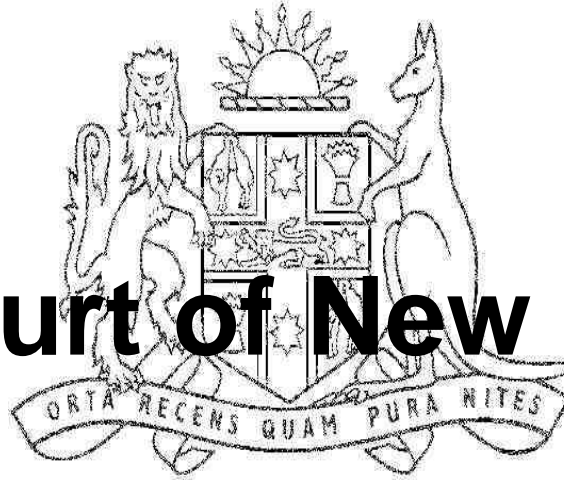


# Supreme Court of New South Wales



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)