

#### Modern indicia of fiduciary duties in a commercial setting Supreme Court Corporate and Commercial Law conference 15 November 2017

**Justice Ashley Black** 

# Outline

- When a fiduciary duty arises
- Fiduciary duties in commercial relationships
- Scope of the fiduciary obligation
- Authorisation, informed consent and ratification
- No conflict rule

### When a fiduciary duty arises

- Traditional fiduciary relationships
- Ad hoc duties generally an undertaking to act for or on behalf of or in the interests of another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense
  - Hospital Products Ltd v United States Surgical Corp (1984)
  - Breen v Williams (1996)
  - ASIC v Citigroup Global Markets Australia Pty Ltd (No 4) (2007)
  - John Alexander's Clubs Pty Limited & Anor v White City Tennis Club Limited (2010)
  - Grimaldi v Chameleon Mining NL (No 2) (2012)
  - Academic commentary Finn, Conaglen, Edelman

## Fiduciary duties in commercial relationships

- Partnerships, joint ventures and anticipated joint ventures
  - United Dominions Corporation Ltd v Brian Pty Ltd (1985)
  - Noranda Australia Ltd v Lachlan Resources NL (1988)
  - Red Hill Iron Ltd v API Management Pty Ltd (2012)
  - *King v Adams* (2016, appeal dismissed 2017)
- Policy issues as to other commercial relationships:
  - desirability of securing the standards of commercial morality
  - parties to a contract ought to be able to define and limit their obligations by terms of contract
  - fiduciary obligations may unduly restrict commercial parties' ability to serve own interests and be contrary to policy favouring commercial enterprise
- Case law
  - Hospital Products Ltd v United States Surgical Corporation (1984)
  - John Alexander's Clubs Pty Limited & Anor v White City Tennis Club Limited (2010)
  - Streetscape Projects (Australia) Pty Ltd v City of Sydney (2013)
  - Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd (2017)

## Scope of the fiduciary relationship

- Fiduciary duty can be limited by scope of the engagement and by contract
  - Hospital Products Ltd v United States Surgical Corporation (1984)
  - ASIC v Citigroup Global Markets Australia Pty Ltd (2007)
  - Howard v Commissioner of Taxation (2014)
  - Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd (No 4) (2017)
- Authorisation, informed consent and ratification
  - Maguire v Makaronis (1997)
  - Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007)
  - Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd (2017)

#### No conflict rule

- No conflict rule a fiduciary cannot have a personal interest or duty owed to a third party which gives rise to a real and sensible possibility of a conflict
  - Pilmer v Duke Group Ltd (in liq) (2001)
  - Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd (2016)
- Whether duty breached by existence of position of conflict or requires pursuit of personal interest
  - Agricultural Land Management Ltd v Jackson (No 2) (2014)
  - Re Colorado Products Pty Ltd (in prov liq) (2014)