks Ltd v Price [1937] HCA 42; (1937) 58 CLR 112 (17 August 1937)	No
194. Palette Shoes Pty Ltd (In Liq) v Krohn [1937] HCA 37; (1937) 58 CLR 1 (3 August 1937)	No
195. Johnson v Buttress [1936] HCA 41; (1936) 56 CLR 113 (17 August 1936)	No
196. Furs Ltd v Tomkies [1936] HCA 3; (1936) 54 CLR 583 (13 February 1936)	**Yes**
197. Para Wirra Gold Bismuth Mining Syndicate v Mather [1934] HCA 46; (1934) 51 CLR 582 (15 October 1934)	**Yes**
198. Hourigan v Trustees Executors Agency Co Ltd [1934] HCA 25; (1934) 51 CLR 619 (3 August 1934)	No
199. Citizens Graziers' Life Assurance Co Ltd v Commonwealth Life (Amalgamated)	No

Assurances Ltd [1934] HCA 22; (1934) 51 CLR 422 (2 August 1934)	
200. Williams v Lloyd [1934] HCA 1; (1934) 50 CLR 341 (6 March 1934)	No
201. Metropolitan Gas Company v Federal Commissioner of Taxation [1932] HCA 58; (1932) 47 CLR 621 (25 November 1932)	No
202. Barcelo v Electrolytic Zinc Company of Australasia Ltd [1932] HCA 52; (1932) 48 CLR 391 (21 November 1932)	No
203. Countess of Bective v Federal Commissioner of Taxation [1932] HCA 22; (1932) 47 CLR 417 (30 June 1932)	No
204. Deputy Federal Commissioner of Taxation v Trustees of the Wheat Pool of Western Australia [1932] HCA 15; (1932) 48 CLR 5 (12 May 1932)	No
205. New South Wales v Commonwealth (No 3) [1932] HCA 12; (1932) 46 CLR 246 (3 May 1932)	No
206. Colonial Mutual Life Assurance Society Ltd v Producers Citizens Co-operative Assurance Company of Australia Ltd [1931] HCA 53; (1931) 46 CLR 41 (23 December 1931)	No
207. A M Spicer Son Pty Ltd (In Liq) v Spicer Howie [1931] HCA 30; (1931) 47 CLR 151 (1 October 1931)	No
208. Slatter v Railway Commissioners (NSW) [1931] HCA 13; (1931) 45 CLR 68 (20 April 1931)	No
209. Saywell v Permanent Trustee Company of NSW Ltd [1931] HCA 10; (1931) 44 CLR 564 (2 April 1931)	No
210. Sewell v Agricultural Bank of Western Australia [1930] HCA 29; (1930) 44 CLR 104 (12 September 1930)	**Yes**
211. Davis v Mackerras [1930] HCA 15; (1930) 43 CLR 488 (11 August 1930)	No
212. Crichton v Crichton [1930] HCA 14; (1930) 43 CLR 536 (11 August 1930)	No

213. Lapin v Abigail [1930] HCA 6; (1930) 44 CLR 166 (28 March 1930)	No
214. George v Greater Adelaide Land Development Co Ltd [1929] HCA 40; (1929) 43 CLR 91 (9 December 1929)	No
215. Birtchnell v Equity Trustees Executors Agency Co Ltd [1929] HCA 24; (1929) 42 CLR 384 (15 October 1929)	**Yes**
216. Cohen v Cohen [1929] HCA 15; (1929) 42 CLR 91 (4 June 1929)	No
217. Herald Weekly Times Ltd v McGregor [1928] HCA 36; (1928) 41 CLR 254 (8 November 1928)	No
218. Manning v Federal Commissioner of Taxation [1928] HCA 9; (1928) 40 CLR 506 (23 April 1928)	**Yes**
219. Federal Commissioner of Taxation v Clarke [1927] HCA 49; (1927) 40 CLR 246 (24 November 1927)	No
220. National Trustees Executors Agency Company of Australasia Ltd v Boyd [1926] HCA 44; (1926) 39 CLR 72 (18 November 1926)	No
221. Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd [1926] HCA 26; (1926) 38 CLR 272 (27 August 1926)	No
222. Davison v Vickery's Motors Ltd (In Liq) [1925] HCA 47; (1925) 37 CLR 1 (27 November 1925)	No
223. Thornley v Tilley [1925] HCA 13; (1925) 36 CLR 1 (7 May 1925)	**Yes**
224. McFarlane v Federal Commissioner of Taxation [1925] HCA 2; (1925) 35 CLR 414 (7 April 1925)	No
225. R v Boston [1923] HCA 59; (1923) 33 CLR 386 (10 December 1923)	No
226. Australian Metropolitan Life Assurance Company Ltd v Ure [1923] HCA 29; (1923) 33 CLR 199 (2 August 1923)	No

227. Stuart v Kingston [1923] HCA 17; (1923) 32 CLR 309 (18 May 1923)	No
228. Harris v Jenkins [1922] HCA 54; (1922) 31 CLR 341 (15 December 1922)	No
229. Commonwealth the Central Wool Committee v Colonial Combing, Spinning Weaving Co Ltd [1922] HCA 62; (1922) 31 CLR 421 (14 December 1922)	No
230. John Cooke Company Pty Ltd v Commonwealth [1922] HCA 60; (1922) 31 CLR 394 (12 December 1922)	No
231. Heron v Port Huon Fruitgrowers' Co-operative Association Ltd [1922] HCA 20; (1922) 30 CLR 315 (15 May 1922)	No
232. Wicks v Bennett [1921] HCA 57; (1921) 30 CLR 80 (16 December 1921)	No
233. Wood v Little [1921] HCA 50; (1921) 29 CLR 564 (21 November 1921)	No
234. Official Assignee of the Estate of Turnbull v Goldstein [1921] HCA 33; (1921) 29 CLR 377 (12 August 1921)	No
235. Haskew v Equity Trustees Executors Agency Co Ltd [1919] HCA 53; (1919) 27 CLR 231 (15 October 1919)	No
236. Barton-Smith v Railton [1918] HCA 78; (1918) 25 CLR 427 (17 December 1918)	No
237. McBride v Sandland (No 2) [1918] HCA 59; (1918) 25 CLR 369 (3 October 1918)	No
238. Commissioner of Stamp Duties (NSW) v Simpson [1917] HCA 69; (1917) 24 CLR 209 (10 December 1917)	No
239. Blackham v Haythorpe [1917] HCA 21; (1917) 23 CLR 156 (1 June 1917)	No
240. Keogh v Dalgety Co Ltd [1916] HCA 69; (1916) 22 CLR 402 (27 October 1916)	No
241. Gray v Dalgety Co Ltd [1916] HCA 35; (1916) 21 CLR 509 (2 June 1916)	No

242. Ford v Andrews [1916] HCA 29; (1916) 21 CLR 317 (5 May 1916)	**Yes**
243. Ardlethan Options Ltd v Easdown [1915] HCA 53; (1915) 20 CLR 285 (20 August 1915)	No
244. R v Hopkins [1915] HCA 51; (1915) 20 CLR 464 (6 August 1915)	No
245. Manning River Co-operative Dairy Co Ltd v Shoesmith [1915] HCA 32; (1915) 19 CLR 714 (22 April 1915)	No
246. Gray v Dalgety Co Ltd [1914] HCA 81; (1914) 19 CLR 356 (18 December 1914)	No
247. Spong v Spong [1914] HCA 52; (1914) 18 CLR 544 (29 September 1914)	**Yes**
248. Miles v Sydney Meat-Preserving Co Ltd [1912] HCA 87; (1912) 16 CLR 50 (19 December 1912)	No
249. Dowsett v Reid [1912] HCA 75; (1912) 15 CLR 695 (5 November 1912)	**Yes**
250. Cock v Aitken [1912] HCA 70; (1912) 15 CLR 373 (22 October 1912)	No
251. Creak v James Moore Sons Pty Ltd [1912] HCA 67; (1912) 15 CLR 426 (21 October 1912)	No
252. Nissen v Grunden [1912] HCA 35; (1912) 14 CLR 297 (30 May 1912)	No
253. Jones v Bouffier [1911] HCA 7; (1911) 12 CLR 579 (12 April 1911)	**Yes**
254. Black Black v S Freedman Company [1910] HCA 58; (1910) 12 CLR 105 (28 October 1910)	No
255. Campbell v Kitchen Sons Ltd Brisbane Soap Co Ltd [1910] HCA 50; (1910) 12 CLR 515 (1 October 1910)	No
256. Smith v Perpetual Trustee Co Ltd [1910] HCA 39; (1910) 11 CLR 148 (25 August 1910)	No

257.	Webb v Syme [1910] HCA 32; (1910) 10 CLR 482 (18 June 1910)	No
258.	Southern Law Society v Westbrook [1910] HCA 31; (1910) 10 CLR 609 (18 June 1910)	No
259.	Turner v New South Wales Mont De Piete Deposit Investment Co Ltd [1910] HCA 15; (1910) 10 CLR 539 (22 April 1910)	No
260.	**Johnston v Friends Motor Co Ltd [1910] HCA 10; (1910) 10 CLR 365 (7 April 1910)**	**Yes**
261.	Cock v Smith [1909] HCA 64; (1909) 9 CLR 773 (11 October 1909)	No
262.	Cadd v Cadd [1909] HCA 59; (1909) 9 CLR 171 (20 September 1909)	No
263.	Nicholson v Gander [1909] HCA 34; (1909) 8 CLR 648 (28 May 1909)	No
264.	Maiden v Maiden [1909] HCA 16; (1909) 7 CLR 727 (5 April 1909)	No
265.	Bayne v Stephens [1908] HCA 76; (1908) 8 CLR 1 (18 November 1908)	No
266.	Re Will Codicil of Walter Padbury, Deceased v Solicitor-General [1908] HCA 72; (1908) 7 CLR 680 (11 November 1908)	No
267.	Wheal Ellen Gold Mining Company v Read [1908] HCA 58; (1908) 7 CLR 34 (18 September 1908)	No
268.	Gander v Murray [1907] HCA 67; (1907) 5 CLR 575 (16 December 1907)	No
269.	Manuel v Phillips [1907] HCA 55; (1907) 5 CLR 298 (4 November 1907)	No
270.	**Reid v MacDonald [1907] HCA 45; (1907) 4 CLR 1572 (24 September 1907)**	**Yes**
271.	**Perpetual Trustee Co Ltd v Orr [1907] HCA 15; (1907) 4 CLR 1395 (17 May 1907)**	**Yes**

272.	W Scott Fell Co Ltd v Lloyd [1906] HCA 79; (1906) 4 CLR 572 (11 December 1906)	No
273.	**Bayne v Blake [1906] HCA 54; (1906) 4 CLR 1 (17 September 1906)**	**Yes**
274.	Austin v Austin [1906] HCA 5; (1906) 3 CLR 516 (14 March 1906)	No
275.	Slattery v R [1905] HCA 66; (1905) 2 CLR 546 (28 June 1905)	No
276.	**Luke v Waite [1905] HCA 5; (1905) 2 CLR 252 (18 March 1905)**	**Yes**
277.	**New Lambton Land Coal Co Ltd v London Bank of Australia Ltd [1904] HCA 23; (1904) 1 CLR 524 (6 September 1904)**	**Yes**

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