NOTES

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 employer, 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 injuncted

- 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 go
- 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 oarties 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 impacts. 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 Stubss* had by this stage the president of
    - UK Supreme Court and said they were wrong in *Sinclar v Versaille*. 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 Captial 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. Recission

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 Intenational 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. <u>Proprietary Relief</u>

SCAFFOLD

TOPIC 1: THE HISTORY AND NATURE OF EQUITY

WHAT IS EQUITY?

- **Equity** – the body of cases, maxims, doctrines, rules, principles and remedies which derive from the jurisdiction established by the English High Court of Chancery → CL is self sufficient system
    - **Fiduciary Duty**: Obligation to act in the best interest of another party subordinate to his/her own interests
        - E.g. trustee and beneficiary, agent and principle → Presumed to be fiduciary
        - **Two obligations universally acknowledge**:
            - **1**. Obligation not to be in situation where there is a real possibility of conflict between self interest and fiduciary duty
            - **2**. Obligation not to make profit from fiduciary position
        - If breach = damages even if no harm has been
- **Fundamental principle according to which equity acts:** a party having a legal right shall not be permitted to exercise it in a way that the exercise amounts to unconscionable conduct.
    - Harsh unconscionable results which would flow from application of common law rules alone in certain cases provided the theoretical and moral justification for the existence of Chancery
    - **Aristotelian conception** of equity as a '**rectification of law where the law falls short by reason of its universality**' of great significance
        - Injustice flows form generality of the laws rules and inability to mould rules to fit the circumstances of the case
    - **The notion of conscience is central to equitable jurisdiction**
- **Three Main Courts of Law in Westminster** – King's Bench, Common Pleas, Exchequer Chancery
    - In 19th century there were different outcomes of same dispute depending whether heard in King's Bench (criminal CL) and Commons Pleas (civil CL) or Exchequer Chancery/Court of Chancery (equity)
    - Court of Chancery developed as distinct body to deal with petitions for discretionary relief from oppression or injustice from harsh judgements of common law courts
    - Petitions dealt with **through common injunctions** – orders preventing opposing party from putting forward claim which equity found obnoxious/executing obnoxious common law judgement
    - Developed as a jurisdiction to **escape harsh/oppressive judgements at CL**
        - Granted discretionary relief as 'men's actions are diverse and infinite'
        - To correct men's consciences for frauds, breach of trusts, wrongs, oppressions and soften extremity of the law
    - Whilst law and equity are distinct in their courts, judges and rules of justice they both aim at one end – to do right and achieve justice
- Interested in **remedies beyond damages**: injunctions, estoppel, specific performance
- **Common Injunctions → No longer exists**
    - Issued by chancellor – provided that no steps were to be taken further in the common law action until the question of availability of equitable defence had been decided
    - Came to head in *Earl of Oxford's Case* whereby King James I decided they could continue with these – common injunctions could still be issued

***The Earl of Oxford's Case in Chancery* (1615)**
Principle: First case to find distinction between equity and common law. Equity will prevail and common injunctions will continue to be issued.
If there is a conflict between rules of equity and common law, equity wins.

- **Three Equitable Jurisdictions**
    - **Concurrent Equity Jurisdiction:** matters in which both the equity and CL courts have jurisdiction to make orders
        - E.g. enforcement of contract where primary equitable remedy is order for specific performance and CL remedy is an order for damages.
    - **Exclusive Equity Jurisdiction**: relief against invasion/breach of legal rights which are not protected by equity in the concurrent jurisdiction
        - Matters in which equity has an exclusive cognizance because no relief can be obtained at CL
        - Intervention of equity justified as necessary to prevent multiplicity of actions at law upon same subject matter or prevent irreparable injury not properly compensated by damages
        - These requirements did not apply when case fell into concurrent jurisdiction
    - **Auxiliary Equity Jurisdiction**: a person goes to equity merely in order to obtain its assistance in proceedings, which they are taking, or about to take in courts of law.
        - E.g. Seek order of injunction to prevent irreparable injury to property pending decision at law

JUDICATURE ACTS

- Historically law and equitable jurisdiction administered separately.
- **4 Important areas of limitation upon equity's recognition of legal rights:**
    - 1. Chancery had no power to decide disputed legal right or title as a step in protecting it against invasion
    - 2. Limited power to transfer a suit to the common law courts; a plaintiff who brought action in the wrong court had to start again
    - 3. Could not award common law remedy of damages for invasion of equitable right existing only in exclusive jurisdiction. Cannot bring common law claim that only requires award of damages.
        - In 1858 *Lord Cairns' Act* gave chancery limited power to award damages in addition to or in substitution for injunction or decree of specific performance
        - Provision is re-enacted from time to time and is still in force in England and all Australian states – it isn't settled, except in Victoria, by legislative amendment (*Giller v Procopets*) whether the Act gave power to award damages in the exclusive jurisdiction or was limited to suits in respect of legal rights and titles.
        - E.g. if injunction is not issued – but had legitimate loss (equity cannot issue damages) – cannot transfer files, would need to restart in CL courts
    - 4. Differed from Common law courts procedure – relied on affidavit evidence and avoided juries
- **Conflicts between law and equity**
    - Limited class of case in which the same dispute might be the subject of proceedings both at law and in equity, which would be decided differently because of a conflict between law and equity as to the applicable rule of substantive law.
    - ***Coroneo v Australian Provincial Assurance Association Ltd* (1935)**
        - Orders for injunctions and specific performance are actions in court of chancery and can't be maintained at common law
    - ***Nelson v Nelson 1995***
        - Equity offers discretionary relief attuned to particular facts of a case.
- **Introduction of The Judicature System**
    - The Judicature Acts of 1873 and 1975 (UK) attempts to solve the problems of separate courts state above
        - Common injunction became obsolete and abolished
        - s 25(11): Provided that in event of conflict, equity shall always prevail at the outset
        - s 24: empowered judges to give effect to both common law and equitable principles
            - No intention in the legislation to fuse the principles of common law and equity into one system of law
    - **<u>Judicature system adopted in all states of Australia</u>**
        - The scheme of the judicature system appears from its **NSW** counterpart in the
            - *Law Reform (Law and Equity) Act 1972* and the
                - **s 5:** in the case of conflict the rules of equity prevail
            - *Supreme Court Act (1970-73)*
                - **s 57:** the Court shall administer concurrently all the rules of law, including the rules of equity
                - **s 58:** if equitable claim against some legal right and the relief can only be given in equity court – the same court gives you that relief
                - **s 61(1):** The Court shall not restrain by injunction any proceedings pending in the court – abolishes common injunction
                - **s 61(2):** stipulated that there was a defence to common injunction

FUSION FALLACY – RESULT OF JUDICATURE SYSTEM

- Judicature system has **two essential and conceptually distinct effects**:
    - Fuses procedures of old common law and equity jurisdictions
    - Embodies in statutory mandate the **supremacy of equity** over law in cases of conflict between the rules
- **Fusion Fallacy**
    - Results have been **called 'fusion fallacies'** – they are explicable by application of neither law nor equity and can only be the product of a change in substantive principles in English jurisprudence
        - A fusion fallacy arises when the decision reached in a particular case is one which could not have been reached under the separate system of courts that existed before the judicature system reforms were enacted
        - Administration of a remedy not previously available at common law or equity e.g. in the words of Heydon JA in *Harris v Digital Pulse* '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 the judicature system would not have administered'
    - **The legislation had no intention to fuse the principles of common law and equity into one system of law →** More of administrative reform
    - E.g. legislation did not authorize the new court to award CL damages for breach of an equitable obligation.
- Windeyer J in *Felton v Mulligan* referred with approval to Ashburner's metaphor that asserted that "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters"
- Although it is quite clear that legislation fusing formerly separate courts into one court did not of itself permit fusion fallacies, there is nothing in legislation to suggest that the law could not develop in such ways in the future.
- NOTE: Lord Diplock argued against the separation and believed the Judicature Act did represent a fusion of the jurisdictions → REJECTED IN AUSTRALIA
    - This view has been supported by Courts in New Zealand and Canada where courts asserted that common law and equity are mingled/merged

Harris v Digital Pulse Pty Ltd (2003)

- H, in defiance of express term of employment contract, secretly worked for benefit of his own business and competed with employer during course of employment. DP sued for exemplary damages for breach of fiduciary duty → can exemplary damages (CL remedy) be awarded for equitable obligation
- **Currently NO**. → would be fusion fallacy
    - It is unnecessary/undesirable to decide case on basis that punitive monetary award can't ever be awarded in equity. Remedial flexibility is characteristic of equity's jurisdiction.
        - Sir Anthony Mason: There is no reason why courts in shaping principles, whether their origins lie in CL or equity, should not have regard to both CL and equitable concepts, borrowing them either as may be appropriate.
    - Such a view, if based upon the view that the fusion of courts allow new single court to award common law remedies for breaches of equitable obligations, amounted to a 'crude fusion fallacy'
- The fiduciary relationship is much closer to contractual relationship than tortuous and exemplary damages aren't available for contract in Australia – court should not develop this for the first time.

***Walsh v Lonsdale (1882)* → ALL WRONG**

- Lease b/w W and L, not under seal and therefore void at law. L sought 1 years rent, payable in advance. W refused, L distrianed W's goods. W sued L for wrongful distress and that in possession without a lease with rent payable quarterly, not in advance.
- Remedy for distress granted.
- The case establishes that, until a formal lease is executed in compliance with a decree of specific performance, there exists an equitable lease only, although the parties to the lease stand in the same position as if a lease has been granted.
    - **Note:** this is a fusion fallacy – held that there was an equitable right (interest in the property) but there was a common law remedy of wrongful distress. This is **not the approach in Australia.**
- There aren't two estates as there were formerly – one at common law by reason of payment of rent from year to year and one at equity under agreement. There is only one court and equity rules prevail in it.

***Chan v Cresdon Pty Ltd (1989)* → CORRECT**

- Lease agreement b/w CP and Sarcourt (owned by C), lease not registered (void at law). Sarcourt defaulted, CP took action against C as guarantor of the unregistered lease ('C guarantor under this lease')
- CP unsuccessful → there was no registered lease there was no enforceable guarantee.
- **Two reasons:**
    - 1. This is a guarantee and the law has a **very narrow approach to construing guarantees**
        - Guarantee obligations are "under this lease" (document says this) → No reason for construing it as an equitable lease (promise to give lease) the promise reflected in the bargain is to be a legal lease
        - C would be liable pay all rent Sarcourt owed under legal lease → however only equitable lease
        - Still have obligation to pay in an equitable lease however no guarantee in the equitable lease of paying rent – also must sue in equity
    - 2. Although rule in *Walsh v Lonsdale* meant an agreement to lease gave rise to an equitable lease, it **didn't create a legal interest.**
        - Insists difference between legal lease (CL) and the specifically enforceable promise for a legal lease (equitable lease)
            - Difference evident when 3rd party is introduced: The equitable lessee will be defeated by a bona fide purchaser of the legal estate (3rd party) who acquires the

legal estate for valuable consideration and without notice of the equitable lease.
    - Court confirmed that operation of the rule depended on the availability of specific performance of the agreement to lease.
- Two facts raised doubts as to the availability of specific performance:
    - Cresdon had in the meantime mortgaged the property
    - The lease had come to the end before expiration of the term due to Saracourt's breach.

    Because specific performance is discretionary, a court can 'backdate' it so that a lease that has expired can still be susceptible to a decree of specific performance.

***Day v Mead [1987]* → NZ CASE, DIFFERENT POSITION TO AUSTRALIA**

- M was D's solicitor. On advice of D, M invested (purchased shares) in D's company. D participated in the management of the company, which later went into receivership and lost investments. M had numerous conflicts of interests. → D sued M for loss plus interest, claiming breach of fiduciary duty.
- At trial, **the award for equitable compensation was reduced by half** on the basis that the Plaintiff did not seek to protect his own interests by engaging independent and competent financial advice
    - Imported contributory negligence into equity
- **Regardless of whether there has been previous cases** where compensation for breach of fiduciary has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course
- **It is an opportunity for equity to show that it has not petrified and to live up to the spirit of maxims.**

MAXIMS OF EQUITY

- Maxims of equity are **fixed and formulaic statements** of **certain broad equitable principles**
    - Not rules or laws and can't supply answers to specific legal problems
- They perform rhetorical function for judge of demonstrating how the decision is imbued with ancient values of ancient jurisdiction and can represent certain fundamental moral ideas and themes which lie at the heart of equitable jurisdiction
- **Maxims**
    1. Equity looks on that as **done which ought to be done**
        a. Where one for valuable consideration agrees to do a thing, such executory contract is to be taken as done and the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he agreed to
    2. Equity **follows the law**
        a. Equity recognises common law rights, estates, interests and titles and doesn't say that such common law interests aren't valid
    3. He or she who comes into equity must come with **clean hands**
    4. He or she who **seeks equity must do equity**
        a. Plaintiffs in equity must fulfil their legal and equitable obligations before seeking a remedy.
        b. *Nelson v Nelson* – merely putting property in name of someone else and buying it yourself gives you an equitable interest in property but, you have defrauded the government to do so – mother had to pay back government as price of getting equitable relief
    5. Equity **doesn't allow a statute** to be made an **instrument of fraud**
    6. **Equality** is equity
    7. Equity **acts *in personam***
    8. Equity **will not assist a volunteer**
        a. It is the presence of valuable consideration that will attract the intervention of equity
    9. Equity **looks to intent not form**
        a. Courts of Equity make distinction between that which is a matter of substance and that which is a matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such a form and thereby defeat the substance
    10. Equity will **not suffer a wrong to be without a remedy**
        a. It isn't sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time.
    11. Where equities are equal, t**he law prevails**
    12. Where the equities ar**e equal the first in time prevails**
    13. Equity **aids the diligent not the tardy**.

Corins v Patton (1990)

- Mr and Mrs P joint proprietors of land. Mrs P want interest to transfer to her husband after her death – transferred her interest 5 days before her death to C. → Mrs P executed deed of trust in accordance with order of court (given to solicitor). However needed to obtain duplicate copy of certificate of title from bank of NSW → Took no steps to do so before dying

- Joint tenancy was NOT severed. → For equity to recognise a gift, the intending donor has to do all that is necessary to transfer legal title, such that the legal transfer could be effected without any further action on his/her part. → Declaration of intention is not sufficient
- "Equity will not assist a volunteer" **– like other maxims of equity, it is not a rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill defined and somewhat uncertain.**

TOPIC 2: BREACH OF CONFIDENCE

- **Breach of Confidence:** The tort of failing to preserve the secrecy of confidential information despite having undertaken to do so. Equitable remedy available under doctrine of breach of confidence
  - **Contract:** Contractual promises of confidence will be enforced – breach will result in contractual damages and possibly injunction in equity's **auxiliary jurisdiction**
  - **No Contract:** Can occur where there is no contract or where d was not a party to any contract
- **TEST:** ***Optus Networks Pty Ltd v Telstra Corp Ltd***
  - **Facts:**
    - Agreement between companies about fees of use of copper cabling. Telstra knows every call Optus subscribers make. Agreement that Telstra will keep records of Optus calls but information will only be used for billing.
    - Telstra breached contracts. Optus did not want damages, they wanted an account of profits because Telstra had made money out of breach of confidence.
  - **To establish an equitable breach of confidence:**
    - 1. The information in question must be identified with specificity.
    - 2. It must have the necessary quality of confidence;
    - 3. It must have been received by/imparted D in circumstances importing an obligation of confidence; and
    - 4. There must be an actual or threatened misuse of the information without P's consent.
- *Coco v A N Clark (Engineers) Ltd*
  - For *quia timet* relief is readily available for threatened misuse, including in the absence of detriment, and there can be an accounting for profits for unauthorised use by the defendant of information which occasioned no loss to the plaintiff
  - Gummow J: the obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff

1. Must Be Able To Specify The Confidential Information

- Only if you can identify information so it can be written out in court order can equity protect it – normal remedy is injunction → Generally not an issue

O'Brien v Komesaroff **(1982)**

- O and K partners selling 'tax minimisation devices'. O was a solicitor who drafted the 'devices'. After fallout K continued to sell 'devices'. O sued for infringement of copyright and for breach of confidence.
- 'Tax devices' was advice O **published regularly to the world at large**, albeit for a limited purpose the nature of such information ill accords with the accepted conception of confidentiality. The information is **too general** and can't satisfy that it was imparted in circumstances that gave rise to obligation of confidence.
- Although **equitable protection may be given to ideas** as opposed to their expression (contrast copyright), in order to be capable of being treated confidentially, the **idea must be sufficiently well developed to be capable of realisation.**

2. Necessary Quality of Confidence

- Absolute secrecy not required – question of degree → Dependent on facts
- **Three Categories:**
  - Commercially sensitive information
  - Personal
  - Held by Governments

Commercial

- Factors; *Thomas Marshall (Exports) Ltd v Guinle, Ansell Rubber Co Pty Ltd v Allies Rubber Industries Pty Ltd* and *Wright v Gasweld*
  - Extent to which information is known outside the business
  - Extent to which trade secret was known by employees and others involved in plaintiffs business
  - The extent of measures taken to guard the secrecy of the information
  - The value of the information to the plaintiffs and their competitors
  - The amount of effort/money expended by the plaintiffs in developing the information
  - The ease/difficulty with which the information could be properly acquired or duplicated by others

- Whether it was plainly made known to the employee that the material was by the employer as confidential
- The fact that the usages and practices of the industry support the assertions of confidentiality
- The fact that the employee has been permitted to share the information only by reason of his or her seniority/high responsibility
- That the owner believes these things to be true and that belief is reasonable
- The greater the extent to which the 'confidential material' is habitually handled by an employee, the greater the obligation of the confidentiality imposed
- That the information can be readily identified.

- The general question is, however, "would a **person of normal intelligence**, in all the circumstances of the case, including, inter alia, the **relationship of the parties** and the **nature of the information** and the **circumstances of its communication**, **recognise this information to be [confidential]**" – Fullagar J in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd*

Public Domain

- Once information gets into the **public domain** it can **no longer be the subject of confidence** – *Douglas v Hello! (No. 3)*
- **What is the 'public domain'?**

Johns v Australian Securities Commission (1993)

- ASC conducted private confidential examination of company. Originally disclosed to State Royal Commissioner on instances privately, on second instance on the basis they could be tendered. When tendered, copies were made available to the media, which published the reports of their contents.
- A defendant who, having received information **in circumstances which impose a duty of confidence**, **makes a limited publication** in breach of that duty, **can be restrained from further breaching the duty** by making a wider publication.
  - Here the transcripts were exhibits tendered before the Royal Commission sitting in public.
  - **When the proceedings of a court, tribunal or commission created by statute or in exercise of the prerogative are open to the public and a fair report of the proceedings can be lawfully published generally, it isn't possible to regard information published in those proceedings as outside of the public domain** – *Home Office v Harman*
- **Gaudron J:** It has been held in Australia that a third person who comes by information innocently may be restrained from making use of it once he/she learns that it was obtained in circumstances involving an breach of confidence
  - **Publication does not destroy right to sue for original breach:** Regardless of 'the consequences of the tender of the transcripts in the proceedings of the Royal Commission… it does not follow that the tender brought the ASC's obligation of confidence to an end…. Publication, no matter how extensive and no matter whether by third parties or by the person who owes the primary obligation, does not necessarily extinguish an obligation of confidence.
- Question of whether there should be a duty on third parties must depend on the extent to which the information in question is generally known or available

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001)

- The Commonwealth, intervening, sought unsuccessfully to dilute the requirement of confidentiality

Gummow and Hayne JJ rejected the submission as follows:

- 1. A court of equity has jurisdiction to enjoin use of information obtained by **illegal or improper means** which need not have the necessary quality of confidence → protected on the ground that it would be 'unconscionable'
- 2. **Third party** may be enjoined from using information even if **not implicated** in the illegal or improper initial obtaining of it.

NOTE: Enjoin → prohibit someone from performing (a particular action) by issuing an injunction.

Employment

University of Western Australia v Gray (2009)

- **Employment setting**: Information communicated to/acquired by the employee in the course of his/her employment has the necessary quality of confidentiality → employee has duty of confidence, unauthorised use or disclosure of the information by the employee will be an actionable wrong.
  - Relatively secret, not trivial and it not public property or knowledge
- **Factor Include:**
  - When information has been produced or obtained only after the **expenditure of time or money**, either by way of research or in the application of skill and ingenuity
  - The novelty or originality of the process, technique or product which the information encapsulates is an important indicator that the information itself is not already in the public

domain.
    - What is required in the cases of technical, scientific and business information is 'some product of the human brain which is relatively secret' – *Coco*
- **Ex-employee:** An ex-employee **cannot use/disclose confidential information** that can be **fairly regarded** as a separate part of the employee's stock of knowledge which a **man of ordinary honesty and intelligence would recognise to be the property of his old employer**

Government Secrets

Commonwealth v John Fairfax & Sons

- The Commonwealth sought to restrain the publication of a book *Documents on Australian Defence and Foreign Policy* on three bases including breach of confidence
- Equitable principle fashioned to protect personal, private and proprietary interests of the citizens, not to protect the very different interests of the executive government. **When equity protects government information it will look at the matter through different spectacles.**
    - **Rationale:** democratic society → unacceptable to restrain publication of information relating to government just because it enables the public to discuss, review and criticise government action – freedom of interest starts with premise that citizen has right to information.
- The court will determine the government's claim to confidentiality by **reference to the public interest**. **Unless disclosure is likely to injure the public interest, it will not be protected.**
- Degree of embarrassment to Australia's foreign relations which will flow from disclosure is NOT enough to justify interim protection of confidential information
    - The sales of the book already made to countries it could offend
    - The circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas

Esso Australia Resources Ltd v Plowman

- Confidential arbitration 20 years ago. Explosion at a gas refinery in Victoria causing people to be out of pay – issue of who was going to pay. Confidential arbitration. Issue of disclosure of some of the information.
- The courts have consistently viewed government secrets differently from personal and commercial secrets
- **Reversal of the onus of proof:** the government must prove that the **public interest demands non-disclosure**

ABC v Lenah Game Meats

- Film of possums being processed for pet food → sent to ABC. Injunction against ABC to stop show being broadcasted. Commonwealth tried to intervene.
- Argued that confidential information obtained surreptitiously should be protected → extending to 3rd parties.
- (Gummow and Hayne JJ) reaffirmed Mason J's decision 'different spectacles'. Injunction set aside.
- The court determines the legal/equitable right upon which the plaintiff relies for its equity, considers the adequacy of legal remedies and then comes to discretion and such matters as the imposition of terms and the form of any relief.
    - Look to whether common law remedy is adequate, if not look to equity's auxiliary jurisdiction

3. <u>Imparted in Circumstances Importing an Obligation of Confidence</u>

- Broad principle in equity that he **who has received information in confidence** shall **not take unfair advantage of it**; *Ammon v Consolidated Minerals Ltd (No. 3)* [2007]
- The **more general the description** of the information which a plaintiff seeks to protect, the **more difficult** it is for the court to satisfy itself that information so described was **imparted in circumstances which give rise to an obligation of confidence**.' – *Independent Management Resources Pty Ltd v Brown*
- Whether the information was **imparted in circumstances** where a **reasonable person** must have **realised on reasonable grounds** that he/she was **not free to deal with the information** as his/her own or **must have realised** that he/she could deal with the **information within certain limitations**; *Del Casale v Atedomus (Aust) Pty Ltd* by Campbell JA
- Third parties who receive information from a person in breach of duty, knowing of that breach, will themselves become subject to a duty of confidence; *ABC v Lenah Game Meats*
- **Improperly or Surreptitiously Obtained**
    - Equity will intervene to **prevent the activities of eavesdroppers** – information **imparted in confidence** and **information improperly or surreptitiously** obtained are treated as two species of the same genus – *Smith Kline & French*

- The fact that information was surreptitiously obtained can be the **clearest indication** that it was **confidential** and that the defendant considered it to be so; *Ashcoast Pty Ltd v Whillans*
- ***Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd*** supports the claim above, however rejection of improper/surreptitious means as sufficient basis for equitable intervention in the same case.
    - Merely embarrassing information doesn't reach standard of confidential information especially in a commercial context.
- ***Creation Records Ltd v News Group Newspapers***
    - Interlocutory relief was granted → newspaper photographer surreptitiously took pictures of Oasis photo shoot.
        - Photo shoot was public, public allowed to was allowed to watch whole thing + take pictures before the shoot
        - HOWEVER surreptitious photographing, easy inference that he knew that photography wasn't permitted, allowed to remain on the basis that photographs would not be taken → thus imparted in circumstances importing obligation of confidence

***Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991)**

- SK provided confidential information to DCSH in support of an application to approve a drug for the treatment of gastro-intestinal ulcers → failed to enjoin competitor using same information in determination of approval for version of same substance
- **Test of reasonable person** does not give guidance as to the scope of an obligation of confidentiality where one exists.
    - **Basis of obligation to respect confidences**: obligation of conscience arising from circumstances in which information is acquired.
    - Obligation could impose no restrictions on use as long as not revealed to 3rd parties OR not entitles to use it except in limited circumstances
    - Courts exercising equitable jurisdiction shouldn't be too ready to import an equitable obligation of confidence in a marginal case. Distinction between use of confidential information in a way of which many people might disapprove on the one hand and illegal use on the other.
- Relationship with the common law:
    - Claims for breach of confidence may overlap with other claims
    - *Commonwealth v John Fairfax & Sons Ltd* – Commonwealth failed to establish case for interlocutory relief protecting confidential information but succeeded in copyright
    - What is the relationship with contractual and equitable confidences?
        - *Optus Networks Pty Ltd v Telstra Corp Ltd* – argued that express contractual terms dealing with the use of parties' confidential information and limiting the damages available for breach stood in the way of a claim in equity for an account of profits

Former Clients

- Where a person owes **a fiduciary duty to another** – there is contention over the **equitable protection over confidential information after the termination** of the fiduciary's retainer
    - The basis of equitable relief depends on confidential information **not some 'duty of loyalty'** surviving from the fiduciary relationships
- The weight of authority currently supports the proposition that the **duty of loyalty DOES NOT survive the termination of the retainer**; *Ismail-Zai v Western Australia*
    - C.f. Victoria – there is a duty of loyalty remaining
- HOWEVER there is **well-established basis** to **restrain a former solicitor from acting**, even **without** it being shown that he/she possesses any confidential information of the former client
- There is a **duty of confidentiality** → Regarding former client only duty remaining is the continuing duty to preserve confidentiality of information imparted during its existence; *Bolkiah v KPMG*
- **Double employment/simultaneous representation:** A lawyer must obtain fully informed consent from each client before they can act and, subject to the scope of the consent, will need to ensure an effective information barrier is put in place to protect each client's confidential information.
    - The existence of *fully informed consent* is a question of fact in all the circumstances of the matter; *Maguire v Makaronis* (1997)
    - There is no precise formula for determining whether fully informed consent has been given and the sophistication of the clients involved will have an impact upon the level of disclosure required

Bolkiah v KPMG [1999]

- KPMG provided services to a former client and potentially has the power to use confidential information of the former client to work for another, new opposing client.
- Court granted injunction restraining KPMG from acting for new client.

- Burden on KPMG to show that there was no risk of information (from old client) coming into the possession of those within KPMG acting for the new client
    - Evidence KPMG attempting to exact Chinese wall however it was ad hoc and within a single department → another two teams involved with former and current client with large rotating memberships with persons accustomed to working together
- Distinction to be drawn between client and former client.
    - Client: absolute duty to current client.
    - Former Client: **Only duty to former client is a continuing duty to preserve confidentiality of information imparted during its existence.**
        - The duty **extends beyond** that of **refraining from deliberate disclosure**, and includes the **duty not to put the client at risk**: '… a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.'
        - 'I prefer simply to say that the **court should intervene** unless it is **satisfied that there is no risk of disclosure**. It goes without saying that the **risk must be a real one**, and **not merely fanciful or theoretical. But it need not be substantial**.'
        - There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk.
            - The Australian courts assess the *effectiveness*, rather than reasonableness, of the steps taken to screen the *tainted* individual lawyer(s)
- P seeking to **restrain former solicitor from acting** in a manner for another client **must establish**:
    - 1. That the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and
    - 2. That the information is or maybe relevant to the new matter in which the interests of the other client is or may be adverse to his own'.

***Kallinicos v Hunt (2005)* → no real chance lawyer had confidential info → should he be restrained? YES**

- Lawyer had acted on behalf of a partnership company in respect of transactions, which were highly contentious in a later litigation between the directors and shareholders of the company. In the litigation, the lawyer acted for one of the parties. → major conflict of interest
- The **court always has inherent jurisdiction to restrain solicitors from acting in a particular case**, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice
- The **test to be applied** in this inherent jurisdiction is **whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting**, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice
- The jurisdiction is to be regarded as exceptional and is to be exercised with caution
    - Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause
- Brereton J, exercising the court's inherent supervisory jurisdiction over its officers, granted an injunction preventing the lawyer from continuing to act given the following circumstances:
    - the lawyer might well be exposed to a suit (there were serious allegations of wrong doing and the possibility of the solicitor being implicated in improper conduct);
    - the lawyer would (almost certainly) be a material witness; and
    - the lawyer appeared to have a vested interest in how the evidence turned out.

4. <u>Unauthorised or Threatened Misuse</u>

- Generally not an issue

5. <u>Remedies</u>

- **Remedies Available:**
    - An **injunction** is the **usual remedy** in the exclusive jurisdiction (breach of confidence is equitable right) coupled with orders for delivery up and destruction
    - Equitable **pecuniary remedies**, such as equitable compensation or an account of profits, are available

Giller v Procopets [2008]

- De facto boyfriend takes videos of girlfriend, some consensually and some covertly and gives them to family. She sues for money for emotional distress.
- $40,000 for mental distress including $10,000 for aggravated damages under *Lord Cairns Act* (or equitable compensation).