

which the Manager and the Trustee were entitled under the Deed.

- These stipulations made the trustee and the manager interested in due administration of the trusts of the Deed meaning the unit holders weren't the persons in whose favour alone the trust property might be applied by the trustee.
- **Principle:** The rule in *Saunders v Vautier* does not apply to a situation where the trustee's right of indemnity (reimbursement or exoneration) has yet to be satisfied. In such an instance, the trustee has a lien on the trust property, such that the beneficiaries do not have an absolute interest in the trust property.

FIDUCIARY OBLIGATIONS

1. THE NATURE OF FIDUCIARY DUTY

- Five part structure to answer fiduciary questions:
 - 1. Is there a fiduciary obligation owed?
 - 2. What is the scope of the fiduciary obligation?
 - 3. Has there been a breach of the conflict rule or the profit rule?
 - Normally best to do in that order
 - 4. Fully informed consent is an answer to any breach of fiduciary duty. Has there been fully informed consent?
 - 5. Remedies.
- Each step not necessarily important in every case.
- A fiduciary relationship is thus a relationship of confidence. The person in whom confidence is reposed within that relationship is referred to as the fiduciary. If a fiduciary abuses his or her position to obtain an advantage or benefit at the expense of the confiding party, the latter will be able to seek relief from a court of equity to prevent such advantage accruing to the fiduciary.
- The essence of fiduciary obligations is that the fiduciary is precluded from acting in any other way than in the interests of the person to whom the duty to so act is owed. In short, the fiduciary obligation is one of 'undivided loyalty'
- **Duties are strict**
 - No intent to defraud on the part of the part of the fiduciary is irrelevant (*Nocton v Lord Ashburton*)
 - Liability of fiduciary does not depend on establishing that the person whom fiduciary duties are owed suffered loss or injury
 - Fiduciary's liability arises even if person to whom duty is owed was unlikely or even unable to have made a profit from an opportunity exploited by the fiduciary
- *Nocton v Lord Ashburton* [1914]
 - N (solicitor); A (client. N and Baring (A's brother) entered into a land development. They later agreed to sell the land to F and H but D and H needed a mortgage. N convinced A to lend them the money after a valuation. Later, as properties developed it became clear that there was insufficient security in the land.
 - One of the judges said that there was a third way, besides fraud and deceit to sue N → breach of fiduciary duty
 - Breach did not require that actual fraud be proven in the common law sense of intention
- **Duties are negative**
 - Equity does not require fiduciary to act positively in the interests of their beneficiaries (*Breen v Williams*)
 - Exception:
 - Duty to disclose possible conflicts of interests and seek the informed consent of the beneficiary of the relationship

2. CONFLICTS BETWEEN INTEREST AND DUTY

- **Fiduciary obligation:** Duty imposed upon a fiduciary operates in circumstances where there is a conflict between the fiduciary's duty and his or her interest
 - Interest: presence of some personal concern on the part of a fiduciary or of possible significant pecuniary value in a decision to be taken by the fiduciary
- Australian approach emphasizes pecuniary interest. Conflicts must be financial.
- Way to approach: (*Breen v Williams*) → examine conduct first then relationship
 - **Step 1:** Is there any subject matter to which fiduciary duty could attach
 - E.g. Has a party made financial profit? Is there a recognized conflict of interest?
 - If no → enquiry ends
 - If there is a profit or conflict in narrow financial sense, then enquiry may proceed to Step 2

- **Step 2:** Whether such obligation is owed
 - Is the relationship of a fiduciary character?

No Conflict, No Profit Rule

- A fiduciary must account to principal for any benefit or gain that is obtained or received:
 - No conflict rule → in circumstances where there is at least significant possibility of conflict between his fiduciary duty and his personal interest in the gain
 - No profit rule → by use of his position as fiduciary, or of opportunity or knowledge resulting from it.
- Any such benefit or gain is held on constructive trust for the principal (*Chan v Zacharia*)

Chan v Zacharia

Facts:

- Doctors C and Z have been doctors in partnership. During time of partnership they have leased certain premises. Lease had an option to renew. Partnership was dissolved but C renewed the lease for himself. There is obvious value in keeping the same practice.

Held: C held lease as constructive trustee. C had taken personal advantage of opportunity that he acquired by personal fiduciary obligation. He only had ability to renew the lease because the partnership had originally entered that lease. Consent is needed by Z. Doesn't matter that Z does not suffer any loss.

Reasoning:

- Each party was obliged as fiduciary to the other to act in the interests of the dissolved partnership and beneficial realization of assets
- Suggests that ex partners may have ongoing fiduciary obligations towards one another which persists until the assets have been distributed. Fiduciaries will be held to account for any personal gain
- C obtained the lease through his position as fiduciary.
 - C was introduced to the premises through partnership.
- the appellant was bound to account in the winding up of the partnership as a constructive trustee for any benefit he received from the new lease. Chan breached fiduciary duty.
- To the extent that the doctor who got the next five years, made money out of it, that had to be accounted to the partnership which was in the process of being wound up.
- Commercial partners are fiduciaries. The law says that the partnership has come to an end but whoever is the owner of partnership property holds it as a constructive trustee for the partners until such time as it is wound up – that is just a given.
- **Deane J:** both before and upon its dissolution, each doctor had a beneficial interest in the assets of the partnership. After the dissolution they held the legal rights under the lease including the option as trustees for the partnership. The first role they held was as trustee of rights and the second was as a member of the former partnership.
- **Principle governing liability to account:** fundamental rule embodies two themes:
 - Conflict rule: appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty
 - Profit rule: requirement for fiduciary to account for any benefit or gain obtained by reason of or by use of fiduciary position or opportunity or knowledge resulting from it.
- The two themes, while overlapping, are distinct – can be in breach of conflict rule and profit rule.
- Any such gain or benefit is held by the fiduciary as constructive trustee.
 - It is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed.
- Chan holds the new lease as a constructive trustee under the general principle governing the liability of a fiduciary.

Hospital Products Ltd v United States Surgical Corp (1984) CLR

Facts: USSC was manufacturer of surgical stapling instruments. Blackman controlled company which was appointed by USSC as its exclusive Australian distributor. After a year they terminated distributor agreement but in the meantime company arranged to manufacture in Australia components of the products without the knowledge of USSC. Company distributed products in fulfilment of pre-existing orders and set up business in competition with USSC.

Issue: whether there was a fiduciary obligation in addition to breach of contract.

Held: there was merely a breach of contract.

Gibson CJ: two features that exclude fiduciary obligation

- It was a commercial contract, they dealt at arm's length and on equal footing
 - Just because something is commercial doesn't, of itself exclude fiduciary obligations
- It was clear that Company should at all times make a profit
 - It was likely at some point of performance of contract that the company's interests would

conflict.

- How is it possible to say company is under obligation not to profit from its position or place itself in a situation in which its duty and interests might conflict?

Mason J: found a fiduciary obligation – dissent on the facts *** what he says is authoritative

- Accepted fiduciary relationships often referred to as relationships of trust and confidence or confidential relationships – trustee and beneficiary, agent and principal, solicitor and client, employer and employee, director and company and partners.
 - Critical feature of these relationships is that fiduciary undertakes to act for/on behalf of/in interests of another person in exercise of power/discretion which will affect the interests of that other person in a legal or practical sense.
 - Relationship is one which gives fiduciary special opportunity to exercise the power or discretion to detriment of that other person who is vulnerable to abuse by the fiduciary of his position
- A contractual and fiduciary obligation can co-exist and contractual relationship in many circumstances has provided the foundation for fiduciary relationship
- Consequence of fiduciary obligation is that fiduciary is not able to act in a self- interested way
- Because USSC entrusted company with responsibility of protecting and promoting the market for USSC's products in Australia, company was a fiduciary in protecting USSC's Australian product goodwill. In no circumstances could it act in its own interests without reference to the interests of USSC.

The scope of the fiduciary duty:

- The scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case
- As a result of the contract here, fiduciary could act in self-interest however had duty not to take benefit by virtue of its position as fiduciary

Breach of fiduciary duty:

- Duty breached in two ways:
 - By developing capacity to manufacture copies of USSC's products with view to appropriate itself as whole of Australian market ▪ Deferring fulfilment of orders for USSC's products in anticipation of filling orders with their own goods.
 - Acts breached contract and fiduciary obligation (had fiduciary obligation been found)

Relief for breach

- (a) General principle governing liability to account
 - Fiduciary can't be permitted to retain profit or benefit which he obtained by reason of breach of fiduciary duty
 - Fiduciary liable to account for profit where it was obtained
 - In circumstances where there was a conflict/possible conflict of interest and duty
 - By reason of the fiduciary position or by reason of fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position
- (b) Constructive trust
 - Profit or benefit obtained held as a constructive trust.
 - It is no answer to application of rule that the profit is of a kind which the company could not itself have obtained or no loss is caused to the company

Deane J:

- constructive trust pursuant to which HPI is liable to account for it's own products should properly be seen as imposed as equitable relief appropriate to particular circumstances of the case rather than as arising from a breach of some fiduciary duty flowing from an identified fiduciary relationship. *** this argument has never been picked up.

Keech v Sandford (1726) → the fact that principal was never in position to make the profit themselves is irrelevant

Facts:

- A trustee held a lease of land on trust for beneficiary (infant). Lease is about to run out and trustee tries to renew the lease in favour of the infant (does job properly). Landlord refuses. He does not want the lease to be held on behalf of infant because he might have trouble getting money out from infant if there is default of rent payment. Trustee takes lease himself in his own name and not as trustee. Beneficiary has not lost anything. Trustee tried his best but it didn't work. Beneficiary cannot complain of any loss. This was an example of no conflict and no profit rule.

Held: In the end the trustee was found to hold the lease on constructive trust for the beneficiary because there was conflict of interest. Not about loss but about deterrence. Might create temptations for other fiduciaries to relax duty and not try as hard.

- If a fiduciary cannot make a profit from their position, then even when the beneficiary if themselves precluded from making a profit, the trustee still cannot go ahead to make that profit
- Principles attaching to fiduciaries are strict obligations, the high standard of conduct is designed to deter improper conduct

Confirmed in ***Boardman v Phipps***

Facts:

- Boardman acted as a solicitor for a trust. He attended the annual general meeting of Lester & Harris Ltd, a company in which the trust had a substantial shareholding. Boardman and Tom Phipps, one of the beneficiaries under the trust, were unhappy with the state of the company. Together they planned to acquire shares in the company to take over the company. Boardman was able to assess the viability of the takeover because of information about the company he gained whilst acting as solicitor for the trust. Boardman advised the beneficiaries of the trust of these plans and no objection was made by any of them. He also had the consent of two of the three trustees, the third, being senile, was not advised of these plans. The takeover was successful and resulted in profits to the trust in relation to its shareholding in the company as well as for Boardman and Tom Phipps in relation to the shares they had personally acquired. John Phipps, one of the beneficiaries under the trust, sought an account of the profits made by Boardman and Tom Phipps on the grounds of breach of fiduciary duties.

Issue: Was there a breach of fiduciary duty?

Held:

- Fiduciary can be accountable despite the fact that he had acted in good faith, and despite the fact that a fiduciary would not otherwise be able to take the benefit for themselves.
- Nothing short of 'fully informed consent' by beneficiaries would have permitted B to keep the profit.
- Also, there was the possibility of a conflict of interest
 - Mere possibility sufficient. (cf with *Chan v Zacharia*: 'real and substantial' possibility of conflict)
 - E.g. B could have used his shares as a tax offset by stripping the company of assets and run it at a loss (not to the benefit of the shareholders; B could accidentally mismanage the company to the detriment of the beneficiaries)

Result:

- B must account for any profits he made to the trust
- Shares will be held on constructive trust for the trust
- However, Court makes a reasonably generous award to allow for B's time and expenses in completing the takeover
- They were acting in breach by obtaining benefit from exercise in duty. It is no answer that the trustees couldn't/wouldn't have done what they did.
- Calculating the benefit: when working out what the benefit is, you must make just allowances. Appellants get credit for time, effort and capital they put in.

Interesting points:

- How can beneficiaries sue B? He was not a trustee. His clients were trustees of the trust and not the beneficiaries. He may have involved himself in the trust so closely that he became a de-facto trustee. He didn't get fully informed consent from all beneficiaries.
- What exactly did he do wrong? He was only exposed to this company when he acted as solicitor for trustees. But is that enough? (Factually becoming aware of opportunity while acting with fiduciary hat on). This was not public company so not publicly listed, but he could have rang up the Pty Ltd company to get financial info. Not secret but not public too. Did he extract the info or just happen to come across it?
 - Lord Hodson: the appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability.... Whether or not the trust or the beneficiaries in their stead could have taken advantage of the info is immaterial as the authorities clearly show
- Argument: Once established that he owes fiduciary obligation (but really?), he put himself in position of conflict. Once he puts himself in the company he can't act without conflict for the trustee. That being said, he could have refuse to advice the trustees regarding the company after he got the shares and then there would be no conflict. But there was no chance for that to happen
- Maybe in Australia, B would have won. Deane said in *Chan v Zacharia*:
 - It may still be arguable in this court that notwithstanding general statements and perhaps even decisions to the contrary in cases such as *B v P*, the liability to account for a personal beneficiaries for gain obtained or received by use of by reason of fiduciary position, opportunity or knowledge will not arise in circumstances where it would be U conscientious to assert it or in which, for example, there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interest of the person to whom the fiduciary duty is owed that the fiduciary obtain for himself rights or benefits which he is absolutely precluded from seeking or obtaining for the person to whom the fiduciary duty is owed.

- I.e. What B did wrong was misuse opportunity or knowledge (not conflict), this info was not secret info

3. CONFLICTS BETWEEN DUTY AND DUTY

a. Presumed Fiduciary Relationships

- **Presumed fiduciary relationships** (no need for analyses in the exam. Can just assert that this person is a fiduciary because he is in a status based fiduciary relationship)
 - Trustee/ beneficiary
 - Agent/ principal
 - Solicitor/ client
 - *Bolkiah v KPMG; Maguire v Makaronis*
 - Director/ company
 - Partner /partner
 - Ordinary partnerships are by the law assumed and presumed to be based on mutual trust and confidence of each partner.
 - After dissolved? *Chan v Zacharia* → Still owed duty until assets are fully divested
 - See *Murad*

Maguire v Makaronis

Facts: solicitors acting for Mr and Mrs Makaronis who want to buy chicken farm. They don't speak English very well. They needed money – solicitor offered to lend them money.

Issue: the solicitor's, in acting for Ms for purchase of poultry farm, job was to give them advice and this was in conflict with lending them money. Solicitor's interest is for interest rate on money lent to be as high as possible.

Held: if a transaction between a solicitor and a client is to stand, it must be open, fair and free from all objection, not merely fair.

- Conveying that there is a heightened standard of fairness in transaction when you have a fiduciary solicitor dealing with his own client.
- A defence to breach of fiduciary duty is to establish fully informed consent.
- How do you show fully informed consent?
- Question of fact – depends on all circumstances
 - No precise formula but it's not merely consent, it's informed consent and it's fully informed consent
 - Must give basic facts that give rise to the breach
 - It's not merely informed consent it's fully informed consent

Prince Jefri Bolkiah v KPMG

Facts:

- KPMG audited the Brunei Investment Agency when it was chaired by B. B was later removed from his position. B had also retained KPMG personally with other litigation which gave them access to his personal financial info. Later KPMG was asked by BIA to do further work. KPMG accepted and set up a Chinese Wall

Held: KPMG should be enjoined

- No absolute rule that solicitor could not act in litigation against a former client, but solicitor might be prevented from doing so if it were necessary to avoid a significant risk of disclosure or misuse of confidential info of a former client
- Court's jurisdiction to intervene on behalf of a former client was based on the protection of confidential information and the duty was to keep info confidential, not simply take reasonable steps to do so
- fiduciary cannot act at same time both for and against the same client. However this doesn't extend beyond that relationship. Just duty to keep information confidential.

Murad v Al-Saraj (2005)

Facts:

- 2 partners put in some money and redevelop the hotel to sell it. One of the partners looks like he was putting up x dollars but actually that money was not new money but through a writing off a debt owed by the hotel. The other partner did not know this. They bought the hotel redeveloped it and sold it. But later the other partner found out nature of contribution and sued him for breach of duty.

Held:

- Even if partner knew of nature, he would still have gone ahead with the deal but he would have gotten a greater profit share. BUT...Partner had to hand over all the profits he made out of the deal, not the difference between the profits that the deceived partner would have got and what he actually got
- Reason is because we are not looking at loss but gain. Only question is whether this profit was gained through a breach of fiduciary duty. If yes, no need for causal relationship (unlike loss). Doesn't matter if the gain could have been made outside breach of fiduciary relationship
- Equity seems to be acting punitively. But in fact it only aims to deter breach of fiduciary duty

b. Expanded Fiduciary Relationships

• Factors include:

- Undertaking to fulfil a duty in the interest of another,
- Scope for one party to unilaterally exercise a power or discretion that may affect the rights or interests of another; and
- Dependency on the part of one party which causes that party to rely upon the other

i. Commercial Relationships

***United Dominions Corporation v Brian (1985)* → Negotiation relationship →**

Facts:

- Joint venture agreement for the development of land between United Dominions Corporation (UDC), Security Projects Ltd (SPL) and Brian Pty Ltd (Brian). Land owned by SPL. Financed by UDC on security raised from SPL. Profits made but UDC kept more than its share by using a clause in the mortgage to SPL. Brian didn't know about the clause and received no profit

Issue: Did UDC owe Brian a fiduciary duty? Problem is that the clause had already been placed in the final k. Surely, in negotiation of deals, everyone is expected to be equal economic actors thinking of their own interest

Held: Duty owed even before finalization of k (at negotiation)

- It is quite clear that a fiduciary relationship may arise during negotiations for a partnership or, for that matter, a joint venture, before any partnership or JV agreement has been finally concluded if the parties have acted upon the proposed agreement as they had in this case. Whilst a concluded agreement may establish a relationship of confidence, it is nevertheless the relationship itself which gives rise to fiduciary obligations. That relationship may arise from the circumstances leading to the final agreement as much as from the fact of the final agreement itself (Dawson J)
- the relationship between the parties in the venture was a fiduciary one at least from the time when the formal agreement was executed.
 - Prima facie, where there is a joint venture in a commercial enterprise with a view to profit you have fiduciary obligation.
- The joint venture property was held on trust.
- A fiduciary relationship can arise and fiduciary duties can exist between parties who haven't reached or may never reach agreement upon the consensual terms which are to govern the arrangement between them.
 - Relationship between prospective partners will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps involved in its establishment.
 - Equitable obligations don't wait for contractual obligations.

***Hospital Products Ltd v US Surgical Corp (1984)* → Distributor relationship → NF!**

Facts:

- HP Ltd (Australian company) was distributor for USSC. USSC terminated the distributor relationship. HP started manufacturing and selling goods themselves, copying USSC goods. At trial and court of appeal, a breach of fiduciary duty was found, and ordered account for profits secured by equitable lien.

Held:

- HC → No fiduciary relationship in the first place. It looks like HP was USSC's agents in Australia. That is not quite right, they were distributor but not agent. They didn't have power to bind USSC. Although this was a close commercial relationship, it was still an arms length relationship that was entered into with the intention that both parties would gain a profit. Not fiduciary!
- HP definitely has breached k with USSC as they have promised not to do that. However, the remedy was only damages. If there was fiduciary duty breach, remedy is an account for profit.

ii. Employers-Employee

Warman v Dwyer

Facts:

- Mr. D was general manager of branch of W International. Through this position he became aware of opportunity to go into partnership with Italian company concerned with manufacture of gearbox. D left W and set up new business a large part of which was concerned with assembling and distribution of gearbox. W sued D for account of profits alleging that D owe them FD as GM and extracted corporate opportunity from W and took advantage of it for himself

Issue 1: Does D owe fiduciary relationship?

- Yes, he is of senior position and reasonably expected to owe duty to employer.

Issue 2: remedy?

- Trial: \$950000 account of profits
- CoA: equitable compensation of much lesser amount. You can sue for loss because of ending of

relationship with Italian company that happened earlier than it would have been. But relationship was going to end soon anyway.

- HC: overturned CoA. Question is not loss but gain! Whether this gain was made in breach of fiduciary duty
- Difficulty between Murad and Warman
 - In M, whole gain was disgorged.
 - In W, he set up a company that was going to go on. Some of the company's business was in breach but some are not (not gearbox).
- In the end was awarded D's profits for first two years of W's business but not for following years. It would be punitive to say that D's profits forever was to be given to W.
- Principal: can't reduce award of profit by raising causation

iii. Doctor/Patient

- Canadian authority which recognizes fiduciary relationship (*Norberg v Wynrib*)

Breen v Williams (Australian)

Facts: Concerning faulty breast implant. She wanted to join law suit in U.S. against manufacturers of implants. To do that she has to send her medical result from Aus. No absolute right to access medical record. She approached her doctor W, W says he will give her the record but only if she will sign a waiver promising not to sue. She didn't want to sign in and tried other avenues to get it. One of the arguments: doctors are fiduciary and they have to best interest of their principals, have to give medical record because it is in B's best interest.

Issue: existence and scope of fiduciary obligation.

Held: Court disagreed:

- to show that a medical practitioner owes a fiduciary obligation in certain circumstances doesn't extend to notes being made available. This is outside the scope of the fiduciary obligation. Scope is a question of fact.
- [I]t would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interest of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty. – Gummow J
- **[I]t is the law of negligence and contract which governs the duty of a doctor towards a patient.** This leaves no need, or even room, for the imposition of fiduciary obligations. Of course, fiduciary duties may be superimposed upon contractual obligations and it is conceivable that a doctor may place himself in a position with potential for a conflict of interest - if, for example, the doctor has a financial interest in a hospital or a pathology laboratory - so as to give rise to fiduciary obligations... But that is not this case
- 2 points to note:
 - 1) Starting with definition (you are fiduciary hence you owe obligation). That is wrong. Don't start by asking is someone in a category. **Start by asking is this person reasonably expected to owe obligations (no conflict and no profit duty).** If a doctor recommended a particular drug because he or she has an interest in manufacturer, then there is fiduciary duty.
 - 2) Fiduciary duty is in negative terms not positive terms. Duty is 'NOT to make unauthorized profit', 'NOT to act on conflict'. It is not 'TO act in the best interest'.

iv. Financial Advisor/Client

- Financial and investment advisers may owe fiduciary duties

Pilmer v Duke Group Limited (in liq) (2001)

Facts:

- Kia Ora Gold Corp Ltd was taking over Western United Ltd. Many Kia Ora directors had an interest in Western. A report by 'independent qualified persons' for the information of shareholders whose approval was ultimately required at a general meeting. The firm of chartered accountants (Nelson Wheeler) engaged by Kia Ora had, in fact, a long history of dealing with both that company and Western United Ltd. The report asserted that the price to be paid for the shares in Western United was fair and reasonable. This was not the case, with Kia Ora paying out around \$26m for \$6m worth of shareholdings and thus enabling huge personal profits to be made by the Kia Ora directors who held shares in Western United. Kia Ora subsequently brought an action against the partners of the accountancy firm seeking to recover for its loss.

Held: The accountants owed no relevant fiduciary duty to K

- There was no prior or concurrent engagement or undertaking by any member of the accounting firm which presented an actual conflict or a real or substantial possibility of conflict in the acceptance and performance of the retainer by the provision of the report

v. Crown/Indigenous Peoples

- Governments do not ordinarily owe fiduciary obligations to their citizens, even when they are overseas and at risk of torture (*Habib v Cth*)
- However, courts, especially in Canada, have discussed existence of fiduciary duties owed by Crown to indigenous people, because of the recognition that the aborigines, as original occupiers of land, have special rights that are protected by the imposition of fiduciary duties upon the crown (*R v Guerin*)
- That being said, Australian courts have not followed (*Mabo; Wik*)

R v Guerin (Canada)

Facts:

- Lease of land to golf club in which the Canadian's first peoples had an interest. The Indian Nation in question said to the government the terms that it would accept. The government in acting for that Indian nation agreed to lease to golf club on terms that were outside authority of the Crown. Years later, the Indian nation sued for equitable compensation for breach of fiduciary duty. They could do that because by statute the Crown must interpose themselves between group of Indian nation and private developer.

Held:

- The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown. An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown acting on behalf of the band's behalf. ... The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

Mabo v Queensland (No 2) (1992)

- Only Toohey J found that there was a breach of fiduciary duty
 - [I]f the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. – Toohey J
- However, he observed that the existence of the fiduciary relationship does not preclude the use of the legislative power of the Crown to extinguish aboriginal rights even though that would constitute a breach of the relationship

Wik Peoples v Queensland (1996)

- Brennan J (dissent): Found that Crown's power to extinguish native title did not by itself give rise to fiduciary duties. It was necessary for the exercise of the crown's power to be for the benefit of aboriginal peoples before the Crown could be found to owe fiduciary duties to them

AG for HK v Reid (NZ) → Civil servant / crown

Facts: Mr. R was a crook who took bribes in HK. He went to jail. He previously took bribe money and bought farms in NZ. HK government pursued him and placed caveat over the farm in NZ.

Issue: Did the Crown HK have a proprietary interest in the farms?

Held:

- Money or property constitution an offered and accepted bribe belongs in law to the recipient. However, equity dictates that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty
- Fiduciary who has received a bribe is responsible for both original amount of bribe and for the increased value of property representing the bribe. Once bribe received, fiduciary holds it on constructive trust for the person to whom the duty's owed.

On the point of whether there was a fiduciary duty

- Court held that there was.
- But note not all civil servants are fiduciary.
- In exam say: R was a fiduciary, so if facts of another case is sufficiently close, civil servant in the case will probably be a fiduciary.
- In Australia, it has always been clear that a thief who takes property holds it on constructive trust. A senior executive who takes a bribe holds the bribe on constructive trust for the partnership/company.
- In England, the position is more complicated. Here it is held that fiduciary that takes bribe does hold it on constructive trust.
- *FHR European v Cedar Capital* 2014 UKSC 45 – better case than Reid.
 - Same man who had followed *Lister v Stubbs* had by this stage the president of
 - UK Supreme Court and said they were wrong in *Sinclair v Versailles*. Should have followed the rest of the world. Outcome is now – no carve out for bribes. A fiduciary who obtains a benefit, whether or not it was criminal law, is liable to hold on account as trustee.

- **Exam – useful to mention FHR and Cedar Capital confirming what was held in Reid.

4. **REMEDIES**

Why we want fiduciary relationship

- Gets gain based relief. In M they could have sued for equitable compensation. But they would only have got the difference between what they got and what they should have got. Under gain based relief they got all the profits.

- No contributory negligence for breach of fiduciary duty

1. **Rescission**

- a. Rescission: Undoing transaction
- b. Should be the first thought! Unwind the breach!
- c. Often not available as soon as third party gets involved
- d. *Maguire v Makaronis* (1997) 188 CLR 449

2. **Equitable Compensation; OR**

3. **Account for profits**

- a. Personal gain based relief

4. **Proprietary relief**

- a. Proprietary gain based relief (constructive trust)

5. **Possibility of injunctions when someone is threatening a breach of trust.**

a. **Rescission**

Maguire v Makaronis (1997) → Illustration of rescission; and fully informed consent

Facts: Maguire & T were solicitors. Mr. and Mrs. Makaronis were their clients. Solicitors acted for their clients in purchase of a chicken farm. Solicitors arranged bridging finance themselves, i.e. lent money to Makaronis. Interest rate was high 24% with discount of 22% for prompt payment. It was secured by mortgage over property. Appears to be conflict. Solicitors did not hide the fact that they were lending the money, i.e. there is fully informed consent.

Held: HC disagreed that there is fully informed consent. There is a breach of fiduciary duty. What's the remedy?

- Rescission: Solicitor has given Mr. and Mrs. Makaronis a large amount of money. Makaronis wanted remedy such that they did not have to repay. But HC → Makaronis could rescind the mortgage (don't have to pay 22%), but they had to repay the advance to solicitors with interest at the rate at 9%.
- Rescission: put everyone back to where that would have been. Solicitors would have kept that money and put it into savings at about 9%.

b. **Equitable Compensation and Damages**

- **Equitable compensation asks what loss is caused by the breach**

Stevens v Premium Real Estate Ltd [2009]

Facts: Estate agents recommending that vendors sell to somebody that the estate has a pre-existing relationship with, and does not disclose it.

Held: Duty-interest conflict → equitable compensation

Nocton v Lord Ashburton [1914]

Facts:

- Solicitor, N, and Client A. N negligently advised A to release part of mortgage security. A few years later, A suffered losses when it turned out security he had was not enough to cover his debt. Now he suffers a loss because he released part of mortgage security.
- However, this was known many years later. Any claim for negligence was time-barred. Only way A could recover is to claim breach of fiduciary duty. N did his job poorly, but no conflict here.

Held: Unknown to anybody at the time, N had a security over the same asset that he advised A to release. There was a factual conflict, even though N may not be aware or did not act dishonestly.

- Not going after gain, but loss → equitable compensation
- Operating in persona as a Court of conscience it could order the D (not to pay damages) but to make restitution or to compensate P by putting him in as good a position pecuniary as that in which he was before the injury

CBA v Smith (1991)

Facts: Bank acting for the purchasers and vendors of hotel. Purchasers over-paid and the bank was sued for negligence and breach of fiduciary duty. The reason it can be called a breach of fiduciary duty was because the bank did not disclose that it was also acting for the vendors

Held: duty-duty conflict → equitable compensation (amount overpaid for the hotel)

Pilmer v Duke Group Ltd [2001]

Court had limited an amount of equitable compensation by reference to contributory negligence. In Day v

Mead, allowed in NZ. But in Australia → fusion fallacy.

Court in this case rejected Day v Mead, and said that contributory negligence not allowed to reduce equitable compensation.

c. Account for Profits

- One can either have account of profits or equitable compensation. Not both

Warman Intentional v Dwyer

Facts:

Warman are the exclusive Australian distributors of particular motorbike and motorbike parts. Their two-year distributorship is coming to an end. Dwyer, the sales manager for QLD goes behind company's back and tells motorcycle company that he will do a better job at selling parts than Warman. As a senior employee he has fiduciary obligations to employer. He has put himself in a position of conflict and is making a benefit out of it. Italians start partnership with new company Dwyer sets up. They make lots of money.

Result:

- Warman was entitled to an account of profits made by the new company in its first two years of operation on the basis of the net profits of the business before tax less an appropriate allowance for the expenses, skill, expertise, effort and resources contributed by the D
- CA finds Dwyer in breach of fiduciary duty. Dwyer has made money and Warman has suffered loss however you cannot sue for both. Equity insists an election must be made between account of profits or equitable compensation.

d. Causation: Recission and Equitable Compensation and Damages

- Causation:
 - Re Dawson
 - Target Holdings
 - Magure v Makaronis
 - Youyang
- Plaintiff's contribution to loss (Mitigation of damages)
 - In NZ and Canada, courts have held that a P's claim for equitable compensation may be successfully defended on the basis that his or her contribution to the loss may be a complete or partial defence to liability on the part of the D (Canson)

Canson Enterprises v Boughton [1991]

- Solicitors acted in breach of duty on a conveyance. Purchaser builds a shed. The shed collapses and causes loss. Sue solicitors because they're acting on both sides of transaction. Canadian court unanimously says you can't say that the loss caused by your dodgy building of shed on this land is in anyway connection to breach of fiduciary duty by acting in non-disclosure for both parties.
- Has to be some casual connection between fiduciary duty and loss caused.

Facts:

- Solicitors acted in a dodgy land development where secret profits were made but others. Later the land development went sour due to negligence in the pile driving during construction. A negligence action was successful but the judgment was partly unsatisfied.
- Trial judge found liability and assessed damages by the same causation rules as deceit

Held:

- Re Dawson: equitable compensation of trust is not governed by causation.
- What the solicitor did counted as breach of fiduciary duty in Canada. Not in Australia! Solicitor did not act out of conflict, or gained any profit. It was breach of duty of care, but not breach of fiduciary duty!

Quotes:

- There might be room for concern if one were indiscriminately attempting to meld the whole of the two systems. Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules. But when one moves to fiduciary relationships and the law regarding misstatements, we have a situation where now the courts of common law, now the courts of equity moved forward to provide remedies where a person failed to meet the trust or confidence reposed in that person. There was throughout considerable overlap. In time the common law outstripped equity and the remedy of compensation became somewhat atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important where the same policy objective is sought.
- In negligence and contract the law limits the actions of the parties who are expected to pursue their

own best interest. Each is expected to continue to look after their own interests after a breach or tort, and so a duty of mitigation is imposed. In contrast, the hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client. It may not be fair to allow the fiduciary to complain when the client fails forthwith to shoulder the fiduciary's burden. This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach. When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been 'the author of his own misfortune'. At this point the plaintiff's failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach. But until that point, mitigation will not be required.

Pilmer v Duke

- **HCA rejected notion of contributing fault impacting award for breach of fiduciary duty.**
- The appeal to the High Court by the former partners of the accounting firm succeeded on the basis that the calculation of damages to compensate for Kia Ora's loss had been incorrect and also that no fiduciary obligation had been breached. Although Kirby J disagreed on the latter score, the court was of one mind in rejecting any place for reduction on the basis of the plaintiff's conduct in the determination of equitable compensation. The reasons included an appreciation of the essence of the fiduciary relationship in which the beneficiary has no obligation to protect himself or herself against the fiduciary and the nature of contributory negligence in tort law. McHugh, Gummow, Hayne and Callinan JJ, at CLR 201–2; ALR 274, said:
- Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common law. Astley indicates that the particular apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in Astley would suggest, a fortiori, that such legislation did not touch the fiduciary relationship.

Exemplary damages

Harris v Digital Pulse Pty Ltd

Cannot receive exemplary damages for breach of fiduciary duty.

Facts:

- This case concerned an action by Digital Pulse against two former employees who had diverted work to their own company.
- This was in clear breach of the clause in their contracts of employment not to compete with Digital Pulse for business.
- At first instance, Palmer J also found that the defendants had been in breach of the fiduciary duty which they owed their employer.
- So flagrant was the defendants' behaviour that, in addition to other forms of relief, his Honour awarded \$10,000 exemplary damages against each.

Held: The majority of the Court of Appeal upheld the appeal and found that Palmer J had erred in awarding exemplary damages on these facts.

- JA, at 360–91, who authored the leading judgment, expressed a fundamental objection to the concept of damages as punishment at equity after a thorough canvassing of authorities. He rejected the persuasiveness of New Zealand and Canadian authorities. Indeed, his Honour's ultimate dismissal of exemplary damages in equity laid the blame for the suggestion at the door, not so much of Palmer J, but the New Zealand Court of Appeal. His Honour, at 416, said:
- What [that court] contemplated in the Aquaculture Corporation case was a form — perhaps a mild form, but a form nonetheless — of fusion. It was fusion in the sense of selecting a remedy from the common law range of remedies which a court of equity administering the law relating to equitable wrongs before the introduction of a judicature system would not have administered. What is contemplated is that the unified court administering the two systems may select a remedy historically granted by the courts of common law in relation to a wrong recognised only in the courts of equity. But whatever one calls the process, it must be recognised as a process involving a deliberate judicially-engineered change in the law

Mason P dissented. His Honour, at 326, said:

- Both 'Equity' and 'Common Law' had adequate powers to adopt and adapt concepts from each other's system well before the passing of the Judicature Act, and nothing in that legislation limits such powers. They are of the very essence of judicial method which was and is part of the armoury of every judge in every 'common law' jurisdiction

e. Proprietary Relief