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**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**BATHURST CJ
AND THE JUDGES OF THE
SUPREME COURT**

Friday 14 December 2012

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE JOSEPH CHARLES CAMPBELL
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **BATHURST CJ:** We are here today to mark the retirement of the Honourable Justice Joseph Campbell from the Court of Appeal of the Supreme Court of New South Wales.

- 2 Your Honour has served as a judge of the Supreme Court for over eleven years. In that time you have contributed greatly to the intellectual rigour of the Equity Division and the Court of Appeal. You have involved yourself in the administration of the profession and of the Courts by sitting on the Legal Profession Admissions Board and Law Admissions Committees and the ADR and Education Committees at the Court. You have also contributed to the richness of judicial life, participating regularly in both the judges' Bible study and Friday afternoon judicial yoga. I should make it clear to everyone else in the courtroom this morning that judicial yoga is not a euphemism, it is an actual event and not a substitute for Court of Appeal judgment writing.

- 3 Perhaps above all in your time in the court you have contributed to the calibre of common law in Australia. Your judgments are regularly of such depth and breadth that they are often taken as the first and final word on their given subject. In the words of one well-known practitioner, "If you're

new to an area and you know Justice Campbell has written on it, his judgment is your first port of call”, and very often, I should add, your last.

- 4 Those who have worked for and with you over the years praise your kindness, patient and humility. They are also fiercely loyal, which has been very frustrating for me. Tradition states that I am supposed to take this opportunity to share amusing anecdotes of your time with the Court, but, as one of your past tipstaves put it to me, “the problem is, Justice Campbell is incredibly nice, incredibly smart, extremely hardworking and uncommonly modest, and so there is not really anything that I can say against him”.
- 5 Fortunately for me, your Honour is not without reputation. Your love of the historical origins of legal doctrine is legendary, and you approach with delight any matter that may give you cause to visit them. This is most particularly the case if the principles in issue relate to equity or real property. It is our good fortune that this predilection provides more than ample material for this morning's address.
- 6 Let us take, for example, your judgment published last year in *Bondi Beach Astra Retirement Village Pty Ltd v Gora* [2011] NSWCA 396. That case concerned restraint on alienation, and I am told it accounted for weeks of good cheer. I will read a brief extract from your Honour's reasons:

“The single most important authority on the present Australian law concerning restraints on alienation is the decision of the High Court in *Hall v Busst* (1960) 104 CLR 206. However, understanding of that decision is assisted by considering the source material upon which it drew, and some other cases that preceded it.”

- 7 Your Honour then begins not with the earliest Australian authority or even the House of Lords but by citing from *Coke on Littleton*, first published in 1682, and in which, in your Honour's words:

“Coke sought to explain and adapt the late medieval law expounded by Littleton 140 years earlier, to the more *modern* (and I note that was your word) conditions of the seventeenth century...Not least because of the enactment in 1535 of the *Statute of Uses*.”

- 8 Many of us here today will have last heard of the *Statute of Uses* in the second year of law school and hope we never hear of it again. Your Honour then proceeded to modernise the spelling used by Coke and translated his Latin maxims. Many pages later in your judgment comes the next section, titled Seventeenth Century Cases, and it proceeds in that fashion. I am told that your Honour has elsewhere had the need to translate law reports from their original legal French.
- 9 Your Honour should not misunderstand my jest. Whilst many on the bench might have satisfied themselves with more recent authority to encompass what came before it, your Honour's judgments, informed as they are by the earliest reference to principle that your Honour can locate - and presumably, therefore, which exists - are of considerable import to the strength, longevity and authority of the common law and are a testament to its best traditions. Both the legal profession and the common law in New South Wales have benefited immeasurably from your Honour's keen interest.
- 10 In that context one could hardly be surprised that your Honour now feels pulled to return to academia. You are an Academician of the International Academy of Estate and Trust Law, have been the Challis Lecturer in Bankruptcy at the University of Sydney, and were last year the Herbert Smith Visitor at Cambridge University Law School. Although I must say I cannot help but spare a thought for the as yet unsuspecting Sydney University undergraduates who will, come March next year, first set eyes on their reading lists for your Honour's Introduction to Real Property course.

- 11 That said, there will no doubt be some for whom your classes open their eyes to the world of law as you see it - and the path of their legal lives may well change irrevocably. Certainly such has been the case for the young people who have been fortunate enough to serve as your Honour's tipstaves over the years.
- 12 While serving in your chambers, your Honour's tipstaves became well known among the court's librarians and adept at navigating the library's stock of English Reports and rare books. So much so that at the start of each new law term, the librarian giving the tour of the court's library always asked your Honour's tipstaff to identify himself or herself. Smiling ruefully, the librarian would inform the unsuspecting bright-eyed youth, "We'll be seeing a lot of you". It also became fashionable for your tipstaves to don their long coats on any visit to the library, in order to save their clothes from the red dust of centuries old law books.
- 13 Of course, this has been all to the good. I cannot imagine that there are many people in the world pursuing PhDs in the History of Equity in the 18th Century. But two of them (and this is quite possibly all of them) are past tipstaves of your Honour's, one currently at Cambridge and the other Oxford.
- 14 Indeed, your Honour's own university experience was a fair predictor of your eventual career path. Former Justice Bob Austin was one of the markers of your Equity exam paper. He described your presence in class as unassuming but that you went on to write, in his words, the best exam answer he had ever and did ever see. Writing in tiny, neat handwriting - which I am told to this day your Honour still worries is illegible - it reflected, again in Austin's words, the extreme organisation of your mind. When Bob Austin eventually went to the bar, you were his pupil master. I remember hearing that you used to say that sitting as duty judge in the Equity Division was like sitting two equity exams in a day. I now better understand that you meant this as a good thing.

- 15 You have spoken often of your debt to your wife's cousin, the now retired Federal Judge Richard Conti, with whom you read. No doubt his Honour made you most welcome on the eleventh floor. Still I think it should be remembered that you arrived at St Andrews College at the University of Sydney from humble beginnings in Tamworth, and through your own hard work and intelligence made yourself an invaluable asset to the profession and the community. At your swearing in 11 years ago, you spoke fondly of the collegiality of the profession, the friendships there forged, and the support you received. This is certainly true of our profession. Where merit is present, those seniors will do a very great deal to help their juniors, with no expectation of reward or favour in return. Your Honour has come to embody the best of that spirit.
- 16 Although you have always been most silent about your own acts of kindness and generosity, those who have benefited have not been. You have made gifts of your robes, wig and even desk to young barristers. The only condition you impose is that they too one day pass the item on to a new reader. You are known to go to great lengths to support the careers and pursuits of your juniors and staff, sharing your knowledge, time and resources without hesitation. It therefore seems only fitting that you will now do this for the next generation of law students at the University of Sydney.
- 17 In the courtroom you are known to be courteous, tolerant and patient, especially to new barristers or those who appear in person. Your judgments are widely reported and respected, and always insightful. For my part, I think in particular of those judgments in which you settle the law in a given area, from first principles through to modern application; for example, your judgment as a puisne judge in *AG Australian Holdings Limited v Burton* [2002] NSWSC 170, regarding breaches of and exceptions to confidentiality agreements.
- 18 Some of your appeal judgments that come to mind include *Kowalczyk v Accom Finance* (2008) 77 NSWLR 205; (2008) 252 ALR 55; (2008) 229

FLR 4; (2008) 14 BPR 26,565; [2008] NSWCA 343, regarding relief under the *Contracts Review Act* for unjust contracts and unconscionability, *Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92, in which you set out the law relating to contempt, *Gagner Pty Ltd t/as Indochine Cafe v Canturi Corp Pty Ltd* (2009) 262 ALR 691; (2009) 236 FLR 401; (2009) 77 ATR 157; [2009] NSWCA 413, in which you set out the law in relation to damages for tort, *NRMA v Whitlam* [2007] NSWCA 81, concerning the construction of deeds of indemnity, and *BE Australia WD Pty Ltd v Sutton* (2011) 285 ALR 532; (2011) 256 FLR 67; (2011) 86 ACSR 507; [2011] NSWCA 414, in which you establish the definition of creditor and the powers of the court for the purpose of s 477A of the *Corporations Act*. It happens your judgment in *Nau v Kemp* (2010) 77 NSWLR 687, was just yesterday affirmed by a majority in the High Court in *Newcrest Mining Limited v Thornton* [2012] HCA 60. You have also written leading judgments in presiding in the Court of Criminal Appeal, most notably in *Sieders v R* (2008) 72 NSWLR 417; (2008) 186 A Crim R 540; (2008) 72 NSWLR 417, and in *Jimmy's Case* (2010) 77 NSWLR 540; (2010) 269 ALR 115; (2010) 240 FLR 27; [2010] NSWCCA 60.

- 19 Others will no doubt speak at greater length of your most notable judgments. That is not what I want to spend the remainder of my speaking time on. I have made much of your Honour's love of the law. However, as your Honour's loyal and hardworking associate, Margaret Gaertner, has said, "The only thing that lights up his eyes and quickens his step more than a protracted and complex equity problem, is a visit from his wife, Jenny". And here we come to the truest measure of your Honour, for as much as you love the law and are now tempted by the academic life, I suspect that your greatest motivation for leaving the bench is to finally have more time with Jenny, your three children and six grandchildren, for whom your love and affection is patent.
- 20 It happens that this week is momentous for the legal profession and for your Honour's family, not only because of your retirement today but also because your son James was admitted to the roll of lawyer practitioners

last Monday. I was pleased to sit on the bench with you at that ceremony, and welcome the newest “legal Campbell” into the profession.

21 Apart from the law, music appears to be the passion of the Campbell family - both James and your youngest son David are orchestral musicians. Over the years, you and Jenny became a familiar sight on your floor departing together in the late evenings to the opera or symphony to watch either of your sons perform. They, as well as your middle son Robert who works in finance, are here today, along with I think most of your grandchildren, Luke, Ilia, Samantha, Gemma, Heidi and Asha.

22 So while I am very sad we are losing so fine a jurist relatively early in his judicial career, I am confident that you will continue to be a positive force in the legal world through your influence on the newest legal minds, and I wish you the very best of judicial retirements and a long and fulfilling future career.

23 **MR PHILLIP BOULTEN SC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION:** May it please the Court.

24 It is a truly great honour for me to be able to stand here today on behalf of the New South Wales Bar Association and to pay due respect to a distinguished career in the profession of law as an esteemed commercial and equity lawyer, as a teacher, as a judge and ultimately as an appellate judge.

25 Justice Campbell, your appointment to the Equity Division of the Supreme Court in October 2001 met with widespread praise, although in some quarters it was asked why it took so long. After all, your Honour was an accomplished practitioner at the bar with more than 26 years' standing. Attorney General Bob Debus described you as a talented and versatile advocate who, as a very junior member of the bar, was afforded rare praise from the Honourable Justice Hutley of the Court of Appeal. To those on your floor you were seen as a collegial and civilising influence

and, speaking as one whose chambers are outside Phillip Street, this can only be viewed as a good thing.

- 26 Juniors appreciated your diligence and preparedness to investigate every legal and factual aspect of the case, and of course they were in awe of your vast knowledge of equity. Some felt it wasn't a coincidence that you accepted an appointment to the bench soon after one of your sons had completed a fiendishly expensive music degree at a college in the United States. Similarly, regarding your imminent retirement, it has been said that your Honour waited until the Supreme Court bench had at least one Campbell to replace you, and now another Campbell to add to the ranks of lawyers.
- 27 Your Honour's judicial qualities have a long lineage. As an articled clerk you spent a year at Allen Allen & Hemsley under the tutelage of your master solicitor, John Lehane, indisputably one of the great equity lawyers this State has produced. You were encouraged to come to the bar by Richard Conti, as he then was, and in June 1975 you began practising out of a room on the 11th floor.
- 28 Your practice became quite diverse with appearances in the Supreme, Federal and High Courts on administrative law, banking, corporations law, insolvency, trade practices and intellectual property, but the greater part was always equity; equity, trusts and Family Provision work. Your Honour is one of a slowly diminishing band of Australian lawyers to have appeared before the Privy Council. In 1983 you were led by Ken Handley QC in *Maynegrain Pty Ltd v Compafina Bank*.
- 29 There were many achievements during your career at the bar: your contribution to the Council for Law Reporting, your service on the Professional Conduct Committee from 1981 to 1984, your time as Challis Lecturer in Bankruptcy at the University of Sydney from 1983 to 1986, and of course in November 1988 you took silk. Yet it would be remiss of me if I

didn't devote the rest of this speech to your achievements on the bench and your contribution to this Court.

- 30 In addition to your courtesy and tolerance, your Honour brought to the bench all of the rigour and the inquisitiveness for which you were renowned, such as the time your Honour considered the authorities going back more than 300 years in the case that the Chief Justice has just mentioned. The Chief Justice has just named a few of your Honour's leading cases. To those I would add quick mention of the *RTA v Refrigerated Roadways* involving the RTA's duty of care to protect motorists from harm, *Sanpine v Koombahtoo Local Aboriginal Land Council* regarding the termination of a joint venture agreement, and *Lahoud v Lahoud*, though I must say as a criminal lawyer I am much more familiar with your Honour's work in the Court of Criminal Appeal, which became a small but important part of your Honour's case load.
- 31 In *Jimmy*, a sentence appeal involving an Indonesian man convicted of money laundering offences, your Honour delivered the leading judgment in New South Wales concerning the principle of parity between co-offenders. In a reflection of your Honour's judgments in the Court of Appeal, your judgment in *Jimmy* involved a comprehensive survey not only of all of the judgments on the topic in the Court of Criminal Appeal and the High Court but also the judgments of the other state and territory Courts of Appeal on this issue as well.
- 32 In addition to your Honour's judgments, there have been a number of thoughtful speeches on the powers and duties of trustees as well as privileged communication with lawyers. While on the bench your Honour continued to make an important contribution to the advancement of the legal profession. From June 2002 to 2006 you were a member of the LPAB's Examinations Committee and served on its Legal Qualifications Committee and its Law Admissions Consultative Committee, as well as on the board itself for two years. In 2007 your Honour was made a judge of the Court of Appeal.

- 33 Your Honour, the bar congratulates you for your many years of dedicated service to the people of New South Wales and to the profession of law. Your Honour's new career in academia is to be welcomed. I understand that you are very interested in the doctrine of *parens patriae* and that a return to research on this topic will be something that we can all look forward to. In any event, we hope that your contribution to public life will continue and we wish you every happiness in the time ahead. May it please the Court.
- 34 **MR JUSTIN DOWD PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.
- 35 In Greek mythology Zeus is represented as the god of justice and mercy. He is the god of the sky and the supreme ruler of the Olympian gods. To have such a presence in one's own chambers to oversee daily activity and to hurl the occasional thunderbolt if and when required would, for some, be more terrifying than reassuring. But reflecting upon your Honour's significant contribution to the administration of justice and to the judiciary, the beautifully carved head of Zeus that looks over your Honour's shoulder could only be considered as having been auspicious.
- 36 Today we celebrate that contribution and on behalf of the solicitors of New South Wales I am privileged to add my valedictory remarks on the occasion of your Honour's retirement.
- 37 Your Honour is renowned for your passion and enthusiasm, particularly when it comes to equity cases. Meticulous in detail, thorough in research, your Honour is noted for always delivering very well reasoned judgments.
- 38 While your Honour's chambers have been respectfully described as akin to organised chaos those who work closely with you describe your Honour as being the most calm, well mannered and even tempered person and an absolute pleasure to work for. Of course, there must have been times

when your Honour's patience would be tested and copious cups of good strong coffee required. As one example given to us, your Honour's early attempts at aligning Dragon Dictation with the proper use of the English language proved frustrating and indeed you were heard to remark that if an employee's command of the language had been similarly wanting they would have been sacked.

- 39 One of your Honour's early cases at the bench was *Ganter v Whalland* in 2001. This case was the subject of much interest in legal circles and discussion papers published in the New South Wales Law Reports, cited in university family law courses, my home jurisdiction, and various media articles. That case has been a leading authority in a contentious and very emotive area of law.
- 40 Your Honour's American namesake, the late Joseph Campbell, was a mythological researcher and psychologist who gained fame in 1949 when he published the *Hero with a Thousand Faces*. A monomyth that chronicles the stages of a hero's journey. While German composer Richard Wagner would not have been exposed to Campbell's research, the mythological story behind his renowned Ring Cycle certainly reflects the hero's journey.
- 41 Your Honour is no stranger to Wagner's famous 16 hour Ring Cycle and, indeed, you and your wife Jennifer attended the magnificent high tech staging of this epic in Adelaide in 2004. Next year, in celebration of the 200th anniversary of the composer's birth, the Ring Cycle moves to Melbourne but your Honour will be able to savour the wonders of Wagner from your home state when the Sydney Symphony Orchestra delights audiences with a one hour symphonic adventure of the epic's highlights. Not only is your Honour a patron and member of the Sydney Symphony but your son David plays double bass in the orchestra.

- 42 For myself I have to say that I agree with another legal luminary, Horace Rumpole, whose view on the Ring Cycle was simply life's too short for Wagner.
- 43 I also note that congratulations are in order for another son, James, also a professional musician who was last week admitted to practice in the New South Wales Supreme Court. One hopes that he will also become a member of the New South Wales Law Society.
- 44 In Campbell's words, a hero is someone who has given his or her life to something bigger than oneself. If we were to consider your Honour's judicial role in this light, Campbell's three basic stages of the hero's journey could be applied to your Honour. In stage 1, which he called call to action, your Honour first graduated with an Honours degree in Philosophy at Sydney University and then answered the call to law, gaining that degree with First Class Honours.
- 45 During that stage 1 your Honour was also in the company of the goddess, a character with special beauty and power, in the form of your wife, Jenny. Your many mentors included the late John Lehane, to whom your Honour was articled, and former Justice Richard Conti, who facilitated your Honour's move to the bar.
- 46 In the second stage, called initiation, your Honour presumably faced challenges in battling the demons. No doubt your early days on the bench presented a range of challenges.
- 47 The hero, though, is also often required to travel. Your Honour became a visiting fellow to Cambridge twice and attended a conference in Istanbul this year which enabled you to fit in an extra tour of Turkey and to discover the real history of Greece. During the second stage the hero is expected to find solutions to problems which your Honour has duly accomplished in the carriage of your judicial duties.

- 48 The third stage is about returning home. It is the place reached after the hero has conquered life in both familiar and unfamiliar worlds and is free to resume their day-to-day lives. Your Honour could be considered to have arrived at stage 3. Much lies ahead.
- 49 On the occasion of Justice Conti's retirement from the Federal Court in August 2007 your Honour remarked: He's not the kind of person who likes to stop and put his feet up. I would suggest that your Honour will likewise be engaged in retirement.
- 50 A return to Sydney University as an adjunct professor is imminent; the institution of learning where your Honour lived, studied and later lectured. There is a trip to India I understand and, importantly, more time to devote to family, your wife Jenny and sons James, Robert and David and the six young grandchildren.
- 51 Your Honour, on behalf of the solicitors of this state I wish you a happy, fulfilling and successful stage 3 of life.
- 52 If the Court pleases.
- 53 **CAMPBELL JA:** Chief Justice, Mr Boulton, Mr Dowd, I am very well aware that hyperbole is the usual linguistic currency on these occasions, but thank you all very much for your kind remarks.
- 54 It is very pleasing that so many people have come today to be able to mark my departure from the Court. There are quite a few members of my family, there are friends I was at university with, there are other friends who are now retired judges and their wives, there are current serving judges. There are guests who have travelled a long way, from Hobart, from Melbourne, from Brisbane, from the Southern Highlands and other people who have taken time out from their busy lives.

- 55 The guests today range from Miss Heidi Campbell, aged three, to my extraordinary aunt by marriage, Miss Ruth Conti, aged 98. I also particularly appreciate how many practitioners have taken the time to come, on what is probably the most inconvenient day of the year, for a ceremony like this. Thank you for coming.
- 56 When I first became a judge I was provided with these robes that I am wearing. When I was appointed to the Court of Appeal I was given another set which are the robes of a judge of the Court of Criminal Appeal. But they were all just on loan. And after today I will have to give them back.
- 57 That is rather like authority as a judge. While you are a judge you have the power to decide people's disputes. Anything that you say in a judgment has a special standing and importance just because you are a judge. And when my resignation takes effect next Wednesday I will stop having that authority. Anything I say about the law after that is going to have to stand on its own feet.
- 58 Some people have asked me why I am retiring at this time. I am only a few months short of the age that the Beatles taught us was ridiculous decrepitude, but I am still eight years short of the compulsory retiring age of a judge.
- 59 The reason is I have gradually come to the conclusion over the last few years that I really should rebalance my priorities in life. The death of my eldest brother a little over three years ago provided a very powerful reminder that my own death was more than just an abstract possibility. The question that kept recurring was, do I really want to spend the rest of my active time writing another few shelf-feet of judgments. I am not ill but there is not going to be enough time left to do all the things I want to do. It has been a difficult decision to leave, and I have taken a long while in coming to it.

- 60 I have no doubt that the role of the judge in administering and developing the law is a very important activity. It provides an essential basis on which the ordinary activities of society can operate. For a country to have a properly operating legal system is a bit like a person having a healthy body. If you have one, you don't much notice. But if something goes wrong with it you become acutely aware of how important it is.
- 61 It really has been a very great honour that the State of New South Wales has trusted me for the last 11 and a bit years to carry out this role. As well, though, I have had great personal satisfaction in doing the job. The process of judging is something that can be of absolutely engrossing intellectual interest. It is only by going through the principles of a case and applying the facts that you become clear about what the principles really are and about how they interact with each other and get some idea of how those principles play out in making the life of the community work.
- 62 In the time I have been a judge I have tried to give the office my whole-hearted attention, but I have never been able to think, write or read fast enough to be able to deal with all the new cases that need listing and must be decided day by day, to do that at the standard that the job requires, and have time for many activities outside the practice of the law. When I was at university and in the early years of practice there was time for more reading, music, discussion on nonlegal matters than has been possible in recent years and I want to allow some time for some of that activity.
- 63 But the law is too interesting to give up altogether and, as you have heard, I am not planning to give it up. What I want to do is to deal with the law in a different way to the way in which a judge deals with it. What you can research and write as a judge always has a very close focus, confined by the need to solve the particular case at hand. I want to spend a while taking a bit of a broader view of the law than you usually can as a judge, and to spend some time thinking about how the law is not a self-contained set of ideas but how it fits in with the history, of ideas in a wider context. I want to spend time looking at its history which as you have heard I am

interested in. As well I want the chance to teach, because that requires having an overview that seldom comes into the argument in deciding a particular piece of litigation. And also I quite like the idea of getting into the heads of another generation of lawyers.

- 64 In the time that I have been a judge I have had invaluable help from very many people. Jim Spigelman was Chief Justice for nearly all of my first 10 years on the bench and Tom Bathurst for the last year and a half. They have both provided the sort of leadership that makes the Supreme Court a happy and effective place to work in. In particular, their work in identifying possible candidates for appointment to the court and encouraging them to accept appointment has kept up the high reputation that this Court very rightly has in the common law world.
- 65 Peter Young was Chief Judge in Equity the whole of the time I was first instance judge in that Division. I had the occasional clash with him as counsel, but when I was appointed to the Equity Division I found that in his role as overseer of that Division he was unfailingly helpful, encouraging and considerate, and he had a huge depth of knowledge of the bits of law that they don't teach you in law school. I should also mention Bill Windeyer, who appointed himself to the position of Equity Division Visitor, which meant that he would drop in for a chat every so often.
- 66 During the time that I was a member of the Court of Appeal, first Keith Mason, then Jim Allsop, have been President. They have both had the seriously daunting task of taking a group of individual, opinionated lawyers and moulding them into a cohesive, co-operative, collegiate court, and they have both done that job extremely well. Whether it is in the Supreme Court as a whole, the Equity Division, or the Court of Appeal, there are intangible but still very real and important qualities that make up the ethos and tone of the body and they come, to a very large extent, from the person who is leading it.

- 67 I have also benefited a great deal from the learning and friendship and co-operation of other judges on the Court. I have had the privilege of having as colleagues in the Equity Division and of sitting with, in the Court of Appeal, judges who are of the highest standard. I cannot recall an instance when a judge has not been willing to share their experience and knowledge in areas where they knew more about something than I did. And very importantly as well, they have been men and women who have been friendly and easy to get on with.
- 68 In the Court of Appeal, where you have three or more judges concentrating on a case, the permanent judges, and also the acting judges that we have been so fortunate to have had sitting on the Court in the last few years, are all seriously good lawyers. Even if there is only one set of reasons that is produced in a case, it is still something to which every judge has made a contribution, whether in the course of the argument of the case or by the process that the profession does not see, of circulation of draft judgments and judges on the bench making comments on them. And even if the end result has been a judgment that is under my name, the end result has always been a much better judgment than I could have produced if I had been sitting on the case on my own.
- 69 The practitioners who appear and prepare cases are essential to the proper running of the system, too. There have been some occasions when counsel appearing have not understood the complexities of the case and have not been much or any help, and simply have not earned the no doubt large fees that they have charged. But fortunately that has been the exception.
- 70 One of the most stimulating intellectual exercises that I can think of is when there is an appeal argument on an interesting topic, with knowledgeable counsel and the bench all concentrating on trying to think through and articulate the complexities that the case involves and to come to the right answer. That is one aspect of being on the Court that I am going to particularly miss. I also particularly appreciate the approach of my

colleagues on the Court of Appeal. They conduct the argument as though it is a genuine search for the right answer. This is unlike the way it has sometimes been in past times, where what has been said to be Socratic dialogue has turned out to be a bit more like a judicial game of “get the guest”.

71 One thing that is very high on the list of fortunate accidents in my entire life is that when I was appointed to the Court, Margaret Gaertner was free to become my associate. We have worked together for the whole of the time that I have been a judge. She has taken great trouble to make sure that the judgments from our chambers are clearly expressed and properly presented. She has made the administrative side of the chambers run like a Swiss watch, and always with good cheer. It simply would not have been possible for me to have had a better associate than Margaret. I owe her a lot.

72 I have also been particularly fortunate in having each year the help of a formidably bright young law graduate to act as my tipstaff. There had been 11 of them now, and each of them has helped a great deal with research, with maintaining the quality and accuracy of judgments and, as well, there is nothing like the company of a bright, keen young person to cheer you up. To some extent I have lived off transfusions of their energy and enthusiasm.

73 Other court staff, in particular the registrars, perform functions that the court could not operate without, in increasingly trying conditions as staff are cut back.

74 I also want to make special mention of the law library in the court. It is one of Australia's great storehouses of intellectual capital. The range of materials it contains and the helpfulness of the library staff in searching out obscure publications, sometimes from other parts of Australia, make an absolutely invaluable contribution to the quality of the judgments that the court can produce. It is a resource that should be nurtured and treasured.

75 As has been mentioned, in the time I have been a judge my family life has been particularly important to me. It has been a constant source of interest and pleasure to keep up with the activities of our three sons as they have turned into what I can unbiasedly say are three very fine young men. In the time I have been a judge they have all married, so we now also have three daughters-in-law of whom we are particularly fond. We also have, as you heard, six grandchildren, and I will not begin to tell you how interesting they are. It is particularly pleasing that the parents of two of our daughters-in-law are amongst the interstate guests who have travelled here today. I want in the time I have to spend more time with the grandchildren, to play a real part in their lives and to encourage them in some of the activities that we find are important.

76 But by far the largest thanks that I owe are to Jenny. She has been my closest friend and daily companion for over 40 years now. Many years ago she gave up her own prospects of an independent career to make her first priority bringing up our children and freeing me to pursue my career at the bar. She has provided a steady, warm home base for our family, constant support and encouragement to us all, and contact with the world outside the law that is so easy for a lawyer to overlook. What I have received from her is very precious, and immeasurable.

77 I leave the Court with quite some regret in doing so, but also with the feeling that it is time to move on to a different way of dealing with the law and to widen my interests beyond the law. I am very grateful that this ceremony has given me the chance to acknowledge publicly all the help I have had from so many people in being a judge. All that is left is to deliver a few judgments that are written but not yet published, and then I have to hand back my robes.

78 **BATHURST CJ:** The Court will now adjourn.

FIDUCIARY RELATIONSHIPS IN A COMMERCIAL CONTEXT

JC Campbell¹

SCOPE OF THE PAPER

You would be justified in wondering what a paper on fiduciary relationships is doing in a conference devoted to regulation of the financial services sector. The principal reason is that any regulation of that market operates in a context of the general law obligations that market participants owe each other. This has effects for the present topic in a couple of ways. One is that there is, or ought to be, a kind of Occam's Razor about legislative intervention in any area of commercial or social life, so that there should be intervention only if and to the extent that the general law is inadequate. In other words, the extent to which sound policy requires regulation, and if so what type of regulation, should depend on how the pre-existing general law obligations operate. Another is that even when there is regulation, it will interact with the pre-existing law, and so the effect of the regulation cannot be considered without taking the general law obligations into account. As well, some of the existing legislation regulating the market uses terminology that comes from the law of fiduciaries, so one needs to know the general law on the topic to understand the legislation.²

The particular concern of the paper is the circumstances in which someone advising on matters of finance and investment can be under a fiduciary obligation to the person who is given the advice, and what follows from the existence of the fiduciary obligation. However, it is not possible to discuss those matters without considering some more general questions. They are the circumstances in which fiduciary

¹ A Judge of the NSW Court of Appeal, Visiting Fellow Wolfson College Cambridge. I am grateful to David Birch and Alexander Edwards for assistance in research.

² Eg s 912A(1)(aa) **Corporations Act 2001** requires a financial services licensee to “*have in place adequate arrangements for the management of conflicts of interest...*”; the definition of “*financial services law*” in s 761A includes in that expression, so far as a licensed trustee company is concerned, a rule of equity that covers conduct relating to the provision of financial services that are traditional trustee company services, s 912A(1)(c) requires a financial services licensee to comply with the financial services laws (and thus with its equitable obligations), and s 912D(1) has the effect of imposing on licensed trustee companies an obligation to notify ASIC of certain breaches of its equitable obligations.

obligations arise, how they relate to any contractual obligations that exist between the putative fiduciary and the person to whom the duty is owed, what is the significance of the relationship concerning which the putative fiduciary duty exists being a commercial one, what fiduciary obligations require the fiduciary to do, and what remedies are available for breach of the obligation. I will also discuss the recent decision in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)*³ as a specific example of the application of fiduciary principles. Finally, I will give some consideration to the practical effect that the law of fiduciaries can have, and the practical effect that regulation can have, on the operations of the financial advice industry.

FIDUCIARY OBLIGATIONS OVERVIEW

First, I will briefly place fiduciary obligations in the conceptual landscape of the law. Equity is a body of judge-made law that supplements and corrects the common law. It is divided into an exclusive jurisdiction, and an auxiliary jurisdiction. It operates by imposing, in its exclusive jurisdiction, obligations additional to those that the common law creates, and providing remedies for breach of those obligations. In its auxiliary jurisdiction it provides different remedies to those of the common law for breach of an obligation that the common law recognises.

The common law has a very limited range of remedies for the wrongs that it recognises. It can require the payment of money, either as damages for breach of a common law obligation or when there is an obligation to make restitution, or it can hold that a transaction is void. Equity has a much wider range of remedies.

A unifying theme in both the obligations that equity imposes and in the remedies that it grants is preventing people from acting in a way that is unconscientious. Even though the distant historical origins of equity's notions of what is unconscientious lie in the moral teachings of the mediaeval Catholic Church, equity's development since then has resulted in it articulating its own standards for what counts as unconscientious conduct. Nowadays, not everything that might be thought to be

³ [2007] FCA 963; (2007) 160 FCR 35.

contrary to conscience as a matter of ordinary language is regarded by equity as being unconscientious.

Fiduciary obligations are ones that are imposed in equity's exclusive jurisdiction. Any fiduciary obligation is owed by some particular person, to a particular person or group of people. I will call the person who is owed the fiduciary obligation the "*beneficiary*" of the obligation. Further, a fiduciary obligation is not owed towards the beneficiary at large – it is owed concerning some particular task or tasks, or concerning some particular type or types of activity.

The time during which a fiduciary relationship exists has a beginning and an end, depending on the nature of the particular task or activity that gives rise to the fiduciary duties. Thus, fiduciary obligations can arise while negotiating for a partnership or joint venture that creates fiduciary obligations,⁴ and can continue in the period after the partnership has ceased to be carried on but before its affairs are totally wound up.⁵

A fiduciary is required to act with undivided loyalty to the beneficiary in the performance of the task or activity concerning which the fiduciary relationship exists.⁶ But even if someone is in a fiduciary relationship with a beneficiary, not every obligation that equity holds that the fiduciary owes to the beneficiary is a fiduciary

⁴ *United Dominions Corporation v Brian Pty Ltd* (1985) 157 CLR 1 at 5, 11-12.

⁵ *Chan v Zacharia* (1984) 154 CLR 178 at 182–183, 197.

⁶ *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19, cited with approval in *Maguire v Makaronis* (1987) 188 CLR 449 at 473 and in *Bofinger v Kingsway Group* [2009] HCA 44; (2009) 239 CLR 269 at [49]. Other places where the High Court has given passing recognition to "*undivided loyalty*" as a requirement of fiduciary duties, without disapproval but not as part of the ratio of the case, are in *Breen v Williams* (1996) 186 CLR 71 at 108 (Gaudron & McHugh JJ) and in *Pilmer v The Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 at [76] (plurality, but as part of recounting the reasoning of the court below), [142] & [149] (Kirby J dissenting). Approval has been given to "*loyalty*" as an indicium of a fiduciary relationship in *Breen v Williams* at 93, 95 (Dawson & Toohey JJ). Gummow J at 125 expressed it conversely, saying "*in fiduciary law 'informed consent' is an answer to circumstances which otherwise indicate disloyalty*", while at 134 he quoted with apparent approval a statement by La Forest J in *Hodgkinson v Simms* [1994] 3 SCR 377 at 406; (1994) 117 DLR (4th) 161 that "*whereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed...*"

obligation.⁷ For example, a trustee is clearly a fiduciary, but some of the obligations of a trustee, like the duty to keep proper accounts,⁸ or to exercise care concerning the making of investments of trust property⁹ are not fiduciary obligations.¹⁰

In broad terms, if the fiduciary obligation is breached, the court grants a remedy that, so far as is practicable, undoes the consequences of the breach of the fiduciary obligation, and requires the person in breach to act in the way that conscience requires in light of the breach having occurred. The most powerful of the remedies is that a fiduciary is not permitted to keep any property or other benefit that he has gained in circumstances where there has been a breach of a fiduciary obligation.

IDENTIFYING A FIDUCIARY RELATIONSHIP

Recognised Categories Of Relationship

There are some categories of relationships that the law recognises as ones that impose fiduciary relations between the parties, unless there is some special reason why the relationship is not fiduciary. The list that Gibbs CJ gave in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 68 included trustees, partners, principal and agent, director and company, master and servant, solicitor and client, and tenant for life and remainderman. Other judges have varied this list somewhat.¹¹ The categories are not closed.¹²

⁷ *Permanent Building Society v Wheeler* (1994) 11 WAR 187; 14 ACSR 109 at 157-158 per Ipp J (Malcolm CJ and Seaman J agreeing); *Bristol and West Building Society v Mothew* at 16. In *Youyang v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484 at [40] their Honours refer to “acceptance in Australia of the reasoning in *Bristol*”.

⁸ *Jacobs on Trusts* 7th ed LexisNexis Butterworths (2006) at [1713].

⁹ *Jacobs on Trusts* at [1718].

¹⁰ *Maguire v Makaronis* at 473 per CJ Gaudron and McHugh and Gummow JJ; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [38] per Gleeson CJ McHugh Gummow Kirby and Hayne JJ.

¹¹ Mason J in *Hospital Products* at 96 omitted tenant for life and the remainderman, and at 101 added bailor and bailee “when the bailor entrusts to the bailee goods to be held or dealt with by him for the benefit of the bailor or for certain limited purposes stipulated by the bailor.” Dawson J in *Hospital Products* at 141 included the relationship between wards and their guardians. In *Clay v Clay* [2001] HCA 9; (2001) 202 CLR 410 Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ recognised that the relationship of guardian and ward is fiduciary concerning property that the guardian administers for the ward.

A subclass of investment advisers owe fiduciary obligations to their clients. In **Daly v The Sydney Stock Exchange Ltd** (1986) 160 CLR 371 Dr Daly had sought advice from a stockbroker about investing a sum of money. There is no mention in the High Court of Dr Daly being a pre-existing client of the broker. Indeed there was mention in the Court of Appeal judgment of him being “*shown over the apparently impressive offices of the firm*”¹³ on the day the advice in question was given, which suggests that he was not a pre-existing client. The broker advised him against investing on the stock exchange at that time, and recommended that the money should be lent to the broking firm. Dr Daly accepted that advice, but the broker became insolvent and the loan was not repaid. The members of the High Court all held that there had been a breach of fiduciary duty by the broker when the broker did not inform Dr Daly of its own parlous financial situation.

A stockbroker is sometimes an agent for its client concerning the buying and selling of listed securities, and principal and agent is one of the recognised categories or fiduciary relationship. However in **Daly** there was no such actual agency because no listed securities were bought. The most that could be said was that, depending on the advice the broker gave and whether it was accepted, a relationship of principal and agent might come into existence. It was the giving of advice, rather than the circumstances being one in which a relationship of principal and agent might come about, that the High Court regarded as an essential element in the arising of a fiduciary obligation. The reasons of Gibbs CJ¹⁴ why the stockbroker owed a fiduciary duty to Dr Daly concerning investment advice that it gave were, at 377:

“The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a

¹² **Hospital Products** at 96 per Mason J; **Breen v Williams** at 107 per Gaudron & McHugh JJ; **Northern Land Council v Commonwealth of Australia (No 2)** (1987) 75 ALR 210 at 215 per Mason CJ Wilson Brennan Dean Dawson Toohey and Gaudron JJ.

¹³ **Daly v Sydney Stock Exchange Ltd** [1982] 2 NSWLR 421 at 424 per Reynolds JA.

¹⁴ with whom Wilson and Dawson JJ agreed.

stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction: *In re Franklyn; Franklyn v Franklyn*;¹⁵ *Armstrong v Jackson*;¹⁶ *Thornley v Tilley*;¹⁷ *Glennie v McDougall & Cowans Holdings Ltd*;¹⁸ *Burke v Cory*;¹⁹ *Culling v Sansai Securities Ltd*.²⁰ The duty arises when, and because, a relationship of confidence exists between the parties: see *Tate v Williamson*;²¹ and see also *McKenzie v McDonald*;²² *Hospital Products Ltd v United States Surgical Corporation*.²³

Similarly Brennan J²⁴ said at 385:

“Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises. The adviser cannot assume a position where his self-interest might conflict with the honest and impartial giving of advice: see *In re a Solicitor; Ex parte Incorporated Law Society*;²⁵ *Armstrong v Jackson*.²⁶

The duty of an investment adviser who is approached by a client for advice and undertakes to give it, and who proposes to offer the client an investment in which the adviser has a financial interest, is a heavy one. His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have but a third party did have a financial interest in the investment to be offered, to reveal fully the adviser's financial interest, and to obtain for the client the best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction. Such a duty has been established by authority: see *Haywood v Roadknight*²⁷ and the cases therein referred to at p. 521, especially *Gibson v Jeyes*²⁸ and *McPherson v Watt*.²⁹”

¹⁵ (1913) 30 TLR 187.

¹⁶ [1917] 2 KB 822.

¹⁷ (1925) 36 CLR 1, at 12.

¹⁸ (1935) 2 DLR 561.

¹⁹ (1959) 19 DLR (2d) 252.

²⁰ (1974) 45 DLR (3d) 456.

²¹ (1866) LR 2 Ch App 55, at 61, 66.

²² [1927] VLR 134, at 144-145.

²³ (1984) 156 CLR 41, at 67-75, 141-142.

²⁴ with whom Wilson J also agreed.

²⁵ [1894] 1 QB 254, at 256.

²⁶ [1917] 2 KB 822 at 824-825.

²⁷ [1927] VLR 512.

²⁸ (1801) 6 Ves Jun 266, at 271, 278 [31 ER 1044, at 1046-1047, 1050].

²⁹ [1877] 3 App Cas 254 at 266.

Pilmer v Duke Group Ltd (In Liquidation) [2001] HCA 31; (2001) 207 CLR 165 concerned a situation where accountants had been engaged by company A to provide a report, as required by stock exchange listing rules, on whether the proposed consideration for a takeover by company A of company B was fair and reasonable. The report had been prepared incompetently and in breach of the contractual and tortious duties of the accountants. The majority judgment in the High Court approved³⁰ the manner in which the trial judge had reached the conclusion that the advisers did not owe a fiduciary duty to company A. The trial judge had considered in the course of his reasoning ***Hospital Products, Daly***, and ***Breen v Williams***. He found that the accountants had not acted as financial and corporate advisers for company A, and that they had given no advice and made no representation to company A about the efficacy or wisdom of the takeover.³¹ He found they had not given “*advice in the relevant sense for the purpose of liabilities as a fiduciary*”.³² In other words, there was no fiduciary relationship because one of the elements that Gibbs CJ had identified in ***Daly*** was missing. There is no suggestion, in the approval by the High Court of this reasoning, that ***Daly*** has been in any way qualified or detracted from.³³ Thus, while it cannot be said that a fiduciary relationship always exists between someone giving financial advice and the person given the advice,³⁴ High Court authority demands that a financial adviser who satisfied the additional criteria identified in ***Daly*** must be taken to owe a fiduciary duty, unless there is a valid reason of principle for distinguishing ***Daly***.

However, without an understanding of the principles that justify the result in ***Daly*** one cannot tell whether a difference from the facts of ***Daly*** is a valid reason of principle for distinguishing it. Nor can one tell whether ***Daly*** should be extended to cover a situation that differs somewhat from the precise facts with which it was concerned.

³⁰ at [74].

³¹ at [72].

³² at [73].

³³ Gaudron, McHugh and Gummow JJ had earlier referred to ***Daly*** without disapproval in ***Breen v Williams*** at 108 and 134 respectively.

³⁴ An unqualified person volunteering stock exchange tips in the pub probably owes no fiduciary duty.

Thus I will give some consideration in general terms to when a fiduciary relationship arises.

Relevance of Contractual Terms

Equity intervenes to impose a duty or give a remedy only when the common law is inadequate to require behaviour that is conscientious according to equity's standards. Thus, if there is a question about whether an equitable obligation should be imposed, one must first identify what are the obligations that the relevant people owe under the common law.

In particular, a provision of a contract can prevent what would otherwise be equitable obligations from arising between the contracting parties. Meagher Gummow and Lehane's *Equity Doctrines and Remedies*, 4th ed (LexisNexis Butterworths (2002) [41-020] correctly says, concerning when an equitable obligation relating to confidential information will be recognised:

“Where there is a contract then it is to the contract that the court should look to see from express words or necessary implication what the obligations of the parties are and the introduction of equitable concepts should be resisted.”

The same applies concerning fiduciary relationships. In ***Hospital Products*** there was a question about whether the Australian distributor of the products of an American manufacturer owed a fiduciary duty to the manufacturer. Consistently with equitable obligations being ones that supplement and correct common law ones, in ***Hospital Products*** all the judges proceeded by first considering what obligations were imposed by the contract between the parties.³⁵ The contract, understood in the light of the practical exigencies involved in one person being the distributor of the product manufactured by another, both defined the task that the distributor was undertaking, and set out what the parties had expressly agreed about the manner in which that task should be carried out.

³⁵ Similarly in ***Moorgate Tobacco Co Ltd v Philip Morris Ltd*** [1984] HCA 73; (1984) 156 CLR 414 Deane J (with whom other members of the High Court agreed) considered whether a fiduciary duty was owed between a trademark licensor and licensee by starting with the obligations arising from the terms of the licensing agreement.

In *Hospital Products* at 97, Mason J said:

“... [that] contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.”³⁶

Thus, as with any obligation in equity’s exclusive jurisdiction, whether a fiduciary obligation is owed, and if so its scope, can depend on the terms of the contract between the parties. In particular, there are situations where, if it were not for a contractual provision, a court would hold that a fiduciary relationship existed, but the terms of the contract prevent that fiduciary relationship from arising. The rationale of this is that, to the extent that the parties have agreed how their relationship will operate, there is nothing unconscientious about them carrying out their agreement.

Of course, the contract must be one that continues to operate between the parties. To the extent that the contract is illegal or contrary to public policy it will be ignored. If there is a ground such as misrepresentation or undue influence for equity setting the contract aside, and that ground is actually invoked, the existence of a fiduciary relationship will be decided without reference to the contract. As well, increasingly there are statutes that empower courts to rewrite certain contracts, or provide a remedy independently of the terms of the contract between the parties. At least sometimes, such a statute could have the effect that a court rules that a contract that on its face would exclude or limit the scope of a fiduciary obligation should not do so.

The terms of the power that these statutes give to the court to override the contract or provide a remedy sometimes uses language like “*unconscionable*” that has at least a family relationship to the language of equity.³⁷ The meaning of such a statute

³⁶ Citations omitted. See similarly *Breen v Williams* at 132 per Gummow J; *Pilmer* at [72] per McHugh, Gummow and Hayne and Callinan JJ.

³⁷ The test for a court having the power to rewrite a contract under the *Contracts Review Act 1980*, if in its discretion it decides it is appropriate to do so, is that the contract is “*unjust in the circumstances*”

must be decided in accordance with ordinary principles of statutory construction. However, the statute can have an effect that is not too far from it being equitable concepts that decide what are the operative terms of the contract between the parties, rather than the situation that there is under the general law, in which equitable obligations must accommodate themselves to the terms of the contract.

General Criteria

There are types of relationship that do not fall within the recognised categories of fiduciary relationships, but in which the courts have held that a fiduciary relationship arises taking into account particular facts about the relationship between two particular people. Examples include certain joint ventures,³⁸ the relationship between an older relative and a young man he advises about how to raise money to pay his debts,³⁹ the relationship between a mortgagee who has exercised a power of sale and the parties with any claim on the proceeds of sale,⁴⁰ and the relationship

relating to the contract at the time it was made” (s 7). Section 4 provides that in that Act “*unjust includes unconscionable harsh or oppressive*”. A corporation cannot be granted relief under that Act (s 6(1)), and natural person cannot be granted relief “*in relation to a contract so far as the contract was entered into in the course of all for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person*”, other than certain farming undertakings (s 6(2)). However s 6(2) does not mean that any contract that a natural person enters and that has a connection with a business transaction is prevented from being the subject of relief under the **Contracts Review Act**; **Toscano v Holland Securities Pty Ltd** (1985) 1 NSWLR 145; **Australian Bank Ltd v Stokes** (1985) 3 NSWLR 174; **Ring Tread Systems (Australasia) Pty Ltd (Receiver and Manager Appointed) v Tubb** (NSW Court of Appeal, 30 October 1998, unreported); **Ford by his Tutor Beatrice Ann Watkinson v Perpetual Trustees Victoria Limited** [2009] NSWCA 186; (2009) 75 NSWLR 42 at [93]–[103]; **Brighton v Australia and New Zealand Banking Group Ltd** [2011] NSWCA 152 at [115]–[123]; **Agricultural and Rural Finance Pty Limited v Atkinson** [2010] NSWSC 635 at [31]–[33], not challenged on appeal **Wardle v Agricultural and Rural Finance Pty Ltd** [2012] NSWCA 107 at [337]. Sections 21 and 22 of the **Australian Consumer Law** (Schedule 2 of the **Competition and Consumer Act 2010** (Cth)) provide that, in some circumstances, a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engaging in conduct that is, in all the circumstances, unconscionable.

³⁸ **United Dominions Corporation Ltd v Brian Pty Ltd** at 10-11; **Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd** [2006] HCA 55; (2006) 229 CLR 577 at [15] per Gummow ACJ, [124] per Hayne J, [156] per Callinan J.

³⁹ **Tate v Williamson**.

⁴⁰ **Bofinger v Kingsway Group** at [49]–[51]. The terms in which their Honours spoke in **Bofinger** may well mean that this is another recognised category of fiduciary obligation, rather than one arising from the facts of the particular case. See generally **Residential Housing Corp v Esber** [2011] NSWCA 25; (2011) 80 NSWLR 69; (2011) 15 BPR 29,213 at [125]–[144].

between an errand boy and the person who sends him off with money to make a purchase.⁴¹

A variety of accounts has been given of how one tells whether a particular relationship that falls outside the traditional categories is fiduciary. I will mention some of them. In discussing these accounts my purpose is to show both the diversity of accounts that has been put forward, and the extent to which there are similarities between them.

The “Duty Inherent In The Task” Account

Such an account was given by Mr JRF Lehane⁴² in 1984.⁴³ He considered a test that had been put forward in the Court of Appeal in the *Hospital Products* case⁴⁴ whereby the important factors for the arising of a fiduciary obligation were said to be the existence of a power to affect the interests of another, and an undertaking by the putative fiduciary to act for or on behalf of the other person. Lehane J said that the “*for or on behalf of*” test should be understood “*in a reasonably strict sense*”, lest it becomes circular. He continued:⁴⁵

“It is, of course, virtually a definition of agency; the trustee administers the trust estate *for* the beneficiaries, not (except, obviously, to the extent that he is one of them) for himself; the director participates in the control and management of the company *for* the company (the body of corporators); the partner acts in the course of the partnership business *for* the partnership; the employee, in the course of his employer’s business, acts *for* his employer. This is not, of course, because equity has imposed, on persons in those positions, the duty (as it has developed) not to let personal interests conflict with duty. It is because the ‘undertaking’ is inherent in the nature of the position. If the trust is to be treated as a paradigm,⁴⁶ it would be

⁴¹ *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728 per Fletcher Moulton LJ.

⁴² as his Honour then was.

⁴³ J R F Lehane, “Fiduciaries in a Commercial Context” in Finn (ed) *Essays in Equity*, The Law Book Company Ltd 1985, p 95. The paper was originally delivered in May 1984, before the High Court decision in *Hospital Products* (Finn (ed) *Essays in Equity*, The Law Book Company Ltd (1985) p v), but was evidently revised and added to after the High Court decision was delivered (p 102-104).

⁴⁴ *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 207-208.

⁴⁵ at 101.

⁴⁶ [1983] 2 NSWLR 157 at 206, 207; on this issue see also *Tito v Waddell (No 2)* [1977] Ch 106 at 230.

virtually a contradiction in terms to say that the trustee need not conduct the affairs of the trust for (or on behalf of) his beneficiaries. There is, of course, no reason why the principle should not apply in any case where the undertaking can be found: clearly, for example, it can be found in the case of the celebrated errand boy of Fletcher Moulton LJ.”⁴⁷

Dawson J expressed a similar but not identical thought in *Hospital Products* when he said:⁴⁸ “*the relationship must be of a kind which of its nature requires one party to place reliance upon the other*”.⁴⁹ I will try to spell out what is implicit in those remarks of Lehane and Dawson JJ.

There are some types of task that have, intrinsic to their nature and purpose, the aim of helping or benefiting someone else, and it would be inconsistent for the person carrying them out to obtain any advantage for himself in doing so, or be influenced by a desire or obligation to benefit anyone else. For example, if a trustee is really to hold the trust property and exercise the trustee’s powers for the benefit of the beneficiaries, as the trust instrument and trust law requires him to do, he could not carry out that task and at the same time make private profits, or exercise a trustee’s power in a particular way because he had a duty to some non-beneficiary to do so.

In considering the purpose for which a task is undertaken, one is not concerned solely with the purpose of the person who required the task to be performed. For example, with many a discretionary trust, the purpose of the person responsible for setting it up is to enable his or her family to be provided with money or other

⁴⁷ *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728.

⁴⁸ at 147.

⁴⁹ Somewhat similarly, Professor Finn said, in “The Fiduciary Principle”, in TG Youdan (ed) *Equity Fiduciaries and Trusts*, LawBook Co (1989) at pp 46- 47:

“What must be shown ... is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. *The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship.* It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exists for the ‘fiduciary expectation’.” (emphasis added)

Those remarks have received judicial approval in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 541 per Lockhart, von Doussa and Sackville JJ, in *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 26 per La Forest J, and in *Citigroup* at [274].

property, in ways that are suited to their individual circumstances from time to time, and in ways that minimise the tax that is paid. But as well one can say that the trust is an institution that the law has established, which has a purpose that is independent of the purpose of any particular person. The purpose of the trust as an institution includes that it enables a person to control the manner in which particular assets will be used when that person is not able themselves to attend to it, either because they are otherwise occupied, or when they are dead. A person is able to set aside a fund of property, secure in the knowledge that it will only be used in the ways he has laid down, for the benefit of particular persons, or to advance particular purposes that are themselves of public benefit. He is able to transfer the property to someone else, confident that that person will not use it for his own purposes except if and to the extent the settlor has permitted. The purpose of the trust is such that if it is to operate properly, ie in a way that will achieve its purpose, many of the powers and discretions of the trustee must be exercised in circumstances where the trustee is acting with undivided loyalty to the beneficiaries.

While a fiduciary must act *with undivided loyalty* to the beneficiary, that does not mean that the fiduciary is bound to act *solely* in the interests of the beneficiary, or in a way that is totally uninfluenced by self-interest. Any partner who acts diligently to advance the interests of the partnership is acting in his own interest in so doing, as well as in the interest of his partners. An agent for sale who is rewarded by a commission calculated as a percentage of the sale price is not in breach of his fiduciary duty when he seeks to maximise the sale price, and thereby maximise his own commission. One can conclude that these situations involve no breach of fiduciary duty when one understands the nature and purpose of the task that the partner, and the commission agent, have respectively taken on. The partner's task is to carry out the partnership business for all the partners, and that task can be carried out with undivided loyalty to the partners even though to the extent that the fiduciary himself is one of the partners he is incidentally providing a benefit to himself as part of benefiting all the partners. The commission agent's task is to benefit the principal by carrying out his contractual obligations. He can carry out that task with undivided loyalty to the principal even though the terms of engagement in his contract have the consequence that benefiting the principal by obtaining a more advantageous price will incidentally also benefit the agent.

Similarly the extent of the fiduciary obligation that a guardian owes to a ward is derived by understanding how the institution of guardianship works:

“Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness.”⁵⁰

The nature and purpose of the task undertaken by the guardian of a ward is such that it is possible for the guardian to derive some incidental benefits in the course of administering property of the ward, though *“the nature and extent of the advantages permitted must depend peculiarly upon the intention ascribed to the instrument”*.⁵¹ A guardian is not subjected to the accounting obligations of a trustee because to do so *“would defeat the very purpose for which the fund is provided if its administration were hampered by the necessity of identifying, distinguishing apportioning and recording every item of expenditure in vindicating its propriety”*.⁵²

This way in which the existence and scope of a fiduciary relationship is derived from considering the nature and purpose of the task that the putative fiduciary has undertaken, and the practical exigencies of carrying out that task, is consistent with the way in which a court ascertains the duties of trustees.⁵³

It follows that it is a necessary part of identifying a fiduciary relationship that one be specific about the tasks or areas of activity that the putative fiduciary is undertaking. It is possible, indeed common, for A to owe a fiduciary obligation to B concerning some activities or tasks, but not concerning others.⁵⁴ That this is so is consistent

⁵⁰ ***Countess of Bective v Federal Commissioner of Taxation*** (1932) 47 CLR 417 at 420-421 per Dixon J, approved by the unanimous judgment in ***Clay v Clay*** at [40].

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ J C Campbell, “Should be ‘rule in Hastings-Bass’ be followed in Australia – Trustees’ duty to enquire and trustees’ mistakes” (2011) 34 *Australian Bar Review*, 259 at 270-273.

⁵⁴ ***New Zealand Netherlands Society “Oranje” Inc v Kuys*** [1973] 1 WLR 1126 at 1130; ***Hospital Products*** at 73 per Gibbs CJ, 98 per Mason J; ***Noranda Australia Ltd v Lachlan Resources NL*** (1988) 14 NSWLR 1 at 15; ***Blythe v Northwood*** [2005] NSWCA 221; (2005) 63 NSWLR 531 at [211]; ***Beach Petroleum NL v Kennedy*** [1999] NSWCA 408; (1999) 48 NSWLR 1 at [188]-[189].

with the fiduciary obligation being one that arises from the nature and purpose of a particular task that is undertaken.

Such an account of the origin of fiduciary obligations is consistent with the explanation that Dixon J gave in ***Birtchnell v Equity Trustees, Executors and Agency Co Ltd*** (1929) 42 CLR 384 at 407-408 for the origin of the fiduciary obligation of partners:

“The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the *very fact that they are associated for such a common end* and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (***Cassels v Stewart*** (1881) 6 App Cas at p 79). The subject matter over which the fiduciary obligations extend is *determined by the character of the venture or undertaking* for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.” (emphasis added)

What I have said so far show that, at least sometimes, consideration of the nature and purpose of the task can lead to a conclusion that a fiduciary duty is owed. However it is not adequate to show that that is always the way to find out whether a fiduciary duty is owed.

Mason J’s “Single Essence” Account

In ***Hospital Products*** Mason J was the only judge in the High Court who found that a fiduciary relationship existed between the American product manufacturer and the Australian distributor who were involved in that case. He found that the distributor owed a limited fiduciary duty concerning the goodwill of the product in Australia. That finding was strongly dependent on particular facts of the case. In the course of finding that the duty existed, he considered, at a general level, the circumstances in which a fiduciary relationship will exist outside the traditional categories. He said, at 96-97:

“Because distributor-manufacturer is not an established fiduciary relationship, it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the

concept, preferring instead to develop the law in a case by case approach, we have to distil the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In so doing we must recognize that the categories of fiduciary relationships are not closed: **Tufton v Sporni**; **English v Dedham Vale Properties Ltd**.

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. **Phipps v Boardman**), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility ...

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed: see generally Weinrib, *The Fiduciary Obligation*, *University of Toronto Law Journal*, vol 25 (1975), pp 4-8. Thus a mere sub-contractor is not a fiduciary. Although his work may be described loosely as work which is to be carried out in the interests of the head contractor, the sub-contractor cannot in any meaningful sense be said to exercise a power or discretion which places the head contractor in a position of vulnerability."⁵⁵

Dawson J was the only other judge in the High Court in **Hospital Products** who ventured even a tentative general account of the characteristics of circumstances in which a fiduciary relationship exists. At 141, he said: "... *no satisfactory single test has emerged which will serve to identify a relationship which is fiduciary.*" Notwithstanding that, at 142 he said:

"There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other: see **Tate v Williamson** (1866) 2 Ch App 55, at pp 60-61."

By contrast, Gibbs CJ at 69 doubted that there could be a general statement of the circumstances in which a fiduciary relationship will be found to exist, and found that all the criteria for a fiduciary relationship that had been put forward in argument were

⁵⁵ citations omitted.

inadequate. Notwithstanding that Gibbs CJ and Dawson J differed about the practicality of stating in general terms when a fiduciary relationship existed, Wilson J⁵⁶ said he had a “*view substantially in accord with that expressed*” by both of them. Deane J held that there was no general fiduciary relationship, because the contract imposed no obligation on the distributor to disregard its own interests where they conflicted with the manufacturer’s, it did not establish a partnership or joint-venture, and it did not make the distributor an agent for the manufacturer or require the distributor “*generally to subordinate its own interests to those of the manufacturer. The arrangement under the contract was the ordinary arrangement that the distributor would buy a product from a manufacturer and sell it on its own behalf.*”⁵⁷ However, he also recognised that it was possible that “*within or arising from that relationship, a more restricted fiduciary relationship might exist. Indeed, the continuing relationship of manufacturer and distributor may well provide a context in which it would be easier to imply undertaking by one party to act as a fiduciary in relation to a particular matter than would be the case if that relationship did not exist.*”⁵⁸ However he found that the particular fiduciary relationship that had been argued for, namely concerning the local products goodwill, did not exist.⁵⁹

Even though Mason J was in the minority in ***Hospital Products***, his account of when a fiduciary relationship will arise has been referred to several times in the High Court since, without explicit endorsement or adoption, but without disapproval either.⁶⁰

⁵⁶ at 116.

⁵⁷ at 123.

⁵⁸ at 123.

⁵⁹ at 124. The headnote at item (4) on 156 CLR 43 is wrong in suggesting that Deane J found that there was a fiduciary relationship between the parties. Deane J would have awarded the manufacturer an account of profits as relief, but not because there was a breach of a fiduciary duty. He would have awarded it because there had been a calculated breach of contract of such enormity that the distributor could not in conscience retain the proceeds for itself. A remedy of that type remains undeveloped in Australian law: ***Town & Country Property Management Services Pty Ltd v Kaltoum*** [2002] NSWSC 166 at [80]-[83]; ***Biscayne Partners Pty Ltd v Valance Corp Pty Ltd*** [2003] NSWSC 874 at [229]-[236]; ***Short v Crawley*** [2005] NSWSC 928 at [21]-[23]; ***Hospitality Group Pty Ltd v Australian Rugby Union Ltd*** [2001] FCA 1040; (2001) 110 FCR 157 at [155]-[159] per Hill and Finkelstein JJ; Gleeson & Watson “Account of profits, contracts and equity” (2005) 79 *Australian Law Journal* 676.

⁶⁰ In ***Daly*** at 377 Gibbs CJ referred to ***Hospital Products***, citing both Mason J’s judgment at the pages where Mason J gave this test, and also his own significantly different judgment. In ***Breen v Williams*** at 92-93 Dawson and Toohey JJ set it out, though with the qualification that “*Mason J did not intend to suggest that this description of a fiduciary relationship isolated those features from other relationships of trust and confidence which do not impose fiduciary obligations.*” Gaudron and

Mason J referred to his account as a “*distillation of the essence*” of a fiduciary relationship rather than a definition. I hope you can understand the difference.

The elements of his Honour’s account are:

- (i) relationship of trust and confidence;
- (ii) the fiduciary undertakes or agrees to act;
- (iii) for or on behalf of or in the interests of another person;
- (iv) in the exercise of a power or discretion;
- (v) which will affect the interests of the other person in a legal or practical sense;
- (vi) the fiduciary has the special opportunity to exercise the power or discretion to the detriment of the other person, and
- (vii) there is vulnerability of the other person to abuse by the fiduciary of his position.

The interrelationship of these elements seems to be that (ii)–(v) must all coexist before the relationship of trust and confidence identified in (i) is established. When there is such a relationship, it is found to also have characteristics (vi) and (vii). His Honour does not say that elements (ii)-(v) are sufficient to establish the relationship of trust and confidence identified in (i).

I will examine these elements in turn.

McHugh JJ at 107 referred to it, but other passages in their judgment at 106–107 make clear that they are not adopting it. In *Pilmer* at [70] the joint judgment of McHugh, Gummow, Hayne and Callinan JJ set it out (though in the context of recounting the trial judge’s reasoning). In *John Alexander’s Clubs Pty Ltd v White City Tennis Club* [2010] HCA 19; (2010) 241 CLR 1 at [86] the joint judgment states that the parties to the case accepted that the relevant principles were stated by Mason J. Of course, that is quite different to their Honours accepting those principles. The remarks that their Honours went on to make at [88]-[91] accepting two points made by Lehane J do not, as I read them, involve any acceptance of Mason J’s formulation. When they say, at [91] “*in the Hospital Products case, Mason J spoke in terms consistent with the later discussion of the case by Justice Lehane*” that is referring to “*Justice Lehane’s second point*”, concerning why commercial transactions often do not give rise to fiduciary duties, not to the whole of Mason J’s account.

Relationship of Trust and Confidence

It follows from the interrelationship of the elements in Mason J's account that he is not using the expression "*relationship of trust and confidence*" in its usual English meaning. This is readily confirmed. It often happens that one person reposes trust and confidence in another when a fiduciary relationship exists, but such trust and confidence is neither necessary nor sufficient for the existence of a fiduciary relationship. Trust and confidence on the part of someone for whom a task is being carried out is not sufficient because, as Gibbs CJ pointed out in ***Hospital Products***,⁶¹ "*an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.*"

One reason why trust and confidence is not sufficient to give rise to a fiduciary relationship, is that equity recognises that there is no point in recognising a duty unless it is possible to give a remedy if the duty is breached. Thus, the range of remedies that equity can provide affects the circumstances in which it will recognise a duty in its exclusive jurisdiction. It has never been the role of an equity court to provide compensation or orders to make restitution for losses other than monetary or proprietary ones. Nor will it provide compensation where a monetary loss is sustained as a consequence of a personal injury or disease. If one considers other equitable remedies, an account of profits must necessarily be measured in monetary terms, and a constructive trust, lien or charge has property as its subject matter. One equitable remedy is rescission of a contract, but the contracts concerning which equity grants rescission are usually ones relating to property or business affairs. Thus, in general, fiduciary duties relate to matters involving property and financial affairs; "*the interests protected have been economic.*"⁶² Because of the limitation on the remedies equity provides, total trust and confidence concerning physical welfare is not enough to give rise to a fiduciary duty. For example, the plane passenger trusts with his or her life the aircraft pilot and numerous unnamed maintenance people and flight controllers, but there is no fiduciary relationship between them. Similarly,

⁶¹ at 69.

⁶² ***Paramasivam v Flynn*** (1998) 90 FCR 489 at 504 (Miles, Weinberg and Lehane JJ), special leave refused (2000) 21(9) Leg Rep SL 1b.

sexual abuse of a child in one's care is a gross breach of a position of trust⁶³ but is not the subject of a fiduciary duty.⁶⁴

A further example is that most patients trust and rely on their doctor for their diagnosis and treatment, but medical practitioners do not owe a fiduciary duty to their patients concerning the full range of their diagnostic decisions or treatment recommendations.⁶⁵ For the most part, the only remedy that the law offers concerning any lack of skill that a doctor shows arises under the common law of professional negligence.

Conversely, trust and confidence on the part of the person owed the fiduciary duty is not necessary for a fiduciary relationship to exist. A trustee does not stop being subject to fiduciary obligations merely because a beneficiary, perhaps justifiably, forms the view that the trustee has no commercial sense or is dishonest, and so does not trust him. There is a fiduciary relationship, but no trust or confidence on the part of the beneficiary, when there is a trustee for very young children or unborn children, or an administrator of the estate of an incapable person.

It might be said that in those cases even if the beneficiary did not trust the fiduciary, there was someone else who trusted him. For example, it might be said that the settlor (or whoever else appointed the trustee) trusted the trustee, or whoever appointed the administrator trusted the administrator. But a person can come to owe fiduciary duties without there being anyone who puts the person into the fiduciary position and who trusts the fiduciary – eg a company promoter who abuses the position he has by virtue of being the promoter can be held liable by the company once it comes into existence for a breach of fiduciary duty.⁶⁶

⁶³ and is likely to be referred to as such by a judge imposing a criminal sentence: s 21A(2)(k) **Crimes (Sentencing Procedures) Act 1999**.

⁶⁴ **Paramasivam v Flynn** at 504-508; **Brown v State of New South Wales** [2008] NSWCA 287 (Spigelman CJ, Beazley JA and Handley AJA) at [34]-[40].

⁶⁵ **Breen v Williams** at 82-83 per Brennan CJ, 92-98 per Dawson and Toohey JJ, 106-108 per Gaudron and McHugh JJ. Gummow J at 134-136 held that the relationship was a fiduciary one. As appears later at page 26 footnote 76, a fiduciary obligation can attach to some aspects of the doctor-patient relationship.

⁶⁶ **Erlanger v New Sombrero Phosphate Co** (1878) 3 App Cas 1218 at 1229-1270; **Brunninghausen v Glavanics** [1999] NSWCA 199; (1999) 46 NSWLR 538 at [89]-[90].

But Mason J did not say that whether a fiduciary relationship existed depended on whether there was actual trust or confidence by the beneficiary, or by anyone else. He spoke generally about fiduciary relationships being “*relationships of trust and confidence or confidential relations*” – ie he was talking about classes or types of relationships. On his account, those classes or types of relationships had the characteristics (ii)–(v) that I have separated out earlier.

That is not the same as the way in which other judgments have regarded the “*relationship of trust and confidence*” that gives rise to a fiduciary duty. In ***Tate v Williamson***, Lord Chelmsford LC at 61 said, concerning fiduciary relationships:

“... the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.”

That seems to be talking about actual trust and confidence. Indeed, Mason, Brennan and Deane JJ had spoken in a similar way in ***United Dominions Corporation Ltd v Brian Pty Ltd*** at 12, when they said:

“... A fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement.”

“*The Fiduciary Undertakes Or Agrees To Act For Or In The Interests Of Someone Else*”

Let me return to considering the elements that Mason J identified as critical for the existence of a relationship of trust and confidence.

Sometimes there can be a fiduciary relationship even if there is no role that the fiduciary has undertaken for or in the interests of someone else, or agreed to perform for or in the interests of someone else. Rather, the fiduciary relationship arises simply by virtue of a set of circumstances in which the fiduciary finds himself acting. In ***Brunninghausen v Glavanics*** the sole effective director and majority shareholder of a small family company was negotiating to buy the shares of his brother-in-law, who was the sole minority shareholder. An important part of the reason for the negotiation was that they had fallen out over the operation of the company, and their mother-in-law had urged them to try to restore family harmony. While negotiations for the majority shareholder to purchase the minority shares were going on, the majority shareholder received an unexpected offer from a third party to buy the company's business. The majority shareholder conducted negotiations to buy the minority shareholder's shares, and the negotiations to sell the company business, at the same time. He reached an agreement to buy the minority shares before agreement was reached on the sale of the business. Both the price at which sale of the business was initially discussed with the prospective purchaser, and the price at which the sale was ultimately consummated, was such that the purchase of the minority shares was at a significant undervalue. The majority shareholder was held to be in breach of a fiduciary duty to the minority shareholder because of his failure to disclose the negotiations for the sale of the company's business before the agreement for purchase of the shares was made.

There was no basis for holding that the majority shareholder had in any way undertaken to act on behalf of the minority shareholder or in the interests of the minority shareholder. Even so, Handley JA⁶⁷ held that there was a fiduciary duty arising:

“... from the bare facts of the relationship. These include the position of the defendant as the sole effective director, the existence of only one other shareholder, their close family association, the intervention of the mother-in-law to secure a family reconciliation, and the exclusive advantage or opportunity which the defendant's position conferred on him to receive any offers to purchase the company's business from third parties.”⁶⁸

⁶⁷ Priestley and Stein JJA agreeing.

⁶⁸ at [54].

Handley JA approved⁶⁹ a test that Professor Finn⁷⁰ had put forward:

“But whether or not a real trust and confidence is there ... the law simply prescribes that, in general, *one party is entitled to expect* that the other will act in his or their joint interests in those matters falling within the ambit of the [fiduciary] relationship. ... Against the background of the relationship, its nature and its purpose [the law] asks for what purpose one party has acquired rights, powers and duties in the relationship: to promote his own interests, the joint interest, or the interest of the other party alone. Insofar as it is either of the latter two, the relationship will be fiduciary to that extent. ... the expectation may be a judicially prescribed one because the law itself ordains it to be that other’s entitlement. This may be so ... because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter....”

He reached the conclusion that there was a fiduciary relationship because of the particular facts of the case, notwithstanding that he recognised that in many situations a company director will owe a fiduciary duty to the company, but not to individual shareholders.⁷¹

That case can be understood as one in which the fiduciary relationship arises from the nature and purpose of the task that the majority shareholder was performing. The various factors that Handley JA identified as giving rise to the duty are ones that were all relevant to understanding the nature of the task he was performing in negotiating the purchase of the minority shareholder’s shares. There is a fiduciary relationship because equity sees that in performing a task of that nature, it was inconsistent for the majority shareholder to derive a private advantage for himself, regardless of what commitments or undertakings he had given, or not given, to his brother-in-law.

Acting For Another

There is a wide variety of circumstances in which it can legitimately be said that one person is “*acting for another*”, but not all of these relationships involve fiduciary duties. The cleaner who cleans my house is cleaning it for me, the builder I engage

⁶⁹ at [100]–[101].

⁷⁰ as his Honour then was, in Youdan (ed) *Equity, Fiduciaries and Trusts*, Carswell, (1989) p 34-35.

⁷¹ at [40]-[41], [109]-[110].

to build a house is building it for me. However, as Gibbs CJ said in *Hospital Products* at 71:

“The fact that there is a duty to be performed — a job to do — cannot in every case create a fiduciary obligation. I agree with the statement of Megarry V-C in *Tito v Waddell [No. 2]*⁷² that the imposition of a statutory duty to perform certain functions cannot be said as a general rule to impose fiduciary obligations, and the same is true of contractual duties arising under ordinary commercial contracts.”

A builder undertakes a task of carrying out certain construction work, he has a contractual obligation to carry it out in a good and workmanlike manner, he has a measure of discretion about how to go about the task, and how he performs the task can have a profound effect on the interests of the client in a legal and practical sense. However the builder is not thereby a fiduciary. That is because the nature and purpose of the task that he undertakes should be understood as being, in nearly all its aspects, to confer a benefit on the proprietor by performance of the contract. In performing that task there is no inconsistency in the builder making as much profit as he can, consistent with performance of his contractual obligations.

Acting For Another In The Exercise Of A Power Or Discretion That Affects Another

There is another aspect to the element of Mason J’s account of fiduciary relationships that *“the fiduciary undertakes or agrees to act for or on behalf or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.”* It is that the exercise of a power or discretion that will affect another person in performing a task for that other person is not enough to give rise to a fiduciary obligation.

Consider the case of a builder performing a building contract on a do and charge basis. He has a discretion about which subcontractors to engage at which rates, and from whom and at which price he will buy materials. In those matters, the builder is entitled to take his own interests into account to some extent – absent an express contractual requirement he is not required to hunt out the cheapest materials if materials of the type required are available locally at a fair market price. The

⁷² [1977] Ch 106, at 229-230.

builder's ability to do so is adequately preserved, and the proprietor's legitimate interest protected, by an implied term that the builder will act reasonably (and perhaps in good faith) in procuring labour and materials for the job.

On the other hand, an investment advisor in the circumstances identified in *Daly* exercises a power or discretion only in a very loose sense. He does not exercise any power or discretion in any way that is analogous to, for instance, a trustee investing the trust fund, where the manner in which the trustee invests the fund operates without any other action being necessary to affect the interests of the beneficiary. The investment adviser simply gives advice, which the client might or might not accept. The only sense in which the adviser exercises a power or discretion is that he has a choice about what advice to give. The same could be said of a solicitor, who clearly owes fiduciary obligations to the client.

But the existence of a power or discretion in this loose sense is not enough either. A medical practitioner must often choose between different available treatment regimes that he or she will recommend to the patient, and that choice could profoundly affect the interests of the patient. However, that is not enough to make the medical practitioner owe a fiduciary duty to the patient concerning the choice of treatment. There is no fiduciary obligation concerning those matters because there is *"no need, or even room, for the imposition of fiduciary obligations"*⁷³ beyond the contractual and tortious obligations that a doctor owes to a patient. Alternatively, imposition of a fiduciary duty *"would significantly alter the already existing complex of legal doctrines governing the doctor-patient relationship, particularly in the area of contract and tort"*⁷⁴, and *"fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."*⁷⁵ There is nothing that equity regards as unconscientious behaviour in a doctor making a mistake, even a serious mistake, in the course of treating a patient.

⁷³ per Dawson and Toohey JJ, *Breen* at 93.

⁷⁴ per Gaudron and McHugh JJ, *Breen* at 110.

⁷⁵ per Sopinka J *Norberg v Wynrib* [1992] 2 SCR 226 at 312; (1992) 92 DLR (4th) 449 at 481, quoted with approval by Gaudron and McHugh JJ in *Breen* at 110.

Further, it may be that another reason why the medical practitioner owes no such duty is that it is necessary that the interests of the putative beneficiary that might be affected be ones concerning property or economic matters and that the economic interests of the patient not be affected only as a consequence of bodily harm. Even if poor medical treatment causes financial loss, as happens if the patient incurs expense for treatment that is no use or suffers loss of earnings through being uncured or ill, equity's remedies do not extend to that type of loss.

However, when the way in which the patient's economic interests are affected by a decision of the medical practitioner is not consequential on the inadequacy of the treatment given, there are some circumstances in which a fiduciary relationship could exist between doctor and patient. Thus, it has been recognised that a medical practitioner could be in breach of a fiduciary duty to a patient if he recommended a course of treatment from which the practitioner would obtain an undisclosed financial benefit.⁷⁶ Similarly, he could be in breach of an equitable obligation if he obtained a financial advantage for himself by reason of the relationship.⁷⁷ When the doctor is advising the patient which course of treatment to adopt, it is not hard to see that task as one that of its nature requires the doctor's choice to be uninfluenced by considerations of private undisclosed gain.

⁷⁶ Dawson and Toohey JJ expressly recognised this in *Breen v Williams* at 94, as did Gummow J at 136. Similarly, Gaudron and McHugh JJ at 112 recognised that a doctor may be restrained from using the information in medical records to make an unauthorised profit or from disclosing that information to one authorised persons. The ultimate conclusion of Dawson and Toohey JJ, at 98 was not a blanket rejection of there being a fiduciary relationship between doctor and patient, but that there was no "*fiduciary relationship between doctor and patient carrying with it a right of access on the part of a patient to medical records compiled by the doctor in relation to that patient.*" Similarly, Gaudron and McHugh JJ accepted, at 107-108 that "*in some circumstances, the dependency of the patient or the provision of confidential information may make the relationship between a doctor and patient fiduciary in nature. But that does not mean that their relationship would be fiduciary for all purposes.*" They concluded, at 110 that the doctor did not owe the patient "*a fiduciary duty to give her access to the medical records.*" Gummow J accepted that the relationship between medical practitioner and patient was fiduciary either because "*the relationship between the parties is one which gives the medical practitioner a special opportunity to affect the interests of the patient who is vulnerable to abuse by the fiduciary of his position, or because the medical practitioner undertakes to exercise professional skill for the benefit of the patient, and particular reliance is placed upon the medical practitioner by the patient*" (at 134).

⁷⁷ *In Re a Solicitor* [1894] 1 QB 254 at 256, considering a deathbed transaction between doctor and patient. It is not clear from the case that the equitable obligation would be a fiduciary one.

By analogous reasoning, I would think that a builder performing a building contract on a do and charge basis could owe a fiduciary duty to the client that would be breached if he purchased goods from suppliers in which he had an undisclosed personal financial interest.

Vulnerability

Mason J was not saying that vulnerability of the person who is owed the duty is enough to give rise to the fiduciary duty. Rather, he is saying that vulnerability of the person who is owed to duty is one of the attributes of a situation where a fiduciary obligation is imposed, so that *absence* of vulnerability to the exercise of a power or discretion that the putative fiduciary has can be a reason why a fiduciary relationship does not exist. The joint judgment in **John Alexander**⁷⁸ similarly used lack of the relevant type of vulnerability as a reason for finding that no fiduciary duty was owed. They said that “*the only vulnerability of the Club was that which any contracting party has to breach by another*”, and that was not the relevant type of vulnerability.

Conclusion re Mason J's Account

This discussion shows that, while Mason J's account is adequate for some instances where there is a fiduciary duty, it is not adequate for all of them. I agree with the remarks of Lehane J in **C-Shirt Pty Ltd v Barnett Marketing and Management Pty Ltd** (1996) 37 IPR 315 at 336:

“While, with respect, that passage may be accepted as stating succinctly a number of matters, particularly the “critical feature”, which are indicative of the existence of a fiduciary relationship, it must be remembered that his Honour's judgment was a dissenting one, in a case in which the majority held that no fiduciary duties arose out of an exclusive distributorship agreement construed as expressly prohibiting the distributor from competing with the supplier. ... In any event, I do not think that in Australian law ‘vulnerability’, though it may be a characteristic of some of those to whom fiduciary duties are owed, is the touchstone of fiduciary obligation: the fundamental question is for what purpose, and for the promotion of whose interests, are powers held? In the case of a distributorship where the distributor is one who buys goods and then sells them as principal, on his own terms, the answer will not ordinarily be that the rights or powers of the distributor are to be exercised in the interests of the supplier or any joint interest.”

⁷⁸ at [83].

The law is a discipline that has its own history of ideas. Mason J's account, given in 1984, shows a similar turn of mind to other attempts that were being made in the High Court at that time to provide bold over-arching accounts of broad legal concepts. It is of a piece with the attempt in tort law, that started in 1984, to give a general account of proximity as a unifying concept that must be met, along with reasonable foreseeability of harm, before there is a duty of care.⁷⁹ The High Court has now rejected that attempt.⁸⁰ It is of a piece with Deane J's suggestion in 1983 that there might be a unifying concept for the law relating to equitable liens.⁸¹ That suggestion has not advanced, and has difficulties of principle.⁸² It is of a piece with Mason and Deane JJ proposing, in 1983, a single overarching principle for the law of estoppel⁸³. While that has not yet been rejected decisively by the High Court,⁸⁴ there are good grounds of principle for doubting the usefulness of such an overarching concept, and for believing that it glosses over important distinctions.⁸⁵ Mason J's account should, in my view, be approached with caution.

The Multifactorial Account

In *Breen v Williams*, Gaudron and McHugh JJ said, at 106:

“Australian courts have consciously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another. This is because ... the term ‘fiduciary relationship’ defies definition.”

⁷⁹ *Jaensch v Coffey* (1984) 155 CLR 549 at 553-554, 579-585, 613; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

⁸⁰ Eg *Vairy v Wyong Shire Council* at [28].

⁸¹ *Hewett v Court* (1983) 149 CLR 639 at 667-668.

⁸² J C Campbell, “Some Historical and Policy Aspects of the Law of Equitable Liens” (2009) 83 *Australian Law Journal* 97 at 121-122.

⁸³ *Legione v Hateley* (1983) 152 CLR 406 at 430, 435, further advanced in *Walton's Stores v Maher* (1988) 164 CLR 387 at 403-404, 420, 447-448, *Foran v Wight* (1989) 169 CLR 385 at 411, 435; *Commonwealth v Verwayen* (1990) 170 CLR 395 at 454, 499-501.

⁸⁴ In *Giumelli v Guimelli* [1999] HCA 10; 196 CLR 101 at [6] Gleeson CJ, McHugh Gummow and Callinan JJ referred to proprietary estoppel as “a well recognised variety of estoppel as understood in equity” – as though there continued to be several varieties of estoppel. At [7] their Honours apparently regarded whether there was a “single overarching doctrine” or “general doctrine of estoppel by conduct” as continuing to be an open question.

⁸⁵ Handley, *Estoppel by Conduct and Election*, Thomson, Sweet & Maxwell London (2006) [1-028].

They went on to quote the remarks of Gibbs CJ in *Hospital Products* to that effect.

Their Honours went on, at 107, to say:

“... the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence (*Hospital Products* (1984) 156 CLR 41 at 69, citing *Tate v Williamson* (1866) LR 2 Ch App 55 at 61; *Coleman v Myers* [1977] 2 NZLR 225 at 325); inequality of bargaining power (*Hospital Products* (1984) 156 CLR 41 at 69-70); an undertaking by one party to perform a task or fulfil a duty in the interests of another party (*Reading v The King* [1949] 2 KB 232 at 236; *Hospital Products* (1984) 156 CLR 41 at 96-97); the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another (*Frame v Smith* (1987) 42 DLR (4th) 81 cited in *LAC Minerals Ltd v International Corona Resources* (1989) 61 DLR (4th) 14 at 62-63); and a dependency or vulnerability on the part of one party that causes that party to rely on another (*Johnson v Buttress* (1936) 56 CLR 113 at 134-135).

While this account provides a correct description of some of the circumstances in which a fiduciary duty has been found to exist, it is self-confessedly incomplete, and has little predictive power.

The “Entitlement to Expect” Account

Professor Finn’s view that a fiduciary relationship arises if “*one party is entitled to expect that the other party will act in his interests in and for the purposes of the relationship*”⁸⁶ has been adopted by various judges.⁸⁷ Such an account has the same potential difficulty as all “*legitimate expectation*” accounts of the source of a legal obligation, in putting one step off the true source of the obligation. The ability of such an account to identify when a fiduciary relationship arises, outside the traditional categories, is only as great as its ability to identify what it is that generates the entitlement to expect.⁸⁸

⁸⁶ Finn, “The Fiduciary Principle”, in Youdan (ed) *Equity, Fiduciaries and Trusts* 1989, p 46.

⁸⁷ *Glandon v Strata Consolidated* (1993) 11 ACSR 543 at 556-557 per Cripps JA (Clarke JA agreeing); *Brunninghausen v Glavanics* at [100]-[101]; *News Ltd v Australian Rugby Football League Ltd* at 541; *ASIC v Citigroup* at [273]-[274].

⁸⁸ Professor Finn’s account of that is too complex to be dealt with adequately here. I have quoted some aspects of it at footnote 49 and at page 23 footnote 70 above. Another part, that was approved by Cripps JA in *Glandon*, comes from Youdan at 46:

Kirby J, in the course of a discussion of various theories of when and how fiduciary obligations arise in *Pilmer* at [136] accepted that this theory “*can be criticised as tautologous and subjective*” but was nonetheless of the view that “*it represents the best attempt to express what is involved*”.

The “Abandon Theory” Account

Cases that lie outside the usual field in which a legal concept operates provide a test of the adequacy of any general account of that concept. *Paramasivam v Flynn* was such a case: the plaintiff claimed someone *in loco parentis* to him had sexually abused him while a child and sought relief on the basis that there had been a breach of fiduciary duty. In rejecting that claim Miles, Lehane and Weinberg JJ said:⁸⁹

“Of course, conduct such as that alleged against the respondent in this case can readily be described in terms of abuse of a position of trust or confidence, or even in terms of the undertaking of a role which may in some respects be representative and, within the scope of that role, allowing personal interest (in the form of self gratification) to displace a duty to protect the appellant’s interests. But it should not be concluded, simply because the allegations can be described in those terms, that the appellant should succeed in an action for breach of fiduciary duty if the allegations are made good. What the apparent applicability of the descriptions illustrates is not only the incompleteness but also the imperfection of all the individual formulae which have at various times been suggested as encapsulating fiduciary relationship or duty. The principles can be understood only in the context of the way in which the courts have applied them.”

“Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exists for the ‘fiduciary expectation’. Such a role may generate an actual expectation that the other’s interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other’s entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility. Illustrative of the former are relationships of unthinking dependency, a phenomenon which can be prevalent in family and close personal relationships. Illustrative of the latter are relationships such as solicitor and client and doctor and patient, in which loyalty to the client or patient is regarded as necessary if the integrity and credibility of those socially important service relationships are to be maintained.”

⁸⁹ at 505.

In light of the repeated statements in the High Court of the impossibility of adequately encapsulating when a fiduciary duty arises, that seems the safest way to proceed. But that does not mean that discussion of in what circumstances a fiduciary relationship arises is reduced to construction of lists of specific instances. It is possible to recognise a coherent pattern of equitable principle, in promoting particular values and protecting particular types of interests, in the recognition of fiduciary obligations in some situations but not in others. Some assistance can be gained from considerations of how common law and equitable obligations interrelate, of why equity sometimes imposes obligations that do not exist at common law, and what it is that equity has regarded, in past cases, as the type of unconscientious behaviour that calls for its intervention. Engagement with the reasoning process of the judges who have held that a fiduciary obligation arises in certain particular cases enables the reader to come to an understanding of when a relationship is fiduciary, through those cases acting as a ostensive definition of a fiduciary relationship.⁹⁰

THE SIGNIFICANCE OF A RELATIONSHIP BEING COMMERCIAL

The title of this paper, “*fiduciary relationships in a commercial context*”, might be thought to suggest that all commercial contexts operate in the same way, so far as fiduciary relationships are concerned. Any such suggestion would be incorrect. Characterising a relationship as “*commercial*” does not get us very far in determining the existence of fiduciary duties. Rather, it is what precise task or activity the putative fiduciary is carrying out and how that task or activity is related to the person to whom the duty might be owed that are of fundamental importance.

In *Hospital Products* at 99-100 Mason J said:

⁹⁰ *Certain Lloyds Underwriters v Giannopoulos* [2009] NSWCA 56 at [106]; *Waugh Hotel Management Pty Ltd v Marrickville Council* [2009] NSWCA 390, 171 LGERA 112 at [119]; *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Limited* [2009] NSWCA 263, 77 NSWLR 360 at [230]; *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303, 15 BPR 29,465 at [239], [253]; *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152 at [95]; *Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd* [2011] NSWCA 128, 281 ALR 304, 84 ACSR 33 at [94]; *Re GHI (a protected person)* [2005] NSWSC 581 at [20]; *Sanpine v Koopahtoo Local Aboriginal Land Council* [2005] NSWSC 365 at [177].

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

The essential thought in that passage has now been put beyond doubt by the High Court’s decision in ***John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd*** [2010] HCA 19; (2010) 241 CLR 1 where the unanimous joint judgment said, at [90]:⁹¹

“... the reason why commercial transactions falling outside the accepted traditional categories of fiduciary relationship often do not give rise to fiduciary duties is not that they are ‘commercial’ in nature, but that they do not meet the criteria for characterisation as fiduciary in nature...”

There has been repeated High Court recognition that the fact that an arrangement between parties was the commercial kind and that they had dealt at arm’s length and on an equal footing is an important, but not a decisive, factor in favour of a conclusion that no fiduciary relationship exists.⁹² However, the cases usually cited in support of that proposition depend very much upon their particular facts for their conclusion that no fiduciary relationship exists.⁹³

Talking of parties being at arms length is a metaphor that conjures up images of them being cautious, wary, keeping their distance yet still able to communicate. If a relationship is like that, it is the antithesis of a fiduciary relationship. It is a matter of fact, an empirical generalisation, rather than a matter of legal analysis, that many commercial relationships are ones in which the parties are at arms length.

⁹¹ adopting an observation of JRF Lehane (as his Honour then was) in “Fiduciaries in a Commercial Context” in Finn (ed) *Essays in Equity* (1985) 95 at 104.

⁹² ***Hospital Products*** at 70 per Gibbs CJ, 119 per Wilson J, 123 per Deane J, 147 per Dawson J. ***Moorgate Tobacco Co Ltd v Philip Morris Ltd*** at [11], 427-428, [25]–[26], 436-437.

⁹³ ***Jones v Bouffier*** (1911) 12 CLR 579; ***Dowsett v Reid*** (1912) 15 CLR 695; ***Para Wirra Gold & Bismuth Mining Syndicate NL v Mather*** (1934) 51 CLR 582; ***Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd*** (1958) 100 CLR 342.

In very broad terms, you are more likely to find that there is a fiduciary relationship between people who have different roles to play on the same side of a commercial transaction or dealing than you are to find that there is a fiduciary relationship between people who have roles on opposite sides in a commercial dealing or transaction. That proposition is also empirical generalisation, not a statement of law. One reason why it is true is that if F and B are on the same side in a commercial dealing you are more likely to find that the task that F performs that affects B is one that in its nature and purpose requires F to suppress any of his own interests or duties that conflict with his duty to B than would be the case if F and B are on opposite sides. In deciding whether a commercial relationship gives rise to fiduciary obligations, as in other contexts, it is useful to consider carefully the nature and purpose of each particular task that the putative fiduciary is carrying out.

These days, many admittedly fiduciary relationships have a commercial aspect. It is by no means uncommon for a trustee, a solicitor, or an agent to be paid for carrying out their task. Sometimes they are paid handsomely. Sometimes there is detailed negotiation and complex contracts about the basis on which they will be paid. But those commercial aspects of the relationship between the fiduciary and the person owed the duty are not of themselves enough to stop fiduciary duties being owed. That is because, even when the fiduciary is being paid, there will still be tasks that the fiduciary carries out that are of a nature and purpose that requires that the fiduciary give undivided loyalty to the beneficiary in the performance of that task.

CONTENT OF THE FIDUCIARY DUTIES

If F is in a fiduciary relationship with B, not all ways in which F could be said, in ordinary language, to be disloyal to B involve breaches of fiduciary duty. There might be disloyalty, but no breach of fiduciary duty, if F fails to vote for B in a local government election, or sleeps with his wife. Nor is everything that might be called disloyalty *in the task or activity concerning which the fiduciary duty exists* a breach of the fiduciary duty. If F is lazy and does not try very hard to advance B's interests in

performing the task that might be disloyalty in ordinary language, but it is not a breach of a fiduciary duty.

In **Breen v Williams** Gaudron and McHugh JJ said:⁹⁴

“... Australian courts only recognize proscriptive fiduciary duties ... In this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interests. As a result, equity imposes on the fiduciary proscriptive obligations -- not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.”

This passage clearly states the present Australian law. It has since been approved by the majority judgment in **Pilmer v Duke Group Ltd (In Liquidation)**.⁹⁵ In **Youyang v Minter Ellison** it was also approved in the joint judgment of Gleeson CJ McHugh Gummow Kirby and Hayne JJ at [41] when they said that **Youyang** was not:

“... a case of breach by the trustee of the proscriptive fiduciary obligations not to obtain an unauthorised benefit from the relationship and not to be in a position of conflict. These are identified and explained in **Breen v Williams** and **Pilmer**”⁹⁶

⁹⁴ at 113.

⁹⁵ [2001] HCA 31; (2001) 207 CLR 165 at [74].

⁹⁶ The references that their Honours there gave were to **Breen v Williams** at 113 and 137, while the references to **Pilmer** to were at “[74]-[78] cf... [134]-[136]”. I have already quoted the passage in **Breen v Williams** at 113. The passage at 137 that I take their Honours to be referring to is where Gummow J said: “*Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty*”. **Pilmer** at [74]-[78] included approval of the statement of Gaudron and McHugh JJ in **Breen** at 113 that I have already quoted, and the statement that [78] that:

“In particular, the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances where there is “conflict or a real or substantial possibility of a conflict” between personal interests of the fiduciary and those to whom the duty is owed ... Similar reasoning applies where the alleged conflict is between competing duties, for example where a solicitor act on both sides of a transaction.”

The passage in **Pilmer** at [134]-[136] that appears, from the “*cf*” to be disapproved, is in the dissenting judgement of Kirby J.

The “No Conflicts” Rule

The obligation “*not to be in a position of conflict*”, requires some explanation. The principle had sometimes been expressed (incompletely) in terms that a person “*is not allowed to put himself in a position where his interest and duty conflict*”, or “*may conflict*”. However, it had been pointed out that a principle as unqualified as that is a counsel of prudence rather than a rule of equity,⁹⁷ and that “*even as an unqualified counsel of prudence, it may in some circumstances be inappropriate*”.⁹⁸ It is the actual entering into of the transaction or actual performance of the engagement in which the fiduciary has, or can have a personal interest conflicting with the interests of those of his beneficiary, or the actual receipt of a personal benefit or gain in circumstances where such conflict exists or has existed, that triggers the availability of an equitable remedy.⁹⁹ That led Deane J in ***Chan v Zacharia*** to state the no-conflicts principle in terms of when an equitable remedy is available.¹⁰⁰

In ***Hospital Products*** Mason J took a different approach. He reverted to stating the principle in terms of what the obligation is rather than of when a remedy is available, but modified the statement of the obligation to being:

“an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a *real or substantial possibility* of a conflict between his personal interests and those of the persons who he is bound to protect.”¹⁰¹ (emphasis added)

It is the approach of Mason J that is the current Australian law on this topic, by reason of its adoption in ***Pilmer*** at [78].¹⁰² Because it depends on the *possibility* of a conflict, this rule has rightly been described as “*inflexible*”¹⁰³ and “*stringent*”.¹⁰⁴ In

⁹⁷ ***Chan v Zacharia*** at 198 per Deane J (Brennan and Dawson JJ agreeing), approving a statement of Sir Frederick Jordan.

⁹⁸ *ibid.*

⁹⁹ ***Chan v Zacharia*** at 198 per Deane J (Brennan and Dawson JJ agreeing).

¹⁰⁰ at 199.

¹⁰¹ at 103.

¹⁰² See generally ***Aberdeen Railway Co v Blaikie Bros*** (1854) 1 Macq 461; ***Birtchnell v Equity Trustees*** at 408 per Dixon J; ***Queensland Mines Ltd v Hudson*** (1978) 52 ALJR 399 at 401 (a decision of the Privy Council); ***Pilmer*** at [78] per McHugh Gummow and Hayne and Callinan JJ.

¹⁰³ ***Bray v Ford*** [1896] AC 44 at 51 per Lord Herschell.

deciding whether there has been such a breach, the conflicting duty or interests must be identified.¹⁰⁵ The only relief from the stringency of the rule is that it is possible that there will be marginal cases where there is argument about whether a fiduciary's prospect of obtaining a personal benefit provided an inducement that was strong enough to give rise to a "*real or substantial possibility*" of a conflict between his duty and his interest.¹⁰⁶

An advantage arising from the desirability of coherent legal theory of adopting the approach of Mason J rather than that of Deane J is that a legal remedy ought be available only if one can identify what is the obligation that has been breached. There are also some more pragmatic advantages of adopting the approach of Mason J in this respect. One is the statement of Lord Herschell in ***Bray v Ford***¹⁰⁷ that:

"... human nature being what it is, there is a danger, in such circumstances, of the person holding the fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

To similar effect is the statement of Deane J in ***Chan v Zachariah***,¹⁰⁸ that "*the objective is to preclude the fiduciary from being swayed by considerations of personal interest*", and the statement in ***Warman International v Dwyer***¹⁰⁹ that "*courts have always insisted on compliance by fiduciaries with strict and rigorous standards with a view to ensuring that they do not expose themselves to a conflict of interest and duty.*"

Another pragmatic advantage is that if a fiduciary is in a situation where there is a real possibility of a conflict, and the fiduciary actually prefers his own interest, or prefers to perform the duty owed to someone else, the person owed the duty will

¹⁰⁴ ***Warman International v Dwyer*** (1995) 182 CLR 544 at 557.

¹⁰⁵ ***Pilmer*** at [83].

¹⁰⁶ ***Pilmer*** at [79].

¹⁰⁷ at 51-52, approved by Gaudron and McHugh JJ in ***Breen v Williams*** at 108.

¹⁰⁸ at 198.

¹⁰⁹ at 563.

sometimes not find out, and any remedy that is given after the breach will sometimes be inadequate. One way of lessening the risk of that happening is to have a rule saying that there cannot be any such conflict. It lessens the risk because many people will try to perform their legal obligations if they are told what they are, and a simple rule requiring the avoidance of situations where there is a real possibility of a conflict is one that solicitors who are giving advice can easily communicate. The type of equitable remedy that is available for breach of the rule provides a control on its excessiveness – there will be litigation only if the fiduciary has obtained a benefit, or the beneficiary has been caused a loss, as a result of the conflict.

The “*interest*” of the fiduciary that can result in a conflict of interest is not only his interest in having a benefit of some sort accrue to himself. It is also his interest in having a benefit of some sort accrue to some third party whom he wishes to benefit.¹¹⁰

Another way in which a fiduciary can be in a “*position of conflict*” is if there is a conflict between a duty that the fiduciary owes to the beneficiary, and the duty he owes to someone else.¹¹¹ Concerning that type of conflict, the obligation “*not to be in a position of conflict*” requires the fiduciary “*not to enter upon conflicting engagements to several parties*”.¹¹² This rule is likewise a stringent one – it is not the *performance* of a duty that conflicts with that owed to the beneficiary that is prohibited, it is *entering into the engagement* that creates the duty concerning which the possibility of conflict exists.

Effect Of The Duties Being Proscriptive

The High Court’s clear statement that fiduciary duties are the two proscriptive duties identified in ***Breen*** requires there to be some re-examination of previous statements about the content of fiduciary obligations.

¹¹⁰ ***Haywood v Roadknight*** at 517.

¹¹¹ ***Beach Petroleum NL v Kennedy*** at [196], [202].

¹¹² ***Breen v Williams*** at 135 per Gummow J. Similarly, see ***Birtchnell*** at 408 per Dixon J.

Variable Fiduciary Duties?

It has been held that different fiduciary relationships give rise to different obligations.¹¹³ It has also been held that the scope of the duties to which a particular fiduciary is subject “*must be moulded according to the nature of the relationship and the facts of the case*”.¹¹⁴

I suspect that the way to resolve the apparent conflict between there being only prospective duties of the type recognised in **Breen**, and these other statements of the law is that the statements that suggest that fiduciary duties can vary from relationship to relationship are identifying the scope of the duty by identification of the particular task concerning which the fiduciary duty exists.

A similar phenomenon can be seen in the law of negligence, where there is only one duty that the law imposes, namely to take reasonable care, but there are many different factual situations in which such a duty can arise. The duty can arise concerning activities as diverse as driving a motor vehicle, making residential property available for lease, making statements, and conducting surgery. It is the particular situation concerning which the duty arises that affects the scope of the duty in any particular case: what is involved in taking reasonable care while driving a motor vehicle is quite different to what is involved in taking reasonable care while conducting surgery. Similarly concerning fiduciary duties, the fiduciary obligation is the short list of things that the fiduciary must not do, but there can be a very diverse collection of tasks concerning which a fiduciary obligation arises. It is the precise task concerning which the fiduciary obligation arises that fleshes out concerning what it is that, in any particular situation, the fiduciary must not pursue his personal interest, or perform a duty he owes to someone other than the beneficiary, or make private profits.

¹¹³ **Hospital Products** at 69 per Gibbs CJ; **Breen v Williams** at 83 per Brennan CJ, 137 per Gummow J; **In Re Comber** [at 728–729].

¹¹⁴ **Birtchnell v Equity Trustees, Executors and Agency Co Ltd** at 408 per Dixon J; **Hospital Products** at 102 per Mason J.

Fiduciary Duty Of Disclosure?

There is old authority that sometimes there can be a fiduciary duty to disclose information – eg it has been held that a company director has a duty to disclose information that is relevant to a resolution that is to be put to the company, regardless of whether the director has learned that information in the course of his activities as a director: *Bulfin v Bebarfald's Ltd*,¹¹⁵ approved in *Brunninghausen v Galvanics* at [71]–[79]. Similarly, it has been held that a solicitor has an obligation to place at his client's disposal all the knowledge that the solicitor has that is relevant to the transaction concerning which the solicitor is giving advice, even if that knowledge was not obtained in the course of acting for the client.¹¹⁶

Of particular relevance to any discussion of the fiduciary duties of financial advisers is that both Gibbs CJ and Brennan J in *Daly*¹¹⁷ held that the stockbroker in that case had a duty of disclosure. In particular, Brennan J in *Daly* specifically held that an investment adviser who is approached by a client for advice and undertakes to give it, and who proposes to offer the client an investment in which the adviser has a financial interest, could be subject to a duty of disclosure.

How could there be a fiduciary duty to disclose information, if fiduciary duties are proscriptive? In *Aequitas v AEFC*¹¹⁸ Austin J said:

“In my opinion, in light of the reasoning in *Breen v Williams*, Brennan J's dictum should be taken to refer, for the most part, to the contractual aspects of the adviser-client relationship. The duty to provide ‘best advice’ and to disclose knowledge and information arise out of the adviser's ‘undertaking’, and are therefore implied terms of the contractual retainer. And disclosure may also relieve the adviser from the fundamental fiduciary duty not to ‘assume a position where his self-interest might conflict with the honest and impartial giving of advice’.”

¹¹⁵ (1938) 38 SR (NSW) 423 at 432.

¹¹⁶ *Spector v Ageda* [1973] 1 Ch 30 at 48 per Megarry J; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 213-215 per Mahoney JA; *Little v Price* [2004] QCA 383; [2005] 1 Qd R 275 at [4]-[6]; *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239; (2008) 223 FLR 1 at [6361]-[6365].

¹¹⁷ in the passages cited at pages 5 and 6 above.

¹¹⁸ [2001] NSWSC 14; (2001) 19 ACLC 1006 at [287].

In **Citicorp** at [376] Jacobsen J said that it “*may follow*” this view of Brennan J’s remarks was correct, but he did not need to decide the question.

If the first opinion given in **Aequitas** (about to what “*Brennan J’s dictum should be taken to refer*”) was that Brennan J was intending to refer to a contractual duty, then I doubt that that opinion is correct. The whole point of the discussion of the duties of the broker in **Daly** was to decide whether Dr Daly had a valid claim against the fidelity fund established under the **Securities Industry Act 1975** that would entitle him to be indemnified for the losses he had suffered. Because of the language of the statute that governed the fund, that in turn depended upon whether the money he paid over “*was entrusted to*” the firm. The argument put on behalf of Dr Daly was that the money was entrusted to the firm, because it owed him a fiduciary duty concerning it, and had breached that duty. Contractual obligations between the firm and Dr Daly, at the time the advice was given, had nothing to do with that.¹¹⁹ As well, the cases upon which Brennan J relied, and on which Gibbs CJ relied for his similar statement, included at least some that clearly put a duty of disclosure on the basis that a fiduciary duty was owed.¹²⁰ However, the first opinion given in **Aequitas** is at least a useful reminder that an adviser might sometimes have a contractual duty to disclose information, and that if the adviser is a fiduciary there could be a breach of fiduciary duty if there were to be a conflict between, for example, that contractual duty and the interest of the fiduciary in writing business.

In my view, the second opinion given in **Aequitas** is correct. Knowledge of and consent to a situation that would otherwise be a breach of a fiduciary obligation can result in there being no breach, provided that the consent is properly informed.¹²¹ Once a beneficiary gives a fully informed consent to an action that a fiduciary

¹¹⁹ Indeed there is nothing in the report to suggest that there were any contractual obligations at that time. A contract entered later, when Dr Daly lent the money to the firm, was however relevant to the Court’s ultimate conclusion that the money in question had not been “*entrusted*”.

¹²⁰ Rather than interrupt the flow of the argument at this point, I seek to make this proposition good by discussing the cases concerned in the Appendix to this paper. Some of the cases in the Appendix also provide some justification for why the second opinion expressed in **Aequitas** is correct.

¹²¹ **Phipps v Boardman** [1967] 2 AC 46 at 105; **Hospital Products** at 73 per Gibbs CJ; In **Breen v Williams** at 125-126 Gummow J said “*it is an answer to a claim against an erring fiduciary that the plaintiff gave an informed consent, after full and frank disclosure of all material facts, to the alleged breach of duty.*”

proposes to take, any conflict that there otherwise might be between the duty to the beneficiary, and the interest or countervailing duty of the fiduciary, disappears.

In *Maguire v Makaronis*¹²² the High Court said “what is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include ... the importance of obtaining independent and skilled advice from a third party.”¹²³ In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹²⁴ the joint judgment specifically said that, “the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made.”¹²⁵

The effect of this is that sometimes a fiduciary will be under a practical compulsion to make a disclosure of circumstances that by themselves would amount to a breach of duty, because it is only by making that disclosure that the fiduciary can obtain an informed consent. That practical compulsion is not, however, the same as a legal obligation. As the majority joint judgment in *Maguire v Makaronis* said at 467:

“... there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty.”

The remarks of Gibbs CJ and Brennan J in *Daly* were made in a similar context to that of many of the cases on which they relied, in that the investment that the broker proposed to Dr Daly was a loan to itself. Thus, inducing Dr Daly to make the loan would be a breach of the brokers’ fiduciary duty, unless they obtained his informed consent to that breach. While Brennan J referred to the “*duty*” of the investment adviser to disclose information, the cases on which he relied do not establish that there is any such duty in the sense of a duty that if breached is the basis of a cause of action.¹²⁶ *Daly* only establishes that there is such a duty in the sense of a

¹²² (1996) 188 CLR 449 at 466.

¹²³ Jacobsen J summarised the law to similar effect in *Citigroup* at [293]–[296].

¹²⁴ [2007] HCA 22; (2007) 230 CLR 89.

¹²⁵ at [107].

¹²⁶ I seek to justify that statement in the Appendix.

practical compulsion on a fiduciary who is to avoid being in breach of his fiduciary duty.

At the risk of some repetition, an analogy from tort law may be helpful. There is only one duty that a motorist owes to another user of the highway, namely to take reasonable care; it is inaccurate to say that a motorist owes a duty to keep a proper lookout, to drive at a safe speed, not knowingly to drive a defective vehicle, and so on.¹²⁷ Rather, failure to keep a proper lookout, failure to drive at a safe speed, and knowingly driving a defective vehicle are all ways in which the duty to take reasonable care of other users of the highway could be broken. Similarly, the sorts of activities that would count as a breach of a fiduciary obligation will depend on the nature and purpose of the task that the fiduciary is performing, and in that way the scope of the duty, ie the area of activities over which the duty comes to operate, will depend on the task. However, the formulation of the duty that applies to all fiduciary relationships is still not to derive an unauthorised benefit from the task concerning which there is a fiduciary relationship, and not to be in a position of conflict between the duty concerning which the relationship exists, and one's own interest or some other duty.

Even since *Breen v Williams* and *Pilmer*, the High Court has sometimes slipped into talking about a fiduciary having a duty of disclosure.¹²⁸ However, when it did so in *Farah* it explained that duty as arising “...because to exploit those opportunities without informed consent would be to place Farah in a position of conflict between its self-interest and its duty”.¹²⁹ The shorthand talk of a “duty of disclosure” should not be seen as anything other than a recognition of what the fiduciary must do if it is to avoid being in breach of its proscriptive fiduciary duty. Similarly, the Court of Appeal in England has spoken of an employee having a fiduciary duty to disclose his own

¹²⁷ *Teubner v Humble* (1963) 108 CLR 408 at 504 per Windeyer J (Dixon CJ and McTiernan J agreeing); *Crimmins v Stevedoring Committee* [1999] HCA 59; (200 CLR 1 at [65] per McHugh J (Gleeson CJ agreeing)); *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 at [26] per McHugh J, at [117]-[118] per Hayne J (Gummow J agreeing).

¹²⁸ *Farah v Say-Dee* at [29] (d) (specifically identifying whether there was a duty of disclosure as being one of the issues in the case), [103], [105], heading preceding [106].

¹²⁹ at [103].

wrongdoing.¹³⁰ That can likewise be explained on the basis that the employee has a conflict between his own interest in keeping quiet about his wrongdoing, and his duty to disclose it, and the only way for there not to be a breach of fiduciary duty is if the employee discloses it.

What I have said so far does not mean that someone who is a fiduciary can only be under a duty of disclosure in this backhanded sense that disclosure is something that must be done if one is to avoid a breach of fiduciary duty. Consider the situation where a solicitor realises, through information that is not confidential and that he has obtained other than in the course of carrying out a particular retainer, that a client is about to make a serious blunder concerning the transaction that is the subject of the retainer. The solicitor would gain nothing by keeping the information to himself, so there is no question of there being a conflict between his duty and his interest. He has no duty to anyone else to keep the information to himself, so there is no question of a conflict between his duty to the client and his duty to anyone else. It offends all one's instincts as a lawyer to think that the solicitor would be free to sit back, say nothing, and let the client make the blunder. For the solicitor to act in that way could easily be called not being loyal to the client, concerning the task that the solicitor has embarked on for the client. But that does not mean that courts below the High Court in the appellate hierarchy should look for ways to distinguish the statements about fiduciary duties only being proscriptive, or that the High Court itself should think again about whether fiduciary duties are all proscriptive. The common law duty of the solicitor, to act with reasonable care and skill in carrying out the retainer, would itself be breached if the solicitor stayed silent. His obligation to use reasonable skill and care requires him to use whatever he knows that is relevant to the retainer, wherever he derived that knowledge from. In other words, even if someone is a fiduciary, it is not only the fiduciary duties that he owes that are of importance.

¹³⁰ *Item Software v Fassihi* [2005] 2 BCLC 91.

Duty to Act in the Interests of the Beneficiary?

In *Hospital Products* Mason J accepted that “*the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed*”.¹³¹ The joint judgment in *John Alexander* similarly recognised a duty to exercise the power or discretion that the fiduciary had in the interests of the person to whom it is owed.¹³² Yet between those two statements of the law there has been an express statement in *Breen v Williams* and in *Pilmer* that, apart from not obtaining unauthorised benefits or being in a position of conflict “*the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interest of the person to whom the duty is owed.*”

At first glance this might look like a flat contradiction. But I do not think it is. The statements in *Hospital Products* and *John Alexander* were made in a context that presupposed that the power or discretion was being exercised. They were concerned with the manner in which it was being exercised. In the context where a fiduciary is exercising the power or discretion, “*acting in the interests of the beneficiary*” means not acting in a way that prefers his own interest (or duty to a third person). When the judges in *Breen* and *Pilmer* denied that there was a positive legal duty to act in the interests of the person to whom the duty is owed they were saying that if a fiduciary exercises a power or discretion in a way that is less advantageous to the beneficiary than a different exercise of the power would be – eg if a fiduciary agent enters a contract that is not as profitable as another that was available would have been – but the fiduciary derives no personal advantage from his choice and is not in a position of conflict, then there is no breach of a fiduciary duty. In other words, any duty to exercise care and skill is not one that equity imposes as a fiduciary duty. That is exactly what the High Court had earlier decided, when it accepted the reasoning in *Bristol and West Building Society v Mothew*.¹³³

¹³¹ at 97.

¹³² at [87].

¹³³ See cases cited at footnotes 6 and 7 on pages 3 and 4 above.

THE REMEDIES FOR BREACH OF FIDUCIARY OBLIGATION

If there is a breach of a fiduciary obligation that brings with it the discretion for the judge to choose from the full range of equitable remedies. The remedy that is chosen is whatever the court decides is appropriate, given the nature of the particular case, to do what is “*practically just*”.¹³⁴ What is “*practically just*” is determined by reference to what will, as nearly as is practicable, make good all the departures from equitable principle that have occurred, or if that is not possible that will give effect to the better equity. As the Privy Council put it in ***Plimmer v Mayor of Wellington***¹³⁵ “*the court must look at the circumstances in each case to decide the way in which the equity can be satisfied*”. In crafting any equitable remedy, the court can make adjustments on both sides of any litigation to take account of events and lapse of time between the breach and the court order.¹³⁶ It can grant relief that is conditional on the plaintiff taking certain action, to ensure that a plaintiff who seeks equity also does equity.

The available remedies for a past breach of fiduciary duty fall into two groups. The first group aims at ensuring that the defaulting fiduciary, and anyone else who has received a benefit from the breach other than as a bona fide purchaser for value without notice, retains no benefit from the breach. If the fiduciary or other person has acquired property through the breach of the obligation, the remedy might be rescission of the transaction, if *restitutio in integrum* is possible.¹³⁷ An account of profits can be available if a profit was obtained “*by reason of [his] fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position*”,¹³⁸ The court can require the fiduciary to account for all the profits that he has made through a breach of his duty, even if the beneficiary could not have

¹³⁴ ***Maguire v Makaronis*** at 467, approving ***Spence v Crawford*** [1939] 3 All ER 271 at 288 (a decision of the House of Lords).

¹³⁵ (1884) 9 App Cas 699, approved in ***Giumelli v Giumelli*** (1999) 196 CLR 101 at [10].

¹³⁶ ***Spence v Crawford*** at 289; ***Maguire v Makaronis*** at 467-468.

¹³⁷ ***Maguire v Makaronis*** at 467. The court adopts a less sympathetic attitude to a contention that *restitutio* is not possible if the defendant has been fraudulent: ***Spence v Crawford*** at 288 - 289.

¹³⁸ ***Warman International Ltd v Dwyer*** at 557, approved in ***Maguire v Makaronis*** at 468.

made those profits himself,¹³⁹ and even if the fiduciary has acted honestly and reasonably.¹⁴⁰ When an account of profits is sought the court will not receive evidence or consider argument that seeks to show that the beneficiary has not suffered a loss through the breach of the duty.¹⁴¹ Sometimes, if the property has been acquired from the plaintiff through breach of a fiduciary duty, and it can be traced, the remedy might be a declaration of a constructive trust, or a lien, over the property into which it can be traced.¹⁴² Property acquired from someone other than the beneficiary, by reason of the fiduciary position, can also be declared to be held on a constructive trust.¹⁴³

The second type of remedy for a past breach of fiduciary duty is an order for equitable compensation, to put those who have been wronged back into the situation they would have been in had the breach not been committed.¹⁴⁴ Equitable compensation can be ordered even if the defaulting fiduciary has derived no profit as a result of the breach.

If there is reason to believe that there might be a future breach of fiduciary duty, an injunction to restrain the breach might be available.

¹³⁹ *Costa Rica Railway Co v Forwood* [1901] 1 Ch 746 at 761; *Birtchnell v Equity Trustees* at 409; *Warman International v Dwyer* at 558.

¹⁴⁰ *Warman International v Dwyer* at 558.

¹⁴¹ *Parker v McKenna* (1874) LR 10 Ch 96 at 124; *Birtchnell v Equity Trustees* at 408-409; *Consul Development v DPC Estates* (1975) 132 CLR 373 at 394 per Gibbs CJ; *Warman International v Dwyer* at 557.

¹⁴² *Maguire v Makaronis* at 468-469; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 disapproving *Lister & Co v Stubbs* (1890) 45 Ch D 1. In *Daly* at 379 Gibbs CJ had given some limited approval to the refusal of *Lister v Stubbs* to permit a constructive trust “when applied to the case in which the person claiming the money has simply made an outright loan to the defendant”, but the reasoning of Finn Stone and Perram JJ in *Grimaldi v Chameleon Mining (No 2)* (2012) 200 FCR 296 at [569]–[584] explains persuasively why that remark in *Daly* does not prevent a constructive trust often being the appropriate remedy for a breach of fiduciary duty that results in the fiduciary acquiring property.

¹⁴³ *Chan v Zacharia* at 182 per Gibbs CJ, 186 per Brennan J.

¹⁴⁴ *Maguire v Makaronis* at 470; *Michael Wilson & Partners v Nicholls* [2011] HCA 427; 244 CLR 427 at [106].

In providing these remedies, equity does not regard righting the wrong that has occurred as the sole justification. As well, it aims to hold the fiduciary to, and vindicate, the high duty owed to the beneficiary.¹⁴⁵

The usual equitable defences are available.¹⁴⁶

The discretionary nature of the remedy should not be over-emphasised. The remedy is “*granted or withheld according to settled principles*”.¹⁴⁷ Frequently, once a particular breach has been identified, there will be only one type of remedy that could adequately remedy the breach, and the only practical role for discretion will be in making an order that fits the facts of the particular case. For example, if a fiduciary has made profits as a consequence of a breach of the fiduciary duty, an order for account of profits will often be the only appropriate type of remedy, and the role for discretion will be confined to the giving of directions to ascertain the amount of those profits, or the type or amount of any allowances that should be made.

ASIC v CITIGROUP

The relevant facts, for present purposes, are fairly simple. Toll engaged the Investment Banking Division of Citigroup as its financial adviser concerning a proposed takeover of Patrick. A different division of Citigroup, the Equities Division, traded in shares as a principal.

Citigroup carried out its work concerning the proposed Patrick takeover under a mandate letter that identified the task and obligations that Citigroup was undertaking as follows:

“As we have discussed, in the course of our engagement as your financial adviser, we will perform such financial advisory and investment banking services for the Company in connection with the proposed Transaction as are customary and appropriate in transactions of this type and as you reasonably request. ...

¹⁴⁵ ***Warman International v Dwyer*** at 557-558; ***McGuire v Makaronis*** at 465.

¹⁴⁶ ***Warman International v Dwyer*** at 559.

¹⁴⁷ ***Warman International v Dwyer*** at 559.

Citigroup will advise the Company in connection with, and will be considered by the Company in relation to, any interest rate, currency rate, equity or other hedge program(s) of the Holding Company relating to the Transaction, including assisting in the structuring of such program(s) and managing any related auctions. Citigroup or its related bodies corporate will provide any liability management services (including consent solicitations, debt repurchases or defeasances) desired by the Company in relation to or as a result of the Transaction, subject to the execution of definitive documentation containing mutually agreed fees, terms and conditions with respect to such services.”

Those obligations were fairly nebulous.¹⁴⁸

The mandate letter included a term:

“[Toll] acknowledges that Citigroup has been retained hereunder solely as an adviser to [Toll] and not as an adviser to or agent of any other person, and that [Toll’s] engagement of Citigroup is as an independent contractor and not in any other capacity including as a fiduciary. ... The Company should be aware that Citigroup and/or its related bodies corporate may be providing or may in the future provide financial or other services to other parties with conflicting interests. However, consistent with our long-standing policy to hold in confidence the affairs of our customers, we will not use confidential information obtained from the Company except in connection with our services to, and our relationship with, the Company, nor will we use on the Company’s behalf any confidential information obtained from any other customer.”

The mandate letter was signed on 8 August 2005, but Citigroup had known of Toll’s wish to take over Patrick, and had been seeking to obtain the engagement to advise Toll concerning that takeover, since at least January 2005. The clause stating that Citigroup was not a fiduciary had appeared in draft mandate letters from the very first draft in June 2005, and had never been objected to or commented on by Toll.

A week or so after the mandate letter was signed, but before any takeover had been announced, a Citigroup employee, working in the Equities Division, purchased on Citigroup’s behalf a large parcel of shares in Patrick. That led to some conversations, the details of which do not matter, that crossed the Chinese wall that was supposed to exist between the Equities Division and other parts of Citigroup.

¹⁴⁸ The first paragraph quoted has some content, as Jacobson J recognised [332]. The first sentence of the second paragraph quoted also has some content, though concerning tasks that are not at the core of advising concerning the proposed takeover. The second sentence of the second paragraph quoted might appear to have some specificity at a quick reading, but the “*subject to*” clause at its end made it an illusory obligation.

The purchase had a tendency to contribute to a rise in the market price of Patrick shares, which was against the interests of Toll.

ASIC brought proceedings against Citigroup, alleging that it had breached s 912A(1) of the **Corporations Act 2001** because it did not have in place adequate arrangements for the management of conflicts of interest that may arise in the provision of financial services. ASIC accepted that the provision would be contravened only if Citigroup and Toll were in a fiduciary relationship.¹⁴⁹

Contractual Exclusion Of Fiduciary Obligations

Jacobson J found that there was no fiduciary relationship because of its exclusion by the mandate letter. That finding was correct. As discussed earlier, equity cannot impose a fiduciary relationship between two people in a way that is inconsistent with an operative provision of a contract between those people. A particular application of this is that there is no reason of principle why the parties cannot by the terms of their contract exclude fiduciary relationships between them. As Jacobson J recognised at [322], there is express authority to that effect concerning certain types of fiduciary.¹⁵⁰

That does not mean that inclusion of a clause like that in the Citigroup mandate letter will always be effective to exclude fiduciary obligations. It is a truism that contracts have to be construed as a whole. Construction takes place on an objective basis, by reference to what a reasonable observer would conclude the parties had agreed by reference to their words and actions, considered, so far as appropriate, in their context.

One aspect of the requirement to construe contracts as a whole is that if there are provisions in a contract that are inconsistent with each other, the court must decide which of them is to prevail. Concerning partnership agreements, if there are specific

¹⁴⁹ at [26].

¹⁵⁰ **Chan v Zacharia** at 196 per Deane J concerning partners; **Woolworths v Kelly** (1991) 22 NSWLR 189 at 225 per Mahoney JA concerning company directors.

terms whereby people agree that they will undertake activities and perform obligations towards one another that are indicative of them carrying on business in common with a view to profit¹⁵¹ then they are partners even if there is a specific provision in the agreement that they are not partners.¹⁵² Similarly, if parties agreed to carry out tasks and undertake obligations that are consistent only with one of them owing a fiduciary obligation to the other, a clause specifically stating that there is no fiduciary relationship will not necessary govern the construction of the contract as a whole.

In *Citigroup* the judge recorded that ASIC had not argued that the words “*including as a fiduciary*” should be read down by reference to anything else in the mandate letter.¹⁵³ But it is hard to see this as a deficiency in the way ASIC put its case. The obligations that Citigroup undertook in the mandate letter were so imprecise that there was no textual basis for reading down the clause excluding a fiduciary relationship.

No Precontractual Explanation Or Disclosure

In the period before the mandate letter was executed there were some significant dealings between Citigroup and Patrick. Jacobson J set those dealings out in great detail.¹⁵⁴ Over months, Citigroup gave advice to Toll about the desirability of making a bid for Patrick,¹⁵⁵ the value of the consideration that Toll might offer, the way the consideration to be offered should be made up,¹⁵⁶ how to proceed with any bid,¹⁵⁷ and how Toll could raise the money to make the bid.^{158 159} No doubt the advice was

¹⁵¹ The definition of partnership in s 1 *Partnership Act 1892* (NSW) and other legislation based on the English *Partnership Act 1890*.

¹⁵² *Pooley v Driver* (1876) 5 Ch D 458 at 483-485, helpfully summarised in Fletcher, *The Law of Partnership in Australia*, 9th ed, Lawbook Co (2007) at 57-59.

¹⁵³ at [334].

¹⁵⁴ at [73]–[140].

¹⁵⁵ at [74].

¹⁵⁶ The elements of the consideration that could be juggled were cash, shares in Toll, and shares in Virgin Blue, a Toll subsidiary – [78].

¹⁵⁷ Including how to build up any pre-bid stake [79], and how to deal with defences to a bid [134].

¹⁵⁸ at [85].

not as detailed as advice on those topics would ultimately need to be, and it was given in a context where Citigroup was trying to persuade Patrick to appoint it. However, it was still advice given by a company that held itself out as having expertise in the field, and the advice was quite clearly given in the course of a confidential relationship between Citigroup and Toll. The confidentiality was such that all the companies involved were referred to by code names. The importance of Citigroup's advice to Toll concerning the takeover can be gauged from Citigroup's fees, which, depending on the outcome, lay in a range of between \$5M and \$18M.¹⁶⁰ Jacobson J held, correctly in my view, that "*But for the express terms of the mandate letter, the precontract dealings between Citigroup and Toll would have pointed strongly towards the existence of a fiduciary relationship in Citigroup's role as an adviser*".¹⁶¹

However, ASIC specifically declined to argue that there was any fiduciary relationship before the execution of the mandate letter.¹⁶² That had a significant effect on the way the judge reached his conclusion, though not on the ultimate outcome of the case.

A fiduciary relationship can arise even before there is a contractual relationship between the parties. In **Daly** it arose before Dr Daly had made or agreed to make any investment.¹⁶³ In **United Dominions Corporation Ltd v Brian Pty Ltd**¹⁶⁴ a fiduciary obligation arose between intending partners who "... *have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled*"¹⁶⁵ or "*if the prospective partners have reached an informal arrangement to assume such a relationship and has proceeded*

¹⁵⁹ This summary can be read with Jacobson J's summary at [327]-[330].

¹⁶⁰ at [144].

¹⁶¹ at [325].

¹⁶² at [306].

¹⁶³ Brennan J at 384 explicitly stated that a "*fiduciary relationship in respect of the transaction may arise though there has been no anterior relationship between the parties to that transaction*", and it is clear that Gibbs CJ made a similar assumption.

¹⁶⁴ (1985) 157 CLR 1.

¹⁶⁵ at 12.

to take steps involved in its establishment or implementation".¹⁶⁶ At least sometimes, a solicitor who wishes to enter a time costing agreement with a client or intending client could be in breach of a fiduciary obligation if he fails to disclose to the client all relevant information known to the solicitor concerning the desirability of entering such an agreement, and fails to bring to the client's attention any aspects of the contract in respect of which the solicitor may be in a position of advantage vis-a-vis the client.¹⁶⁷

It is elementary that someone must already be in a fiduciary relationship at the time he engages in conduct that is a breach of a fiduciary obligation. However, it well might be that, on the facts of a particular situation, a fiduciary relationship arises quite early in the contact between a plaintiff and a defendant, and that the scope of that fiduciary relationship extends to the terms on which the defendant will later be engaged. I would not agree that it makes any difference whether the relationship that is entered, or contemplated being entered, is within the established categories of fiduciary relationship. When ASIC declined to argue that there was a fiduciary relationship between Citigroup and Toll prior to the entering of the mandate letter, it was inevitable that there could be no finding that Citigroup had breached a fiduciary obligation in failing to point out that one of the consequences of the exclusion of fiduciary relationships in the mandate letter was that Citigroup was free to trade in Patrick shares on its own behalf.

That aspect of the way ASIC ran the case did not affect the outcome, because there was a finding that in any event Patrick gave informed consent to Citigroup trading on its own behalf.¹⁶⁸

¹⁶⁶ at 12.

¹⁶⁷ *Law Society of NSW v Foreman* (1994) 34 NSWLR 408 at 435; cf *Council of the Queensland Law Society Inc v Roche* (2004) 2 Qd R 574 at [13], which slips into referring to a duty to disclose. Other relevant authority is cited in *Citigroup* at [298]-[299].

¹⁶⁸ at [361].

APPLICATION OF FIDUCIARY LAW TO THE FINANCIAL ADVICE INDUSTRY

My aim in this section of the paper is to consider differences between the ways in which fiduciary obligations on the one hand, and regulation on the other, can affect the financial advice industry.

The law about fiduciary obligations affects the way in which the financial advice industry operates only in limited and specific ways. But the commercial importance of the ways it has effect can be very great. That someone should not even expose himself to a situation where there is a real possibility that there might be a conflict between his duty to a beneficiary, and his own interest, and should not enter a relationship that brings about a real possibility that there might be a conflict between a duty he owes under that relationship and the duty he owes to the beneficiary can cut out very significant areas of commercial activity. Similarly, it is a significant restriction for the fiduciary to be prohibited from making profits from information or opportunities that he has by reason of the fiduciary relationship. Fiduciary obligations are totally opposed to the objective in much modern business to do the best one can for oneself. The remedies that can be granted for breach of fiduciary obligations are ones that can inflict major financial damage on an adviser who is in breach.

There are two Acts that have been passed recently by the Federal Parliament and were assented to in June 2012¹⁶⁹ that attempt to regulate the industry in ways that the law about fiduciaries does not, and that pre-existing legislation did not. Susan Hilliard's paper discusses the details of the new legislation. In this section I will take from the legislation regulating financial advisers a few examples of effects that legislation can achieve that the general law cannot. I will leave it to others to decide whether those effects are desirable or represent good policy.

Clearly the law of fiduciaries is virtually no use in keeping rogues and spivs out of the industry, or making sure advisers have at least a minimum level of competence,

¹⁶⁹ The *Corporations Amendment (Future of Financial Advice) Act 2012*, and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

knowledge or experience. Licensing is needed to achieve that. There is room for choice about precisely which roles in the industry should be performed only by licensed people.

Because fiduciary obligations are proscriptive, they do not impose any standard of positive action on an adviser, like giving advice that is appropriate to the client and has a reasonable basis. Legislation can impose standards of positive action.¹⁷⁰

Imposition of conditions on a licence¹⁷¹ is one way of requiring certain standards of active or positive conduct. Imposition of statutory obligations on the person who provides the advice (whether that person is licensed or not) is another way of achieving those standards.

There is a limitation on the ability of the law of fiduciary obligations to affect the financial advice industry because the existence and scope of a fiduciary obligation is dependent on the terms of the contract between the adviser and the client. So far as equity law is concerned, a financial services licensee could make profits from information it received in the course of advising clients, or act in a way that was in conflict with the interests of a client, if it drafted its documentation so that it never had a fiduciary obligation to a client.

If one focuses just on the client, it may well be justifiable to say that if the client is sophisticated enough to make an informed decision to deal on that basis, it should be free to do so. But that leaves a policy decision for legislators about whether it is satisfactory for the clients of financial advisers who are not sophisticated to be exposed to the risk that their own adviser might act with less than undivided loyalty.

Quite apart from that, fiduciary law does nothing more than impose limited proscriptive obligations that one *person* owes to another *person*. A legislator might take the view that there are more than the interests of just the adviser and the client that are affected by the manner in which financial services licensees operate – that

¹⁷⁰ s 945A **Corporations Act** imposes statutory obligations similar to these on licensees.

¹⁷¹ as s 912A **Corporations Act** now does.

there is a public interest in having markets that operate honestly and openly. The markets involved here are both the market for financial advice, and also the markets for securities that an adviser might recommend.

Remuneration practices in the financial advice industry create particular problems for the application of fiduciary principles. One model for remuneration is that an adviser who signs a client up to a particular financial investment is paid a commission by the provider of that product. That immediately puts the adviser in a situation of potential conflict, between his interest in obtaining the commission and his (contractual) duty to use care and skill in advising. It is his obligation as a fiduciary to be in that conflict situation only if he has the informed consent of the client. But when equity's standard of informed consent is dependent on the facts of the case and the sophistication of the individual client, it might be hard to tell whether any consent obtained is properly informed. In particular, it might be hard to know whether the consent is properly informed at the point of time of entering a transaction, rather than at the time of considering the transaction in hindsight, as a court does. For someone who wants to carry out their legal obligations, it is being able to know at the time of entering the transaction that is important. For example, does the rate of commission have to be disclosed or just that a commission is paid? After all, the prospect of a big commission is likely to provide the adviser with a bigger temptation than the prospect of a little commission. Does the adviser have to disclose how the commission is made up? This question arises because in the industry the benefits that a product provide confers on an adviser can include initial commissions, trail commissions, payments for selling over a particular volume of a particular product, and so-called soft dollar benefits like a subsidised printer or a paid trip to attend a conference at a resort. If product A and product B both might be suitable for the client, and there is a higher commission for product A than for product B, does that have to be disclosed? Does the extent of the difference in commissions have to be disclosed? If selling a particular product to the client will put the adviser over the threshold for a volume benefit, does that fact about the individual transaction have to be disclosed? If a firm of stockbrokers recommends an investment in a stock whose float it is underwriting, is a client put into a situation of informed consent merely by being told that the broker is receiving a fee for underwriting? How can there be adequate disclosure of the extent to which the broker's recommendation is driven by

the stock being overpriced, and the broker being fearful that if the float is not well subscribed it will be obliged to take up stock that the market has already found unattractive? Existing legislation deals with these difficulties to some extent, but not completely.¹⁷²

Another common model for remuneration is for ongoing advice on the basis of the client being charged a percentage of the value of assets under management. Having that sort of model immediately creates a situation of potential conflict if the adviser has to consider whether the client should gear investments, and if so to what extent. If the client knows about the remuneration basis, and agrees to a gearing recommendation, is that in itself informed consent to the conflict?

If a disclosure was made in the course of a few pages of closely typed legalese, that the investor signed, a court may well regard the investor as bound by it. Legislation can require clearer or more emphatic disclosures.

Detailed regulation of an industry brings its own problems. One is that the mass of detail can make it difficult for an ordinary operator in that industry to understand what legal obligations he is subject to. Another is that no matter how many detailed provisions there might be, a smart lawyer will often be able to find a way of complying with their letter while infringing their spirit. Detailed regulation can make compliance into a box-ticking exercise, conducted without regard to the reason why the regulation is imposed. That is because it is not possible to capture, in detailed and specific provisions, the broad evaluative standards by which one decides whether a transaction has been conducted, or a market is operating, with decency and integrity.

There is a question concerning whether equity's attitude that informed consent prevents there being a breach of a fiduciary duty provides an adequate way of dealing with a situation when there would otherwise be a breach of a fiduciary duty.

¹⁷² s 947B **Corporations Act** imposes an obligation on an adviser to give a Statement of Advice that includes (broadly) disclosure of any benefits, interests or associations that might reasonably be expected to be or have been capable of influencing the advice given. Legislation expressed in those terms does not assist in solving the types of problems I have just been discussing.

In the ordinary situation of seeking advice from a stockbroker about possibly buying or selling shares, the client usually knows that it is only if he enters a transaction that the broker will receive a commission. Even where the client is confident that the broker would not recommend a transaction he did not honestly believe was appropriate, the broker is still likely to have mortgages and dependents to support, and unconscious motivation can be a powerful force. How is the client supposed to factor into his decision whether or not to accept the broker's advice to buy (or sell) a particular stock the possibility that there is this unconscious motivation? For all types of potential conflicts, there is a question for policymakers whether there are types of transaction that, in the interests of protection of clients and proper operation of a market, it should simply not be possible for a financial adviser to enter, even with informed consent.

Another way in which there can be a conflict between an adviser's duty and interest concerns advice given about securities in which the adviser also deals as principal. The clear case is when the adviser recommends that the client buy securities and uses its own securities to meet the order. Less clear cases are where the client buys the securities in the market around the time the adviser sells its securities into the market, or where the adviser recommends that the client not sell a stock of which the broker holds a large parcel.

But not all cases in which an adviser deals in the securities that are the subject of the advice will be ones where there is a breach of fiduciary duty. If there is active trading in a stock, and the adviser's proprietary dealings are just a small part of that trading that would not affect the market price, and are not based on any information obtained in the course of the relationship, there may well be no conflict between the duty to the client and the adviser's interest in profit-making by proprietary trading. The practical difficulty, though, is in knowing whether the adviser's trading will influence the market price.

It is instructive to see how **Citigroup** exemplifies ways in which a fiduciary duty might be alleged to arise concerning proprietary trading by the adviser. In **Citigroup** ASIC's attention was attracted because it suspected that the proprietary trading had been the product of inside information, but that case failed on the facts. ASIC

alleged that Citigroup had a fiduciary obligation to disclose to Toll that it had been trading on its own account in Patrick shares. That failed because the judge held that even if there were a fiduciary duty it would not be breached because a fiduciary has no positive duty of disclosure,¹⁷³ and also because on the facts it was not established that it was material for Patrick to know that it was Citigroup, rather than anyone else, that was trading in its shares.¹⁷⁴ To understand the significance of those findings, it is important that ASIC was not seeking to vindicate *all* the rights that Toll had against Patrick, whether fiduciary or otherwise. All that ASIC was doing was asserting that Citigroup had breached its statutory obligation to manage conflicts of interest. ASIC was not concerned to argue or enquire whether Citigroup had a contractual or tortious obligation to disclose the information in question. Thus, the case should not be treated as authority on that topic.

Citigroup had an interest in the price of Patrick shares going up after it made its proprietary purchase. ASIC pleaded that that was in conflict with an interest of Toll that the price not go up. The judge did not accept, for reasons dependent on the evidence in the case, that there was any such conflict.¹⁷⁵ Because it was so dependent on the evidence, that aspect of the case is of little precedent value.

There is a different type of problem concerning the practicalities of enforcing fiduciary obligations. Enforcement is usually by an individual bringing an action against the defaulting fiduciary, though there might be some situations where it would be possible for a class action to be brought. Before the action is launched the plaintiff has to have enough of a factual basis to justify bringing an action. Often a client will not know about the breach of fiduciary obligation, and has no way, short of proceedings for preliminary discovery, to find out.

The remedy a court gives for breach of a fiduciary obligation is usually one that strips the defaulter of any profit made by reason of the breach, or gives equitable

¹⁷³ [375]–[376] (though he accepted that Brennan J's remarks in *Daly* about a duty to disclose might be confined as discussed in *Aequitas* – see page 39 above – which would result in there being a practical compulsion to disclose.)

¹⁷⁴ [377]–[378].

¹⁷⁵ at [397]–[403].

compensation for the breach. However it is just the profit, or the loss, that arises in the particular transaction in which there has been a breach of the duty that is owed to *that* plaintiff that makes up the remedy is given. Often the amount at stake, coupled with the inherent risk and irrecoverable costs and expenditure of time that comes with litigation, makes it not worthwhile for particular plaintiffs to bring proceedings, even if they know about a breach.

If there has been a type of breach that is sufficiently widespread to affect many people, or that is symptomatic of the market for financial advice not working properly, statutory powers of investigation by a body like ASIC can ascertain facts before litigation is launched, and viable actions that might not otherwise be brought can be financed and run.

Statutory remedies like power to cancel licenses or impose conditions on licences, and seek civil penalties from the courts, can provide a greater encouragement for advisers to behave appropriately than the law of equity provides. If a range of statutory remedies is available for breach of a statutory obligation, that can provide a reason for creating as a statutory obligation an obligation similar to one that equity imposes. An example is the provision in the 2012 legislation that imposes an obligation on an adviser not to prefer his own interest if there is a conflict between the client's interest and his own interest.¹⁷⁶

A further reason why some might think it desirable to restate the content of equity's fiduciary duties in a statutory form is that a statutory obligation can be created in terms that prevent it being excluded by contract. As well, statutory obligations can be imposed on people who do not themselves owe fiduciary duties – eg the 2012 legislation prohibits product providers from paying “*conflicted remuneration*” to an adviser.¹⁷⁷

¹⁷⁶ Section 961J creates the obligation. Various remedies for its breach are conferred by ss 961K, 961M and 961N.

¹⁷⁷ New sections 963A–963L **Corporations Act**.

Of course, any regulation of commercial activity brings its own cost, and some or all of its effects in changing the way markets would otherwise operate might be judged to be undesirable rather than desirable. All I am doing is pointing out how legislation can affect the financial advice industry in ways that the law of fiduciary obligations cannot, and leaving it to others to decide how far legislative intervention should go.

Legislation Altering The General Law Re Fiduciaries

It should not be thought that legislative controls of the financial advice industry do nothing more than impose more stringent obligations than fiduciary law would do, while leaving the fiduciary law unchanged. It is possible that, at least sometimes, the content of legislation affects the way in which the fiduciary obligations operate.¹⁷⁸

One way is that legislative obligations could in some circumstances be taken into account in deciding whether a fiduciary obligation exists is that legislation could affect the nature of the task that an adviser performs for a client, and thus whether it is one that requires undivided loyalty. Another is if legislation permits an adviser to commit a breach of what, absent the legislation, would be a fiduciary duty. Particularly if legislation in future is more detailed, there might be room for argument about whether it is a code that implicitly excludes certain equitable obligations altogether.

There may be room for argument about whether the present legislative provision that requires a licensee to have in place arrangements to “manage” conflicts of interest waters down equity’s absolute prohibition of conflicts of interests. I would be inclined to think it did not. Nothing in the wording of s 912A says that it takes away or modifies any civil rights that would otherwise exist. The consequences of a breach of s 912A(1)(aa) are that ASIC can suspend or cancel a licence after a hearing,¹⁷⁹ and it can apply to the Court for an order regulating the conduct of the licensee.¹⁸⁰ Section 912A is not included in Schedule 3 of the **Corporations Act**, so s 1311(1A)

¹⁷⁸ *Maguire v Makaronis* at 465.

¹⁷⁹ s 915C.

¹⁸⁰ s 1101B.

does not impose any criminal penalty for its breach. It would seem to be perfectly possible for a licensee who takes reasonable steps to manage conflicts, but still has those conflicts, to be liable to the client for any breach of fiduciary duty that arose from those conflicts.

Appendix

(see page 40 at footnote 120)

The cases that Gibbs CJ and Brennan J relied on in *Daly* to conclude that there was a duty of disclosure can be divided into three groups. The first is a group of cases that say that the fiduciary in question has a duty to disclose information, but do not go so far as to suggest that if the duty to disclose is breached that would itself give rise to a cause of action on which the beneficiary could sue. These cases do not establish that the “*duty*” is anything other than a practical compulsion on the fiduciary to disclose, if he is not to be in breach of his fiduciary duty not to benefit from a situation of conflict. The second group comprises cases that do not say there is a duty of disclosure, but rather what is a permissible defence to an action for breach of fiduciary duty, or a permissible way of avoiding a breach of such a duty. The third group are some Canadian cases that depend upon reasoning that could not be accepted in Australia, and provide illustrations that powerfully justify the decision by all judges in *Breen* (a case that is later than *Daly*) that Canadian cases on fiduciary law are not a reliable guide to the law of Australia.¹⁸¹

The First Group

*Tate v Williamson*¹⁸² set aside a sale of land made when a young man with debts sought the advice and assistance of a relative, who purchased the land, but did not disclose a relevant valuation of it that he had obtained. Lord Chelmsford LC spoke

¹⁸¹ per Brennan CJ at 83, Dawson and Toohey JJ at 95, Gaudron and McHugh JJ at 112-113, Gummow J. at 137.

¹⁸² (1866) LR 2 Ch App 55.

at 65 and 66 of the defendant's "duty" to communicate the valuation. However he also, at 66 said that "*the Defendant had placed himself in such a relation of confidence, by his undertaking the office of arranging the intestate's debts by means of a mortgage of his property, as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value*".

McKenzie v McDonald,¹⁸³ was an action by a widow who had consulted the defendant, a real estate agent, about selling her farm. The agent entered a contract with her whereby he exchanged other real estate that he owned for the farm, with a cash adjustment that was inadequate to make up the real discrepancy in value between the properties. The agent misrepresented the value to her, and also misrepresented his intentions about the farm. Dixon AJ spoke unambiguously of a confidential relationship giving rise to a duty of full disclosure when the person in whom confidence is reposed purchases property of the other.

"The duty arises when, and because, a relationship of confidence exists between the parties: see **Tate v Williamson**."¹⁸⁴

Like in **Tate v Williamson**, the "duty of disclosure" arises because, without such disclosure, the person in whom confidence is reposed could not contract without being in breach of his fiduciary obligations. That is not a freestanding obligation to disclose, merely a precondition to a contract being entered that does not breach the fiduciary obligations. Dixon AJ approved¹⁸⁵ Fry J's statement of the principle¹⁸⁶ as "*... if the parties can contract at all, they can contract only after the most ample disclosure ...*".

Haywood v Roadknight,¹⁸⁷ a decision of Dixon AJ that was affirmed by the Full Court, was clearly based upon equitable obligations, and gave the equitable remedy

¹⁸³ [1927] VLR 134 at 144–145.

¹⁸⁴ (1866) LR 2 Ch App 55, at 61, 66.

¹⁸⁵ at 144.

¹⁸⁶ in **Davies v London and Provincial Marine Insurance Co** [1878] 8 Ch D 469 at 474.

¹⁸⁷ [1927] VLR 512.

of an account of profits. The plaintiff sold land to a real estate agent whom he had engaged to try to sell it. The real estate agent negotiated the contract with the assistance of the solicitor who acted for the plaintiff. The agent on-sold the land soon after for more than three times the price he had paid. Dixon AJ at 516 held that the purchase should be judged by the same principles as if the solicitor himself was the purchaser, and¹⁸⁸ that the principle that had been breached was that the solicitor could not buy the property from his client for himself.

The question of adequacy of disclosure arose only concerning whether the defendant had satisfied the court that the solicitor had “*done as much for his client as he would have done if the purchaser had been a third person*”. Again, this is stating what must be proved to avoid a conclusion that there has been a breach of a fiduciary duty. Dixon AJ specifically did not base his decision on there being any fiduciary relationship between the agent and the plaintiff.

The judgment of the Full Court, given by Lowe J, not only supported the basis upon which Dixon AJ had relied, but also justified the outcome because “*the defendant never even attempted to – and certainly did not – give to the plaintiff the benefit of his expert opinion and advice in relation to this land*”.¹⁸⁹ That remark was made in the context where they had held that “*a relationship of confidence did exist between the defendant and the plaintiff, and that the onus of proof lay on the defendant*”.¹⁹⁰ In other words, the question of disclosure was being examined for the purpose of whether there was a defence to what would otherwise be a breach of fiduciary duty.

Similarly, ***Gibson v Jeyes***¹⁹¹ was a case where Lord Eldon set aside a transaction in which an attorney sold an annuity to his client. The remarks in it to which Brennan J referred in ***Daly*** concerned the nature of the advice that an attorney must give to his client, when a client is considering contracting with the attorney, if the contract is not to be liable to be set aside.

¹⁸⁸ at 517.

¹⁸⁹ at 522.

¹⁹⁰ at 522.

¹⁹¹ [1801] 6 Ves Jun 266; 31 ER 1044.

Armstrong v Jackson¹⁹² granted rescission of a contract to purchase shares when a sharebroker who had been instructed to purchase shares in a particular company secretly provided shares of his own to fill the order. McCardie J said at 823-824:

“A broker who is employed to buy shares cannot sell his own shares unless he makes a full and accurate disclosure of the facts to his principal, and the principal, with full knowledge, gives his assent to the changed position of the broker.”

That passage is immediately followed by reference to the duty of an agent not to permit his interest and duty to conflict. That statement is, in substance, a statement that disclosure is required to avoid a breach of the agent’s duty concerning conflicts.

The Second Group

In re Franklyn; Franklyn v Franklyn¹⁹³ was a claim by the executor of a broker’s client. The broker had obtained money from the client, supposedly for investment in a scheme whereby she purportedly bought or sold stock through the broker, with the intention that she not actually take delivery of stock purchased, or provide stock sold, but receive profit or loss depending on whether the stock rose or fell in price. In fact, the broker did not buy or sell any stock. Rather, he kept any money the client sent to him to make purchases, and his recommendations turned out to be predominantly to purchase stocks that fell in value. The plaintiff’s claim was not for damages, but for return or repayment of the money which the client had placed in the broker’s hands. The principle stated Cozens-Hardy MR at 188 was:

“It was impossible for a man in a fiduciary position to make any defence to a claim which was based on his having induced his client to enter into transactions by statements that he was buying for her, when, as a matter of fact, he was dealing on his own account.”

That does not say anything about a duty of disclosure, just what is a permissible defence.

¹⁹² [1917] 2 KB 822.

¹⁹³ (1913) 30 TLR 187.

The passage in *Thornley v Tilley*¹⁹⁴ that Gibbs CJ referred to in *Daly* is authority for the relationship between client and broker being a fiduciary one, so that “... *unless displaced by special circumstances, ... the agent cannot make a profit for himself out of the principal’s investments*”, but it says nothing about duties of disclosure.

The last of the cases referred to by Gibbs CJ, is *Hospital Products*. The portion at 67-75 that his Honour cites is Gibbs CJ’s own discussion of fiduciary relationships. It contains nothing that supports the existence of a duty of disclosure. Indeed, he had repeatedly stated the obligation in terms that did not involve any duty to disclose. He had said, at 67:

“A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty.”

and at 73:

“How, in those circumstances, is it possible to say that HPI was under an obligation not to profit from its position, and not to place itself in a situation in which its duty and its interest might conflict?”

and at 75 he talked of a relationship not being:

“... a fiduciary one in the sense that the distributor or representative owed a duty not to make a profit from his relationship and not to allow his interest to conflict with his duty.”

The passages that Gibbs CJ cites from *Hospital Products* at 141-2 are from the judgment of Dawson J. No part of it says that a fiduciary is under a duty of disclosure. Indeed, at 142, immediately after the passage I have cited at p 16 above, Dawson J said:

“From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position.”

¹⁹⁴ (1925) 36 CLR 1 at 12.

The remarks of Lord O'Hagan in **McPherson v Watt**¹⁹⁵ to which Brennan J referred concern the stringent obligation that a solicitor has to show that he *"has acted with complete faithfulness and fairness"* in entering a contract to purchase property from a client. But that obligation is one that arises in the context of litigation after the event. What Lord O'Hagan said was:

"An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly."

Other speeches in **McPherson v Watt** similarly speak about what the fiduciary must do in litigation if he is to avoid being found to be in breach of his duty.¹⁹⁶

The Third Group

Glennie v McDougall & Cowans Holdings Ltd¹⁹⁷ (a decision of the Supreme Court of Canada), rejected the claim by the assignees of an insolvent firm of stockbrokers to recover an amount they contended was owing by a client. It was uncontested that the client owed money to the brokers by reason of certain stock they had purchased on his account, and the contest turned upon a cross-claim. The client held shares in two particular companies. Had the shares been sold in July 1930, when the client

¹⁹⁵ [1877] 3 App Cas 254 at 266.

¹⁹⁶ Lord Cairns LC (with whom Lord Gordon agreed) said at 263: "... *non-disclosure prevents the transaction from being supported in any Court administering equity.*" Lord Blackburn at 272 said that where a lawyer in effect purchases property from his client without disclosing that he is the purchaser, *"we do not inquire whether it was a good bargain or a bad bargain, before we set it aside. The mere fact that you, being in circumstances which made it your duty to give your client advice, have put yourself in such a position that, being the purchaser yourself, you cannot give disinterested advice, your own interests coming in conflict with his, that mere fact authorizes him to set aside the contract if he chooses so to do."*

¹⁹⁷ (1935) 2 DLR 561.

instructed the brokers to sell, the client would still have incurred no loss. However, the brokers persuaded him to keep the shares. The value of the shares then declined dramatically as the Great Depression proceeded, and eventually, when the client was unable to meet a margin call, the brokers sold the shares for a price which left a substantial amount owing to them.

The case was tried before a jury (566). The questions left to the jury included whether there had been a lack of due skill and care on the part of the brokers, and what loss was suffered in consequence of that lack of care and skill (566). Other questions, however, related to whether the client was to the brokers' knowledge relying on the brokers' advice, and whether the brokers' advice was disinterested and in good faith. To those questions the jury answered "Yes" and "No" respectively (567). The basis of the latter answer was that, unbeknown to the client, the broking firm itself had large holdings of stock of the two companies in question. The judgment of the Supreme Court, delivered by Davis J, does not refer to a single previous authority. The closest the case comes to a statement principle is at 579:

"During the argument the nature and extent of the rights and obligations of brokers to their customers were broadly discussed by counsel but it is unnecessary for us in this case to attempt to lay down any general statement. The customer here requested the brokers to sell. The brokers undertook to advise the customer at that time not to sell, for that must be involved in the findings of the jury. Having so undertaken to advise, the brokers undoubtedly owed a duty to their customer to advise fully, honestly and in good faith, and the non-disclosure to the customer of their own substantial interest in the stocks that he was carrying and wanted to sell was a breach of duty for which the brokers were liable for any damages suffered by the customer in consequence of that breach of duty. There is no evidence that the appellant would have taken a different course had disclosure been made to him but once the interest was shown to exist, the burden rested upon the respondent to exonerate the brokers and establish that the advice given and the mode of handling the account was not affected by the brokers' very large interest in the pools. The fullest and clearest explanation for the non-disclosure rested upon the respondent and no attempt was made to give any explanation."

This case has nothing to do with the fiduciary obligations of brokers, as opposed to the contractual or tortious duties that they owed.

Burke v Cory,¹⁹⁸ a decision of the Ontario Court of Appeal, concerned an action that Schroeder JA described at 253 as a “*claim for damages sustained by him in consequences of the negligent misrepresentations made by or on behalf of the defendant in breach of the defendant’s fiduciary duty to the plaintiff.*” The defendant was a share salesman, who assisted the promoters of companies to sell their shares in return for a commission (254). The plaintiff had purchased shares in two mining companies, after the defendant had sent him brochures that had lauded its own skills and access to reliable information, and after the defendant had made false representations to him that the companies had obtained favourable drilling results. One of the contentions advanced by the defendant was that there was:

“No cause of action in law for damages for innocent or negligent misrepresentation unless the person making the representation owed a contractual duty to the representee, or a duty arising out of a fiduciary relationship between them to exercise due care. Moreover, that the circumstances surrounding the transaction between the plaintiff and the defendant did not give rise to a fiduciary relationship between them.”

Schroeder JA held, at 258, that the defendant’s self-promotional statements, accepted by the plaintiff, resulted in there being “*a duty on the defendant to advise the plaintiff carefully, fully, honestly and in good faith*” (258). He went on – leaping what to Australian eyes is a huge conceptual chasm – to refer to the circumstances in which courts in equity found a fiduciary relationship to exist. He quoted from Lord Chelmsford LC in **Tate v Williamson** that when there is a relationship of confidence that is abused “*the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.*” He expressed the view that “*whether the relation exists or not is a question of fact which must be determined on the facts and circumstances of each individual case*”. He applied **Glennie v McDougall & Cowans**, as being an instance of how dealings between a broker and his customer “*may well be of such a character as to bring into being a fiduciary relation between them.*” He quoted the passage from **Glennie** that I have already set out, and concluded, at 259-260:

¹⁹⁸ (1959) 19 DLR (2d) 252.

“The principle there enunciated is applicable to the facts of this case. While it is true that the defendant assumed the role of agent for the vendor of the stocks in question, nevertheless he went to great pains to convince the defendant of his pre-eminent qualifications as an ‘investment counsellor’, and of his possession of vital private information in relation to the stocks which he was advising him to buy. In fact he went to the greatest lengths to gain the plaintiff’s confidence and when he succeeded he abused it in the manner which reflects discredit both upon himself and his agents. This disposes of the first and second grounds of appeal advanced on behalf of the appellant.”

Notwithstanding its invocation of *Tate v Williamson*, *Burke v Cory* cannot be accepted as consistent with Australian law on fiduciary obligations. It is quite foreign to Australian law for the existence of a fiduciary relationship to give rise to a claim for damages for negligent misrepresentation.

*Culling v Sansai Securities Ltd*¹⁹⁹ is a first instance decision of Anderson J in the British Columbia Supreme Court. It was an action by the purchaser of shares in a company called Nisson against the vendor, claiming damages for a fraudulent or negligent representation concerning Nisson. The judge found that there “*was clear fiduciary relationship by reason of the fact of the ‘broker-customer’ relationship and the fact of the interlocking directorate*” (462). The “*interlocking directorate*” there referred to was the fact that the directors of the broking company were also directors of Nisson. I fail to see how the interlocking directorate has anything to do with the existence of a fiduciary relationship between the plaintiff and the defendant.

At 463, the judge rejected a submission that a breach of a fiduciary relationship could only take place if there was a secret profit earned by the defendant company. He said “*while it is true that in most cases, where there has been a breach of a fiduciary relationship between broker and customer, a conflict of interest has existed or a secret profit has been made, the existence of a conflict of interest or a secret profit is not always an essential element*”. His authority for that proposition was *Burke v Cory*. When *Burke v Cory* does not represent the Australian law, *Culling* does not represent the Australian law.

21 August 2012

¹⁹⁹ (1974) 45 DLR (3d) 456.

Should the “Rule in Hastings-Bass” be Followed in Australia? – Trustees’ Duty to Enquire and Trustees’ Mistakes

J C Campbell¹

In the last 10 years a startling line of cases has developed at first instance in the English courts and in the courts of various tax havens that follow English law. In these cases a trustee has dealt with the trust property in a way that involves a mistake, or turns out to have unpredicted and unwelcome consequences – usually in the form of incurring more tax than had been anticipated – but the trustee or the beneficiaries, or the trustee and the beneficiaries together, have been able to approach the court and have the transaction undone.

These cases are a development of some remarks of the English Court of Appeal in 1975 in *In Re Hastings-Bass; Hastings-Bass v IRC* [1975] Ch 25. In the decade from 1990 some cases considered the remarks and elaborated on them, but without finding that the particular cases at hand met the requirements for setting the transaction aside.² In that time a rule of law that was thought to arise from the remarks came to be called “*the rule in Hastings-Bass*”.³ As the pursuers of poltergeists and flying saucers are well aware, as soon as one coins a name, people will assume that there really is something that is referred to by the name. And it has come to be accepted in the English courts of first instance that there is such a “*rule*”.

It is only since 2000 that the working through of this “*rule*” has led to courts actually setting aside transactions that trustees have entered.⁴ In 2010, the scope of application of the “*rule*” has been extended beyond trustees to the exercise of a fiduciary power by the administrator of the property of a mentally incapable person.⁵

The power of the “*rule*” is demonstrated by the variety of trustees’ decisions have been judicially rubbed out in accordance with it:

- The trustees of a British Virgin Islands will trust exercised a power of appointment by appointing funds to an accumulation and maintenance (A & M) trust for a granddaughter of the testator. The trustees of the will trust knew that a solicitor who they appointed as one of the trustees of the A & M trust was about to retire from practice. They did not realise that the effect of his retiring was that he would lose the status of being a deemed non-resident, and that would cause not only the A & M trust, but also the entire will trust to be regarded as UK-resident for tax purposes. The will trust had huge accumulated capital gains, and bringing the trust onshore would create an enormous tax liability. The will trustees would not have made the appointment if they had realised that this would be the effect. The judge held that the appointment was void.⁶
- A complex scheme for the avoidance of capital gains tax required the trustees of an Isle of Man trust exercise a power of appointment in a later tax year to that in which the man for whose benefit the tax scheme was established and certain members of his family were excluded as beneficiaries of a trust. Despite specific counsel's advice that exercising the power of appointment in a different tax year was essential, the trustees exercised the power of appointment in a tax year when that man and his family were still beneficiaries of the trust. The judge held that the exercise of the power of appointment was void⁷.
- When a trustee's solicitor received instructions from the settlor of a trust to exercise in favour of the settlor's sons a power of appointment concerning 40% of the trust property, the trustee made an appointment of 60% of the funds. This was done in 1992. The sons received about £200,000 in capital and £200,000 in income before, in 2002, the trustee applied to the court to have the decision declared void. The judge held that, because the fault in conveying the settlor's instructions to the trustee was attributable to the trustee's solicitor, the trustee had failed to take into account a relevant consideration (namely, the settlor's wishes). He declared the appointment voidable.⁸

- The trustees of a trust exercised a power of appointment of certain property, on the basis of legal advice about the tax consequences. After the power had been exercised, it was realised that the legal advice was wrong. It was held that the exercise of the power of appointment was void. One reason was that the trustees had failed to take into account a relevant consideration, namely what the tax consequences really were, because their lawyers provided them with wrong advice on that topic.⁹

This paper will not trace in detail the sequence of cases through which the “rule” has developed.¹⁰ However, it should be noted that the development has occurred entirely at first instance level. There have been only *obiter* in passing concerning the case of **Hastings-Bass** (and no endorsement of a “rule” derived from it) in the English Court of Appeal.¹¹ It has not been mentioned in the House of Lords or the Supreme Court of the United Kingdom. In the Privy Council it has been mentioned only in a case where **Hastings-Bass** is cited as authority for the obligation of a trustee to use a discretionary power for a proper purpose,¹² and in another case in a dissenting judgment of one Law Lord.¹³

Nearly all of the cases that have developed or applied the “rule” are ones where the entity with the greatest commercial interest in resisting the remedy, namely the Revenue, was not a party, and where either the trustees and beneficiaries agreed that a transaction should be set aside, or else there is real room to wonder how vigorous any opposition to the remedy was. That makes them of weaker persuasive value than they otherwise might be. Extracurial remarks by judges on the “rule” range from cautious through puzzled to hostile.¹⁴

In Australia **Hastings-Bass** has been referred to without being followed in some first instance decisions,¹⁵ and not cited in any appellate court. Thus the question of whether the “rule in *Hastings-Bass*” should be followed in Australia is very much an open one.

I make clear that any views I express in this paper are necessarily tentative ones, and I am very conscious that judges who try to work out a legal problem on their

own often do not do as well as they might after proper argument concerning the problem¹⁶.

The English Court of Appeal decision from which the line of cases sprang, **Hastings-Bass** itself, was one that did not apply the so-called “*rule in Hastings-Bass*”. **Hastings-Bass** arose when trustees of fund A had transferred some trust funds to trust fund B, believing they were exercising a power of advancement concerning William, who a contingent beneficiary of fund A. Fund B was held for William for life, then for any wife or children he might have, with some other gifts over. When they exercised the power the trustees of fund A had not realised that the effect of the rule against perpetuities was that the trusts that followed William’s life interest were void, and there would be a resulting trust to fund A after William’s life interest.¹⁷ The Court of Appeal held that there was none the less an effective exercise of the power of advancement. It was in that context that the Court of Appeal said:

“...where by the terms of a trust ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless

- (1) what he has achieved is unauthorised by the power conferred upon him, or
- (2) it is clear that he *would not* have acted as he did
 - (a) had he not taken into account considerations which he *should not have taken into account*, or
 - (b) had he not failed to take into account considerations which he ought to have taken into account.

In the present case (2) above has not, in our judgment, been established ...¹⁸” (emphasis and formatting added by me)

Things to notice about this test are:

1. It takes the form “*the court should not interfere ... unless.*” Such a test identifies necessary conditions for the court to interfere, but does not purport to state the conditions that are sufficient for the court to interfere.
2. It is imprecise about what sort of “*interference*” there might be.
3. It presupposes that the trustee is acting in good faith in exercising the discretion.
4. There are effectively three different circumstances in which it is contemplated that the court might intervene – when the act done is outside the scope of the power, OR when taking into account improper considerations causes him to act in a way different to how he would have acted if those considerations had not been taken into account, OR when a failure to take into account considerations he ought to have taken into account causes him to act in a way different to how he would have acted if he had taken those considerations into account. In other words, the failure to take account of considerations that should be taken into account, or taking account of improper considerations, is something that occurs within the scope of the power.
5. The “*considerations*” are referred to in a question-begging way, as ones that he “*should not have*” or “*ought to have*” taken into account. The reader is not told how to identify whether any particular consideration fits one of those descriptions. However in the context of the case, it is clear enough that the consideration that the trustees failed to take into account was that the rule against perpetuities would make part of their appointment invalid, and in consequence they did not turn their minds to whether the appointment that would actually take effect (ie just William’s life interest) was for William’s benefit, as opposed to whether the appointment that they thought they were making was for his benefit. However the court was satisfied that if the trustees had turned their mind to whether an appointment of just a life interest to William was for his benefit, they would have concluded that it was.

The confusion that has resulted from the “*rule in Hastings-Bass*” is all the greater pity because its origin, the summary of relevant principles that the court gave in *Hastings-Bass*,¹⁹ was unnecessary for the decision. The court had held that the trustees had in substance asked themselves the correct question, and given the only reasonable answer to it, in the course of asking themselves what was eventually known to be the mistaken question of whether an advance to the 1957 trust, taking effect completely, would be for William’s benefit. When the trustees had in substance asked themselves the correct question (and thereby given real and genuine consideration to whether to make the advancement), and their bona fides were not in dispute, their decision stood, even though the advancement they made was cut down in its effect by the rule against perpetuities.

In the course of the later first-instance case law the principle stated by the Court of Appeal has been transmuted from a negative statement of when a court will not interfere into a positive statement of when a court will interfere. The statement that is currently accepted in first instance cases in England is that of Lloyd LJ in *Sieff v Fox* at [119]:

“Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.”

Transforming the test in that way is invalid logic. Even if the court in *Hastings-Bass* had been right in saying that “*a court should not interfere ... unless...*” one of the conditions it identified were met, that is simply not the same as saying the court *will* interfere if one of the conditions is met.²⁰ However, what matters for present purposes is whether a test as so stated is justified in principle.

My present view is that it is not, for several reasons.

Equity’s Conceptual Apparatus and Method

The first is that the “rule” as formulated in ***Sieff v Fox*** ignores a fundamental feature of the methodology and conceptual structure of equity. Equity does not proceed, code-like, by a set of rules that can be stated in propositional form and are then applied in a deductive fashion to the facts of a particular case. Rather, it proceeds by reference to two quite distinct types of concepts. They are equity’s standards, and its remedies.

The standards are the criteria by reference to which equity holds that the conduct of one person towards another is unconscientious. The case law shows that there are many and different ways in which one person can behave in what equity regards as unconscientious towards someone else. They range from causing someone to part with property or enter a transaction through fraud²¹ or undue influence, to keeping property one has received as a volunteer once one knows that it is the product of fraud or undue influence, to refusing to actually bear a burden that that person is equally liable with another person to bear. The question that judges commonly pose to plaintiff’s counsel, “*What is your equity?*” is answered by identifying the breach of equity’s standards for which the plaintiff is seeking a remedy, and showing that the plaintiff is someone who has suffered or might suffer by reason of that breach of standards.

The common law had only one remedy for all the civil wrongs it recognised, namely damages. Equity developed a wide range of remedies of its own. A distinctive feature of the way it applied its remedies is that it acted *in personam*. One aspect of acting *in personam* is that equity made an order that required the person who was before it to do something.²² Another was that precisely what that person was required to do was one tailored to the situation of that person and the facts of the individual case. The remedy was one that would require the person to do whatever actions were most likely, within the limits of what was practically possible, to undo the particular breach of equity’s standards that had been committed, or that there was a threat to commit. That there have been subsequent dealings with the properties involved, that make it impossible to put the parties back into exactly the position that would remedy the unconscionableness, was not necessarily a reason for denying a remedy

completely.²³ Frequently the unconscientious conduct was conduct that the defendant had committed or was threatening to commit, but it need not be so.²⁴

The remedy that equity granted was just a means to an end, namely fixing the departure from equity's standards.²⁵ Granting an equitable remedy required a judge to be very clear about just what was the standard that had been breached, in what way it had been breached in the particular circumstances of the case, by whom the standard was breached or would be breached, and also to form a judgment about what would be the best practical course to adopt to make good the breach so far as was possible. Though there were precedents of orders that had been made in similar situations that could guide a judge in formulating an order, each order granting a remedy was hand-crafted to meet the circumstances of the particular case.

There is nothing to stop the one case from exhibiting contraventions of more than one standard of equity. If that has happened, the judge then moulds a remedy that will, as near as is practicable, make good all the departures from equitable principle that have occurred. As the Privy Council put it in *Plimmer v Mayor of Wellington*²⁶, "*the Court must look at the circumstances in each case to decide in which way the equity can be satisfied*"²⁷.

Equitable defences can provide a reason for a court not granting a remedy, or modifying the remedy it would otherwise have given.²⁸

To state a rule in terms that "*the court will interfere*" with a trustee's action if a short list of criteria is fulfilled ignores the way that the availability and terms of an equitable remedy are based on the facts of the individual case, and many different equitable principles might impinge on a particular fact situation. Attempts to lay down either necessary or sufficient conditions for granting an equitable remedy concerning a trustee's exercise of a power seem to me to be inherently undesirable, because they fail to take account of the many different ways in which equitable standards could be breached, and the many different factors that could impinge on the judge's discretion about the appropriate remedy. For these reasons, the "*rule*" is a dogmatic oversimplification.

To make this more concrete, even if trustees have exercised a discretionary power, and the effect of the exercise is different from that which they intended, and they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account, a court will not “*interfere with their action*” in any of the following situations:

- (1) as a consequence trust property has come to be held by a bona fide purchaser for value without notice²⁹ (though there might be an action for breach of trust against the trustee)
- (2) the action of the trustees was one to which the beneficiaries gave informed consent³⁰
- (3) if there are circumstances giving rise to a defence of acquiescence, election or estoppel³¹
- (4) if the property has been transferred to a volunteer – in that situation, if the transferee still has the property it might be recovered through a tracing action, or there might in some circumstances be an action available to the trustee to recover its value, but the remedy is not to “*interfere with [the] action*” of the trustee

Mixing Different Equitable Principles

A second problem with the formulation of the “*rule*” in ***Sieff v Fox*** is that it mixes together two distinct streams of equitable principle, one concerning trustees taking into account irrelevant considerations or failing to take into account relevant considerations, the other concerning trustees acting under the influence of mistake or ignorance. There are quite distinct types of unconscientiousness involved in those two streams. The first stream concerns what a trustee must do to fulfill the requirements of conscientious behaviour in exercising a discretionary power, the second concerns identifying when it is unconscientious for someone

to keep a benefit once they know that it has been conferred on them by mistake or through ignorance. I will consider each of those streams in turn.

The Source of a Trustee's Duty³²

To state the elementary, a trust involves property being held by the trustee, for the benefit of another person or persons.³³ The fundamental expectation of the equity court is that the trustee will faithfully perform the office that he has taken on. Because the trustee has been entrusted with the property on the basis that it will be held on the terms of the trust, it is a departure from equity's requirement of conscientious behavior for him not to perform that office faithfully. Sometimes a trust instrument will state expressly certain duties of the trustee, but the courts recognize many duties that are not expressly stated. These duties of trustees have been derived by the courts by reasoning from the nature of the office of trustee, and the practical realities of the trustee carrying out the particular office that he has undertaken. To the extent they are not stated expressly, a trustee's duties are thus arrived at by a type of implication from the nature of his office.

It depends on the precise terms of the individual trust in question, the circumstances surrounding its setting up, and the nature of the property involved, just what is involved in the trustee faithfully carrying out his office. The performance of a trustee's office is one that almost inevitably involves the trustee in forming and carrying through practical judgments.³⁴ Because a trust necessarily involves the trustee in holding property, there are almost inevitably judgments of a business nature, to do with the manner of investment of the trust property, which will have consequences for whether the capital is at risk of loss in whole or part, whether the capital grows, and what income is derived from the property from time to time. Because many trusts have their origin in the desire of a man or woman to look after the financial interests of their family, often after the settlor's death or incapacity, some of the decisions that trustees are called on to make are of a familial nature, such as deciding how much income to distribute and to whom, whether to provide for specific needs like the maintenance of children and if so how much and for which children, and whether to distribute capital and if so how much and to whom.

Any trustee's duty is one that the court has arrived at by deducing or implying what, in the context of the particular trust and its particular circumstances, the trustee *must* do if the settlor's intention is to be carried out. The nature of this process of deduction is illustrated by the way the court³⁵ reasoned in ***In Re Pauling's Settlement Trusts***³⁶ about the circumstances in which a trustee acts properly in exercising a power to pay capital for the benefit or advancement of a beneficiary:³⁷

Being a fiduciary power, it seems to us quite clear that the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced or, as was said during argument, it is thought to be "a good thing" for the advanced person to have a share of capital before his or her due time. That this must be so, we think, follows from a consideration of the fact that the parties to a settlement intend the normal trusts to take effect, and that a power of advancement be exercised only if there is some good reason for it. That good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may hereafter become interested under the trusts of the settlement.

It is also illustrated by the obligation of the trustee to convert into authorised investments wasting or reversionary property that is settled in succession.³⁸ In imposing this obligation the court is almost always not giving effect to any stated intention of the settlor that the property should be converted. Rather, it is giving effect to the settlor's intention that the beneficiaries were to enjoy the property in succession. Where the property was wasting or reversionary that intention in practical reality could only be achieved by converting it into an asset of the kind whose capital value would be retained or at least not significantly eroded (thereby protecting the interest of the remainderman), while also producing an income for the life tenant.³⁹

The duty of the trustee not to delegate arises from the settlor's intention that it will be the trustee, not someone else, who makes decisions concerning the trust, and carries the trust out. However that duty is subject to some exceptions, that arise from practical necessity, or from what the court takes the settlor's intention to be. Thus, in ***Speight v Gaunt*** (1883) 9 App Cas 1 at 5 Earl of Selborne LC described

the circumstances when a trustee was justified in using an agent to transact trust business, when there was no specific power to do so, as one where there was a “moral necessity from the usage of mankind”. Lord Blackburn said:⁴⁰

“ ... where there is a usual course of business the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed.

The transactions of life could not be carried on without some confidence being bestowed. When the transaction consists in a sale where the vendor is entitled to keep his hold on the property till he receives the money, and the purchaser is entitled to keep his money till he gets the property, it would be in all cases inconvenient if the vendor and purchaser were required to meet and personally exchange the one for the other; when the parties are, as is very often the case, living remote from each other, it would be physically impossible.

Men of business practically ascertain how much confidence may be safely bestowed, or rather whether the inconvenience and hampering of trade which is avoided by this confidence is too heavy a premium for insurance against the risk thus incurred. When a loss such as that which occurred in *Ex parte Belchier* Amb. 218 occurs from having bestowed such confidence, they doubtless re-consider all this; and when a new practice, such as that of making bankers' cheques payable to order and crossing them arises, as it has done within living memory, no doubt it is made use of in many cases to avoid incurring that risk, which was formerly practically inevitable. So that what was at one time the usual course, may at another time be no longer usual.

Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash. I think that the principle which Lord Hardwicke lays down is that, while the course is usual, a trustee is not to be blamed if he honestly, and without knowing anything that makes it exceptionally risky in his case, pursues that usual course. And I think that, independent of the high authority of Lord Hardwicke, this is founded on principle. It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are.”

The justification for the court proceeding in that way is that the prevailing practices that prudent men of business follow are the ones that the settlor is likely to have envisaged the trustee would follow, unless the settlor has expressly said otherwise.

At least some of the cases that established or expounded various of the trustees' duties did so by reference to social conditions that existed at the time.⁴¹ At least some of the duties that the courts have evolved have been altered by legislation.⁴² Some of the duties were arrived at by reasoning that might be contestable, if it were to be argued afresh what is required as a matter of practical necessity for the trustee to faithfully carry out his office, but the duties have hardened into positive rules of law.⁴³

The point of this discussion about the origin of trustees' duties, for present purposes, is that the duties are an attempt to state what the trustee must do to carry out his office faithfully. That that is the task they seek to perform is an important aid to understanding the general language in which they are sometimes cast.

There will be many practical decisions where a range of choice is open to the trustee, consistently with the settlor's intentions. In that sort of situation, the only duty of the trustee is not to stray outside the bounds of that range of choice.

Trustees' Duty concerning Exercise of Discretionary Decisions

The duty of trustees in exercising a power exercisable in their "*absolute and unfettered discretion*" has been stated by McGarvie J in ***Karger v Paul***:⁴⁴

"... with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion."

In ***Re Beloved Wilkes Charity***⁴⁵ Lord Truro LC said that the duty of trustees was to exercise their discretion

“... with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrive at, except in particular cases. If, however ... trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion.”

In ***Parkes Management Ltd v Perpetual Trustee Co Ltd*** (1977) 3 ACLR 303, Hope JA⁴⁶ held⁴⁷ that:

“In equity, where a trustee has a discretionary power, that power “must be exercised with an absence of indirect motive, with honesty of intention and with a fair consideration of the issues”: ***Jacobs Law of Trusts*** 4th ed p 301. In ***Lewin on Trusts*** 15th ed p 32, the requirement is expressed to be that the trustee’s conduct be bona fide and the determination not influenced by improper motives. There is ample authority for these propositions ...”

Barwick CJ in ***Lutheran Church of Australia South Australian District Incorporated v Farmers' Co-Operative Executor and Trustees Ltd***,⁴⁸ said of a mere power conferred on a trustee:

“... whilst the power is not in the nature of a trust so that the trustee must exercise it, equity would ensure that the trustee bona fide considers whether or not the power should be exercised, and that in doing so, proper considerations are in mind, and improper considerations excluded. The discretionary nature of the power does not mean that the discretion is absolute, in the sense that it can be exercised irresponsibly, capriciously or wantonly.”⁴⁹

Another formulation of when an exercise of a discretionary power can be held ineffective is if the trustees act for reasons that are “*irrational, perverse, or irrelevant to any sensible expectation of the settlor*”.⁵⁰

In ***Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*** [1998] FCA 51; (1998) 79 FCR 469 in the Full Federal Court, Heerey J quoted a statement made by Northrop J in the court below

concerning the grounds on which an exercise of a trustee's power could be challenged in a court:⁵¹

“Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously (*Re Pauling's Settlement Trusts* [1964] Ch 303 at p 333), wantonly, irresponsibly (*Lutheran Church of Australia South Australian District Inc v Farmers' Co-Operative Executor and Trustees Ltd* (1970) 121 CLR 628 at 639), mischievously or irrelevantly to any sensible expectation of the settler (*Re Manisty's Settlement* [1974] Ch 17), or without giving a real or genuine consideration to the exercise of the discretion (*Karger v Paul* [1984] VR 161, which includes a survey of the authorities). The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable (see *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896) or unwise (*Gisborne v Gisborne* (1877) 2 AC 300 at p 307). Where a discretion is expressed to be absolute it may be that bad faith needs to be shown (*Gisborne v Gisborne* at 305). The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness (see *Re Londonderry's Settlement* [1965] Ch 918 at 928-9: *Karger v Paul* at 165-6).”

The joint decision of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Attorney-General (Cth) v Breckler* [1999] HCA 28; (1999) 197 CLR 83 at [7] quoted the statement of Northrop J in *Wilkinson* concerning “... the scope for challenges in courts of equity to the exercise of discretions reposed in the trustee of a settlement.” Their Honours noted at [7] that, “In this Court, the accuracy of that summary was not disputed.” As I read the case, that should not be taken as an indication that their Honours have reservations about the accuracy of the summary. They later accepted, at [24]:

“In the present case, plainly the decision of the trustees in respect of which Mrs Leshem complained to the Tribunal was made in exercise of discretionary powers which, however, in a court of equity, would not be open to attack by application of a criterion of fairness or reasonableness.”

The other member of the court, Kirby J, specifically endorsed Northrop J's summary, at [58]:

“Before the creation of the Tribunal, disputes between beneficiaries, trustees and insurers concerning superannuation were decided, where necessary, by courts of competent jurisdiction, applying to the problem in hand the general law relating to trusts, contracts, insurance and so forth.

The grounds for challenge to the exercise by trustees of the powers reposed in them, particularly if the trustees gave no reasons for their decision, were limited (*Re Londonderry's Settlement* [1965] Ch 918 at 928-929 per Harman LJ; cf *Karger v Paul* [1984] VR 161 at 185 per Young CJ; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.) The circumstances in which relief could be obtained from a court were accurately summarised in *Wilkinson* (1998) 79 FCR 469 at 480. They are reproduced in the joint reasons. They did not extend to cases where the decision of the trustee was criticised as unfair or unreasonable (*Dundee General Hospitals Board of Management v Walker* [1952] UKHL 1; [1952] 1 All ER 896) or unwise (*Gisborne v Gisborne* (1877) 2 App Cas 300 at 307 per Lord Cairns)

Even carrying through the requirement of giving a “*real and genuine consideration*” or a “*fair consideration*” to a practical question of whether to exercise a power can involve the trustee in some measure of gathering and weighing the facts that are involved in making that particular consideration. Just how far the trustee needs to go in gathering facts will depend on the particular trust. There will be some occasions when quite extensive fact-finding is required before the trustee can make a properly informed decision. For instance, if a trustee of a superannuation fund is required to make a discretionary allocation of a benefit amongst dependents of a member, the trustee will need to find out who are the dependents, and enough about their circumstances to make the decision in a way that meets the description of “*real and genuine consideration*”.

Sometimes the fact that the trustee is someone who the settlor would know was familiar with the circumstances relevant to making the choice involved in exercise of a particular power is a reason why the court has inferred that the trustee is entitled to rely on his own knowledge of the subject matter.⁵² At other times, even if the question at issue is one involving a familial type of decision like exercise of a power of appointment where the potential beneficiaries are member of a family, if the trustee is not in a position to know the facts relevant to exercise of the power, the duty of giving “*real and genuine consideration*” would require the trustee to ascertain enough about the circumstances in life of the potential beneficiaries to be able to say that the settlor’s intention about the manner in which the power would be exercised has been complied with.

A specific aspect of faithful performance of the trustee's office is that he will exercise care in making discretionary decisions. The standard of care that the equity court held was required was the care that a reasonable man of business would exercise concerning his own affairs.⁵³ Exercising that degree of care will involve the trustee in enquiring about the facts that are relevant to any proposed decision. Thus, when trustees had a discretion to invest in any company they chose, it was held that before investing in a particular company the trustees should "*make every necessary inquiry to satisfy themselves that it is really a solvent company*".⁵⁴ In ***Elders Trustee and Executor Co Ltd v Higgins*** (1965) 113 CLR 426 at Dixon CJ, McTiernan and Windeyer JJ said:

"The duty of the trustee was to exercise due diligence, care and prudence in the conduct of the business, bearing in mind the need to preserve the capital of the testator's estate for those entitled in remainder: ***Speight v Gaunt*** (1883) 22 Ch D 727; ***Learoyd v Whiteley*** (1886) 33 Ch D 347; (1887) 12 App Cas 727. If it did not do this it was guilty of a breach of trust."

These judges explicitly recognised the need for trustees to consider relevant facts before making a discretionary decision. The reason they gave for holding a trustee's decision concerning investment to be a breach of trust was, at 451-452:

"... the appellant has asked us to infer that, since mala fides or neglect is not to be imputed to a trustee from his silence alone, the various possibilities must have all been considered and a decision made to reject them. If that were so, the decision would seem to have been one that a prudent man, *duly considering the relevant facts*, could not reasonably reach." (emphasis added)

Whether trustees have failed in performing their duty by failing to find out a relevant fact will depend on the scope of inquiry the settlor is likely to have intended them to carry out, and any implications that arise from the practical necessities of the circumstances in which they are administering the trust. Consider the situation of a trust that has a family member as trustee, and creates a power of appointment among family members. If one of the family members is undergoing financial hardship that is not observable and not known to the others, but that the family member would

disclose if asked, it would usually not be a breach of the trustee's duty to have failed to ask the question.

A similar approach is shown, in the context of trustees' business decisions, by ***Speight v Gaunt***.⁵⁵ There, a trustee had paid trust funds to a broker "*whose good faith he had then no cause to suspect*"⁵⁶ for investment. When the broker absconded, the beneficiaries sought to hold the trustees personally liable. It was held that the trustees were not personally liable, because employment of a broker was the usual way of carrying out that sort of transaction, and it had been within their power to pay the money to the broker. Lord Blackburn said⁵⁷:

"as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit."

Application of the Law concerning Trustees' Duty in the Hasting-Bass Line of Cases

In the statements of principle quoted earlier⁵⁸ concerning the duty of trustees in exercising a discretionary decision, McGarvie J and Lord Truro refer to the ability of the court to correct the discretionary decision of trustees if the trustees disclose their reasons, and those reasons are found to be inadequate. It has been a feature of the cases concerning ***Hastings-Bass*** that the trustees have been anxious to put the inadequacy of their own reasoning in front of the court, and indeed have made the inadequacy of their own reasons the basis of their application. That distinguishes them from many cases in which trustees' decision are challenged, and the trustees seek to keep their reasons to themselves.⁵⁹

The decisions that apply the ***Hastings-Bass*** principle recognise a duty of trustees to "*take relevant considerations into account*". The expression "*relevant consideration*" is inherently relational – considerations are not

relevant in isolation, they are only relevant for some particular purpose or in some particular context. What is a relevant consideration in one context might not be a relevant consideration in another context. The **Hastings-Bass** cases have come to identify the “*relevant considerations*” with an adamant objectivity that is not informed by the essential equitable question of what is not only permissible but necessary for faithful performance of this particular trustee’s office, either as a matter of the intention of this particular settlor or what is usual practice for prudent people or practical necessity. The “*relevant considerations*”, for the purpose of deciding whether a trustee has acted in breach of trust, are any that the trust instrument expressly requires be taken into account, and those without which the trustee could not give real and genuine consideration to the topic, and make a bona fide decision.

The requirement in the **Hastings-Bass** line of cases that the trustees consider the true effect of the choices they have to make means that they may well need to know the answer to a very complex legal question to perform their task correctly. For example, in **Hastings-Bass** itself, the only “*relevant considerations*” that the trustees could arguably have failed to take into account was that the interests subsequent to William’s life interest would fail because they contravened the rule against perpetuities. Yet, given that the trustees made their decision before **Pilkington**⁶⁰ was decided, to expect them to take that into account would be to expect them to be better informed than the first judges in the Chancery Division and the Court of Appeal were at the time. Another example is that Warner J’s reason in **Mettoy** for not being satisfied that the trustees would have come to a different conclusion if they had acted carried out their task properly⁶¹ was that the trustees, performing the task properly, would have realised that the power of amendment of the pension fund rules involved in **Mettoy** was fiduciary and thus would be exercised by the court in the event of liquidation. In **Sieff v Fox**, even though the trustees had obtained legal advice about the tax consequences of the appointment of a made, the advice was wrong because it did not take into account how tax impacted on particular aspects of the transaction.⁶² It seems quite unrealistic to

pitch the standard for proper exercise of trustee's duties as high as these cases do. It is not consistent with any likely intention of the settlor, nor with any practical necessity.

I would agree that, when a trustee is deciding whether to exercise a power of appointment or advancement, there will be many situations where giving "*real and genuine consideration*" to whether to exercise the power will require the trustee to take reasonable care to find out what the tax effect of the transaction would be. The purpose of many a settlor in establishing a family trust is to provide a means of reducing the family's total tax bill, the purpose of many a settlor in establishing a superannuation fund is to take advantage of the tax concessions made available to such funds, and any such intention of the settlor should appropriately be taken into account when a trustee exercises a discretionary power concerning such trust. However, the cases following ***Hastings-Bass*** have come to require the trustee to take into account the *actual* tax effect that a contemplated transaction will have, and have concluded that, concerning at least some tax consequences, that tax effect, if he has sought advice from competent people but has been given advice that could objectively be seen as wrong, then the duty has not been performed. There is an exception, of uncertain scope, if the trustee fails to take into account "*details*" of the tax effects that are "*subtle*" or "*arcane*".⁶³ But even so, requiring the trustee to take into consideration the principal or important *actual* tax effects of a decision, even if he has been misled by his advisers, goes beyond what equity requires of a trustee.

This approach can be compared with the result that the House of Lords arrived at in ***Speight v Gaunt***. In ***Speight v Gaunt***, surely it would be a relevant consideration that the agent that the trustee was proposing to employ was dishonest, and contemplating absconding. The trustees in ***Speight v Gaunt*** clearly did not take that consideration into account, because they had no reason to suspect the agent was dishonest and might abscond. There could be no realistic doubt that they would not have paid him if they knew he was dishonest. According to the ***Hastings-Bass***

line of cases, their failure to take that relevant consideration into account should have meant that their decision to pay the money to the agent was void, and hence that they had parted with the money for a purpose that was unauthorised, and hence that they should have been liable. The fact that the House of Lords concluded that the trustees in ***Speight v Gaunt*** were not liable casts doubt on the correctness of the ***Hastings-Bass*** line.

By contrast, the way in which the Court of Appeal proceeded in ***Stannard v Fisons*** was orthodox – it could have been said, as soon as the trustees' decision about dividing the fund was made, that their information-gathering was inadequate in so far as it did not consider the then present value of the fund.

Lloyd LJ in ***Sieff v Fox*** suggests that the ***Hastings-Bass*** principle might apply in circumstances other than where trustees are in breach of their duty.⁶⁴ If this means that failure to take into account relevant considerations, or taking into account irrelevant considerations, is part of the reason why it is suggested a trustee's decision made within power should be set aside, I know of no equitable principle that allow such a result, short of the trustee having acted in breach of duty. Indeed, the only criterion by reference to which a trustee ought (or ought not) have taken some consideration into account is performance of his duty as trustee. If trustees have acted within the scope of a power conferred on them, and in accordance with the standards that equity makes obligatory for trustees, their act will be valid, unless it contravenes some positive law like the rule against perpetuities or a statute.

Remedy for breach of trustees' duty re exercise of discretionary decision

If a trustee has made a decision in a way that does not accord with equity's standards, the remedy that equity grants will be the one that will undo, so far as is possible, the breach of standards that has occurred. What remedy will achieve that result will depend on what has been done to implement the decision.

If the decision of the trustees has not been acted on in any way, it would suffice for the court to declare the decision void, and (if there was any risk that the trustees might seek to implement the decision) order the trustees not to implement it.

If the trustees have parted with the trust property in accordance with the decision, the appropriate remedy will depend on in what circumstances and to whom they have parted with it. If they have transferred some trust property to a beneficiary, who still has it, the beneficiary, as a volunteer, and absent any other equitable consideration like estoppel or laches, would not be able to resist a claim for its return once he had notice that he had acquired it in breach of trust.

It is sometimes of fundamental importance to the availability of equitable remedies whether a person affected by them is a volunteer, and in many instances those in whose favour a discretionary decision of trustees operates are volunteers. Even if the beneficiaries of a trust have given value in connection with the trust, as happens concerning occupational superannuation schemes, and managed investment schemes that operate in a trust structure, the relevant question is whether, in relation to the particular decision that is in question, the beneficiary has given value. ***AMP (UK) plc v Barker***⁶⁵ was a case where a trustee had amended the rules of a superannuation scheme to increase, at comparatively small cost, the benefits payable to a small class of members. The trustee did not realise that the rules created a flow-on effect to another class of members, which would have a massive cost. While it was a rectification case, it was held that part of the reason why rectification was available was that, while the members had given consideration in relation to the pension scheme as a whole, they had not given consideration for the rights that they acquired as a result of the flow-on.⁶⁶ That reasoning would be equally applicable to applications to the court to cure a trustee's breach of duty arising from failure to take relevant considerations into account.

In ***Kerr v British Leyland (Staff) Trustees*** the Court of Appeal regarded the fact that members had given consideration in relation to the superannuation scheme as a whole as a reason why the trustees had an obligation to give properly informed consideration to a member's claim for a disability benefit.⁶⁷ I doubt that that is the reason why there was the duty to give properly informed consideration – giving properly informed consideration is part of the duty trustees owe even to volunteers. However, whether or not I am right or not in saying that, ***Kerr*** makes a different point to that made in ***AMP v Barker*** about the significance of giving consideration.

At the other extreme to volunteer beneficiaries, if the property has passed to a third party for value without notice, it will not be recoverable, and it may be that the only remedy is for the trustee to recoup the trust fund. There are numerous other situations in between. The point to make is that a declaration of voidness cannot be assumed to be always the appropriate remedy.

The question of the appropriate remedy was ignored in ***Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain***.⁶⁸ A tax scheme that was set in train in 1999 involved a company controlled by the taxpayer (AHL) making a loan of £750,000 in May 2000 to the trustee of a British Virgin Islands trust. The UK tax legislation was changed in March 2000, without the trustee being informed. In consequence the May 2000 loan was made as had originally been planned. Because of the March change in the law a large tax liability would arise. The trustees applied to have their acceptance of the loan avoided. That relief was granted.

The case as reported is highly unsatisfactory. There was a contention that the loan had in fact not been made to the trustee, which the judge did not deal with. (One would have thought that either an admission or a decision that there really was a loan would be a prerequisite to setting it aside.) The decision proceeds on an assumption that the loan had been made. It seems that the judge found, at [5], that the loan was applied in lending

£712,500 to another company, Westbourne, and as to £37,500 in applying for some shares. While AHL was party to the proceedings, Westbourne and the company in which the shares were applied for were not. If the transaction had really been carried through, Westbourne and the share-issuing company would still have the money they had been paid. No consideration was given to how the situation as between AHL and the trustee could be restored to the status quo – even if the trustee’s decision to accept the loan was declared void, that would not restore to AHL the money.

“Would” or “Might” Have Been Different?

One requirement of the statement of the “rule” by Warner J in **Mettoy** is concerned, and the modified version of it adopted by Lloyd LJ in **Sieff v Fox**⁶⁹ is that the trustee *would have* acted differently if the relevant consideration had been taken into consideration. One can readily enough understand how a minimum requirement for a court setting aside a flawed decision of trustees is that they *might* have decided differently if they had gone about their task correctly. Once there has been a departure from equity’s standards in the decision-making process, then unless the court is persuaded that that departure in fact made no difference to the outcome,⁷⁰ and equity court would search for a remedy. **Kerr** and **Stannard** both adopted the “*might have acted differently*’ test as the basis for making an order that a trustees’ decision was of no effect when proper consideration had not been given to the subject matter. However, **Hastings-Bass**, **Mettoy** and **Sieff v Fox** all hold that the precondition for the court interfering is that the trustees *would not* have acted as they did had they taken into account the obligatory considerations, or failed to take into account the inappropriate considerations.

The reasons that Lloyd LJ gave in **Sieff v Fox** for adopting the tougher test, of setting aside a decision only if it could be shown that the trustees would have acted differently if they had taken into account the matters they should have, was that the trustees’ power in question in **Kerr** and

Stannard was one that they were bound to exercise, while the power he was considering was one that trustees might or might not exercise in their discretion. (*Kerr* was a case where a *superannuation disability benefit depended on whether the trustees “accepted that your incapacity is permanent”*. The only duty the trustees were held to have was to give properly informed consideration the application.) At [52] he recorded a submission:

“... that *Kerr* and *Stannard* are in a different and distinct line of authority from *Re Hastings-Bass*, because they are concerned with circumstances in which the trustees are under an obligation to act, whereas *Re Hastings-Bass* concerned a voluntary exercise of a discretion, as did *Mettoy*. Other cases in the same line as *Kerr* and *Stannard* include *Mihlenstedt v. Barclays Bank International Ltd* [1989] IRLR 522 and *Harris v. Lord Shuttleworth* [1994] ICR 991. He submitted, on this basis, that the proposition that the matter overlooked “might” have led the trustees to act differently cannot properly be transferred from the *Kerr* line of cases to the *Re Hastings-Bass* principle, both because of this distinction and because it is inconsistent with the Court of Appeal’s judgment in *Re Hastings-Bass* itself.”

He gave his reasons for accepting that submission at [55]–[56]:

“*Kerr* is thus a rather different kind of case, where the trustees are the arbiters of a beneficiary’s entitlement to a particular benefit under the rules of the pension scheme, and that entitlement is derived not from pure bounty, as would be the case in a family trust, but from the contract of employment. In those circumstances, and given the inadequate information provided to the trustees on which to take their decision, it seems to me logical that a relatively low threshold of relevance (“might”) should have been adopted by the court as the test of whether the deficiency of information entitles the beneficiary to have his case, in effect, reconsidered. *Mihlenstedt* was a similar case, though there the decision lay with the employer, not the trustees, and the claim failed on the facts. *Harris* was also a similar type of case.

Likewise in *Stannard* the trustees were under an obligation to act, by appropriating an amount to be applied for the benefit of the transferring employees, though they had to decide, after consulting the actuary, what amount should be appropriated, as being the amount which they decided to be just and equitable. Although on its facts *Stannard* is a different kind of case from *Kerr*, it seems to me that the analogy is fair. Both were pension cases, so that the rights of the members or beneficiaries arose in the context of the contract of employment. Both were cases in which the trustees

were under a duty to act, though with some freedom as to how they proceeded. It is true that even outside this type of case, if trustees have a discretionary power, they are under obligations in relation to it, including to consider from time to time whether to exercise it, and if they do decide to exercise it they are under duties in respect of that process, but it seems to me that there is a real distinction between such a case (which ***Re Abrahams' Will Trusts, Re Hastings-Bass*** and the present case are) and cases such as ***Kerr*** and ***Stannard*** where the trustees are under a duty to act, not merely a duty to consider from time to time whether to act. I consider, therefore, that Mr Herbert's submissions in this respect are well founded."⁷¹

I do not agree with this basis for the distinction. If a trustee has failed to take into account a consideration that proper performance of his duty requires him to take into account, his decision is flawed. Why should the granting of a remedy depend on whether the trustee is obliged to attempt the task again? And if trustees have made a decision that is not the type that could be made in faithful performance of their office, why should it only be when the court is positively persuaded that they would have acted differently, if they had done the task properly, that their dereliction of duty should be corrected? It is true that, if the flawed decision is set aside, the trustees might not attempt to make a decision on the same topic. But that the trustees might decide not to exercise their power is exactly the situation that the settlor brought about, by conferring a power that there is no duty to exercise. I can see no reason of principle why the court should state a principle in a way that saves flawed decisions of trustees, once the flaw has been demonstrated.

Mistake or Lack of Adequate Understanding Alternative Grounds for a Remedy

In ***Re Beloved Wilkes Charity*** Lord Truro said that if trustees disclose their reason for making a decision and it "*is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision*"

This is a recognition of the line of authority whereby a transaction conferring a voluntary benefit can in some circumstances be either set aside⁷², or a document incorporating or giving effect to it rectified,⁷³ if the decision is the product of mistake. Another line of authority results in a conferring of a voluntary benefit being set aside if it is entered without a proper understanding of the nature of the transaction.⁷⁴

While those lines of authority cover a wider field than decisions by trustees, they are capable of applying to decisions by trustees. The equity that is invoked here is not dependent on there being a breach of duty by the trustee. Rather, it is dependent on the unconscientiousness of someone receiving a benefit as a volunteer if a mistake or lack of understanding has caused that benefit to be given. These lines of authority can provide an alternative basis to a “rule in *Hastings-Bass*” for setting aside or removing the sting of some decision of trustees that are the product of a mistake. Understanding how they work concerning dealings with trust property requires the lines of authority to be set into context.

Creation and Dealing With Interests in Trust Property

An equitable interest in trust property can come into existence through unilateral action of one person. One way is that someone declares that henceforth he will hold upon certain trusts certain property⁷⁵ that he already owns. Another is that someone who is a beneficiary of a trust and *sui juris* directs the trustee henceforth to hold the property on new trusts.⁷⁶ Likewise, the exercise of a power of appointment or a power of variation of a trust has the effect of creating a new trust on which the trust property is held – it operates because of the person exercising the power “*having sufficient dispositive power over or in respect of the [trust property] to subject [it] to new and different trusts*”.⁷⁷ An assignment of an interest in a trust similarly causes the trustee to hold the trust property for a new beneficiary.

The rationale of the express trust is that there is a moral obligation to adhere to the settlor's intention concerning the administration of the trust property. When someone declares himself trustee of property he already owns, it is his own conscience that is bound by the statement of intention. When property is transferred to a trustee with a declaration of trust, it is receiving and keeping the property in the knowledge of the terms upon which it is given that binds the trustee's conscience. If the trust contains a power of appointment or a power of variation, it is part of the settlor's intention that the trust property will be held and applied in accordance with an appointment or variation made within the scope of the power. Thus in that situation giving effect to the settlor's intention requires one to recognise the efficacy of the appointment or of the variation. But it is inherent in the notion of a power that the person who exercises it can choose what will be done, within the scope of the power. The exercise of that choice involves giving effect to the intention of the appointor.

Thus, when a new trust is brought into existence, the terms on which the trust property will thenceforth be held depend on the intention of one person only, namely the settlor. When a power of appointment or power of variation is exercised the terms on which the trust property is thenceforth held will depend on the intention of the settlor (who intended that the property should be held in accordance with an appointment or variation of a particular type) and also on the intention of the person who exercises the power.⁷⁸

There are other ways as well in which a creation or alteration of beneficial interests in a trust can involve more than one person. Trusts are often declared by a deed to which the settlor and the trustees are parties. Sometimes A transfers property to B stating that it is to be held on certain trusts, and B accepts the property. A common example of this happening is when a trust is created by a settlor settling a comparatively small sum of money on particular trusts, and someone⁷⁹ then "*feeding*" the trust with assets of more substantial value. In these examples the trustee, or B, might make promises about how the trust will be conducted, or might

passively accept the property. Trusts are often declared as a result of a previous negotiation, in which a consensus is arrived at about what the terms of a trust will be.⁸⁰ Similarly, a power of appointment could be exercised as a result of a previous consensus.⁸¹ It is common in occupational superannuation schemes for the trustees to have the power to change the rules of the scheme, with the consent of someone else (often the employer).⁸²

A release of a right under a trust, or an assignment of an equitable interest under a trust, are dealings with equitable property that are dependent for their efficacy on the intention of the person who engages in them.⁸³

At this stage, I simply draw attention to the way in which there might be one person, or more than one, involved in the historical path by which property has come to be held on particular trusts. I will seek to demonstrate that who has been involved, and their roles, can make a difference to the type of unconscientious conduct that can arise, and to the identity of the person who is seen as acting unconscientiously, and that these differences lead to differences in to how the remedies of rectification and rescission apply concerning trusts and dealings with trust property.

Setting aside settlements and dealings with trust property

In the absence of any other factors, a fully constituted trust that contains no power of revocation cannot be revoked by the settlor, binds the trustee, and can be enforced even by volunteers.⁸⁴

Settlements of property and dealings with trust property, like other transactions, can be set aside in equity if they are the product of what equity regards as fraud – which can extend to misrepresentation, undue influence, abuse of a fiduciary position, deliberately taking advantage of what one knows is a mistake, and taking advantage of weakness.⁸⁵ Dealings that have been produced by such means are set aside, because it is unconscientious for the recipients of benefits under such a document

to keep benefits that have come to them through such means. That is so even if the recipient of the benefits is not the person who has engaged in the conduct that is fraudulent.

Mistake

Even in the absence of this sort of fraud, a dealing with trust property will be set aside if it is the product of a mistake on the part of the settlor or appointor.⁸⁶

The sorts of documents that have been set aside because they are a product of such a mistake on the part of the settlor or appointor include:

- a resettlement of trust property⁸⁷
- a deed of appointment of trust property⁸⁸
- a deed of revocation of a settlement⁸⁹
 - a surrender of a life estate under a settlement⁹⁰

Examples of the sort of mistake that has justified rescission of a deed is when an appointment is made with the intention that it produce equality between the provisions made for the appointor's children but it actually produces inequality,⁹¹ when a man gives property to his wife with the intention that she should enjoy it beneficially but unbeknown to him such a gift is caught up by the couple's marriage settlement and so would not be enjoyed by her beneficially,⁹² or when a widow exercises a power to revoke a settlement, believing (on her solicitor's mistaken advice) that it will enable her to keep the settled property available to her in its then state of investment but in fact the legal effect is to cause the property to revert to her husband's estate.⁹³

The onus of showing that the dealing is the product of a mistake is on the person who seeks to set the dealing aside or have it altered.⁹⁴

Rationale

The equity that is involved here is that the mistake has caused the dealing that the settlor or appointor enters to operate completely differently to the way that person intended, so that the usual rationale for enforcement of trusts, giving effect to exercises of powers, and recognising dealing with equitable interests does not apply. When there is no intent that the donee should have the trust property in the way the dealing on its face provides, it is unconscientious for the donee to keep it.

Thus in ***Ogilvie v Littleboy*** (1897) 13 TLR 399 at 400 col 1 Lindley LJ, delivering the judgment of the court concerning an attempt by a settlor to set aside the trusts she had declared, said:

“Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor ... In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.”

The unconscientiousness of a donee keeping a benefit granted through a serious mistake has been recognised as the basis of this equity in ***Gibbon v Mitchell***.⁹⁵

Parallels With Money Had and Received

The unconscientiousness of keeping a benefit that was given by mistake is the explicit basis for one species of the common law’s remedy for money had and received, which is explicitly based on equitable principles.⁹⁶ (Lord

Mansfield, who developed the remedy, had had years of practice at the Chancery bar and on several occasions declined the Lord Chancellorship⁹⁷). In **Barrow v Isaacs & Son**⁹⁸ Kay LJ explained how the unconscientiousness of keeping the money meant that it could be recovered, even if the mistake under which it was paid arose from the forgetfulness or carelessness of the payer:

“... it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity.”⁹⁹

He went on to explain that there was not the same sort of unconscientiousness involved if a contracting party exercised a right to terminate a lease on the basis of a breach of covenant that the lessee had committed through his own forgetfulness, or if a person enters a contract because of a mistake that arises from his own forgetfulness.

A topic for further investigation is the extent to which the defence of change of position, that the common law recognizes to an action for recovery of money paid by mistake, has parallels in equitable defences.

Effect of a Transaction Cf Its Consequences

In **Gibbon v Mitchell**¹⁰⁰ Millet J said¹⁰¹ that:

“ ... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.

This distinction between the “*effect of the transaction itself*”, and “*its consequences or the advantages to be gained by entering into it*” is a difficult one to grasp and apply in practice.¹⁰² In ***Ogden v Griffiths*** [2008] EWHC 118 (Ch); [2009] Ch 162 Lewison J has pointed out at [24]–[25] that the formulation of principle that Lindley LJ gave in ***Ogilvie v Littleboy*** was not so restricted, and doubted that the distinction was a proper limitation on the scope of the equitable jurisdiction to relieve against the consequences of a mistake.

I agree that there is no such limitation on the equity to set aside a transaction for mistake. The unconscientiousness that generates the remedy occurs whenever someone has received a benefit that he would not have received if the mistake had not been made. The precise nature of the mistake does not matter – what matters is that the mistake causes the benefit to be conferred.

Gibbon was decided in 1990, at a time when the English law concerning recovery of money paid under mistake was restricted to recovery caused by a mistake of fact. Now in both Australia and England money has been held to be recoverable if paid under mistake, whether the mistake is of fact or law,¹⁰³ provided the mistake causes the payment.¹⁰⁴ It is not necessary to categorise the mistake as “*fundamental*”.¹⁰⁵ Given the equitable origins of the action for money had and received, these developments are at least consistent with the equity to set aside transactions for mistake depending on the mistake being one that causes the transaction, rather than on the nature of the mistake.¹⁰⁶

If a mistake must be causative of transaction being entered before it can be set aside under an equity relating to mistake, it is correct to say that if trustees exercise a discretion “*but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would have not have acted as they did had they not*” made that mistake. To that extent, the formulation of the “*rule in Hastings-Bass*”

in ***Sieff v Fox*** is right. However there is no need for a causative mistake that it is sufficient to warrant a transaction being set aside to be one that arises from any failure of the trustees to take into account considerations which they ought to have taken into account, or from their taking into account considerations which they ought not to have taken into account. As shown earlier, if the failure to take into account considerations which the trustees ought to have taken into account, or taking into account of considerations which they ought not to take into account is itself a breach of the trustees' duty, that can provide a separate ground for setting the transaction aside, without any need for showing that the trustees would not have acted as they did if they had not breached their duty.

Lack of understanding

Mistake involves having a positive belief about some topic, which is incorrect. The type of mistake that is relevant to setting aside a trust dealing arises when the person in question has an intention that he seeks to carry out by the deed, but that intention is not carried out by the document actually entered.

As well as there being a line of cases setting aside settlements and dealings with trust property that are made through mistake, there is a separate line of cases whereby a settlement or dealing with trust property can be set aside if the nature of the transaction being entered was not understood by the person who entered it.¹⁰⁷ The onus of proof of the lack of understanding is on the person who seeks to have the deed set aside.¹⁰⁸ By contrast with the situation concerning mistake, there can be a lack of understanding sufficient for the deed to be set aside even if there is no proof of exactly what it was that the person intended.

Tests for setting aside the document are that the settlor did not know or have a fair opportunity to understand the nature and effect of the deed before he executed it,¹⁰⁹ or the court is satisfied the deed was not "*the free,*

determined act of the settlor".¹¹⁰ One practical guide¹¹¹ for when a deed settling a significant amount of property is binding¹¹² is that:

"All that the law requires in a deed of this description is that it should be effective, and should not contain any extraordinary clauses, unless those clauses are shewn plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him. It is not necessary to shew that the usual clauses inserted by conveyancers were explained; but any unusual clauses must be shewn to have been brought to his notice, explained and understood."

Rationale

The rationale for setting aside transactions not properly understood is that any intention with which the transaction was entered is so malformed that it would be unconscionable for those granted benefits by the transaction to keep them.

Rectification of documents effecting trust dealings

In circumstances where it is possible to establish not only that the document by which a trust dealing is effected does not give effect to the intention of the relevant person or persons, but also what that intention was, the court can rectify the document by rewriting it to make it accord with the actual intention. If there are two or more parties to the dealing in question, who have come to a common intention about its terms, it must be proved what the common intention of all the parties was before the document can be rectified,¹¹³ but if the document is a unilateral one then only the intention of the person who made it need be proved.¹¹⁴ If there is more than one party to the document, but no antecedent common intention, it may be that it is only the intention of the settlor that need be established.¹¹⁵ If the document as executed could reasonably be argued not to state the intention correctly, rectification can be granted *ex abundantia cautela*, without the court deciding the true construction of the document, because when there is a reasonable argument open that the

intention is not correctly expressed the instrument is a blot on the title of the persons who take under it¹¹⁶.

The type of mistake that justifies rectification need not be as serious as the type of mistake that justifies rescission of the document. In ***Ogilvie v Littleboy*** (1897) 13 TLR 399 Lindley LJ¹¹⁷ said at 400 col 2:

“in a long and complicated deed of gift mistakes might be made, which the court might rectify if desired by the donor, and yet such mistakes might not be important and serious enough to enable the donor to set aside the whole deed as failing in substance to carry out his intention.”

This emphasises that the mistake that justifies completely setting aside a transaction must be one that causes the transaction as a whole to be entered, not merely that the mistake produces some of the detail of the transaction. It is in that sense that a setting aside of a dealing with trust property requires a mistake that is serious.

The sorts of documents that have been rectified include a deed exercising a power of appointment (rectified to give effect to the intention of the appointor),¹¹⁸ a deed of settlement (rectified to give effect to the intention of the settlor)¹¹⁹, a deed of amendment of a trust (rectified to give effect to the intention of the person who had the power of amendment).¹²⁰

The court requires clear proof that the intention is not accurately stated,¹²¹ and the court must be particularly careful before it finds an intention on the basis of oral evidence,¹²² but there is no legal requirement that there be contemporaneous written evidence of the intention.¹²³

Even if the relevant party intended to use the actual words that were used in the document, rectification can be granted if it actually effects a different transaction to that which was intended.¹²⁴

If the practical outcome that the maker of the document intended to bring about is clear, the court can rectify by using technical words of its own drafting that are apt to achieve that practical outcome.¹²⁵ Just as in a suit for specific performance of a contract to convey property the court can use its own knowledge of what provisions are usual and appropriate to fill in gaps of conveyancing detail in the parties' agreement,¹²⁶ so in a suit to rectify a settlement made pursuant to a sketchy agreement the court can use its own knowledge to fill in such gaps.¹²⁷ There is authority that an intention as to the effect that a document is to achieve can result in rectification where “‘effect’ means the legal and actual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral kind (for example, its liability to stamp duty).”¹²⁸ That statement mirrors the “effect/consequences” distinction that was drawn in *Gibbon*, and may need reconsideration.¹²⁹

But if the equity of rectification is made out, the fact that a tax benefit would arise from granting a remedy is not a reason to refuse it. In ***Whiteside v Whiteside*** at first instance,¹³⁰ Harman J had refused rectification on grounds that included as a discretionary reason that the fact that the plaintiff was seeking rectification to provide “a side wind to help the plaintiff against the Revenue”. When ***Whiteside*** went on appeal¹³¹ the fact that a tax advantage was sought was not part of the reasons of the Court of Appeal for declining rectification.¹³² Later cases have held that, if a document fails to give effect to the intention of the parties it can be rectified even if there is an incidental effect that the rectification confers a tax advantage.¹³³

Rationale for rectification concerning trust transactions

Again, the rationale for the remedy is the unconscientiousness of the donee keeping a benefit that was not intended to be given. In ***Lady Hood of Avalon v Mackinnon***¹³⁴ Lady Hood made an appointment in 1904 of trust property to one of her daughters, in the same amount as she had

recently appointed to her other daughter. She entered the 1904 deed forgetting that 16 years before she had already made provision for the first daughter, so that the effect of the 1904 dealing was not, as she had intended, to create equality between the daughters, but to create inequality. The 1904 deed was set aside, but Eve J said, at 481:

Now the question is whether, in that state of facts, I can, consistently with the law, say that such a mistake on the part of the appointor entitles her to have the deed rescinded. I accept Mr. Lawrence's argument that whether it is rescission or whether it is rectification is only a question of degree. If the Court comes to the conclusion that the plaintiff is entitled to relief, then whether the proper relief be reformation or rescission is really immaterial, because whatever is the proper and necessary relief the Court is bound to give it.

That it is “*only a question of degree*” whether rescission or rectification is granted is a product of it being the same equity that underlies both remedies. Even though the order made was¹³⁵ “*that the deed be rescinded and set aside*”, as well as Eve J adopted a form of order that has an analogy with the type of order made in rectification:

“... it would be a wise expedient if there was now indorsed on the original settlement a note of the three appointments which have been made and which stand, and also a note of the appointment with which I am now dealing, and a copy of the order which I am now making rescinding that last appointment, and I so direct.”

Similarly, in ***Re Strain (deceased); Allnutt v Wilding*** [2007] EWCA Civ 412; 9 ITELR 806 Mummery LJ said at [5]:

“Mistake is undoubtedly a ground on which a court may set aside or rectify a voluntary settlement. Rectification is but one aspect of a wider equitable jurisdiction to relieve parties from the consequences of their mistakes.”

Conclusion

When there are separate strands of principle and precedent that govern trustees duties, trustees mistakes and trustees lack of understanding, and the rationales for those principles are not all identical, it would be better to

keep the principles separate than to mix them together as the “*rule in the Hastings-Bass*” does.

25 November 2010

¹ Judge of the NSW Court of Appeal, Visiting Fellow Wolfson College Cambridge, Herbert Smith Visitor Cambridge University Faculty of Law Easter Term 2010

² **Mettoy Pension Trustees Ltd** [1990] 1 WLR 1587 (Warner J); **Stannard v Fisons Pension Trust Ltd** [1990] Pensions LR 179 (Warner J); **Stannard v Fisons Pension Trust Ltd** [1991] 1 Pensions LR 225 (EWCA);

³ The expression was first coined by Warner J in **Mettoy Pension Trustees Ltd** [1990] 1 WLR 1587.

⁴ **Green v Cobham** (decided 19 January 2000) HH[2000] EWHC 1564 (Ch); [2000] WTLR 1101; [2002] 1 BTC 170; **AMP (UK) plc v Barker** [2000] EWHC Ch 42; [2001] PLR 77; [2001] WTLR 1237 (**Hastings-Bass** said *obiter* to support setting aside the transaction, but not actually relied on); **Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children** (decided 17 July 2001) HH[2001] EWHC B2 (Ch); [2001] WTLR 953; [2001] STC 1344 (Patten J); **Hearn v Younger** [2002] EWHC 963; [2003] OPLR 45 (obiter discussion only); **Abacus Trust Co (Isle of Man) v Barr** [2003] EWHC 114 (Ch) 245; [2003] Ch 409 (Lightman J); **Sieff v Fox** [2005] EWHC 1312 (Ch); [2005] 3 All ER 693; [2005] 1 WLR 3811 (Lloyd LJ, sitting at first instance); **Gallagher Ltd v Gallagher Pensions Ltd** [2005] EWHC 42 (obiter discussion only); **Burrell v Burrell** [2005] EWHC 245; [2005] STC 569; **Betafence Ltd v Veys** [2006] EWHC 999 (obiter only); **St Mary and St Michael Parish Advisory Company Ltd v Westminster Roman Catholic Diocese Trustee** [2006] EWHC 762 (obiter only); **Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain** [2007] WTLR 1697 (a decision of the Grand Court of the Cayman Islands); **Pitt v Holt** [2010] EWHC 45 (Ch); ((2010) 12 ITEL 807, [2010] 1 WLR 1199, [2010] 2 All ER 774, [2010] BTC 235, [2010] EWHC 45 (Ch), [2010] STC 901, [2010] STI 1443, [2010] WTLR 269; **Futter v Futter** [2010] EWHC 449 (Ch) (Norris J); **Jiggins v Low H** [2010] EWHC 1566 (Ch)H [2010] All ER (D) 243 There have also been some decisions where the “rule” was invoked but where the court declined to set aside the transaction: **Breadner v Granville-Grossman** [2000] EWHC 424; [2001] Ch 523; **Smithson v Hamilton** [2007] EWHC 2900; [2008] 1 All ER 1216; [2008] 1 WLR 1453 (appeal settled **Smithson v Hamilton** [2008] EWCA Civ 996).

⁵ **Pitt v Holt** [2010] EWHC 45 (Ch); ((2010) 12 ITEL 807, [2010] 1 WLR 1199, [2010] 2 All ER 774, [2010] BTC 235, [2010] EWHC 45 (Ch), [2010] STC 901, [2010] STI 1443, [2010] WTLR 269

⁶ **Green v Cobham** HH[2000] EWHC 1564 (Ch); [2000] WTLR 1101; [2002] 1 BTC 170 (Jonathan Parker J)

⁷ **Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children** HH[2001] EWHC B2 (Ch); [2001] WTLR 953; [2001] STC 1344 (Patten J);

⁸ **Abacus Trust Co (Isle of Man) v Barr** [2003] EWHC 114 (Ch) 245; [2003] Ch 409 (Lightman J)

⁹ **Sieff v Fox** [2005] EWHC 1312 (Ch); [2005] 3 All ER 693; [2005] 1 WLR 3811 (Lloyd LJ, sitting at first instance).

¹⁰ That task has been performed recently by Professor Peter Edmundson in “*Setting aside trustees’ decisions: How secure is the rule in Hastings-Bass?*” (2008) 31 Australian Bar Review 36

¹¹ One that should be mentioned for completeness is **Stannard v Fisons Pension Trust Ltd** [1991] 1 Pensions LR 225 (EWCA). In it, the Court considered the 1986 decision in the Court of **Kerr v British Leyland (Staff) Trustees Ltd**, not reported until [2001] WTLR 1071, that had adopted a “*properly informed consideration*” test for the validity of trustees’ discretionary decisions, and said at [39], 233 only that there was “no difficulty in reconciling the judgment in **Kerr v British Leyland (Staff) Trustees Ltd** with the decision of this court on **Re Hastings-Bass**”. That is really a comparison of the individual decisions, and does not involve recognition of any “rule”. **Allan v Nolan** (also known as **Allan v Rea Bros Trustees Ltd**) [2002] EWCA Civ 85; [2003] O.P.L.R. 11; [2002] Pens. L.R. 169; [2002] W.T.L.R. 625; (2001-02) 4 I.T.E.L.R. 627 (a decision of Robert Walker LJ, with whom Aldous and Keene LJ agreed) concerned a purported transfer of assets from the EW pension fund to another, that to the knowledge of at least one of the trustees of the EW fund was being conducted for an improper purpose of allowing a beneficiary to get access to his benefit before reaching retiring age, and thus was ineffective to transfer any beneficial interest in the asset at all. It was in that context that Robert Walker LJ said, at [49]

“Since the court does not know the precise terms of the transfer payments power in the EW scheme it is impossible to say whether the invalidity of its exercise should be classified as an excessive (ie *ultra vires*) exercise of the power, or as a fraud on the power (which makes the exercise void, not voidable: *Cloutte v Storey* [1911] 1 Ch 18) or as an example of the operation of the principle in *Re Hastings-Bass* [1975] Ch 25: see *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587 at 1621-24, where Warner J stated at 1624

“For the principle to apply however, it is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.”

This court formulated the test in less demanding terms in *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27, but in this case even the most demanding test would lead to invalidity.”

That mention in passing seems to treat the principle as just a test for the invalidity of a trustee’s decision, which is not the way that later English cases have treated it. In *Giovanni Malonne v BPB Industries plc* [2002] EWCA Civ 126; [2002] ICR 1045; [2002] IRLR 452; [2003] BCC 113 there is passing mention at [53] of counsel referring to the cases of *Hastings Bass* and *Mettoy Pension Trustees v Evans*, concerning which the only judicial remark is at [56] that “I do not believe that the cases cited assist him”.

¹² *Hayim v Citibank NA* [1987] AC 730. A testator had appointed X as the trustee of his American will (under which the plaintiffs were beneficiaries) and Y as trustee of his Hong Kong will. Clause 10 of the American will said that if (as actually happened) at the time of his death he owned a residence in Hong Kong and his brother or sister or both survived him, X’s only responsibility or duty with respect to that property was one that would arise upon receipt of the proceeds of the residence or upon the death of the survivor of the brother and sister. The plaintiffs requested Y to sell the Hong Kong residence, but X requested Y not to do so. The house declined in value. The plaintiffs’ action against X for breach of trust failed. Lord Templeman at 746 said:

“Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as [X] thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that [X] had not properly exercised the discretion conferred on [X] to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie: see *In Re Hastings-Bass, dec’d* [1975] Ch. 25, 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable [X] to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.”

While page 41 of *Hastings-Bass* is the place where the statement of principle previously quoted occurs, the circumstances of *Hayim* were not ones where X had failed to take into account any relevant consideration, or where there was any question of the actions of X not having the full effect intended.

¹³ *Oakley v Osiris Trustees* [2008] UKPC 2. The issue was whether there had been an effective exercise of the power of trustees to change the proper law of a trust from the law of Jersey to the law of the Isle of Man. Having found that, for 3 separate reasons, the exercise of the power was ineffective, Lord Scott of Foscote mentioned, at [55], that the purported exercise of power in relation to that trust did not take into account that there would be no change of proper law concerning another closely related trust, and continued:

“If these Trusts had been subject to the law of England that consideration might well have been sufficient to undermine the validity of the exercise in regard to the Tabatha Trust (see *In re Hastings-Bass* [1975] Ch. 25, *Charman v Charman* [2006] 1 WLR 1053 and *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409). It could not have been intended that the two Trusts should have different proper laws. This point, however, was not the subject of any argument either below or before the Board. There is plenty of other material that in my opinion requires the dismissal of this appeal.”

¹⁴ For example, Sir Robert Walker, “The Limits of the Principle in *Re Hastings-Bass*” [2002] PCB 226, at 238 – 239 said:

The unrestrained extension of the Hastings-Bass principle could lead to trustees being treated as new class of incapacitated persons, like children or feeble-minded adults. No-one could ever be sure that they had taken proper advice (even, as in the Abacus case, if they had teams of expert advisers) or that they meant what they said. Huge uncertainty would arise, especially as each doubtful decision would tend to have a knock-on effect making analysis of later decisions much more difficult (this will be a familiar experience for anyone who has, in investigating family trusts, identified an appointment, perhaps 20 or 30 year before, which was void for perpetuity). The

consciences of even the most honest and respectable professionals might be troubled at whether to raise doubts about a past appointment which had since proved inconvenient for tax purposes, or to suppress doubts about an appointment which, although questionable, had proved convenient.”

Justice Hayton, in the Preface to the 17th (2007) edition of Underhill and Hayton, *Law Relating to Trusts and Trustees*, says:

“The ramifications of the *Hastings-Bass* principle are clearly too extensive under the current law: as a matter of policy, can a settlor really be allowed to create a situation where his beneficiaries can insist that the trustee must always exercise its powers as a paragon of legal virtue or, otherwise, the exercise is void, so that a trustee’s mistakes can always be undone and put right? A case on the principle needs to proceed through the appellate process or Her Majesty’s Revenue and Customs need to have some limiting legislative provision in a Finance Bill.”

Justice Barrett, in *R v Barrett*, “The Principle in *Re Hastings-Bass*” (http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_barrett230206H) is suspicious and doubtful about the “rule”. There is also an extensive academic literature concerning it.

¹⁵ In *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 at [76] per Bryson J referred to *Hastings-Bass* but expressed no opinion about any “rule in *Hastings-Bass*”). In *Asea Brown Boveri Superannuation Fund No1 Pty Ltd v Asea Brown Boveri Pty Ltd*, H[1999] 1 VR 144H at 157 Beach J held that the law applicable to the court’s control of discretionary decisions of trustees was that stated by McGarvie J in *Karger v Paul* [1984] VR 161 and by Hayne J in *Esso Australia Ltd v Australian Petroleum Agents and Distributors Association* [1999] 3 VR 642., not a “so-called rule in *Hastings-Bass*”, but went on to hold that in any event the facts of the case did not satisfy that so-called rule. In *Sinclair v Moss* [2006] VSC 130 Byrne J at [13] set out principles that were common ground before him:

(2) The Court will interfere where a clear case is made out^{H^{2H}} that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees’ discretion (*Rapa v Patience* (unreported) SC (NSW), McLelland J, 4 April 1985, at 11, BC8500888; *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276 at 283 [26], per Callaway JA):

If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene.”^{H^{4H}}

(3) A discretionary determination may be impugned if the trustees in making it failed to take into account matters which are relevant (*Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 905, per Lord Reid.), that is, matters which they should have taken into account or which should have affected their decision or where they took into account matters which they should not have taken into account (*Edge v Pensions Ombudsman* [2000] Ch 602 at 619). The importance of the word “should” in this context is emphasised in the 1993 decision of Hayne J in *Esso Australia Ltd v Australian Petroleum Agents’ & Distributors’ Assn* ([1999] 3 VR 642 at 652 [41]):

The bare fact that there was material that was not placed before the trustee and which the trustee might have taken into account is not to say that the trustee should have considered it. Thus proof that there was material not considered by the trustee and which was material that the trustee might have taken into account does not show that the decision is ill founded.

(4) This principle, which is referred to in England as the Rule in *Hastings-Bass*,^{H^{8H}} is there said to contain the further requirement that, had the trustees taken into account the matter which they should have taken into account but did not, they would not have exercised their discretion in the way that they did. There seems to be some uncertainty whether the Rule in *Hastings-Bass* is accepted as the law in Victoria.^{H^{9H}} Principal (3), however, is well established by the cases to which I have referred. In argument before me nothing was made of the *Hastings-Bass* gloss.

Byrne J recorded in a footnote that “This case, as presented, did not involve a contention that the trustees took into account a matter which they should not have taken into account.”

In **BMD v KWD** [2008] WASC 196 McKechnie J decided not to grant leave to appeal against a decision of the administrator of a mentally incapable person not to take steps to set aside a contract that that person had entered. at [12] he set out the words in which the “rule in Hastings Bass” had been stated in **Mettoy v Evans**, and continued: “There is recent authority (**Sinclair v Moss** [2006] VSC 130 at [4]) casting doubt on the *Hastings-Bass* principle but I am content to apply it in this application as it is favourable to the appellant”. He went on to hold at [40] that on the facts “the appellant has failed to establish that the Public Trustee’s decision was wrong or that the SAT decision is attended with sufficient doubt to justify an appeal.”

¹⁶ Cf Campbell, “*Access by Trust Beneficiaries to Trustees’ Documents Information and Reasons*” (2009) 3 J Eq 97 text at at p 101, fn 18

¹⁷ They could not have been expected to realise that those trusts were void, because that aspect of the rule against perpetuities became clear only when the House of Lords decided **In Re Pilkington’s Will Trusts** [1964] AC 612, after the trustees had made the transfer.

¹⁸ at 41

¹⁹ Para 18 above

²⁰ If I decide that I will not buy a house *unless* it has at least 3 bedrooms and is within 15 minutes drive from the CBD, that does not mean I *will* buy a house *if* it has at least 3 bedrooms and is within 15 minutes drive of the CBD: there are quite a few more factors that enter into the decision.

²¹ And there are numerous different types of behaviour that equity regard as fraud – see text at fn 85 below.

²² Thus it did not matter that the person was required to do an act concerning a thing that was not itself within the court’s territorial jurisdiction, like foreign land (**Penn v Lord Baltimore** 1750) 1 Ves Sen 444; 27 ER 1132) or a foreign patent (**Potter v Broken Hill Pty Co Ltd** (1906) 3 CLR 479).

²³ **Earl Beauchamp v. Winn** (1873) LR 6 HL 223 at 232; **Alati v Kruger** (1955) 94 CLR 216 at 224-226

²⁴ It may be that it is only the course of the litigation itself that shows what equitable rights exist, but the court will grant a remedy to require those rights to be observed, even if there is no immediate threat on anyone’s part not to recognise them, once the court has identified them.

²⁵ Eg **O’Halloran v R T Thomas & Family** (1998) 45 NSWLR 262 at 272. In **Sindel v Georgiou** (1984) 154 CLR 661 at 667 the joint judgment said, concerning rectification of contracts, “Rectification is a remedy which cures erroneous expression of the parties’ true intention in a contract which is already binding.”

²⁶ (1884) 9 App Cas 699 at 714

²⁷ approved in **Giumelli v Giumelli** (1999) 190 CLR 101 at [10]

²⁸ In this field a relevant defence is that a settlement that could have been set aside soon after it was entered can become binding if it is later confirmed with knowledge: **Jarratt v. Aldam** (1870) L R 9 Eq. 463

²⁹ In **Turner v Turner** [1984] Ch 100 a purported exercise of a power of appointment and consequent conveyance of land occurred when trustees signed documents put in front of them without a clue about their duties as trustees, without understanding or questioning the documents, and without even realising that they were purporting to exercise a discretion. The exercise of the power of appointment was set aside as between the trustees and the beneficiaries, but not so as to prejudice a mortgagee who had acquired rights over the land, bona fide and without notice, after the conveyance.

³⁰ **Fletcher v Collis** [1905] 2 Ch 24; **In Re Pauling’s Settlement Trusts (No 1)** [1964] Ch 303 at 357–358; **Allan v Nolan** [2002] EWCA Civ 85 at [64]

³¹ **Habib Bank Ltd v Habib Bank AG** [1981] 1 WLR 1265 at 1284-1285

³² Part of this section of the paper draws on my summary in “*Exercise by Superannuation Trustees of Discretionary Powers*” (2009) 83 ALJ 159

³³ I will ignore, for ease of exposition, purpose trusts, but a similar analysis applies to them.

³⁴ An exception is a bare trust, where the sole duty of the trustee is to hold particular property in its then state of investment and hand it over to the beneficiary at a predetermined time, or when asked.

³⁵ Willmer LJ, giving the judgment of the English Court of Appeal

³⁶ [1964] Ch 303

³⁷ At 333

³⁸ **Howe v Earl of Dartmouth** (1802) 7 Ves Jun 137

³⁹ **Hinves v Hinves** (1844) 3 Hare 609; 67 ER 523 at 611,524 (“The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention.”); **Cafe v Bent** (1845) 5 Hare 24; 67 ER 812 at 35, 817 (“The rule proceeds upon this that the testator has intended the enjoyment of perishable property by different persons in succession, and this the Court can only accomplish by means of a sale.”). This derivation of the duty to convert wasting or reversionary property was pointed out in Stebbings, **The Private Trustee in Victorian England**, CUP 2002, p 69

⁴⁰ At 19 -21

⁴¹ Eg the cases that decide what particular types of investment a trustee could safely invest in arrived at their conclusions by reference to the types of investment that were available at the time, and their relative security. In **Smith v Hassall** (1899) 20 NSW (Eq) will 165 at 171-172 A H Simpson CJ in Eq held that a difference in social conditions between England and Australia made a difference to the sorts of investments trustees could properly invest in.

⁴² Eg permissible trust investments are now identified by the criteria in s 14–14F **Trustee Act 1925** (NSW); the trustees’ duties as developed by the courts in the nineteenth century came to be seen to be too stringent, and so there was a series of ameliorating Acts in England from the **Law of Property and Trustees Relief Act 1859** to the **Judicial Trustees Act 1896**, the latter of which introduced the provision found in s 85 **Trustee Act 1925** (NSW) that allowed a trustee to be relieved from liability if he “acted honestly and reasonably and ought fairly be excused for the breach of trust and for omitting to obtain the direction of the court”. The history is traced in Chantal Stebbings, **The Private Trustee in Victorian England**, Cambridge University Press 2002, p 174-195

⁴³ I will not consider whether or to what extent those rules of law might themselves be open to question, at least in an appellate court, by reference to changed social conditions.

⁴⁴ [1984] VR 161 at 163-4

⁴⁵ (1851) 3 Mac & G 440; 42 ER 330

⁴⁶ with whom Mofitt P agreed

⁴⁷ at 311

⁴⁸ (1970) 121 CLR 628 at 639

⁴⁹ These remarks cannot be taken to be part of the ratio of the case. Only four judges sat in the High Court, and they divided equally on the validity of the disposition in question, for reasons partly influenced by whether creation of bare power of appointment by will was a valid exercise of the power to make a will – a question with complications beyond how a bare power of appointment created *inter vivos* is enforced. Even so, they still seem to me to state a correct principle.

⁵⁰ **Re Manisty's Settlement** [1974] Ch 17 at 26

⁵¹ at 480

⁵² **Karger v Paul**, where a testatrix appointed her husband and solicitor as trustees of her will, with power to appoint capital to (inter alia) the husband, and it was held that before making an appointment the husband was not bound to enquire of other potential beneficiaries about their financial circumstances, and the solicitor was entitled to rely on what the husband told him on that topic.

⁵³ **Fouche v Superannuation Trust Fund** (1952) 88 CLR 609 at 641. Under the judge made law, a trustee might sometimes be obliged to ignore some speculative investments which a prudent man of business might

make if he were investing money for himself: **Learoyd v Whiteley** (1887) 12 App Cas 727 at 733; **Smith v Hassall** (1899) 20 NSW (Eq) 165 at 170; **Bartlett v Barclays Trust Company (No 1)** (1980) Ch 515 at 531. Statute has modified the test slightly to require trustees who are professional trustees or investors of other people's funds to exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, and trustees who are not professional trustees or investors of other people's funds to exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other person is: s 14A (2) **Trustee Act 1925 (NSW)**.

⁵⁴ **Consterdine v Consterdine** (1862) 31 Beav 330; 54 ER 1165 at 333, 1167 per Sir John Romilly. Similarly, in **Carlton Clock Tower Pty Ltd v Lew** (1990) V Conv R 54-389 Brooking J. at 64,773 said that even if a particular type of investment is authorised by the trust instrument, the trustees still must act with prudence in investing in that type of investment.

⁵⁵ (1883) 9 App Cas 1

⁵⁶ At 12

⁵⁷ At 19

⁵⁸ Footnotes 44 and 45 above

⁵⁹ There are some limited opportunities for a beneficiary to require disclosure of trustees' reasons – see Campbell, "Access by trust beneficiaries to trustees' documents information and reasons" (2009) 3 J Eq 97

⁶⁰ see fn 17 above

⁶¹ **Mettoy** at 1614 – 1617

⁶² The capital gains tax charge on certain not exempt chattels, and the effect of a particular clause of the settlement

⁶³ **Sieff v Fox** at [86]

⁶⁴ Para (iii) of the summary of his conclusions in [119]

⁶⁵ [2000] EWHC Ch 42; [2001] WTLR 1237

⁶⁶ At [77], 1262

⁶⁷ per Fox LJ at 1079

⁶⁸ [2007] WTLR 1697 (a decision of the Grand Court of the Cayman Islands)

⁶⁹ quoted at page 6 above

⁷⁰ eg **Cowan v Scargill** [1985] Ch 270 at 294

⁷¹ There is some supplementary discussion of the topic at [77], which does not make any significant new point.

⁷² Examples concerning decisions of trustees are **Meadows v Meadows** (1853) 16 Beav 401; 51 ER 833; **Ellis v Ellis** (1909) 26 LT 166; **Anker-Petersen v Christensen** [2001] EWHC B3 (Ch) [2002] WTLR 313; **Lady Hood of Avalon v Mackinnon** [1909] 1 Ch 476; **In Re Walton's Settlement** [1922] 2 Ch 509; **Gibbon v Mitchell** [1990] 3 All ER 338; [1990] 1 WLR 1304; **Dent v Dent** [1996] 1 WLR 683; **Phillipson v Kerry** (1863) 32 Beav. 628; 55 ER 247; **Forshaw v Welsby** (1860) 30 Beav 243; **Ogden v Griffiths** [2008] EWHC 118 (Ch); [2009] Ch 162

⁷³ Examples concerning decisions by trustees are **Wright v Goff** (1856) 22 Beav 207; 52 ER 1087; **Walker v Armstrong** (1856) 8 D M & G 531; 44 ER 495; **Lackersteen v Lackersteen** (1860) 30 LJ Ch 5; **Welman v Welman** (1880) 15 Ch. D. 570; **Killick v Gray** (1882) 46 LT 583

⁷⁴ Examples are **Dutton v Thompson** H(1883) 23 ChD 278H; **Wollaston v Tribe** (1869) L.R. 9 Eq. 44

⁷⁵ The property in question might be legal property, or it might be equitable property

⁷⁶ **Comptroller of Stamps (Victoria) v Howard-Smith** (1936) 54 CLR 614 at 622-623

⁷⁷ per Nettle JA, *Commissioner of State Revenue v Lam & Kym Pty Ltd* (2004) 10 VR 420 at [31]

⁷⁸ If a power of appointment is exercised by will the witnesses to the will are essential to the validity of the will, but not because they have any input into its contents – a will can be validly witnessed by people who know nothing of the contents. Thus their intent is not relevant to the trusts on which the property is thenceforth to be held.

⁷⁹ In Australian practice usually not the settlor

⁸⁰ This commonly happened with marriage settlements, where representative of the families of bride and groom negotiated about what property each would bring into the settlement, and on what trusts it would be held.

⁸¹ There are limits about the sorts of consensus that can result in a valid exercise of a power of appointment. If a power is exercised for a purpose outside the scope of the power, that exercise is not valid in equity, eg *Clouette v Storey* [1911] 1 Ch 18, where a father's exercise of a power of appointment in favour of his son was done with the agreement that the son would then give the money to his father.

⁸² Eg *AMP (UK) plc v Barker* [2000] EWHC Ch 42; [2001] WTLR

⁸³ *Norman v FCT* (1963) 109 CLR 9 at 30

⁸⁴ *Villers v Beaumont* (1682) 1 Vern 100, 23 ER 342; *Petre v Espinasse* (1834) 2 My & K 496; 39 ER 1034; *Bill v Cureton* (1835) 2 My & K 503; 39 ER 1036

⁸⁵ *Harvey v Mount* (1845) 8 Beav 439; 50 ER 172;

⁸⁶ In *Asea Brown Boveri Superannuation Fund No1 Pty Ltd v Asea Brown Boveri Pty Ltd, H*[1999] 1 VR 144H at [40] Beach J. said he knew of no such principle, but the relevant authorities do not, with respect, seem to have been cited to him.

⁸⁷ *Meadows v Meadows* (1853) 16 Beav 401; 51 ER 833; *Anker-Petersen v Christensen* [2001] EWHC B3 (Ch) [2002] WTLR 313

⁸⁸ *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476

⁸⁹ *In Re Walton's Settlement* [1922] 2 Ch 509

⁹⁰ *Gibbon v Mitchell* [1990] 3 All ER 338; [1990] 1 WLR 1304

⁹¹ *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476

⁹² *Ellis v Ellis* (1909) 26 LT 166

⁹³ *In Re Walton's Settlement* [1922] 2 Ch 509

⁹⁴ *Henry v Armstrong* (1881) 18 Ch D 668 at 669; *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400 col 1; *Ogilvie v Allen* (1899) 15 TLR 294 at 295 col 1 (House of Lords)

⁹⁵ [1990] 3 All ER 338; [1990] 1 WLR 1304 at 1309 – 10

⁹⁶ In *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24 Baron Parke said at 58, 26: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake." Gurney B concurred with him. Rolfe B said, at 59, 26: "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." See also *Rogers v Ingham* (1876) 3 Ch D 351 at 355 per James LJ, *Muschinski v Dodds* (1985) 160 CLR 583 at 619 per Deane J. re the connection between money had and received and equitable principles.

⁹⁷ Oldham, *English Common Law in the Age of Mansfield*, University of North Carolina Press 2004 p 6, 27

⁹⁸ [1891] 1 QB 417 at 426

⁹⁹ Other authority that paying a debt forgetting that part has already been paid is mistake, for the purpose of recovery of the money as being paid under mistake of fact, is found in **Lucas v Worswick** (1833) 1 M & Rob 293; 174 ER 100. In **Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd** [1989] 1 EGLR 208 at 210 Dillon LJ (with whom Butler-Sloss and Staughton LJ J agreed) said:

“when a person has forgotten the existence of a pre-existing fact and assumes that such fact did not pre-exist, he is labouring under a mistake, and that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist.”

¹⁰⁰ [1990] 3 All ER 338; [1990] 1 WLR 1304

¹⁰¹ at 1309 of WLR

¹⁰² in **AMP (UK) plc v Barker** (decided 8 Dec 2000) [2000] EWHC Ch 42; [2001] WTLR 1237 at [70], 1260 Lawrence Collins J was cautious in recognising this principle (“It is sometimes said that...”), which he traces back to the 1929 edition of Kerr on Fraud and Mistake

¹⁰³ **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 303 at 376; **Kleinwort Benson Ltd. v Lincoln City Council** [1999] 2 AC 349

¹⁰⁴ **Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation** (1988) 164 CLR 662 at 675; **Deutsche Morgan Grenfell Group plc v IRC** [2007] 1 AC 558, in particular at [59], [60] and [143]

¹⁰⁵ **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 353 377-8, 402

¹⁰⁶ Judge Purle QC has previously made a similar point in **Fender v National Westminster Bank** [2008] EWHC 2242 (Ch); [2008] 3 EGLR 80

¹⁰⁷ **Wollaston v Tribe** (1869) L.R. 9 Eq. 44; **Everitt v Everitt** (1870) L.R. 10 Eq. 405; **Phillips v Mullings** (1871) 7 Ch App 244 at 246–248; **Dutton v Thompson** H(1883) 23 ChD 278H; **Bullock v Lloyds Bank Ltd** [1955] Ch 317 at 324–326;

¹⁰⁸ **Anker-Petersen v Christensen** [2001] EWHC B3 (Ch); [2002] WTLR 313 at [35]–[36], 329-330

¹⁰⁹ **Meadows v Meadows** (1853) 16 Beav 401; 51 ER 833 at 404, 834-835

¹¹⁰ **Hall v Hall** H(1873) 8 Ch App 430H at 438

¹¹¹ which seems incorrectly to reverse the onus of proof

¹¹² **Phillips v Mullings** (1871) 7 Ch App 244 at 248

¹¹³ **Thompson v Whitmore** (1860) 1 J & H 268, 70 ER 748 (marriage settlement not rectified when mistaken effectuation of wife’s intention proved, but no positive proof of husband’s intention); **Sells v Sells** (1860) 1 Dr & Sm 42, 62 ER 294; **Rooke v Lord Kensington** (1856) 2 K & J 753; 69 ER 986 at 764, 990; **In Re Colebrook’s Conveyances** [1973] 1 All ER 132.

¹¹⁴ **Wright v Goff** (1856) 22 Beav 207; 52 ER 1087 at 214, 1090; **Behrens v Heilbut** (1956) 222 L T Jo 290; (1956) 106 LJ 794; **Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd** (1995) 41 NSWLR 329 (intention of the trustee who had the power of variation). There are two decisions of Sir John Rommily MR that a voluntary deed cannot be rectified in the lifetime of the grantor if the grantor is unwilling to make the alteration (**Phillipson v Kerry** (1863) 32 Beav. 628; 55 ER 247; **Lister v Hodgson** (1867) LR 4 Eq 30), but these decisions may require reconsideration – the former might be an example of a deed set aside because a fundamental aspect of the transaction (that it might leave the grantor utterly destitute) was not understood, while the latter proceeds by reasoning that treats rectification of a unilateral document in a way that is arguably too close to rectification of a contract, and in any event there was a finding that there was no intention to have a presently constituted trust at all, so rectification to alter the terms of the trusts declared in the document would not have been available even after the death of the “settlor”. By contrast, **Thompson v Whitmore** (1860) 1 J & H 268, 70 ER 748 had held that a volunteer could seek rectification of a settlement, and in **Kent v Brown** (1942) 43 SR (NSW) 124 (affirmed (without reasons being reported) **Brown v Kent** (1943) 66 CLR 670) Roper J said he could not see the difference. A settlement can be rectified after the death of the settlor, provided the settlor has not affirmed the deed as executed during his lifetime: **Weir v**

Van Tromp (1900) 16 TLR 531 *Kent v Brown* (1942) 43 SR (NSW) 124, affirmed (without reasons being reported) *Brown v Kent* (1943) 66 CLR 670

¹¹⁵ *Re Butlin's Settlement* [1976] Ch 251 at 262 – 263; *Will v Gibbs* [2007] EWHC 3361 (Ch); [2008] STC 808

¹¹⁶ *Walker v Armstrong* (1856) 8 D M & G 531; 44 ER 495 at 541-2, 499

¹¹⁷ In the House of Lords each of Lord Halsbury LC, Lord Macnaghten and Lord Morris agreed completely with the judgment of Lindley LJ (who by then had become Master of the Rolls): *Ogilvie v Allen* (1899) 15 TLR 294

¹¹⁸ *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087; *Summers v Kitson* [2006] EWHC 3655 (Ch); [2006] All ER (D) 134; (*Walker v Armstrong* (1856) 8 D M & G 531; 44 ER 495; *Daniel v Arkwright* (1864) 2 H & M 95, 71 ER 396 (in the last two cases mentioned there were two joint appointors, and it was the intention of both of them that needed to be proved)

¹¹⁹ *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5; *Kent v Brown* (1942) 43 SR (NSW) 124; *Re Butlin's Settlement* [1976] Ch 251

¹²⁰ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329

¹²¹ *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087 at 214, 1090; *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5 (where there was evidence from the settlor of his intention, evidence from the solicitor who drew the deed of what his instructions were, but the judge still required an affidavit from the solicitor that there were no written instructions)

¹²² *Bonhote v Henderson* [1895] 1 Ch 742 at 748, appeal dismissed without discussion of principle *Bonhote v Henderson* [1895] 2 Ch 202

¹²³ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 335-336

¹²⁴ *AMP (UK) plc v Barker* [2000] EWHC Ch 42; [2001] WTLR 1237 at [70], 1260

¹²⁵ In *Killick v Gray* (1882) 46 LT 583 a woman had a power of appointment under 4 different trusts, each of which could be exercised in favour of her children. Only one of those trusts had a clause requiring anyone in whose favour a power of appointment was exercised to bring the appointed property into hotchpot. Upon the marriage of one daughter she executed four deeds of appointment, each of which appointed to that daughter 1/3 of the respective trust funds. She died intestate, and without having made any further appointment, in consequence of which the unappointed property in the 3 trusts that did not contain hotchpot clauses was divisible equally among her 3 daughters. Hall V-C was satisfied that it was her intention to produce equality among her daughters. Thus he ordered that each of the deeds of appointment relating to those 3 trusts should have inserted into it a hotchpot clause, providing that the appointee "should not be entitled to any other part of " the capital of the 3 trusts "except the one-third thereof ... to her appointed, without bringing such appointed share into hotchpot, and accounting for the same accordingly, unless a direction to the contrary should be contained in any appointment to be thereafter made by the said" appointor. Similarly in *Will v Gibbs* [2007] EWHC 3361 (Ch); [2008] STC 808 a deed was rectified by adding words appropriate to bring about a tax benefit that the maker of the deed wished to achieve. Though it is not a case concerning trusts, the principle is the same as that invoked in *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67 when an agreement to pay a royalty of "3d per ton free of tax" was entered without taking into account that legislation made such a covenant void, it was rectified to require payment of a royalty (69) "of such an amount as after deduction of income tax at the standard rate from time to time shall leave the sum of three pence", as the judge was satisfied that that was what the parties had intended.

¹²⁶ *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 38 per Handley JA

¹²⁷ *Cogan v Duffield* (1876) 2 Ch D 44 at 50

¹²⁸ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 345 per McLelland A-JA (a statement not endorsed by other judges in the Court of Appeal in that case)

¹²⁹ In *Allnut v Wilding* [2007] EWCA Civ 412; [2007] BTC 8003 there is a statement that rectification is not possible if a settlor intends to execute a particular document, and mistakenly believes that a document of that type will achieve a particular practical outcome. That statement would be in keeping with the authorities I have earlier cited, and the rationale for rectification of unilateral instruments relating to trusts, only if the settlor does not also intend that executing the document will achieve that outcome.

¹³⁰ [1949] 1 All ER 755

¹³¹ ***Whiteside v Whiteside*** [1950] Ch 65

¹³² It was more, in substance, that the court was not satisfied that any tax advantage was ever part of the intention of the wife (75-76), and that in any event there was no need for rectification because the parties had already entered a supplemental deed that created the same rights that they sought to have the original deed rectified to confer (76, 77)

¹³³ ***In Re Colebrook's Conveyances*** [1973] 1 All ER 132; ***Re Slocock's Will Trusts*** [1979] 1 All ER 358 at 363

¹³⁴ [1909] 1 Ch 476

¹³⁵ at 484

**Foreword to Michael Evans, Equity & Trusts,
2nd Edition (2009) LexisNexis Butterworths**

The administration of the principles of the common law and of equity has been carried out in a single court since 1873 in England, and since dates no later than 1972 in the various Australian jurisdictions. Yet even today, any lawyer who fails to pay attention to the fundamental differences between the two sets of principles is asking for trouble.

The two sets of principles are not just two different groups of substantive obligations. As well they spring from different historical origins, continue to be influenced by the different systems of procedure under which they were once administered, provide different remedies, and have different rationales for the imposition of a legal obligation or the granting of a remedy. In short, equity and common law are different thought-worlds.

Even though equity developed as a supplement and corrective to the common law, it has its own unifying attributes. I will give just two examples. One is the repeated use, in solving disputes concerning widely different types of human activity, of the standard of what conscientious behaviour requires the actors in the dispute to do. This standard often provides the rationale for the more specific principles by reference to which equity regulates some type of activity. Those more specific principles can be as various as those that govern the obligations of a fiduciary, the circumstances in which rectification of a contract is granted, the ability of equity to grant relief only on conditions (for example to give effect to the maxim that he who seeks equity must do equity) or the availability of the defence of unclean hands. The last two of these examples show how, when equity's principles stem from what conscientious behaviour requires the actors in the dispute to do, this means *all* the actors, not just the defendants.

Another is equity's focus on the facts of the particular case, and the moulding of the remedy it grants in any particular case to achieve the objective of undoing so far as is possible the particular departure from either common law rules or equitable principles that has occurred in that particular case. This objective has resulted in

equity having a wide range of types of remedy – specific performance of contracts, orders for the carrying out in specie of other obligations, injunctions, rectification of documents, account, and compensation to name just a few – by comparison with the common law's one-size-fits-all remedy of damages. And even in the granting of these various types of remedies, the precise terms of the remedy are moulded to the facts of the particular case.

When equity has unifying attributes such as these, it is a subject that requires to be treated in a unified and coherent fashion if it is to be properly understood.

Because equity has been developed on a case-by-case basis, anyone seeking to study or practice it has no alternative but to read in detail at least the leading cases, and to understand the facts from which they sprang – ripping from a judgment a sentence or two that appears to state a principle, and ignoring the context of that sentence or the particular problem that the judge was trying to solve, has a real risk of leading to misunderstanding. The principles of equity emerge as much by ostensive definition by the cases themselves as from the precise words in which the judges have expressed themselves.

But as well, when there are broad principles that unify equity, and more specific principles that govern more particular areas of it, it is also necessary for the student or practitioner to bear those principles in mind, as the answer arrived at to any particular problem must accord with the principles. The study or practice of the subject requires a repeated flip-flop between the detail of the particular case, and the principles.

Every generation of lawyers needs to discover, to think through and to articulate for itself the principles that the law of its day is applying. This book is a worthy contribution to the ongoing task of keeping the principles originally developed by the great equity lawyers of the past alive in the minds of this generation of lawyers and law students, and relevant to the legal problems that actually arise these days.

It has several attributes that in my view are essential for a proper understanding of those principles. First, it deals with the subject of equity as a whole. Second, it

shows a proper understanding of the importance of the historical origins of the principles, of how even in recent decades there have been changes in how those principles are expressed, understood and applied, and of how differences have developed between the law as understood in Australia and as understood elsewhere. Third, it takes time to consider the facts of leading cases, or to illustrate a principle by a concrete example of its operation. Fourth, it not only extracts and summarises the judges' accounts of principles, but also discusses in the author's own words the principles that provide the big picture within which the individual cases are decided, and the justification (or, sometimes, thinness or lack of principled justification) for the law being as it has been held to be.

The book shows Mr Evans' decades of practical experience as both a barrister practicing in the equity jurisdiction, and a teacher of the subject. It should be a valuable resource for practitioners and students alike.

Justice JC Campbell

ACCESS BY TRUST BENEFICIARIES TO TRUSTEES' DOCUMENTS INFORMATION AND REASONS

JC Campbell¹

Introduction

- 1 There is a difference of opinion in the Equity Division of the Supreme Court of New South Wales about the principles by reference to which a court can compel a trustee to disclose documents to someone who has either a right to receive or a prospect of receiving some or all of the trust property. In March 2007 Gzell J, in *Avanes v Marshall* [2007] NSWSC 191; (2007) 68 NSWLR 595 followed the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, subject to one qualification. *Schmidt* had held, in broad terms, that no beneficiary or potential beneficiary of a trust has an entitlement as of right to disclosure of a document merely because it is a "trust document". The qualification that Gzell J adopted, at [15] was that:

"The decision [in *Schmidt*] should not be regarded as abrogating the trustee's duty to keep accounts and to be ready to have them passed, nor the trustee's obligation to grant a beneficiary access to trust accounts. But when it comes to inspection of other documents there should no longer be an entitlement as of right to disclosure of any document. It should be for the Court to determine to what extent information should be disclosed."

- 2 In September 2007 Bryson AJ in *McDonald v Ellis* [2007] NSWSC 1068 held that a beneficiary who had a vested interest in trust property (as opposed to being merely the potential object of a power of appointment in a discretionary trust) has a right to information about the trust because it is information about that beneficiary's own property ([35]). He took the view, at [46], that the proposition that:

"... the beneficiary is entitled to see trust documents and have information about trust property, and that entitlement has a proprietary basis, is not open to question."

¹ A judge of the Court of Appeal of the Supreme Court of NSW. Visiting Fellow of Wolfson College Cambridge. I am grateful to Ms Michaela Whitbourn for assistance in research for this paper. This paper is based on one delivered at the NSW Supreme Court Judges' Conference on 23 August 2008.

3 He noted, at [47] that in **Schmidt**:

“... the Judicial Committee made a wide survey of case law, including New South Wales case law and (at 729 [52]) stated its general agreement with the approach adopted in the judgments of Kirby P and Shelley JA in **Hartigan Nominees**. The judgment of Kirby P, to which their Lordships referred at some length [52], was of course a dissenting decision and reached its conclusion on the basis of the beneficiary's right of inspection without examining or indeed referring to judicial decisions; the conclusion based itself instead on agreement with a view expressed by Professor HAJ Ford in *Principles of the Laws Of Trust*, 2nd ed (1990) which included this sentence (at 425): "The equation of the right to inspect trust documents with the beneficiary's equitable [proprietary rights]² gives rise to unnecessary and undesirable consequences." The consequences referred to included doubts cast on the rights of beneficiaries who cannot claim to have an equitable proprietary interest in trust assets, such as the beneficiaries of discretionary trusts. This was, I must respectfully say, a slight basis indeed for discarding an established right of beneficiaries with vested interests to inspection of documents of such primary importance as the accounts of the trustees. A decision that all access to trust documents should be in the discretion of the Court is a drastic solution to whatever problems might be perceived in supposing a proprietary basis for discretionary interests, and whatever problems may be perceived in delimiting which documents should be treated as trust documents and in protecting from access documents access to which involves some conflicting principle.”

4 Bryson AJ noted that views expressed in the Privy Council on an appeal from the Isle of Man (which the decision in **Schmidt** was) were not a binding source of law in New South Wales. In accordance with **Cook v Cook** [1986] HCA 73; (1986) 162 CLR 376 at 390 a New South Wales court need adopt those views only to the extent that they were persuasive. Bryson AJ said, at [48]-[49]:

“Their Lordships’ conclusion at 734-735 ([66] and [67]) would make the beneficiary's right to seek disclosure of trust documents an aspect of the Court's inherent jurisdiction to supervise, and where appropriate intervene in the administration of trusts. Although the reasons say that that right is "sometimes not inappropriately described as a proprietary right" it is plain that their Lordships did not treat the right as a proprietary right.

² Typographical error in original corrected.

The history of Equity and the nature of its remedies mean that the treatment of equitable interests as proprietary, and the development of rules based on that treatment, can never be entirely logical or satisfactory; but if this is perceived as a problem, it is an inherent problem and should not be regarded as a basis for discarding a well-established rule.”

- 5 At [51] Bryson AJ stated reasons why he did not find the reasoning in **Schmidt** persuasive:

“The opinion of Lord Walker does not to my reading identify any error in earlier opinion, or state any respect in which it might be said to be significantly unsatisfactory. No earlier judicial decisions adopting the basis on which the Privy Council reset the law were referred to, nor were any text writers. Nor to my reading were any significant policy considerations favouring departure from the previous rules set out; the only matter indicated was an opinion that the rule enounced was a better rule. It was not explained, with any significant reasoning, why it was a better rule. In my opinion it is not a better rule because it introduces discretion and promotes resistance and debate in substitution for a rule which is relatively concrete. The tendency will be that only the determined and litigious beneficiary will find out about his own affairs. Where there is a judicial discretion, there is room for litigious debate about the exercise of the discretion; there is no certainty on so elementary a matter as whether or not a beneficial owner is entitled to information about property in which the beneficial owner has an equitable interest. In the previous rule, in my interpretation Equity followed the law in treating as proprietary an equitable entitlement to trust property. Treating the equitable interest as proprietary brings with it an entitlement to information unless there is a conflict with some other principle which Equity must recognize, such as the principle protecting the trustee’s discretionary considerations. Treating the entitlement to information as an aspect of the Court’s discretionary exercise of its supervising power over trusts is a departure from the relatively concrete concept of equitable interests in trust property which has been adopted for some centuries.”

- 6 At [52] Bryson AJ disagreed with **Avanes v Marshall**, though conceding:

“It might be that the approach of **Schmidt** is appropriate where the interest of the beneficiary is no higher than that of the potential object of a discretionary trust, although opinion in New South Wales is otherwise.”

- 7 The trust in question in **McDonald v Ellis** was one whereby the plaintiff had a beneficial one-quarter share in remainder, subject to two life interests, in a block of flats. While one of those life interests had ceased, the other (that of

the plaintiff's mother, Mrs Ellis) was still on foot, though Mrs Ellis had Alzheimer's disease and so lost legal capacity. The plaintiff, by an administration summons, sought an order that the trustees provide her with accounts for a seven-year period. That order was opposed on the basis that accounts of income and expenditure did not affect the plaintiff as a remainderman. Bryson AJ rejected, at [30], that submission, holding (undoubtedly correctly, with respect):

"The remaindermen have at the present time an economic interest in the state of repair of the block of flats. Whether it is in or out of repair, whether some need for renovation at a future time is coming into being and whether there are any reserves or provisions, are factors affecting the money value of rights which the remaindermen now own."

- 8 The trustees had offered the plaintiff some limited information – a statement from the managing agents that there were no outstanding rates or taxes on the property, a report obtained from a structural engineer, and a certification relating to the fire rating of the property. The plaintiff did not accept that the information to which she was entitled was so limited.

- 9 Bryson AJ rejected, at [53]-[54], the possibility of there being a discretionary reason why the accounts should not be provided:

"On the facts of the present case there is nothing in the nature of a discretionary ground on which any withholding of the plaintiff's entitlement to information could reasonably be based. While I repeatedly sought in the course of argument to establish what discretionary ground was relied upon, nothing was referred to higher than Mrs Ellis' objection to any information about her affairs being given to the plaintiff, expressed to Mr Ellis some years ago before incapacity overtook her. This is in the nature of a claim of confidentiality, but it is not supported by any underlying reason of greater strength than her expressed wish that the plaintiff should not know her affairs. A person who accepts benefits under a trust of which there are other beneficiaries does so on the basis that other beneficiaries also have rights in the trust, including rights to information. I characterise what is put forward as a claim to privacy, and not as a claim to confidentiality; in substance nothing was advanced as a reason for the Court to enforce Mrs Ellis' confidentiality by withholding the rights of some other person. There is no competing principle such as protection of the position of trustees in the exercise of discretion, which was protected in *In re Londonderry's Settlement*.

Notwithstanding my repeated enquiries counsel was not able to refer to any adverse impact on the interests of Mrs Ellis or of anyone else or any particular harm that would be done by giving the plaintiff the information she seeks. Counsel informed me that the information contained in the managing agents' documents relating to the maintenance which has taken place is not itself the subject of any claim that it should not be produced; but production to the plaintiff herself of those documents was resisted because they disclose Mrs Ellis's income, for which confidentiality is claimed. This is not a case where confidentiality relates to the interest of a third party. Mrs Ellis, when taking advantages under the trust, necessarily also incurs any disadvantage to her, actual or perceived, which arises out of administration of the trust."

- 10 Nor was Bryson AJ prepared to regard the very limited rights of a remainderman to compel a trustee to take a certain course concerning the administration of the trust property while the life estate was on foot as a reason for not ordering that the plaintiff receive the information that she sought. He said, at [58]-[59]:

"... In my view those questions should only be addressed and answered when and if the Court is presented with a live issue relating to some clearly expressed and comprehensible basis upon which it is said that the trustees ought to be charged with some liability. Decision on the responsibility of trustees can only be addressed on a clear basis. An attempt to give answers in the abstract may fail to meet the difficulties presented by some actual attempted impeachment of the trustees, when and if one ever eventuates.

Mr Ellis's counsel contended that the present litigation is an exercise in futility because the plaintiff is not entitled to compel the life tenant or the trustee to repair the premises, let alone make a capital investment, and cannot compel the creation of a sinking fund. It would indeed be surprising if the plaintiff obtained an order compelling the trustees to take any such course, even more so, the life tenant; any judicial remedy is much more likely to take the form of imposing liability for some failure on the part of the trustees."

- 11 The difference in view has been publicised. As editor of the Australian Law Journal, Young CJ in Eq noted the decision in **Avanes v Marshall**, without comment, in the April 2007 edition (2007) 81 ALJ 241. In the December 2007 edition, he also noted the decision in **McDonald v Ellis** (2007) 81 ALJ 920. He noted Bryson AJ's view that, until the decision in **Schmidt**:

“The law was relatively clear that beneficiaries with vested interests were entitled to information from trustees. The Privy Council appears to have said that the right, almost regarded as a proprietary right in New South Wales, is in fact a procedural right for the court to make an order in its discretion as part of its role as supervisor of all trusts.

Although the position may be different where the applicant is a potential beneficiary in a discretionary trust, the Privy Council’s rationale should not be followed in New South Wales where the applicant has a vested interest.”

- 12 It is unclear whether the last paragraph just quoted is intended as reporting of Bryson AJ’s decision, or editorial endorsement of it.
- 13 The purpose of this paper is to examine some of the principles relevant to resolution of this difference of opinion. I make clear at the outset that I recognise that I have not considered all potentially relevant topics or cases. As well, I am firmly of the view that the process of litigation³ is far more likely to arrive at a correct solution to this problem, that contains appropriate qualifications and nuances, than is likely to emerge from anyone (myself included) trying to work it out by themselves. Thus, though I express some views, they are necessarily provisional ones.

The Forensic Context in which the Question Arises

- 14 There are different forensic contexts in which a question about whether a beneficiary ought receive information concerning a trust might arise, that could affect the outcome the court gave.
- 15 The first possible forensic context is on an application by a trustee for judicial advice. On such an application, the precise question that is framed will be of crucial significance. It is one thing for a trustee to seek advice about whether he would be justified in disclosing certain information to a beneficiary (taking the view that he would disclose it unless the court advised him he ought not),

³ By which I mean the whole process whereby experienced counsel research and prepare written submissions, then present oral argument, and the judge or judges hearing the case have the opportunity to discuss with counsel, (and in a multimember court, between the judges) any problems seen as arising from the submissions.

and another for a trustee to seek advice about whether he is obliged to disclose a document to a beneficiary (taking the attitude that he would not disclose it unless he was told he must). Particularly in the latter situation, there may be a question, depending on the circumstances, of whether an application for judicial advice was the appropriate forensic structure for the question to be litigated in at all.

- 16 The second possible forensic context is an originating summons brought under Part 54 **Uniform Civil Procedure Rules 2005**, to decide a question concerning administration of the trust, that is not fought as hostile litigation.
- 17 A third possible forensic structure, not investigated in the cases so far as I am aware, is an application for discovery before suit, either under the Rules, or under the court's inherent jurisdiction.
- 18 The fourth possible forensic structure is when there is hostile litigation between the trustee and the beneficiary, in which the beneficiary alleges that the trustee has engaged in a breach of trust, and seeks discovery. In that situation, the availability of discovery depends upon different principles to those applicable in deciding, purely as a matter of trust law, the respective rights and obligations of trustee and beneficiary.
- 19 This paper is concerned only with the second possible forensic context.

The Obligation of a Trustee to Account

- 20 Before discussing the basis on which a beneficiary can be entitled to information and documents, I shall mention what the case law has decided concerning a trustee's obligation to account, and a related topic concerning access to reasons for discretionary decisions.
- 21 It has long been recognised that a trustee frequently has an obligation to account to a beneficiary concerning the administration of the trust assets. Two quite separate activities can be involved in this obligation to account.

One is the trustee maintaining documents and records concerning the trust and its activities. The other is making information about the trust and its activities available to beneficiaries.

- 22 A beneficiary's right to receive information can be enforceable even if it is not being alleged that the trustee has breached any obligation other than the obligation to account itself. Questions in the decided cases have related to (1) who has standing to approach the court seeking to compel the provision of documents or information (2) what is the extent of the documents or information to which any particular plaintiff is entitled.

Standing to Obtain an Accounting

- 23 There were various nineteenth century cases that dealt with the standing to obtain accounting from a trustee. **Clarke v Earl of Ormonde** (1821) Jac 108; 37 ER 791 concerned property that was held on trust for sale of sufficient to pay the debts of the Marquis of Ormonde, and, subject thereto, in trust for the Marquis in fee. The plaintiffs were, respectively, life tenant and some of the remaindermen of the Marquis' deceased estate. They sought accounts relating to the lands vested in the trustees, during the lifetime of the Marquis. The defendant pleaded that he and another trustee had rendered an account to the Marquis in his lifetime, that the Marquis had examined the account, and was satisfied with it. The bulk of the reported case concerns the adequacy of that plea. Lord Eldon at 119-120; 795 said:

"... with respect to the vouchers, it is a plea in bar against producing them; but the persons entitled to the estates now have the same right to them that the late Marquis had, for they have the same right to protect the estates against the payment of debts... Suppose the late Marquis was seized in fee of these estates, and created trusts for the payment of his debts; being tenant in fee-simple, any acts done in execution of those trusts is binding on those who come after him. But he would have a right to say to the trustees, What estates have you sold? What debts have you paid? And those who claim under him have the same right. Having a right to all that information, a plea to bar him of it must shew either that he has had that information given him, or that he had waived it; and a plea not showing that it is insufficient .

Prima facie, the Marquis of Ormond, and all those claiming under him, have a right to ask what was the value of the estates, the amount of money raised by sales and from the rents, and of the incumbrances paid, and of those remaining unpaid. "

24 Thus **Clarke** held that successors in title of a person who was entitled to an account, but who had not been given an adequate one, were entitled to receive that account.

25 **Budgen v Tylee** (1856) 21 Beav 544; 52 ER 970 concerned property that was settled on a trust for such people as the Settlor might appoint, and in default for the plaintiff and her children. After the plaintiff had received a benefit under the trust, the Settlor executed a deed excluding the plaintiff and the children from all further right of participating in the trust deed. The trustee produced the latter deed to the plaintiff, but refused to produce the original trust deed. Though there was an objection concerning parties (the Settlor, who objected to the original trust deed being produced, was not a party to the suit), Sir John Romily MR expressed the view he would give if the Settlor had been joined, namely that

"a person, originally a *cestui que trust*, and taking a benefit and interest under a deed, and who alleges it has been partially and not wholly exhausted by a subsequent deed, is entitled to see the original deed creating the trust, which is stated by him to be partially, and by the trustees wholly exhausted, by a subsequent deed." (at 547; 971)

26 By contrast, **Wynne v Humberston** (1858) 27 Beav 421; 54 ER 165 held that a mere claim to be *cestui que trust*, not established to a prima facie level, was inadequate standing.⁴ When a person who made a bare assertion that he was a *cestui que trust* sought inspection of some trust documents Sir

⁴ The case concerned a will that gave particular real estate to trustees for 15 years, upon trusts to rent it and apply the rents in payment of various expenses. It provided that if any person should, during the 15 years, establish title to that estate as heir at law of the testatrix's uncle, "to the entire satisfaction of the trustees", at the end of the 15 years the property should be conveyed to that person. Otherwise, at the end of the 15 years it should go upon trusts for the plaintiff for life, and thereafter to various interests in succession. During the 15 years, three people claimed the estate as the heir at law of the uncle, but none of them established his claim to the satisfaction of the trustees. At the conclusion of the 15 years, the plaintiff brought action against the trustees, and the three claimants, seeking a declaration that the plaintiff was entitled to the life estate in the property. The trustee made an affidavit of documents, that identified three cases for the opinion of counsel, the papers accompanying those cases, and the resulting opinions, but objected to producing them. One of the claimants sought inspection of those documents.

John Romily MR refused to make an order for inspection, saying, at 423-424; 166:

"There can be no question that the rule is that, where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust*. They are taken for the purpose of administration of the trust, and for the benefit of the person is entitled to the trust estate, who will have paid the expense thereby incurred.

... [the claimant] is not entitled to see the cases and opinion until a *prima facie* case of the relation of trustee and *cestui que trust* is established. This is simply a case of a claimant who has not made out his title. "

- 27 ***Talbot v Marshfield*** held that, where trustees had a discretionary power to advance part of a trust fund for the benefit of certain children, the residuary beneficiaries (whose interest in the estate would be reduced if the advances were made) were entitled to see any case for opinion and counsel's advice concerning whether the trustees should exercise the power to advance.
- 28 The right to account could be asserted by a beneficiary even against someone who claimed to have received the trust property by purchase, where the sale was in performance of the trust. In ***Smith v Barnes*** (1866) LR 1 Eq 65 Sir W Page Wood V-C ordered that production occur in such circumstances,⁵ saying, at 68:

"prima facie ... the plaintiffs were entitled to require of any one holding the trust property, an account of the proceeds thereof."

⁵ The case arose when an executrix held land on trust for sale and to divide the purchase moneys between herself and the testator's children. The executrix borrowed money for the purposes of administration from the defendant. The executrix conveyed the land to the defendant, for a stated consideration that was sufficient to discharge his debt in full. That consideration seemed to be more than an arm's length value of the property. Some of the testator's children brought an action for redemption and an account as mortgagee in possession. They asserted that the property was trust property, because the defendant had taken it from a trustee with notice of the trusts. The defendant asserted there was no trust, because he was a mortgagee who had purchased the equity of redemption, from a trustee who had the right to sell it in exercise of the trust for sale. The defendant objected to produce the conveyance to him, and the agreement leading to it, on the basis that they were his title deeds.

29 The Vice-Chancellor noted the defendant's case that he claimed under the deed by which he had purchased the trust property, and was therefore released from accounting, and continued:

"... but if so, it is important to see how far as the deed may shew on its face whether the moneys advanced were advanced in accordance with the trusts or not. There is in this no analogy to the case of a purchaser for value without notice. ... the deed and the contract leading to it were dealings with the trust estate, with full notice to the Defendant of the trusts, and the *cestuis que trust* have, therefore, a right to see them."

30 There is a significant body of twentieth century Australian authority holding that even a person who has no higher standing than being a potential object of a power of appointment of trust property has standing to seek an account, concerning at least some information, from the trustee.

31 In ***Randall v Lubrano*** (NSWSC, Holland J, 31 October 1975, unreported) Holland J considered a trust under which the trustee had discretions "*in the widest of terms and in the case of a number of important clauses the discretion expressed as equivalent to that of an absolute owner of the trust property*". All the people who were the potential beneficiaries of the trust joined in a request for the trustee to render accounts of the trust, to give the plaintiffs full information as to the amount of the trust property and as to its investments, and to grant them inspection of the accounts of the trust and documents pertaining to it. Holland J made those orders.

32 At page 1, Holland J said, in a passage cited with approval by Kirby P in ***Hartigan Nominees Pty Ltd v Rydge*** (1992) 29 NSWLR 405 at 416, and by Lord Walker of Gestingthorpe in ***Schmidt*** at [36]:

"... no matter how wide the trustee's discretion in the administration and application of a discretionary trust fund and even if in some or all respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee. "

33 At 2, Holland J considered an argument that the plaintiffs had no relevant interest in the trust entitling them to an account because they were merely potential objects of a power. He rejected that argument, saying:

“It may be that if he exercised a discretion given him by the trust in a particular way that was within the scope of his discretion he could not be called upon to explain why he so exercised it: see **Re Londonderry’s Settlement** (1964) 3 All ER 855; but if he misapplied the trust fund or failed to perform a duty imposed on him by the trust there is no doubt in my mind that the plaintiffs would be proper parties to seek relief in this court.”

34 Next, at 3, Holland J considered an argument that the extraordinarily wide discretions of the trustee excused him from accounting. That argument was likewise rejected:

“If the argument for the trustee is correct he could do as he pleases with the trust property and commit any breach of trust that he cared to commit. There may be no way of detecting it and no person could require him to reveal what he had been doing. It may be that with such wide powers as here the trustee may not be obliged to account to discretionary beneficiaries in the sense of justifying investments of the trust property or recouping the trust fund for losses but it is quite a different matter to say that he cannot be required to give an account of the trust property and what he has done or is doing with it.

In my opinion, on elementary principles of justice and on the basic principles on which trusts rest and are supervised by this Court, the plaintiffs have a right to know what the trust property is and how it has and is being administered by the trustee.”

35 **Randall** had concerned the right of a potential beneficiary to information about the trust, when all potential beneficiaries consented to the information being provided. A more expansive right was recognised by Powell J in **Spellson v George** (1987) 11 NSWLR 300 when he upheld the right of one of several potential beneficiaries of a power of appointment to receive some information concerning the trust. He recognised, at 315, that **Gartside v Inland Revenue Commissioners** [1968] AC 553 had held (at 555):

“That the only right of an object of a discretionary trust, of income is to require the trustees to consider from time to time whether or not to apply the whole or some part of the income for his benefit, and this

right is not an interest in the whole fund or any part of it within the meaning of [a particular English taxing Act]”,

and that some previous authorities (eg *O'Rourke v Darbishire* [1920] AC 581 and *Re Londonderry's Settlement* [1965] Ch 918) contain statements to the effect that a beneficiary whose interest is vested has a proprietary right of access to trust documents. Even so, Powell J held that the potential object of the power had a right to obtain information.

36 The basis on which Powell J reached that conclusion is worth setting out at length:

“At the risk of being regarded as overly simplistic, it is as well to start with the fundamental proposition that one of the essential elements of a private trust, be it a discretionary trust or some other form of trust, is that the trustee is subject to a personal obligation to hold, and to deal with, the trust property for the benefit of some identified, or identifiable, person or group of persons: see, eg, *Jacobs*, op cit pars 108-111 at 8-9. It is, so it seems to me, a necessary corollary of the existence of that obligation that the trustee is liable to account to the person, or group of persons for whose benefit he holds the trust property, (see, eg *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506 at 509 per Knox CJ) and, that being so, the trustee is obliged not only to keep proper accounts and allow a cestui que trust to inspect them, but he must also, on demand, give a cestui que trust information and explanations as to the investment of, and dealings with, the trust property: see, eg, *re Tillott*; Ford and Lee, *Principles of the Law of Trusts* (1983) at 404 et seq; *Jacobs*, op cit pars 1713 et seq; at 391 et seq; Pettit, *Equity and the Law of Trusts*, 3rd ed (1974) at 330 et seq.

This being the essential nature of the position of a trustee, and the liability to account being an essential ingredient in it, it seems to me that it is inescapable that the cestuis que trust, or any one of the cestuis que trust, have, or has, a correlative right to approach the Court for its assistance in enforcing the personal obligation of the trustee, and, in particular, in enforcing the trustee's obligation to account. Since that right is, as it seems to me, a fundamental right of the cestuis que trust, or of a cestui que trust, it seems to me that it is not correct to say that its enforcement by the court is dependent upon the cestuis que trust, or the cestui que trust in question, first raising an allegation, or establishing a prima facie case, of fraud or some other like breach of trust. On the contrary, so it seems to me, where the court's assistance in enforcing the trustee's obligation to account is invoked, the court should be concerned with only two questions, they being, first, whether the plaintiffs are, or the plaintiff is one of the, cestuis que trust, and, second, whether the defendant trustee has failed to observe his obligation to account.

The question then is, whether a person whose status is only that of a potential object of the exercise of a discretionary power can properly be regarded as one of the cestuis que trust of the relevant trustee. I do not doubt that he can, and should, properly be so regarded, for although it is true to say that, unless, and until, the trustee exercises his discretion in his favour, he has no right to receive, and enjoy, any part of the capital or income of the trust fund, it does not follow that, until that time arises, he has no rights against the trustee. On the contrary, it is clear that the object of a discretionary trust, even before the exercise of the trustee's discretion in his favour, does have rights against the trustee (see, eg, **Gartside v Inland Revenue Commissioners** (at 605-606) per Lord Reid, (at 617-618) per Lord Wilberforce) — those rights, so it seems to me, are not restricted to the right to have the trustee bona fide consider whether or not to exercise his (the trustee's) discretion in his (the object's) favour, but extend to the right to have the trust property properly managed and to have the trustee account for his management ...”

37 The rights recognised in **Gartside** at 605-606, and 617-618, to which Powell J adverted, were, in summary:

- (a) If the trust is one that imposes an obligation on the trustee to distribute the entirety of the income amongst the potential objects, those potential objects taken together have rights that will ultimately, in totality, exhaust all the income, even if before the distribution is made one cannot say that a particular potential object has the right to any particular amount.
- (b) Even if the trust is not one requiring all income to be distributed, a potential object of the power had *“a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a Court of Equity”* (at 617).
- (c) *“... when it is said that he has a right to have the trustees exercise their discretion ‘fairly’ or ‘reasonably’ or ‘properly’ that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes”* (at 617-618). Such a right has *“some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the*

necessary quality of definable extent which must exist before it can be taxed” (at 618).

- 38 Similarly in ***Spellson v Janango Pty Ltd*** (NSWSC, 8 December 1987, unreported) Hodgson J held that, concerning the right of a potential object of a power of appointment to information:

“... the right of a beneficiary to information concerning a trust is not one which can only be exercised ... for the purpose of investigating possible breaches of that trust, obtaining advice in relation to them and bringing proceedings pursuant thereto. ... [A] beneficiary’s right is related to the trustee’s duty to account to the beneficiary and is related to the trustee’s obligation not to commit breaches of trust. However, ... a beneficiary has a right to know what the trust property is and how it has been and is being administered by the trustee, which is not conditioned on any purpose to investigate breaches of trust and to enforce the trust against the trustee.”

- 39 While Hodgson J accepted, at 12, that “there may be some limitations as to the exercise of that right”, it was (at 13)

“... a general right to unspecified documents relating to the trust. It is a right which can be exercised to ascertaining the beneficiary’s position generally and not in relation to any orders sought in the Family Law Court;⁶ for example, it can be exercised in this case by the plaintiff to find out if there has in the past been an exercise of discretion in his favour in relation to property which he has not received.”

Extent of Information Required to be Disclosed

- 40 The duty to account relates to the provision of information, not merely of such information as happens to exist in writing. In ***Clarke v Earl of Ormonde*** (para [23] above) the way Lord Eldon explained the rights of the Marquis during his life was in terms of an entitlement to have questions answered. Similarly in ***Walker v Symonds*** (1818) 3 Swan 1; 36 ER 751 Lord Eldon said, at 58; 772:

⁶The reference to the Family Law Court arises from the fact that it had been contended that the proceedings before Hodgson J were an abuse of process, because the potential beneficiary of the trust had proceedings on foot in the Family Law Court, and information gained concerning the affairs of the trust may have been of use to him in those proceedings.

"It is the duty of trustees to afford to their *cestui que trust* accurate information of disposition of the trust-fund; all the information of which they are, or ought to be in possession: a trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain."

- 41 Similarly in ***Ottley v Gilby*** (1845) 8 Beav 602; 50 ER 237 Lord Langdale MR said, at 604; 238:

"... a legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but he has no right to require a copy of the accounts at the expense of the estate."

The "*satisfactory explanation*" is a separate thing to the inspection of the accounts.

- 42 Holland J in ***Randall v Lubrano***, Powell J in ***Spellson v George***, and Hodgson J in ***Janango***, all accepted that the potential object of the power had a right to information, as well as to documents.

- 43 Several cases have decided that a beneficiary is entitled to see cases for opinion of counsel, and advices of counsel, that were obtained by a trustee in administering the trust, though not cases for opinion and advices that the trustee obtained for the purpose of defending his own position, once it was known that an allegation that he had breached the trust was being made against him: eg ***Devaynes v Robinson*** (1855) 20 Beav 42; 52 ER 518; ***Talbot v Marshfield*** (1865) 2 Dr & Sm 549 at 550-551; 62 ER 728 at 729.

- 44 The right of a beneficiary to receive information concerning the trust is not merely a right to be provided with what are said to be statements of fact concerning the trust assets and dealings. As well, cases have held that a beneficiary is entitled to a degree of proof that the information that has been given is correct. Thus, in ***Clarke v Earl of Ormonde*** Lord Eldon held that the successors in title of the Marquis were entitled to not only have a set of accounts produced to them, but also to have an inspection of "*the vouchers*"

– which I take to mean documentary proof of the individual transactions that were summarised in the accounts.

45 Similarly in *In re Tillott* [1892] 1 Ch 86 Chitty J said, at 88-89:

“... a trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate, and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, “I have invested the trust money on a mortgage,” but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee’s statement is correct, and that the trust estate is so invested. The general rule, then, is what I have stated, that the trustee must give information to his *cestui que trust* as to the investment of the trust estate. Where a portion of the trust estate is invested in Consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que trust* is entitled to an authority from the trustee to enable him to make proper application to the Bank, as has been done in this case, in order that he may verify the trustee’s own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered, some other person having a paramount title may have obtained a charging order on the stock or placed a distringas upon it.”

46 In that case the plaintiff, who had a one-twelfth interest in remainder subject to a life estate in a trust fund that was invested in consols was held entitled to have the trustee sign an authority enabling the plaintiff to ascertain the amount of the consols held by the estate and any encumbrances on those consols. The trustees had opposed that order on the basis that granting it would enable the plaintiff to ascertain information as to the dealings of the other *cestui que trust* with their shares, and that even if the other *cestui que trust* had encumbered their shares that would not affect the plaintiff’s interest in the consols. Chitty J made such an order, even though there was no suggestion that the trustee’s statement was incorrect. Chitty J continued, at 88-89:

“... that the *cestui que trust* is entitled to the further information that he now asks for, which will enable him to go back with an authority from the trustee, on which the Bank will shew that the fund is either clear of all distringas and the like or that it is not. I quite agree with what fell from counsel for the Defendant that this may give the Plaintiff more information than he is entitled to ask, because as there are twelve shares in this fund, it may be that there are several distringas on the fund obtained by persons who have charges on

the contingent interest of the other persons, and it is clear that the trustee is not bound to give the *cestui que trust* of one share any information as to the dealings of the other *cestui que trust* in whose share he has no interest, shewing whether those shares are or are not incumbranced. I think, then, for these reasons, that there ought to be a further order in the terms the Plaintiff asks for, but the Plaintiff must pay the costs of the motion.”

- 47 That initially puzzling statement might, perhaps, be justified on the basis that, if the plaintiff could be fully informed concerning his own interest in the trust fund only by adopting a course of action that incidentally involved disclosing matters relating to the interests of other beneficiaries in the trust fund, it was necessary for the information relating to the other beneficiaries to be disclosed. Even if that is the correct explanation, the decision on costs seems strange.

Effect of Obligations of Confidentiality on the Trustee’s Duty to Produce Information or Documents

- 48 Asserted obligations of confidentiality owed by a trustee to third parties may on some occasions provide a reason why disclosure of documents relating to the trust is not ordered (see, eg **Schmidt** at [67], **Foreman v Kingston** [2004] 1 NZLR 841 at [92]; HAJ Ford and WA Lee, *Principles of the Law of Trusts*, vol 1, par [9290] at 9-4058; *Lewin on Trusts*, 18th ed (2008) Thomson Sweet & Maxwell at 23-51), but that result has not always followed. In **Gough v Offley** (1852) 5 De G & Fm 653; 64 ER 1285 a deceased estate was invested on mortgage. In an action for administration, the executor objected to producing the title deeds that he held as mortgagee, saying that it would be “*a great injury to the parties entitled to the equities of redemption in the said mortgaged properties, if their names were made known, by means of the suit, to*” the husband of the plaintiff, who was a solicitor carrying on business in the immediate neighbourhood of mortgaged properties. The executor asserted that he could not disclose any further particulars of the mortgages without violating the confidence reposed in him as mortgagee. He objected to producing the documents, and said that most of the mortgagors would pay off the debts rather than allow the production of their deeds to the defendant, and if the debts were paid off that would result

in the estate incurring a loss. Even so, Sir James Parker VC held, at 655; 1286:

"The Plaintiffs have a right to see all the securities. As to the mortgagors, when they parted with their title deeds to the Defendants they subjected themselves to all the inconveniences consequence upon that."

- 49 It may be that this case is properly regarded as one where an obligation of confidentiality as against the beneficiaries did not apply, when the mortgagors knew, or ought to have known, that the mortgages might be required to be produced to the beneficiaries. I note that the argument articulated in it is similar to one adopted by Bryson AJ in **McDonald** (Para [9] above).

Disclosure of Reasons for Discretionary Decisions

- 50 A topic that frequently arises concerning access to trustee's documents concerns whether any special considerations arise when giving access to the documents would involve disclosing reasons for discretionary decisions. **Re Beloved Wilkes Charity** (1851) 3 Mac & G 440; 42 ER 330 is often referred to as the basis for what is said to be a principle that trustees need not disclose reasons for discretionary decisions. It concerned a trust whereby the trustees were to choose a boy for education as a clergyman, whose parents could not afford to maintain and educate him, with preference being given to residents of four named parishes. The trustees were clergymen who were incumbents in the parishes in question. They chose a boy from outside those four parishes. A farmer who was the father of a candidate from within the four parishes sought to set aside the trustees' choice. The trustees gave no reason for their choice, though they filed an affidavit stating

"We were all present together during the whole of such meeting, and the cases of the said youths ... were then and there fully discussed and considered by us all most impartially and no other case was suggested to or occurred to any of us, though we had duly investigated and considered all the said parishes; and in the full and free and fair and *bona fide* exercise and discharge of the discretion and duty given to ... us ... and without favour or affection or caprice

or ill-feeling towards or with respect to any individual or any class or grade of persons⁷ whatever, we unanimously considered the said [successful candidate] to be the proper object for the benefit of such charity trust, and elected him accordingly.” (at 443-444; 332)

51 Lord Truro LC noted, at 447; 333 “*the delicate nature of the duty cast upon the trustees*” in determining eligibility, and

“the disastrous results which would inevitably attend any other method of dealing with the subject and that of ‘leaving it absolutely in the discretion of the trustees always honestly to be exercised.’”

52 He continued:

“I cannot say that there are brought before me materials to shew that these trustees have acted unfaithfully in coming to the conclusion that [the farmer’s] son is not eligible. Trustees with such a duty to perform are in a very painful situation, more especially clergymen, because when they are called upon to shew the bona fide exercise of their discretion, they may be required to state circumstances of a painful and irritating nature, irritating not only to the particular individual who may be personally affected by them, but to those who are in the same situation, and sympathise with him.”

53 He held that the trustees:

“... are not bound to go into a detail of the grounds upon which they come to their conclusion, their duty being satisfied by shewing that they have considered the circumstances of the case, and have come to their conclusion accordingly. Without occupying time by going into a lengthened examination of the decisions, the result of them appears to me so clear and reasonable, that it will be sufficient to state my conclusion in point of law to be, that in such cases I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity and fairness with which the deliberation has been conducted, and not be extended to the accuracy of the conclusion arrived at, except in particular cases.⁸ If, however, as stated by Lord Ellenborough in *The King v The Archbishop of Canterbury* (15 East, 117), trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the court may say that they have acted by mistake and in error, and that it will correct their

⁷ The reference to “*grade of persons*” was an allusion to a suggestion that the trustees regarded all farmers’ sons as ineligible because farmers were likely to be rich enough to be able to afford to educate their children.

⁸ The report gives no clue as to what his Lordship might have meant by saying “*except in particular cases*”.

decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion.” (at 447-448; 333-334)

54 As well, Lord Truro said, at 449; 334:

“... as a general rule, ... the Court ought not to require persons to state reasons for conduct which they are authorised to pursue, because such a statement made in one case, where it may possibly be done without evil and mischief, has a tendency to create an objection against those who, in other cases, do not make it, where a statement of reasons might be most mischievous. In the present instance, I do not know, nor have I any judicial means of knowing, whether the trustees acted upon the ground of the father's competency, or on anything in respect of the son: they have forborne to state anything in the slightest degree disrespectful or painful to either, and in that I think they have acted a very judicious part; for they would, undoubtedly, have greatly increased that feeling of disappointment and displeasure which has arisen at the election of [the successful candidate], if they had entered into any statement reflecting upon either [the father] or his son.”⁹

55 Part of the reason for Lord Truro reaching his conclusion is that, even though it may have been that the reason for not choosing the local boy was that his father was considered able to educate him, or that the boy was not as suitable to become a clergyman as the candidate chosen, the court did not know what basis the trustees had acted on, and there were no means of finding out. Things may not be as simple as that under the modern rules of court procedure. An affidavit cast in the terms of self-serving conclusions, like the one that the trustees filed in this case, is unlikely to survive objection in a modern case, and if the challenge to the trustee's decision took the form of hostile litigation some discovery or interrogatories might be available.

56 However, lack of proof of the trustee's reasons was not the only reason for Lord Truro's decision. More importantly, it seems to me, Lord Truro thought

⁹ A flaw in this reasoning is that the only case relied on in it, *The King v The Archbishop of Canterbury*, had nothing to do with measuring the standards of trustees by equitable standards. Rather, that case (more conveniently reported at (1812) 104 ER 789) was a common law decision (Lord Ellenborough being at the time Chief Justice of the Court of King's Bench). A statute forbade a person from preaching in England unless licensed by the Archbishop or Bishop of the diocese. The Archbishop declined to license a particular person, and gave no reasons. That person sought mandamus, which Lord Ellenborough declined to grant, for reasons dependent on construction of the statute in question. That flaw is far from fatal.

through the reality of what would be involved in a faithful performance of this particular trust, by these particular clergymen trustees who were part of their local community, and likely to know potential candidates and their families personally. He considered what the settlor was likely to have intended such trustees to do. It is hardly likely that the settlor would have intended the trustees to put themselves into the situation of personal embarrassment that could be involved in a public disclosure of their reasons. Likewise, it was hardly likely that the settlor would have intended that the trustees be at liberty to be hurtful to the disappointed candidates, their friends and relations. In that situation, ascertaining the testator's intent as best he could, the conclusion drawn was that not only were the trustees under no duty to disclose reasons (but free to disclose reasons if they chose to), but also that faithful performance of their office positively required them not to give reasons.

- 57 Importantly for the overall thesis I put forward in this paper, approaching the ascertainment of a settlor's intention in that way is well in accordance with equitable principle. In deciding what a trustee must do to give effect, so far as is possible, to the intentions of the settlor equity courts have used a wide range of material as aids to ascertaining that intention. As well as the actual words of the trust documentation, the courts take into account the particular types of social institution with which the trust is concerned, the practicalities of administering that trust, and the sorts of matters that the settlor is likely to have known or intended concerning the manner in which the trust will be carried out.
- 58 One illustration of this is in *Ex parte Inge* (1831) 2 Russ & M 590; 39 ER 519. It was a decision of Brougham LC, deciding a memorial that had been addressed to the King as visitor of a Cambridge college. The college held certain property upon trusts for the maintenance of one fellow be sent to the college out of the free school in Coventry. The testator's will directed that *"the nomination and election of the said fellow and scholar should be and remain to the master and fellows aforesaid, yet still so they should have a careful regard to the recommendation of the Mayor and Aldermen of*

Coventry" (at 591; 519). The memorialist, Rev Inge, was the only candidate for the fellowship who had attended the free school in Coventry, and he had written support of the Mayor and Aldermen of Coventry. He complained that the college had appointed someone who had never been a scholar of the Coventry school. Rev Inge had declined a request by the college to sit an examination to prove his fitness, alleging that he was entitled to be elected as of right, as he was the only candidate who had attended the Coventry school.

- 59 The Lord Chancellor held that he was not entitled to be elected as of right, but that should have another opportunity of presenting himself to be considered. He said, at 596; 521:

"... when a new fellowship is annexed to an existing College or Hall, the fellow is to be chosen according to the manner of election usually adopted in such College or Hall.

When a man endows a fellowship, he knows the nature of the original foundation to which he wishes it to be attached; he must be taken to be generally acquainted with its statutes, if not with the detail of its rules. He must at all events be presumed to be aware of the great inconvenience, not to say absurdity, that would result from endowing a fellowship to be held by a person who had not the qualification which would render him fit to associate with the other fellows, chosen for their good qualities, and learning, and morals, according to the ordinary rules of the foundation."

- 60 In substance, he held that the college was entitled to require Rev Inge to submit to the examination, not to prove that he was the best qualified person, but to prove that he was a sufficient standard warrant being admitted as a fellow. He denied that the requirement for examination had the effect of being calculated to make the Fellowship a general fellowship. He said, at 601-602; 523:

"My answer to that objection is, that this is a trust vested in certain persons, and to be exercised, like all other trusts, in perfect good faith and conscience; and that if those to whom it is committed are found to reject - which is always a matter of circumstantial evidence, for in each case the examination of the candidate must be recorded - if they are found to reject candidates who indisputably possess the title contemplated by the founder, upon the pretext that they are

deficient in learning or morals, the visitorial power will then interfere and control them. For such conduct would be a fraudulent and unfaithful discharge of their office. But it must be a strong case to entitle the Crown to say they have fraudulently executed the trust, because, if they so acted, they would forfeit their character, and fail in the performance of a sacred duty."

- 61 Another example of how courts ascertain a settlor's intentions is that in deciding whether it is appropriate to review a discretionary decision of a trustee, the courts not only take into account whether the settlor has used language which makes clear that it is important to him that it be the particular people he has nominated, rather than anyone else (or the court) who exercises the discretions, but also whether such an intention seems likely from the identity of the people nominated as trustees and their relationship to the settlor and the people or purposes intended to be benefited.
- 62 Thus, in ***Dundee General Hospitals Board of Management v Walker*** [1952] UKHL 1; 1 All ER 896 the House of Lords took into account in construing a gift dependent upon the trustees forming a certain opinion, that the trustees were people well known to the settlor and were well placed to have personal knowledge about the subject matter.
- 63 Similarly, before the ***Charitable Trusts Act 1993*** introduced a presumption of general charitable intention in charitable trusts, it was necessary for the courts to make a positive finding of general charitable intention before a charitable gift could be applied *cy-près*. A wide variety of factors were looked at to consider whether such a finding should be made.
- 64 A possible reason for this broad approach to ascertainment of the settlor's intention is that the court can be confident that the settlor's intention was not that the trustee keep the property for himself, and holding that the trust has failed and therefore there is a resulting trust for the settlor is an extreme step, so the court has to ascertain the intention on the basis of such indications as it has, even if they are less than compelling.

Just What is the “Proprietary Basis”?

- 65 There has been some confusion in the authorities concerning the relationship that rights of property have to a beneficiary’s right to inspect documents that relate to a trust.
- 66 ***Clarke v Earl of Ormonde*** (mentioned at para [23] above) is sometimes seen as an early source of a connection between rights of property and an obligation to account. The reader will recall that the case concerns the adequacy of a plea that the defendant and another trustee had rendered an account to the Marquis in his lifetime, that the Marquis had examined, and was satisfied with.
- 67 After saying that a proper plea would have been that full accounts containing all the particulars that were now requested of the trustees were given to the Marquis and approved by him, Lord Eldon continued, at 120; 795:
- "But if that were so, still I think he would be entitled to the inspection of the vouchers. I state that without prejudice to what may be said. If there was a settlement of all the matters relating to this trust, the trustees would be entitled to the possession of the vouchers, as their discharge to the Marquis; but he would have the right to the inspection of them *as his documents*, to be used by him against all who might be making demands on him, in relation to the debts."
(emphasis added)
- 68 This last paragraph is a continuation of the hypothetical situation that Lord Eldon postulated, of the Marquis being seized in fee of the estates, and creating a trust for the payment of his debts. In that situation, whoever is entitled to the legal estate, subject to the trust, has a right to call on the trustees to account. The phrase “*as his documents*” that Lord Eldon used does not necessarily mean that the person entitled to the interest in remainder actually owns the documents, either in law or in equity. It might equally mean that he is entitled to see them on the same basis that he would be entitled to see them as *if they were* his documents.
- 69 In ***Avanes*** at [3] Gzell J said:

“The general rule that a beneficiary has a right at all reasonable times to inspect trust documents is generally attributed to **Re Cowin** (1886) 33 Ch D 179. In that case a cestui que trust sought a declaration of entitlement to inspect all the deeds, papers and documents relating to the property subject to the trusts of the will. North J expressed the view (at 185) that the plaintiff had a prima facie right to inspect the deeds because the cestuis que trust were the beneficial owners of the trust property.”

That statement requires closer analysis.

In Re Cowin and the “Proprietary Basis” of an Obligation to Account

70 **In re Cowin** arose from a will that gave personal estate on trust for conversion, and real estate with a power to sell. The income was given to the widow during widowhood or until her remarriage, and after her death or remarriage the real estate was to be sold, and divided amongst such of the testator’s children as obtained 21. While the widow was still alive, an adult son wished to obtain an advance on the security of his reversionary interest under the will. Solicitors were willing in principle to make him the advance, subject to satisfying themselves about the title. The solicitors for the trustees permitted inspection of the probate and subsequent documents but not any earlier documents of title. The son took out a summons seeking a declaration that he was entitled as of right to inspect all the deeds, papers and documents relating to the property subject to the trusts of the will, including title deeds of real estate. The trustee for life consented to the documents being inspected. One of the grounds on which the solicitors for the trustees objected to producing documents was that, although they had not inspected the title documents themselves, inspection of them might show that there was a defect in the title, which might adversely affect any later attempts they made to carry out the trust for sale, once the widow had died.

71 North J upheld the plaintiff’s claim. He said, at 184-185:

“The first question is, whether the Plaintiff is *primâ facie* entitled to inspect the title deeds and other documents relating to the real estate; and, if he is, the question will arise whether any good reason

has been shewn for depriving him of that *primâ facie* right. In my opinion the Plaintiff has a *primâ facie* right to inspect the deeds, and for this reason, that *cestuis que trust* are the beneficial owners of the trust property. I think there is clear authority for so holding. The proposition is thus stated in *Lewin on Trusts* 8th Ed. p. 975: "All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners," and three of the cases which Mr. *Lewin* cites are strong authorities in support of that proposition."

72 That statement cannot be taken at face value. First, it mis-states authority. The three cases to which he referred are ***Gough v Offley*** (discussed at [48] above), ***Budgen v Tylee*** (discussed at [25] above), and ***Simpson v Bathurst***¹⁰. It is noteworthy that none of those cases in fact provided support for the element in *Lewin's* proposition concerning "who in equity are the true owners". Neither my reading of the cases, nor the extracts quoted by North J in ***In re Cowin***, say anything about the *cestui que trust* being the "true owners" having anything to do with the rights of inspection.

73 Second, North J does not accurately convey the effect of what *Lewin* said. The 8th ed (1885) of *Lewin* says, at 975:

"All documents held by the trustee in that character must be produced by him to the <i>cestuis que trust</i> , who in equity are the true owners (b). And if the trustee has submitted cases to counsel and taken opinions not for the purpose of defence in any litigation between himself and his <i>cestuis que trust</i> , but for his guidance as trustee, he is bound to produce them to the <i>cestuis que trust</i> , who pay the expense so incurred by the trustee (c). [So, in a suit by <i>cestuis que trust</i> against their trustees to compel them to make good a breach of trust, the trustees are bound to produce letters and copies of letters between them and their solicitors in relation to the matters in question in the action <i>ante litem motam</i> (d). But as all the <i>cestuis que trust</i> have an interest in the documents, they must all be represented, directly or indirectly, in the suit before the documents can be finally dealt with (e). If the trust documents include mortgages upon which the trust fund has been invested, the production cannot be objected to on the ground that the mortgagors, or persons entitled to the equity of	General rule
	Cases for opinion
	Parties

¹⁰ (1869) 5 LR Ch App 193. The only relevant remark in that case was made in the course of ordering obstructive trustees to pay the costs of litigation, where Lord Hatherley LC noted that the trustee "has refused production of the deeds, which, as trustee, he was bound to produce to all persons interested in the trust".

redemption, are not parties (f).

(b) *Simpson v Bathurst*, 5 LR Ch App 202, per Lord Hatherley.

(c) *Wynne v Humberston*, 27 Beav 421; *Devaynes v Robinson*, 20 Beav 42; *Talbot v Marshfield*, 2 Dr & Sm 285, 549.

[(d) *Re Mason*, 22 Ch D 6090.]

(e) *Budgen v Tylee*, 21 Beav 545.

(f) *Gough v Offley*, 5 De G & Sm 653”

74 Notwithstanding what North J says, the three cases to which he refers are not cited by *Lewin* as authority for the proposition contained in the first sentence of that quotation.

75 In *Re Fairbairn* [1967] VR 633 at 636 Gillard J accepted that the authorities relied upon by North J in *In re Cowin* “*did not constitute an express authority for the proposition stated by Lewin. Each of the authorities, however, by implication did suggest some broad generalisation on the lines set out by Lewin*”. I do not agree with the last-quoted sentence from Gillard J.

76 Third, even though the question was whether the trustee had the right to inspect the deeds and other documents, it was only in relation to the deeds that North J said the plaintiff had a right to inspect because they were trust property. Ownership of title deeds has always gone with the land itself. The same does not necessarily follow concerning the other documents.

77 Another oddity in North J’s judgment is that, although he had been referred by counsel (182) to *Lewin on Trusts*, 8th ed, at both pages 680 and 975, he quoted only page 975. At 680 *Lewin* had said,

“*Cestuis que trust* have a right at all seasonable times to *inspect* the documents relating to the trust, and at their own expense to be furnished with *copies* of them, and the rule extends to *cases* submitted and *opinions of counsel* taken by the trustees for their guidance in the discharge of their duty, for as the expense falls upon the trust estate, it stands to reason that the *cestuis que trust* may see the opinions and cases for which they pay. But the right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court: *Wynne v Humberston*, 27 Beav 421.”

- 78 That passage says nothing about equitable ownership having anything to do with entitlement to inspect documents relating to the trust. One wonders what *Lewin's* view really was.
- 79 Most importantly, *In re Cowin* cannot be regarded as authority even for the proposition from page 975 of *Lewin* that North J accepted. That is because, later in the judgment, he disavowed the proposition that the plaintiff was entitled as of right to see the deeds: he said, at 186-187:

“It seems to me, therefore, that the Plaintiff is entitled to see the deeds, subject to this, that there might be circumstances which would justify the trustees in withholding them from him. But nothing has been shewn which can justify them in doing so. The trustees' solicitor has not looked at the deeds at all, and yet it is said that the production of them to the Plaintiff might possibly tend to the disclosure of some flaw in the title to the property, and I am told that there is a presumption that every title has some flaw in it. In my opinion no case has been established for withholding the deeds from the Plaintiff, and I think he is entitled to the production of them for the inspection of himself or his solicitor. I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist.”

In other words, while being a beneficiary of the trust may in some circumstances give a right to inspect some trust documents, one needs to consider all the circumstances before one can conclude there is actually a right to inspect them.

O'Rourke v Darbishire and the “Proprietary Basis”

- 80 Another case frequently referred to as providing a “*proprietary basis*” for a beneficiary's right of inspection is the decision of the House of Lords in ***O'Rourke v Darbishire*** [1920] AC 581.
- 81 The appeal to the House related to an order for production of documents in contested litigation. The last testamentary documents of Sir Joseph Whitworth had, in effect, given all his property to his executors in trust for themselves, and stated the wish (but not the obligation) that the executors

use it for certain purposes that had been communicated to them. The plaintiff was the legal personal representatives of Mrs Uniacke, who had been Sir Joseph's heiress at law, and one of his two next of kin. The plaintiff brought action against the executors, alleging (1) that the executors took the estate upon a secret trust that was invalid, in consequence of which there was a resulting trust for the heiress at law and the next of kin, (2) the executors had induced Sir Joseph to make his will by a fraudulent representation that they would carry out his wishes, when in truth they always intended to keep his property for themselves, and (3) a deed that Mrs Uniacke had entered with the executors, releasing them from all claims, should be held void by reason of fraudulent nondisclosure on the part of the executors. One of the executors was a solicitor. When discovery was sought, the defendants resisted production of various documents on the ground of legal professional privilege, and other grounds not presently relevant. One of the grounds on which the plaintiff argued that the claims of privilege ought not apply was described by Viscount Finlay, at 601, as:

"That the plaintiff had what was called a "proprietary right" as one of the cestuis que trust to see all documents relating to the trust".

82 In the House of Lords four separate speeches were given, by Viscount Finlay, Lord Sumner, Lord Parmoor, and Lord Wrenbury. All agreed that the plaintiff was not entitled to see the disputed documents.

83 Viscount Finlay disposed of the "*proprietary right*" claim at 603-604 by saying:

"I assume that the plaintiff is the representative of the heir and next of kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the statutes of mortmain, the representatives of the heir and next of kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a prima facie case that the plaintiff is a cestui que trust on this

ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his wishes, while, in fact, they from the first intended to, appropriate it to themselves as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any prima facie case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right," on which the appellant relies, in fact, exists. To establish any such right it would further be necessary for the appellant to get rid of the deed of release of December 21, 1889. The release was given so long ago as 1889, and the fraud alleged has yet to be proved. There is certainly no prima facie case that it can be set aside, and so long as the deed stands the appellant cannot be a cestui que trust."

This passage involved denying that the plaintiff had standing to see the documents, for a reason like that given in *Wynne v Humberstone* (para [26] above).

84 Lord Sumner rejected the "proprietary right" claim tersely at 618:

"... appellant has no claim to see these documents, including the first of the two cases for opinion in No. 434, except under the law relating to discovery, because, while the releases obtained by Whitworth's executors stand, to say nothing of the fourth codicil, he cannot claim to see them as being his documents in any sense."

85 Lord Parmoor was similarly terse at 619–620:

"A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission, or the establishment, of the status on which the right is based. I agree in the view expressed by Peterson J, that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which, unless it can be set aside, is a bar to his claim."

86 It is far from clear that by the opening words of this statement Lord Parmoor was intending to say anything about the entitlement of beneficiary to trust documents outside the context of hostile litigation, like that with which he was then concerned.

87 Lord Wrenbury at 626–627 said:

“[The plaintiff’s] claim is made not under the will, but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right, the executors are trustees for him, and none the less by reason of the fact that he claims not under a gift contained in the will but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whosoever is beneficially entitled to the testator’s property.

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else’s documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot v Marshfield* ([1865] 2 Dr. & Sm. 549) is an instance.

But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust he has two difficulties to surmount.”

88 These difficulties were, that he has not yet established the alleged secret trust or its failure, and that he has not yet set aside the deed of release.

89 This passage in the speech of Lord Wrenbury has been seen in some later cases as justification for a theory that beneficiaries of trusts have a “*proprietary right*” to see trust documents. In my view, that requires the passage to bear more weight than it can stand.

90 First, even if the passage is taken at face value, it is a statement to which none of the other Law Lords assented, and in any event relates to what rights there might be in a factual situation that Lord Wrenbury held did not exist. That in itself would be an extremely slim basis of precedent.

91 Second, reading the passage in its context, I have quite some doubt about whether the first two paragraphs that I have quoted are intended to express Lord Wrenbury's own views, rather than encapsulate the submission of counsel that Lord Wrenbury then proceeded to demolish. The summary of counsel's argument on this topic, at 591-592, proceeds in a similar way to the first two paragraphs that I have just quoted. That summary says:

"Further, the appellant can claim production of these documents on the ground of proprietary interest on the principle of *Talbot v Marshfield* (1865) 2 Dr. & Sm. 549. It is true that the persons whom the appellant represents do not take under the will, but they claim, not as outsiders, but through the executors, and are, on one view of the case, *cestuis que trust* under the testator. The defendants are trustees either for themselves as residuary devisees and legatees or for the heiress at law and next of kin of the testator. The appellant has such an interest in the estate as entitles him to see the trust documents."

92 Third, the only instance that Lord Wrenbury cites concerning the alleged "*proprietary right*" is *Talbot v Marshfield* (1865) 2 Dr. & Sm. 549; 62 ER 728. In that case, trustees had a discretionary power to advance part of the trust fund for the benefit of certain children. The residuary beneficiaries objected to their making such an advance. The trustees sought the opinion of counsel as to whether they would be justified in so doing. The residuary beneficiaries then sued the trustees, alleging breach of trust. Once again the trustees sought legal advice, as to what course they should pursue concerning the litigation. Sir Richard Kindersley VC said at 550; 729:

"The first case and opinion, the production of which is sought, were respectively stated and taken by the Defendants to guide them in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other *cestui que trust*. The opinion was taken before proceedings were commenced or threatened, and in relation to the trust. Under these

circumstances it appears to me that all the *cestui que trust* have a right to see that case and opinion. It was contended that it was not taken for the benefit of all the *cestui que trust* ; but all the *cestui que trust* have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in the execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trusts, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestui que trust* a right to see the case and opinion.

The other case and opinion, however, stands on a totally different footing. This was not to guide the trustees in the execution of the trust; but, after proceedings had been commenced against them, they took advice to know in what position they stood, and how they should defend themselves in the suit. It appears to me that the *cestui que trust* have no right to see this case and opinion, unless they can make out that the trustees can charge the expense thereof on the trust fund. As to this there is no proof; the trustees may have to bear the expense of this case and opinion, as having been stated and taken by them as litigant parties with the *cestui que trust*.

The trustees must be ordered to produce the first case and opinion; but not the second."

- 93 I have quoted the whole of the judgment in **Talbot**. It says nothing about rights of property being the basis of, or in any way connected with, the right of the *cestuis que trust* to see the case and opinion. Even if an opinion has been paid for with trust assets, and is therefore itself a trust asset, that means only that it is to be used for trust purposes. If the trust of residue was to sell, and divide the proceeds into X parts, it could not seriously be supposed that the obligation of the trustee was to sell the opinion and divide the proceeds into X parts, so that the beneficiary had that sort of a proprietary right in it.
- 94 In any event, even if (a) a beneficiary having a proprietary right in a document was a sufficient condition to entitle the beneficiary to see the document in **Talbot**, that does not mean it is always a necessary condition, (b) there was no suggestion in **Talbot** of other circumstances that might provide a reason why the beneficiary was not entitled to see the document.

In Re Londonderry's Settlement

- 95 ***In re Londonderry's Settlement*** [1965] Ch 918 has been a particularly influential case in the development of the law relating to the present topic.
- 96 ***In Re Londonderry's Settlement*** concerned a familiar type of family discretionary trust. Under it, the trustees had discretions as to who from specified classes of potential beneficiaries would receive the capital, and income, but those discretions could be exercised only with the consent of certain non-trustees, called "*the appointors*".
- 97 Lady Helen was entitled to a share of the income in default of there being an appointment of the income. She had no entitlement to capital in default of there being an appointment of the capital. She was also, it seems, one of the class to whom both income, and capital, could be appointed. When the trustees made an appointment of all the capital, and thereby brought the trust to an end, Lady Helen was dissatisfied, and wanted to see documents relating to their decision. She sought copies of the minutes of the trustees' meetings, documents prepared for those meetings, correspondence between the trustees, the appointors and the beneficiaries, and correspondence between the settlor, one of the appointors, and the trustees' solicitors. The trustees voluntarily supplied her with copies of the appointments they had made, and of the annual trust accounts, but not the other documents. They took the view that it was in interests of the family as a whole that those documents not be provided, and hence they would not do so unless they had an obligation to do so.
- 98 The trustees then took out a summons seeking the court's decision about what if any documents they were obliged to disclose, beyond those that they had voluntarily provided. A trial judge held they should provide all the documents. The trustees appealed against that decision.

99 The question was posed as one of “the proprietary right of a *cestui que trust* to see documents connected with the trust”¹¹. Lady Helen’s enquiry had all the hallmarks of a fishing expedition. She had well experienced equity counsel (R W Goff QC), who seems deliberately to have put her claim on this proprietary basis. One cannot help thinking it was because there would not have been enough material on which counsel could responsibly have settled a statement of claim alleging impropriety, to start an action in which discovery could have been obtained.

100 Two features of the way in which the case came before the court need to be borne in mind. They both limit its usefulness as a persuasive authority.

101 The first is that the documents were described by categories without the court seeing any of the actual documents. Harman LJ complained about this procedure in the course of argument, saying, “*I dislike this discussion of documents in the air*”¹², “*it is embarrassing for the court to have to consider categories of documents, for there is none in which one cannot pick some kind of hole*”¹³. He also complained about it in his judgment, saying¹⁴ “*It is almost impossible satisfactorily to define the obligations of the trustees in the air.*” He continued:

“On the whole, however, in mercy to the parties, and having heard argument over more than two days, we have decided to attempt an answer, though we are not satisfied that we shall cover all the points.”

102 That sort of admission from a judge does not inspire confidence. Likewise Danckwerts LJ¹⁵ was deeply unhappy about the way in which the action came to court, and recognised the possibility that the court might:

¹¹ at 923, in the course of argument by counsel for the trustees, and accepted at 924 by counsel for the beneficiary

¹² at 925

¹³ at 927

¹⁴ at 931

¹⁵ at 935

“give the trustees directions in general terms which admit of great doubt and may be thoroughly misleading.”

103 If a court is deciding the case under an administration summons, it is deciding what should happen in the same way as it would if the court had taken over the entire administration of the trust, in an administration suit. If the court had taken over administration of the trust, it would have the documents before it. In my view a question of access to documents raised by administration summons should be decided by the court looking at the documents for itself.

104 The second feature of the case is that counsel for the beneficiaries conceded “*that a trustee exercising a discretionary power is not bound to give reasons, nor can he be interrogated*”¹⁶. Thus there was no occasion to examine the correctness of that proposition.

105 The trustees had submitted that they ought not disclose the documents because¹⁷:

“... it was undesirable to wash family linen in public which would be productive only of family strife and also odium for the trustees and embarrassment in the performance of their duties...”

As so put, that is not enough. The court’s task is not to save trustees, or family members, from embarrassment of its own volition. However, if the court can conclude it was the settlor’s intention that there not be that sort of embarrassment, that is another matter.

106 Harman LJ noted the statements of Lord Parmoor and Lord Wrenbury in ***O’Rourke v Darbishire***, but found them of no use¹⁸:

¹⁶ at 924

¹⁷ at 931

¹⁸ at 933

"General observations of this sort give very little guidance, for first they beg the question of what are trust documents, and secondly their Lordships were not considering the point here that the papers are asked for which bear on the question of the exercise of the trustees' discretion."

107 He held that there was no obligation to disclose minutes of meetings and agendas for trustees' meetings "*in the absence of an action impugning the trustees' good faith*", because:

"If the defendant is allowed to examine these, she will know at once the very matters which the trustees are not bound to disclose to her, namely, their motives and reasons."¹⁹

108 He held that:

"... even if documents of this type ought properly be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure. If necessary, I hold that this principle overrides the ordinary rule. This is, in my judgement, no less in the true interest of the beneficiary than of the trustees. ... if one of the trustees commits to paper his suggestions and circulates them among his co-trustees; or if enquiries are made in writing as to the circumstances of a member of the class; I decline to hold that such documents are trust documents the property of the beneficiaries. In my opinion such documents are not trust documents in the proper sense at all."²⁰

The court is not there to legislate about what is in the "*true interest*" of either the beneficiaries, or the trustees. Its only role, in enforcing trusts, is to effect the settlor's intention.

109 There were some aspects of agendas for trustees meetings that Harman LJ held might properly be disclosed, however²¹:

"... if the solicitor advising the trustees commits to paper an aide-memoire summarising the state of the funds or of the family and reminding the trustees of past distributions and future possibilities, I

¹⁹ at 933

²⁰ at 933

²¹ at 933

think that must be a document which any beneficiary must be at liberty to inspect."

110 As to the correspondence, Harman LJ said²²:

"I cannot think that communications passing between individual trustees and appointors are documents in which beneficiaries have a proprietary right. On the other hand ... in general the letters of the trustees' solicitors to the trustees do seem to me to be trust documents in which the beneficiaries have a property. ... I do not think letters to or from an individual beneficiary ought to be open to inspection by another beneficiary."

111 It is to be noted that this way of speaking assumes without argument that "*proprietary right*" (in some unexplained sense) is the appropriate test by which to decide whether a beneficiary has a right to inspect a document. It seems, however, in light of the remarks of Harman LJ at 933, that even that assumption was subject to the overriding principle that the trustees' deliberations on a discretionary matter were protected from disclosure. And there seems to be an equation of 'trust documents' with "*documents that a beneficiary is entitled to see*".

112 While Harman LJ expressed views about which of the documents were ones that the beneficiary could see, he also said,²³

"I should add that very different considerations apply when it comes to a question of discovery in an action where a beneficiary is impeaching the validity of the trustees' actions."

113 Danckwerts LJ agreed with Harman LJ, and added some remarks of his own. He said he found the authorities that had been cited "*of very little assistance*" (at 935). He was scathing about both the procedure by which the litigation had been conducted, and one aspect of ***O'Rourke v Darbishire***:

²² at 934

²³ at 933

"... it is quite a simple matter to make general observations on the right of beneficiaries to inspection of trust documents, but it does not carry one any further until one knows what is meant by "trust documents". For instance, one of the definitions of trust documents which was suggested seems to me quite hopeless. It was suggested that trust documents included everything in the trustees' hands as such. That will cover practically everything that reaches the trustees in their official capacity, from advertisements for pink pills to blackmailing letters from people who think they have a grudge against the trustees. That does not solve our problem in the least.

It seems to me that it would have been far better that the matter should have been left until an action was started by a beneficiary who claimed to have a right to see particular documents and the court would fairly face the problem whether the particular documents were ones which the trustees were bound to disclose to a particular beneficiary." (at 935)

By rejecting the test of "*documents in the hands of the trustees as such*" Danckwerts LJ was rejecting the proposition from *Lewin* that North J had accepted in *In re Cowin* (see para [71] above).

114 Danckwerts LJ said that letters written to the trustees, whether by beneficiaries or other people²⁴;

"... are not really trust documents at all. But even if they be trust documents, it seems to me, in spite of the wide observation which were made by their Lordships in the House of Lords and others, that does not really solve our problem. It seems to me there must be cases in which documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desired to see them, and I think the point was a good one which was taken in the affidavit of Lord Nathan, that to disclose such documents might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same. It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner. Of course, if a case is made of lack of bona fides, that is an entirely different matter. In that case I agree it becomes necessary to examine exactly what has happened because that is in an action and not in a theoretical application for directions, as the present case appears to me to be. It appears to me that the documents are confidential and the trustees' duty would become

²⁴ at 935-6

impossible and the execution of the trust would become impossible if the trustees were bound to disclose to any beneficiary any information or other matters in regard to beneficiaries that they had received.”

115 Danckwerts LJ did not completely reject the notion that some documents could be called “*trust documents*” (in a sense that he did not explain), but he did not regard the question of whether or not a document was a “*trust document*” as the determinant of whether a beneficiary could see it. He concluded (at 936):

“it seems to me there must be a very restricted application of the observation that beneficiaries are entitled to see all trust documents. The matter must be one which is subject to special circumstances and the right to disclosure cannot apply to all trust documents.”

116 Salmon LJ said (at 936) that he agreed with the other two judgments. However his subsequent remarks are in some respects at odds with the previous two judgments. Harman LJ and Danckwerts LJ had used the concept of “*trust documents*” as a guide for deciding which documents a beneficiary had an entitlement to see, without explaining its meaning. Salmon LJ gave his own quasi-definition (at 938).

“The category of trust documents has never been comprehensively defined. Nor could it be - certainly not by me. Trust documents do, however, have these characteristics in common: (1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them. If any parts of a document contain information which the beneficiaries are not entitled to know, I doubt whether such parts can truly be said to be integral parts of a trust document. Accordingly, any part of a document that lacked the second characteristic to which I have referred would automatically be excluded from the document in its character as a trust document.”

The circularity of that quasi-definition has been frequently noted (see, eg *Hartigan Nominees v Rydge* at 413, 418 per Kirby P, at 442-443 per Sheller JA; *Morris v Morris* (1993) 9 WAR 150 at 153 per Seaman J; HAJ Ford and WA Lee, *Principles of the Law of Trusts*, vol 1, par [9290], 9-4054; DSK Ong, *Trusts Law in Australia*, 3rd ed (2007) The Federation

Press at 247). The proposition that the beneficiaries must have a proprietary interest in the documents, the basis for which is considered below, has also attracted criticism (see, eg **Gray v Guardian Trust Australia Ltd** [2003] NSWSC 704 at [35]; **Global Custodians Limited v Mesh** [1999] NSWSC 624 at [50] and the cases and texts cited therein). The quasi-definition was not endorsed by the other members of the court. It does not state the law.

117 And Salmon LJ said²⁵:

“The position is quite different where the beneficiary seeks disclosure of documents from the trustees in the air, as in this case, from the position where the beneficiary seeks discovery of documents in an action in which allegations are being made against the bona fides of the trustees. If the documents in question are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents. In some instances, however, the fact that they are trust documents may nullify the privilege that would otherwise exist, as for example if the document consists of counsel's opinion taken before the issue of the writ, clearly the beneficiary is entitled to see any opinion taken on behalf of the trust. In the present case there is no suggestion of any kind, and certainly not a shred of evidence, that the trustees acted otherwise than with the utmost propriety.”

118 Salmon LJ had stated what he saw as the justification for the “rule” that trustees are not obliged to give reasons for discretionary decisions as follows²⁶:

“Whether or not the court, if it knew all the facts known to the trustees, would have acted as they did, again I do not know - nor is it material. The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercise this power with the consent of persons called appointors under the settlement and exercise it bona fide with no improper motive, their exercise of the power cannot be challenged in the courts - and their reasons for acting as they did are, accordingly, immaterial. This is one of the grounds for the rule that trustees are not obliged to disclose to beneficiaries their reasons for exercising a discretionary power. Another ground for this rule is that it would not be for the good of the beneficiaries as a whole, and yet another that it might make the lives of trustees intolerable should such an obligation rest upon them: **In re Beloved Wilkes Charity; In re Gresham Life**

²⁵ at 938

²⁶ at 936-7

Assurance Society, Ex parte Penney. Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.”

I have earlier explained how it seems to be that *In re Beloved Wilkes Charity* depended upon the construction of the particular trust deed, not upon any general principle of law whereby trustees were not obliged (or obliged not) to give reasons for discretionary decisions.

- 119 Salmon LJ also thought that there was another “rule”, with which the “rule” about trustees not being obliged to give reasons for discretionary decisions was in conflict (at 937):

“Together with the rule enunciated in the authorities to which I have referred marches the rule no less firmly established that beneficiaries have a proprietary interest in, and a right to see, all trust documents: **O'Rourke v Darbishire**. The problem which arises in the present case is to reconcile these two rules - a problem which apparently the courts have never before been called upon to solve. I agree with the solution proposed by my Lords, namely, that all parts of any trust documents (if they are trust documents, and I will refer to this point again presently) which contain information to which the beneficiary is not entitled should be covered up before being shown to the beneficiary. It would need the clearest authority to persuade me that whilst trustees are not compelled to disclose their reasons or any information which might affect their reasons so long as nothing is put on paper, yet once the reasons or the information are reduced to writing, the writing must be disclosed to the beneficiaries. There is no such authority and I would expect to find none, for if it existed it would in my view be entirely contrary to reason and common sense.”

- 120 It often happens that the course of equity practice comes to formulate a “rule”, which encapsulates the usual result in a particular type of situation. However, such rules are not themselves the generative principles of equity. Rather, they are guidelines or aides-memoire or empirical generalisations about what is usually the case. If one comes to a situation where two such “rules” appear to be in conflict, that merely means that the situation should be examined more closely, from a point of principle. I state what seem to me to be some of the relevant principles later in this paper.

121 The basis for saying that Lady Helen had a “*right of property*” in any of the documents held by the trustee seems to me to be very suspect. She was, after all, only one of the takers of income in default of appointment. The documents that the trustees held were, presumably, documents that had been paid for from the trust funds, so, for that reason if no other, they would be documents that the trustees were obliged to deal with in a fiduciary capacity for the purpose of the trust. But Lady Helen did not have in them even the defeasible right of property that a taker of capital in default of appointment has in the trust capital. All she had was a right to part of the income, for as long as no appointment of capital was made. By the time of the litigation, all the capital had been appointed, so she had no ongoing right to income. But even if, because she wished to challenge the appointment of capital, her rights to information should be decided on the basis that no such appointment had been made she would be no better off - the documents could hardly be called income of the trust, so even before the appointment in question had been made she would not have had any property right in them. There was no way in which she could have said “*Give them to me because they’re mine.*” It may be of significance that ***Re Londonderry’s Settlement*** was decided before the House of Lords in ***Gartside v Inland Revenue Commissioners*** [1968] AC 553 had clarified that a potential object of a power of appointment does not have, in that capacity, any right of property in the trust property.

122 If one considers “*proprietary right*” in a looser sense, it may well be that Lady Helen had a right, exercisable by an order in specie, to have the trustees use the documents only for the purpose of the trust. That right is proprietary in the sense that it is transmissible - if she had mortgaged her interest in the trust fund, the mortgagee would thereby have had the standing to require her to lend her name to an action for such an injunction. But that she had a proprietary right of that kind does not say anything about whether she had a right to inspect the documents. As well, her essential complaint seemed to be concerning the proportions in which the capital had been divided, not

about the fact that her right to income had ceased in consequence of the distribution of the capital.

Re Fairbairn and the "Proprietary Basis"

123 One case in which the right of a trust beneficiary to see trust documents turned upon whether the beneficiary had a right of property in the documents themselves was **Re Fairbairn (dec'd)** [1967] VR 633. The plaintiff was a beneficiary of trusts created by his father's will. The will gave legacies, then gave the residue to trustees on trust to divide the residue into three parts. The plaintiff was a life tenant in a protective trust in respect of one of these parts. The plaintiff sought to inspect books of accounts and financial records of the father for the three years prior to death. Gillard J held that, as a matter of general principle, those papers would have passed to the executors, and, not having been appropriated to any particular interest under the will or converted into money, remained as part of the residue, in which the plaintiff had a proprietary interest. He accepted (at 635) a principle that was in the nature of a default rule, that:

"prima facie the plaintiff, *qua* beneficiary, would be entitled to inspect any property forming part of the deceased's estate in which he was beneficially interested. There may be cases where the circumstances are such that an inspection should not be made, but in my view, in the absence of evidence of circumstances which would require that that inspection ought not be given, then the beneficiary is quite entitled to inspect the property forming part of the estate to which he is entitled, or to be more precise, in which he has a beneficial interest."

124 He then went on to confirm that that answer was not shown to be correct by reference to the authorities, namely **Clark v Earl of Ormonde**, **Re Cowin**, **Re Tillott**, **O'Rourke v Darbishire**, **Butt v Kelson** [1952] Ch 197 and **Re Londonderry's Settlement**.

125 However, he went further than merely taking those cases at face value, and reaching the conclusion that none of them showed that the conclusion he

had independently reached was wrong. He positively accepted the criteria as laid down by Salmon LJ in ***Londonderry***. At 639, he said:

"... the general rule appears to provide that a cestui que trust has a prima facie right to inspect any document in the trustees' hands as such relating to the trust and forming a part of the estate inherited by the trustees in trust for the beneficiaries."

- 126 He appears to accept, however, that that prima facie right is subject to an exception concerning production of documents brought into existence in the exercise of a discretionary power conferred upon trustees, and noted that there was no question of any disclosure of reasons for discretionary decisions in the case before him.
- 127 For reasons given elsewhere in this paper, I doubt that Gillard J's adoption of the views of Salmon J in ***Londonderry*** should now be accepted in Australia. As well, while the case provides an example of a proprietary right in documents being held to be the reason why a beneficiary could have access to those documents, the principles discussed in it by no means cover all situations where the beneficiaries seek access to documents.

Proprietary Right Generally

- 128 The theory that having a proprietary right in documents that relate to a trust is the reason why a beneficiary is entitled to see the documents can be tested by considering a situation in which a trustee had been absolutely meticulous that it was his own money, rather than trust funds, that was spent to purchase the stationery and pay for any clerical or professional services involved in producing and maintaining any records relating to the activities of the trust. In that situation, it would be quite clear that, considered as chattels, those records were the property of the trustee personally. But even in that situation, the cases considered above concerning the obligation to account show that a beneficiary would still have the right to be informed of various matters relating to the terms and administration of the trust. As well, as we have seen, there are cases that hold that a beneficiary of a particular

trust is entitled to receive information relating to the trust, even if that information has never been reduced to documentary form, and thus is not the “*property*” of any one. Thus it seems to me that the criterion for a beneficiary being able to inspect a document relating to the trust is not that the beneficiary has a right of property in the document.

- 129 A different type of proprietary theory, and the one preferred by Bryson AJ in ***McDonald v Ellis***, is to the effect that having a proprietary right, not in the documents to which access is sought, but in the trust fund to which the documents relate, gives rise to a right to information about that fund. I will return to that version of a proprietary theory later.

What Schmidt Actually Decided

- 130 ***Schmidt*** is a decision of the Privy Council on appeal from the Isle of Man. At first instance, a complex order had been made, for disclosure of information relating to two trusts, “*running to 9 pages of typescript and including ... the names of over 60 companies (or other legal entities) established in different parts of the world*” (at [23]). That order had been set aside on appeal, but was restored by the Privy Council.
- 131 Mr Schmidt senior had been one of several eligible beneficiaries to whom appointments of capital and income could be made under the terms of two trusts, the Angora Trust and the Everest Trust, of which Rosewood was the trustee. The case proceeded on the basis that though Mr Schmidt senior was not the Settlor named in the documents establishing the two trusts that were in question, he was “*in substance a co-Settlor*” (at [8]). Mr Schmidt senior had written to the trustees of both trusts expressing a wish that, if he were to die, his share of the trust property be held for Mr Schmidt Junior. Mr Schmidt Junior sought disclosure from Rosewood of documents relating to the trusts, both in his capacity as the administrator of the estate of Mr Schmidt senior, and personally. The trustee opposed providing the documents, on the basis that Mr Schmidt Junior in his personal capacity “*was not a beneficiary in any sense of the word*”, and that Mr Schmidt senior

was “never more than “a mere object of a power who as such had no entitlement to trust documents or information”” (at [25]).

132 The argument in the Privy Council turned on whether Mr Schmidt Junior, in either of his capacities, had the kind of relationship to the trust that entitled him to disclosure of information concerning the activities of the trust. The case turned on this single issue of principle, not on any details of the order. The contention of Rosewood was that neither Mr Schmidt senior nor Mr Schmidt Junior had a proprietary interest in the trust funds, and a proprietary interest was necessary for a potential beneficiary of a trust to have a right to information about the trust. It was that broad submission that was rejected by the Privy Council. In other words the sole question related to the standing of a mere potential object of a power of appointment to obtain documents and information from a trustee, a question that had already been answered in the affirmative in New South Wales.

133 Lord Walker of Gestingthorpe summarised the conclusion as:

“51 Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion: see Lord Wilberforce in **Gartside v Inland Revenue Comrs** [1968] AC 553, 617-618 and in **In re Baden** [1971] AC 424, 456- 457, Templeman J in **In re Manisty's Settlement** [1974] Ch 17, 27-28 and Warner J in **Mettoy Pension Trustees Ltd v Evans** [1990] 1 WLR 1587, 1617- 1618...

52 Their Lordships are therefore in general agreement with the approach adopted in the judgments of Kirby P and Sheller JA in the Court of Appeal of New South Wales in **Hartigan Nominees Pty Ltd v Rydge** 29 NSWLR 405. That was a case concerned with disclosure of a memorandum of wishes addressed to the trustees by Sir Norman Rydge (who was in substance, but not nominally, the settlor). Kirby P said, at pp 421-422:

"I do not consider that it is imperative to determine whether that document is a 'trust document' (as I think it is) or whether the respondent, as a beneficiary, has a proprietary interest in it (as I am also inclined to think he does). Much of the law on the subject of access to documents has conventionally been expressed in terms of the 'proprietary interest' in the document of the party seeking access to it. Thus, it has been held that a cestui que trust has a 'proprietary right' to seek all documents relating to the trust: see **O'Rourke v Darbishire** [1920] AC 581, 601, 603. This approach is unsatisfactory. Access should not be limited to documents in which a proprietary right may be established. Such rights may be *sufficient*; but they are not *necessary* to a right of access which the courts will enforce to uphold the cestui que trust's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees. I agree with Professor H A J Ford's comment, in his book (with Mr W A Lee) *Principles of the Law of Trusts*, 2nd ed (1990) Sydney, Law Book Co, p 425, that the equation of rights of inspection of trust documents with the beneficiaries' equitable rights of property in the trust assets 'gives rise to far more problems than it solves' (at p 425): 'The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees ... The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts. It is the extent of that duty that is in issue. The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubts upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents.' "

- 53 Mahoney JA, at p 435, favoured the proprietary basis but recognised that it extended to information of a non-documentary kind. Sheller JA, at p 444, considered that inquiry as to an applicant's proprietary interest was "if not a

false, an unhelpful trail". All three members of the court expressed reservations about the reasoning and conclusions in *In re Londonderry's Settlement* [1965] Ch 918.

- 54 It will be observed that Kirby P said that for an applicant to have a proprietary right might be sufficient, but was not necessary. In the Board's view it is neither sufficient nor necessary. Since *In re Cowin* 33 Ch D 179 well over a century ago the court has made clear that there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis for requiring disclosure of trust documents; and *In re Londonderry's Settlement* and more recent cases have begun to work out in some detail the way in which the court should exercise its discretion in such cases. There are three such areas in which the court may have to form a discretionary judgment: whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court....
- 66 Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in *In re Baden* [1971] AC 424, 448-449) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.
- 67 However, the recent cases also confirm (as had been stated as long ago as *In re Cowin* 33 Ch D 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a

beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.”

134 The result reached concerning the facts of the case was that their Lordships declined to decide whether Mr Schmidt Junior was a beneficiary of any sort under the Angora Trust because it raised questions of construction the resolution of which would affect persons who were not parties to the suit (para [28]-[32], [68] (3)). Concerning the Everest Trust, Mr Schmidt Junior in his personal capacity was a possible object of a wide power to add beneficiaries, but in light especially of Mr Schmidt senior’s letter to the trustee was one *“who may be regarded ... as having exceptionally strong claims to be considered”* (para [33], [68] (4)). Distributions had been made to Mr Schmidt senior during his lifetime ([68] (1)), and to Mr Schmidt Junior in his role as personal representatives after the death of Mr Schmidt senior ([17]), but it was the contention of Mr Schmidt Junior that the entirety of his father’s interest had not been paid out. In his capacity as personal representative he had an entitlement to *“the fullest disclosure”* concerning the funds that had been allocated in this fashion (para [68] (1)).²⁷ As personal representative he also had *“a strong claim to disclosure of documents or information relevant to the issue whether, but for breaches of fiduciary duty (such as for instance overcharging) more funds would have been available for distribution to Mr Schmidt, and would or might have been allocated to him in practice”* (para [68] (2)).

135 It is to be noted that Lord Walker rejects not only the narrow version of the proprietary theory, whereby a proprietary right in the document in question is necessary before the beneficiary can see it, but also the broader version, whereby a proprietary right in the trust fund is necessary before a beneficiary

²⁷ When the case concerned just the question of standing the judgment is sparse about the facts, but it seems it was the son’s contention that, concerning some funds that had been *“allocated”*, his father was an actual beneficiary, not just a potential object of a power. Though the son’s contention had not been established, even at the prima facie level, even if that contention was wrong the father would still have been a potential object of the power. Thus the situation in *Wynne v Humberston* (para [26] above), where a claimant had not made out any basis at all for even a potential entitlement to the trust assets, did not apply here.

is entitled to information concerning the trust fund. Indeed he holds that a proprietary right in the fund is neither necessary nor sufficient.

Precedent Limitations Concerning Basis of Beneficiaries' Rights to Documents

136 Any Australian court approaching the question concerning beneficiaries' rights to trust documents must act within the limitations of precedent that bind that court.

137 There is no decision of the High Court of Australia that relates to a beneficiary's right to information or documents concerning a trust. However there is a significant dictum. In ***CPT Custodian Pty Ltd v Commissioner of State Revenue*** [2005] HCA 53; (2005) 224 CLR 98 at [17] the High Court approved the statement in ***Schmidt v Rosewood Trust***²⁸ that:

“... the right to seek the intervention of a court of equity to exercise its inherent authority to supervise and, if necessary, to intervene in the administration of trusts, "does not depend on entitlement to a fixed and transmissible beneficial interest".”

138 ***Hartigan Nominees Pty Ltd v Rydge*** (1992) 29 NSWLR 405 is the only decision of the New South Wales Court of Appeal that bears on the topic. It does not contain any binding *ratio decidendi* applicable beyond factual situations closely analogous to its own.

139 Sir Norman Rydge had caused a friend to set up a trust for the benefit of members of Sir Norman's family, that Sir Norman had then fed with significant assets. The plaintiff was the grandson of Sir Norman, and was held (by Mahoney J at 426-427, with the agreement of Kirby P at 408) to have rights of property under the trust deed. Specifically, he had:

“... in respect of the capital an interest vested in interest but not in possession, subject to various contingencies. Similarly, he has a contingent interest in income vested in interest but postponed to any

²⁸ [2003] 2 AC 709 at 729

nominated beneficiary and subject to the exercise by the trustees of their discretionary powers.”

- 140 As well, the plaintiff was one of the class of people to whom the trustees could appoint either capital or income.
- 141 While both Mahoney and Sheller JJA held (Kirby P dissenting) that the plaintiff was not entitled to inspect a memorandum of wishes that Sir Norman had provided to the trustee, their reasons for that conclusion differed. As I am now considering the case for the purpose of deciding what binding ratio it states, I will not discuss the judgment of Kirby P.
- 142 Mahoney JA at 431-438 drew a clear distinction between the right of a beneficiary to have access to documents outside the context of litigation, and the right of a beneficiary to have access to information through discovery or interrogatories for the purposes of litigation. Concerning the former situation (which was the relevant category in the case before him) Mahoney JA broke the analysis into three stages.
- 143 The first concerned who had standing to request information. He accepted, at 431, that a beneficiary may make such a request even though his interest is only contingent: **Re Dartnall; Sawyer v Goddard** [1895] 1 Ch 474. However, he doubted that merely being a possible object of a power of appointment, without any actual property rights, gave the right to demand information from the trustee.
- 144 Mahoney JA also made some obiter remarks about the possible extent of the obligation of a trustee to volunteer information to different classes of persons, as opposed to responding to a request for information. He held that the plaintiff, having a right of property, had the standing to seek information from the trustee.
- 145 Mahoney JA's second step was that the right of a beneficiary to have on request inspection of documents or disclosure of information was:

“... in general, limited to documents and information which is – or is in the sense here relevant – the property of the trust. It does not extend to documents or information as to which, as a beneficiary, he has no proprietary interest. It is not necessary that he have in it a present proprietary interest quantifiable in nature in a specific asset. A beneficiary may have an interest in it as part of an unadministered fund. But that which is sought must, in the relevant sense, be the property of the trust.” (432)

146 However, documents or information that the trustee prepared for his own purposes, or (like the memorandum of wishes) that was given to the trustee for his own purposes, was not “*the property of the trust*” in the relevant sense. Note that this involves two different types of proprietary interest, both of which must co-exist – a proprietary right of the beneficiary to documents or information, and that the documents or information must be the “*property of the trust*”.

147 Even concerning documents that were the property of the trust, there were two different circumstances that could result in a trustee having no obligation of disclosure to a beneficiary. One was when the information in question had been given to the trustee on the basis that it was to be kept confidential (433-434). The other was “*if the result of disclosure would be to make known the reasons why a discretionary power has been exercised in circumstances where the disclosure is not required and has not been made by the trustee*”.

148 His Honour regarded these principles as being the basis of the **Londonderry** decision (434-435), and held that the **Londonderry** decision “*should be followed by this Court. It is both correct in principle and in accordance with commonsense*” (435).

149 Mahoney JA, at 436, said:

“In a discretionary trust of this kind the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In cases of this kind, if a settlor’s wishes

cannot be dealt with in confidence, the purpose of the trust may be defeated.”

That reasoning bears a strong resemblance to the way it seems to me that Lord Truro reasoned in ***Beloved Wilkes***.

150 In applying the principles to the facts of the instant case, Mahoney JA said, at 437:

“In the circumstances of this case, it is, I think, proper to infer that the memorandum of wishes prepared by Sir Norman Rydge is, as a matter of probability, directed to matters of administration of such a kind that the document is not, in the relevant sense, part of the property of the trust. It is likely to have been given upon a confidential basis: reference is made to this in the correspondence between the trustees and the plaintiff. And the disclosure of what is said in it may, it may be inferred, be apt to give rise to family difficulties between the various parts of Sir Norman’s family. In the absence of evidence to the contrary, one or all of these inferences may, I think, be drawn. On this basis, I would regard the memorandum as not being a document which the plaintiff as beneficiary is entitled to inspect.”

151 Sheller JA, at 442-443 declined to accept the account given by Salmon LJ in ***Londonderry*** of “*trust documents*” because one of the characteristics was “*that the documents contain information about the trust which the beneficiaries are entitled to know. Such a definition assumes the answer to the question it is directed to solve and is accordingly, with the greatest respect, of no assistance*” (442-443). Sheller JA also rejected, at 443-444, a test based upon whether a beneficiary has a proprietary interest in a document as being “*if not a false, an unhelpful trail*”. He accepted, at 444-445, that,

“... the preservation of the right of trustees not to disclose the motives and reasons actuating them in coming to their decision requires that documents such as minutes of meetings and agenda which are likely to reveal such motives or reasons or the subjective process of reasoning need not be disclosed to a beneficiary.”

152 However in Sheller JA’s view, Sir Norman’s memorandum of wishes, while it may have been considered by the trustees, would not of itself disclose their reasons. Thus any principle whereby trustees need not disclose reasons for

discretionary decisions did not prevent disclosure of the memorandum. In Sheller JA's view, the critical reasons why the memorandum need not be disclosed was a combination of the facts that it had been disclosed to the trustees in confidence, and that there was no:

“... countervailing circumstance which calls for the disclosure of a document given to the trustees in confidence. Such a circumstance may spring from the nature of the document itself, as, for example, the documents of title of the trust, from want of good faith on the part of the trustees, or, perhaps, from some overriding public interest.”

- 153 It follows from this analysis that there is no requirement common to the judgments of Mahoney and Sheller JJA that the beneficiary have in any sense a proprietary interest in the document in question, or that the document be a “*trust document*”. If one, (perhaps charitably) regards the passage from Mahoney JA's judgment that I have quoted at [150] above as saying that *any* of the bases upon which he decided the memorandum was not amenable to inspection would suffice for that conclusion, the common ground between Mahoney JA and Sheller JA is that the confidentiality of the memorandum meant that it should not be disclosed, even though the plaintiff had a property right in the trust assets. As well, Sheller JA did not regard the confidentiality of the memorandum as in itself sufficient – that absence of “*some countervailing circumstance*” was also relevant in his Honour's view.
- 154 It is of some significance that the case proceeded on the basis that the reality that Sir Norman was the instigator of the trust was recognised, and that, though in form he was not the settlor, there was “*no distinction between these two*” (429, per Mahoney JA) or “*the settlor shared Sir Norman Rydge's intention as to the manner in which the trust should be conducted*” (446, per Sheller JA). On this basis, the court regarded Sir Norman's intentions concerning the trust as ones the trustee was obliged to carry out. One intention of Sir Norman that the trustees should carry out, was to keep the memorandum secret. But the contents of the memorandum themselves were regarded as merely expressing a wish, not as imposing an obligation, and so did not fall to be disclosed on the basis that it was part of the constitutive documents of the trust.

- 155 ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89 at [135] requires that intermediate appellate courts and trial judges should not depart from decisions in intermediate appellate courts in other States or Territories concerning the non-statutory law unless they are convinced that the decision is plainly wrong. Thus it is necessary to consider any decisions on the topic of intermediate appellate courts in other States and Territories.
- 156 There are two such decisions. The first is a decision of the Full Court of the Supreme Court of Queensland in ***Tierney v King*** [1983] 2 Qd R 580. It related to the Fire Brigades Union Employees' Superannuation Plan. Cl 7.7 of the deed required that "*the Trustees shall observe strict secrecy with regard to the affairs, accounts and transactions of the Plan, but this shall not prevent the publication of financial, statistical or other information to all Participants generally whenever thought fit by the Trustees*". Another provision of the deed required the trustees to cause actuarial valuation of the assets to be made periodically. The applicant requested the Trustees to provide him a copy of an actuary's report, but the Trustees refused. The appellant then brought a summons seeking to review the trustees' decision under section 8(1) ***Trusts Act 1973*** (Qld).²⁹

²⁹ That statutory provision states:

"(1) Any person who has ... an interest ... in any trust property or who has a right of due administration in respect of any trust, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved, may apply to the court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order ... as the circumstances require."

That section confers on the court a wider power of review of trustees' decisions than the court has under its inherent equitable jurisdiction, and its words appear to confer on the court power to require the trustees to give reasons. However, as Matthews J said at 583:

"... the object of section is not the substitution of a Judge's opinion for that of a trustee. The applicant carries a heavy onus of satisfying the Judge that there is a good reason for adoption of such a course and that the trustee has not exercised that "sound discretion" referred to by Fry J in ***In Re Roper's Trusts*** (1879) 21 Ch D 272."

157 There was evidence that the actuarial reports were used as the basis upon which trustees exercised their discretion concerning management of the plan, employment of the manager, investment of funds, the placing of reinsurance and other similar confidential matters.

158 Matthews J (with whom Kelly and Macrossan JJ agreed) said at 583:

"There is a general rule that a *cestui que trust* has a proprietary interest in and a right, therefore, to inspect trust documents (*O'Rourke v Darbishire* [1920] AC 581, at p 626; *Re Fairbairn* [1967] VR 633) and the appellant relies on this general rule; but even accepting that the documents, the subject of the application, are trust documents the rule, as was pointed out by Salmon LJ in *In Re Londonderry's Settlement* [1965] Ch 918 at pp 936-937 must be balanced with another which is to the effect that trustees acting in good faith are not bound to disclose reasons for the exercise by them of a discretionary power or the information (even if committed to writing) which may bear upon or affect those reasons. The actuarial reports are obtained by the respondents to enable them to exercise one or all of the powers which by clause 2.12 are entrusted to their discretionary decision. When one considers this in conjunction with the secrecy provisions of the deed ... one cannot be satisfied that this is a case for a Judge's interference. Moreover the right conferred upon the respondent in clause 7.7, by way of exception to the general provision, to publish financial, statistical or other information is, it seems to me, confined to a right to publish to all participants rather than to one or a limited number of them. There is an implication from it that one participant is not entitled to inspect documents containing such information."

159 This illustrates the important role of the constituent documents of trusts in determining the obligations of the trustee in a particular case. I doubt that it can be regarded as a decision that would deny a member access to such a report in the absence of the special provisions that were contained in this trust deed, and in the absence of evidence going beyond the generalities that were used in the present case to establish the supposed confidentiality of the documents or any prospect of real harm or inconvenience likely to result from disclosure of the actuary's report. To the extent to which [*Tierney*] endorses the reasons of Salmon LJ in *Londonderry*, and the conceptual appearance of "balancing" two "rules", I would be prepared to say it is plainly wrong. I note in this respect that Sheller JA in *Hartigan*

Nominees v Rydge regarded **Tierney** as of significance only to the extent “that it acknowledges ... that a settlor can effectively impose conditions of confidentiality on trustees” (at 446).

160 The second relevant decision of an intermediate appellate court is the decision of the Full Court of the Supreme Court of South Australia (Doyle CJ, with whom Perry and Martin JJ agreed) in **Rouse v IOOF Australia Trustees** [1999] SASC 181; (1999) 73 SASR 484.

161 The plaintiffs were investors in a managed investment scheme relating to the planting and exploitation of pine trees. The scheme took the form of a trust, of which the defendant was trustee, and management was carried out by a separate company. There were about 20,000 investors in the trust. The trustee had commenced litigation against the management company, and some other companies associated with the management company that played a role in the scheme, alleging breach of duty by those companies. That litigation had not been decided. In the present litigation, some of the beneficiaries of the trust sought access to some of the trustee’s documents, namely the trustee’s brief to counsel in the management dispute, and communications between the trustee and an organisation that purported to represent the investors. Though the report mentions a South Australian statutory provision relating to keeping and disclosure of records by a trustee³⁰, the decision was not based on that statutory provision.³¹

162 Doyle CJ said at [88]-[92]:

“In the case law one can find two different approaches to the basis of the right of a beneficiary to inspect trust documents. One basis is traced back to the words of Lord Wrenbury in **O’Rourke v Darbishire** [1920] AC 581 at 626:

“If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the

³⁰ Section 84B **Trustee Act 1936** (SA).

³¹ See at [66].

judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them."

Some of the later decisions take what His Lordship said quite literally, and treat him as holding that a beneficiary has an actual proprietary interest in trust documents, and that the existence of that proprietary interest is the hallmark of what is a trust document. I doubt whether that is what His Lordship intended. I consider that the true position is as stated by Dawson and Toohey JJ in **Breen v Williams** (1996) 186 CLR 71 at 89:

"But the right of access of a beneficiary to trust documents arises because of the beneficial interest of the beneficiary in the trust property and it is in that sense that the right may be described as proprietary."

On that point see also Gummow J in **Re Simersall** (1992) 35 FCR 584 at 588.

The other approach is that the right of a beneficiary to inspect trust documents is founded not upon any equitable proprietary right but upon the fiduciary duty of a trustee to keep the beneficiary informed and to render accounts. On this approach the existence of a proprietary right may be sufficient to grant a right of access, but is not necessary. This approach to the issue is to be found in **Hartigan Nominees Pty Ltd v Rydge** (1992) 29 NSWLR 405 at 421-422 Kirby P (diss) and at 442-445 Sheller JA.

It is unnecessary to resolve this issue. It is unnecessary to do so because the issue is whether a trustee has a discretion to refuse to permit inspection of trust documents under certain circumstances, and that issue arises whatever the basis of the right may be. Describing the right as a proprietary right does not do away with the issue of whether there are circumstances under which a trustee can refuse to permit inspection of trust documents: see **In Re Londonderry's Settlement** [1965] Ch 918."

So far, the decision notes differing views of the law without deciding between them.

163 The case seems to have been conducted on an assumption that the appropriate conceptual framework was that as a "general rule" (at [95]) a beneficiary of a trust had a right to inspect "trust documents", unless certain exceptional circumstances apply. As already explained, I doubt that that is

the correct conceptual framework. First, the notion of “*trust documents*” is question-begging. Second, the “*exceptions*” are indeterminate in scope.

164 However, a case is not authority for something it assumes rather than actually decides: ***Markisic v Commonwealth of Australia*** [2007] NSWCA 92 at [56] and cases there cited. As well, Doyle LJ noted that the cases to which he had been referred

“... recognise that the right of the beneficiary to inspect trust documents is not unqualified. They do not identify any underlying principle by reference to which the refusal of access may be justified.” (at [97])

165 Doyle CJ recognised that there could be a discretion to refuse access to the “*trust documents*”, and gave some examples of situations where such a discretion might arise. Specific examples identified by Doyle CJ at [98] ff were (1) when inspection is refused to maintain confidentiality of reasons for the exercise of a discretion when the beneficiaries have no right of access to those reasons (2) when the document in question has been received in circumstances of confidentiality, and (3) when “*a trustee, particularly a trustee conducting a business, would be put in an impossible position if the beneficiary of the trust could, as a matter of right, claim to inspect documents in the possession of the trustee and relevant to the conduct of the business.*” (at [100]).

166 He concluded at [101]-[102]:

“Ultimately, I would rest the existence of the relevant discretion upon the need to reconcile the undoubted duty of a trustee to make disclosure to beneficiaries of information about the trust, and the undoubted duty to permit the inspection of trust accounts and trust documents, with the equally fundamental obligation of a trustee to conduct the affairs of a trust, and particularly a trust which involves the conduct or management of a business, in the interests of the beneficiaries as a whole. I consider that on occasions the reconciliation of these interests may entitle a trustee to decline to provide information to particular beneficiaries, when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge its obligations under the trust. It may be that the ultimate foundation of the discretion is the obligation

of the trustee to discharge its duties to manage the affairs of the trust in the interests of the beneficiaries.

I wish to make it clear that the discretion that I envisage is a limited one, and must always be limited by the general duty of disclosure by a trustee to which I have referred. The existence of the discretion cannot be used as an excuse for paternalism or to disregard the interests of beneficiaries. Its existence depends upon the need to protect the trustee's ability to discharge its obligations. The availability of the discretion will depend very much upon the circumstances of the particular case.”

167 I conclude from this review that, while the decisions I have discussed in this section would all need to be taken into account, none of them provide binding authority.

The Principles Applicable

168 There are some fundamental principles about the way in which equity proceeds, that, at the risk of being thought too simplistic, I shall state.

169 One is that equity acts *in personam*. It looks at the situation in which an individual defendant finds himself, in all its factual complexity, and decides what the application of the broad standards of conduct that are equity's generative principles requires of that person in that situation.

170 Another is that if it comes to the decision that there has been a departure from those standards of conduct, it then fashions a remedy that is inherently discretionary. The remedy is inherently discretionary because it represents the judge's view of what practical course of conduct should be adopted, in the circumstances of the particular case, to redress or make good the departure that there has been from the standards of conduct required by equity, in so far as redress is in practical terms possible.

171 This very fact-specific methodology is quite different to a legal methodology that, code-like, formulates rules, of fairly specific content, and then applies those rules to the facts of the case at hand to arrive at an outcome in a way that seems to have as its model deductive reasoning.

172 A trust involves one person holding property on the basis that it will be used or applied for the benefit of another person, or persons, or for a particular purpose. To get any more detail than that concerning a particular trust, one needs to look to the document or documents, or the circumstances, that gave rise to the trust. The trust document or constitutive circumstances will be the place where one finds identification of the precise person or persons or purpose for whom or which the property is held, any directions about the precise interest that the person or purpose will have (eg that the interest is to arise, or to cease, on a person attaining a certain age, or some other condition arising, whether the interest is to be one in the capital or income of the trust assets, whether the interest is to be in the whole of the trust assets or some specified part), and any directions about the manner in which the asset is to be administered until it is distributed (eg directions about the manner of investment, powers of sale or leasing or postponement of sale, powers of using capital for maintenance or advancement, powers of trustees charging for services). Sometimes there are powers or duties imposed on a trustee by statute. It is a matter of construction of the statute whether such statutory powers or duties override contrary provisions in the express terms of the trust, or are subject to the express terms of the trust.

173 Beyond that, the equity court has developed various requirements for, and afforded various facilities to, trustees. They can all be traced back to a single origin – that the equity court will require a trustee faithfully to carry out the responsibilities of the office. *“The office”* is not regarded in some generic way – it is the task of being the trustee of the particular trust in question. There are some responsibilities of a trustee that all trustees have, simply because whatever the particular trust is, faithful performance of the office will require the trustee to act in a particular way. If there are responsibilities that a trustee must have to be called a trustee at all, those responsibilities are part of the *“irreducible core”* of being a trustee. There are some responsibilities that a trustee is likely to be held to have, unless the trust documents or constituent circumstances show that those responsibilities are not intended for the particular trust in question. There are some

responsibilities that the trustee of a trust has only by virtue of peculiarities of that particular trust.

- 174 One requirement of a trustee that is either part of the irreducible core, or the sort of obligation that will apply unless there are circumstances to show that it does not (it is not necessary for present purposes to decide which) is the obligation to account to the beneficiaries for the administration of the trust property.³²
- 175 The obligation to account is not just a matter of providing documents – if all the information needed is not recorded in writing, then there is an obligation to disclose the information.
- 176 At a fairly high level of generality, one can say that faithfully holding and dealing with property for the benefit of another person requires the trustee to be willing and able to inform that person what has been done with the property that is held for that person's benefit, unless there is some special reason why that is not so. Becoming more specific than that usually requires attention to be paid to the terms of the specific trust in question, and sometimes the specific problem that has arisen, for it is only by reference to such specifics that one can decide, concerning a particular trustee, what faithful performance of his office requires.
- 177 Concerning some practical questions of what faithful performance of the office requires very little if any extra information is needed beyond that the person in question is a trustee. Thus, for very many trusts, it is hard to see how the responsibilities of the office could be faithfully performed if the trustee did not keep books of account in accordance with a system that made the written accounts readily comprehensible to another person, and that contained a level of detail sufficient to allow the reader to understand

³² Another aspect of faithful performance of the office is that the trustees execute personally, not by proxy, discretions vested in them, unless the trust documentation says, or surrounding circumstances show, otherwise: **Attorney General v Scott** (1750) 1 Ves Sen 413 at 417-418; 27 ER 1113 at 1116. The obligation to give bona fide consideration to discretionary decisions is another example. cf Campbell J, Exercise by Superannuation Trustees of Discretionary Powers, [2008] 82 ALJ (forthcoming), accessible in speeches section of NSW Supreme Court website.

what was happening concerning the investments, income, expenditure and distributions of the trust fund. If the affairs of a particular trust were such that financial accounts by themselves were not enough to enable someone to understand what had been done with the trust assets, then additional records should usually be kept to enable that information to be given. If a trust is intended to last for years, written records should usually be kept, as faithful performance of the office involves recognising that beneficiaries ought be provided with an account of the trustee's stewardship even if the trustee has died or forgotten details before the time comes for providing that account.

178 But there are some trusts that are simple, and intended to be performed over a short period of time, which the trustee could faithfully perform with minimal documents, or sometimes no documents. If A and B make a bet, and each hands the amount of his wager to C to hold as trustee for the winner, and the outcome of the bet is known within the hour, C could give a faithful account of his trusteeship without any documents at all. A real estate agent who receives the deposit in a conveyancing transaction as trustee for the person who became entitled to it, to be invested at interest with the interest divided equally between vendor and purchaser, could usually give an adequate account of the trusteeship by providing a copy of a statement of account from the financial institution in which the money was invested.³³ In both these examples there is no diversion from it being a part of the faithful performance of the office that the beneficiaries be able to receive an account of what has been done with the trust assets, but there is a considerable difference in what the circumstances of an individual trust require, before faithful performance of the office of trustee of that particular trust could in practice be carried out, so far as accounting is concerned.

179 The content of the obligation to account could be influenced by the terms of the trust documentation. If the documentation requires the trustees to account to some specified person or group of persons, with certain types of

³³ Such a statement would usually show how much money was invested, when it was invested, when it was paid out, and the amount of interest earned.

information, at a certain time or times, those requirements are part of the duties of the office, and so must be carried out if the office is to be faithfully performed. Conversely, if the trust documentation excuses the trustee from keeping or rendering certain types of records, or making them available to particular persons, there is no failure to faithfully perform the office if the trustee does not keep or render those records, or does not make them available to the specified persons. It is only insofar as the trust documentation is silent that the general law has a role to play (subject to any overriding statutory obligations).

180 The content of the general law obligation to account is derived as a matter of implication. It involves thinking through what would be involved in faithful performance of the trust office, and filling in the gaps in what the settlor has expressly laid down. The standard for that gap-filling is what is necessary for faithful performance of the office. It is a somewhat more demanding standard than the standard of what is necessary for business efficacy, that is used in deriving implications in contracts. The model by reference to which contractual implications are derived presupposes parties at arm's length, each seeking (within the limits of good faith, so far as that is relevant to the particular contract) to maximise the benefit and minimise the cost and effort involved for himself in contractual performance. By contrast, the trustee has no interest of his own that he can legitimately advance by performance of the trust, except to the extent that the trust documentation allows him fees or otherwise excuses him from what otherwise would be his fiduciary obligations. And faithful performance of the office, in the eyes of equity, requires diligent, meticulous, conscientious effort. But it does not always involve doing everything that could possibly be done to carry out the trust – and indeed to the extent that carrying out work beyond what is needed for faithful performance of the office involved expenditure of the trust money there could be a duty not to do those extra tasks. Examples of this test of necessity can be seen in *Beloved Wilkes* (para [51] above), *Ex parte Inge* (para [59] above) *Hartigan Nominees v Rydge* per Mahoney JA (para [149] above) per Sheller JA (para [152] above), *Londonderry* per Danckwerts LJ

(para [114] above) per Salmon LJ (para [118] above), and Doyle CJ's reference to "*impossible situation*" in **Rouse** (para [165] above).

181 In deciding who is entitled to receive some degree of explanation of the affairs of the trust, the court is deciding a matter of the settlor's likely intention. That decision is arrived at in accordance with the sometimes less than compelling reasoning that I have earlier mentioned (para [64] above). It may involve a measure of individual judgment – eg it will probably be fairly clear if there are only two possible objects of a power of appointment that faithful performance of the office would require them to have access to a wide range of information, and also fairly clear that if there are a million possible objects faithful performance of the office would not require them to have access to the same range of information but there is room for argument about what the situation would be with fifty possible objects.

182 The course of authority before **Schmidt** had made clear that the court had power, in at least some cases, to require a person who was a mere potential object of a power of appointment to be given some information concerning the trust fund. The basis upon which such a potential beneficiary was entitled to that information simply could not be a proprietary right of any kind, because such a potential beneficiary had no such proprietary right. The way in which the court intervenes to assist such a potential beneficiary is by exercising its inherent jurisdiction to supervise trustees in the administration of trust funds. The equitable standard of conduct that is required in such a circumstance is that the trustee should diligently carry out the intention of the settlor. What the court is doing, when it intervenes in favour of such a potential beneficiary to require information to be provided, is taking the view that diligent performance of the settlor's intention and the office the trustee has undertaken requires that such a potential beneficiary be provided with certain information. It seems to me that when the equity court requires information concerning a trust to be provided to someone who happens to have a proprietary right in the trust fund, it is proceeding on exactly the same principles. In the case of a person with a proprietary right in some particular trust fund, it may be easier to conclude that carrying out of the settlor's

intention and the office the trustee has undertaken would require that person to be provided with particular types of information, but that is a matter about what is involved in performance of that particular trust.

183 However, even in relation to a person with a vested right of property in the trust fund, the circumstances of the particular trust might make clear that the trustee is obliged not to provide information, even to someone with a vested interest. That was exactly what was held to be the case in **Hartigan Nominees v Rydge**. If a parent, in setting up a family trust, took the view that it would sap a child's initiative if the child knew it was due to come into a sizeable fortune, and thus forbade the trustee to disclose anything about the trust to the child until the child reached a particular age, that child would have no right to information about the trust, notwithstanding that it had a vested right of property, until it reached that age.

184 The principle that the manner in which trustees are required to account depends on the constitutive documents of the trust is well established: **Attorney General v Earl of Stamford** (1842) 1 Ph 737 at 747; 41 ER 812 at 817. More recently, **Tierney v King** shows how the provisions of the deed, even in relation to a superannuation plan, could result in the intention of the settlor being that only limited information concerning the trust be provided to members, notwithstanding that members of a superannuation plan would ordinarily have vested rights of property.

185 In my view there is no invariable principle whereby the trustee is not obliged to disclose reasons for a discretionary decision. Rather, courts need to decide, construing each trust deed individually in its context, whether faithful performance of the intention of the settlor of that particular trust deed requires information of the type that the court is considering to be disclosed to the relevant class of beneficiary, to be kept secret from the relevant class of beneficiary, or to be disclosed or not disclosed as the trustee thinks best.

186 In my view, recognising that an order of a court concerning disclosure of information relating to a trust to a beneficiary or potential beneficiary is

discretionary does not involve deserting the firm ground of sure principles for a trackless sea of uncertainty. It is doing no more than recognising that trust obligations need to be decided as a matter of implication when the trust documents are silent, and that every equitable remedy is discretionary.

187 Lord Walker in **Schmidt** identifies several topics concerning which he says discretionary judgments are involved (para [54] of the speech quoted at para [133] above). Of these, in my respectful view, it could be misleading to categorise who has standing, and to what documents a particular person can get access, as discretionary judgments. Rather, when those matters need to be decided as a matter of construction or implication rather than from explicit statement in the trust documentation, they are decided by the application of a legal test that involves questions of judgment and extent. That something is decided in that way has been held in some contexts not to make it discretionary.³⁴ Whether in this context it is called discretionary does not matter much, so long as one is clear about what one is doing and by reference to what principles. Of the other discretionary matters that Lord Walker identified, questions of production of documents are to some extent part of the process of implication whereby one decides whether a particular beneficiary is entitled to particular information, and to some extent the discretionary working out of the terms of an order. Questions of limitation of the use made of information that is disclosed are discretionary matters of formulation of an order to fit the instant case.

188 In the context of disclosure of information concerning trusts, the exercise of any of these discretions must take into account the relevant principle, namely

³⁴ it could be misleading to categorise who has standing, and to what documents a particular person can get access, as discretionary judgments. Rather, when those matters need to be decided as a matter of construction or implication rather than from explicit statement in the trust documentation, they are decided by the application of a legal test that involves questions of judgment and extent. That something is decided in that way has been held in some contexts not to make it discretionary (eg a finding that a contract is “unjust” under s 7(1) **Contracts Review Act 1980: Perpetual Trustee Company Limited v Khoshaba** [2006] NSWCA 41 at [30]–[41] per Spigelman CJ, at [107], [110]–[111] per Basten JA; **Antonovic v Volker** (1986) 7 NSWLR 151 at 154–155 per Samuels J; **Beneficial Finance Corporation Limited v Karavas** (1991) 23 NSWLR 256 at 261–263 per Kirby P, at 270–1 per Samuels JA; or a determination that a testator failed to make adequate provision for the proper maintenance and support of a dependent applying for an order under s 3 **Testator’s Family Maintenance and Guardianship of Infants Act 1916: White v Barron** [1980] HCA 14; (1980) 144 CLR 431 at 441–443 per Mason J, at 456–457 per Wilson J (with whom Stephen J agreed generally), at 448–449 per Aickin J; **Coates v National Trustees Executors and Agency Co Ltd** [1956] HCA 23; (1956) 95 CLR 494 at 508–9 per Dixon CJ).

that the task of the court is to require the particular trustee in question faithfully to perform the intention of the settlor and the office of trustee, and if the trustee has strayed from that course, to make whatever order is appropriate in the circumstances to enable that intention to be effected, and whatever is necessary to carry out that office to be done. Concerning very many situations where a beneficiary seeks access to information about a trust, the outcome will be every bit as predictable as the outcome of, say, a suit for specific performance – that is, there will be some clear cases, and some not so clear cases.

- 189 I do not believe that explicit recognition that access to information is granted as an exercise of the inherent jurisdiction over trusts, and involves some discretionary judgments, involves any greater uncertainty than was recognised in previous decisions. The previous case law has recognised, even concerning cases where the beneficiary has a vested interest, that the beneficiary is usually entitled to information, but entitlement always depends on the circumstances of the individual case. There, there was a reference to a “*prima facie right*” in **Clarke** (para [23] above), **Talbot v Marshfield** (para [27] above), **In re Cowin** (para [71] and [79] above) and **In Re Fairbairn** (para [123] and [125] above). Other statements that as a “*general rule*” or “*in general*” beneficiaries are entitled to information about the trust (eg Mahoney JA in **Hartigan Nominees v Rydge** (para [145] above), **Tierney v King** (para [158] above), **Avanes** (para [69] above), **O’Rourke** (para [85] above), Salmon LJ in **Londonderry** (para [119] above), **In re Fairbairn** (para [125] above) admit, by that language, the possibility of cases where the rule does not apply. Danckwerts LJ in **Londonderry** explicitly recognised that the right of disclosure cannot apply to all “*trust documents*” (para [115] above), and so did the South Australian Full Court in **Rouse** (para [164]-[166] above).
- 190 Bryson AJ in **McDonald** also recognised that a beneficiary’s entitlement to information existed “*unless there is a conflict with some other principle which Equity must recognise*” (para [5] above), and that there could be a discretionary ground on which disclosure could be refused (para [9] above).

191 In my view **Schmidt** did not discard an old principle for a new. Rather, it applied the principle that has always been the generative principle of the court's role in enforcing trusts.

Some aspects of the practical operation of litigation relating to deceased estates

Some aspects of the practical operation of litigation relating to deceased estates[1]

To cut down on wordiness in this paper, I shall proceed on the assumption that all people making wills are male, and all people seeking probate of wills are female.

There are two basic types of grants of probate -- grants in common form, and grants in solemn form. The vast majority of grants of probate are grants in common form.

Administrative Organisation of the Probate List

The Probate List in the Supreme Court contains both proceedings seeking grants of probate in common form, and proceedings seeking grants of probate in solemn form. The Probate List is organised administratively so that there is a Probate List Judge, who has ongoing oversight of the list and deals with most of the interlocutory disputes and short matters which arise in the list. Windeyer J is presently the Probate List Judge. It is also usual for there to be, without there being any formal appointment, a comparatively small group of other judges who deal with interlocutory problems or short matters concerning probate matters if for any reason it is inconvenient for the Probate List Judge to do so. At present Young CJ in Eq and I fill that role. Final hearings which are not short concerning probate matters could be heard by any judge in the Equity Division.

There is a Probate List in which matters are listed for hearing every Monday during the law term. The vast majority of probate matters never appear in any Monday list, because they can be dealt with administratively, on the papers. It is only those matters in which there is a prospect of there being some contention, or a need for directions which cannot be adequately dealt with by the Registrar making requisitions, which are listed in a Monday list.

There are two parts to a Monday probate list. One part is returnable before the Registrar, and another is returnable before the Probate Judge. Broadly, the Registrar deals with those applications which are within his own power, and supervises the preparation of applications which are not within his own power, or which for any reason he decides are appropriate to be dealt with by a judge. The Registrar has a very broad range of powers concerning the matters which are listed in the Probate List: Part 78 Rule 5 **Supreme Court Rules 1970**. Whatever is not in the Registrar's list is in the Probate List Judge's list. If a matter is listed in the Registrar's list, and he decides it is appropriate to be referred to the Probate List Judge, it is frequently referred on that same day.

Grants in Common Form and Grants in Solemn Form

A grant in common form is made by the Registrar, following a hearing on papers conducted in Chambers. The grant takes the form of an order of the Supreme Court. Thus it provides a valid authority to the executrix who is named in it to deal with the assets of the estate, and exercise all the powers of an executrix. It is, however, inherently revocable. If it is revoked, dealings with third parties which have been conducted on the strength of it are valid -- thus, if a legal personal representative appointed by a grant in common form pays a debt, or receives a debt which was owing to the deceased, or compromises a claim against the estate, those dealings are valid even after the grant has been revoked: cf **Re DEF and the Protected Estates Act 1983** [2005] NSWSC 534; (2005) 192 FLR 92 at [19] – [20].

If a distribution to a beneficiary is made, and the grant is later revoked in circumstances where it turns out that that beneficiary ought not have been paid (as happens, for instance, if a later, and different, will is found to the will which has been admitted to probate) then that beneficiary will have a personal obligation to repay the money received, or reconvey the property distributed in specie: **Re Diplock; Diplock v Wintle** [1948] 1 Ch 465. As well, because the overpaid beneficiary received the distribution as a volunteer, it will be possible to trace into any property still in the hands of that beneficiary and into which the distribution has been converted, and recover that property in specie: **ibid**, at 516ff.

A grant in solemn form aims to decide finally, and as against the whole world, whether a particular will is the last valid will that the deceased executed. If that aim is successfully achieved, then on the issue of whether a particular will is the last valid will that a deceased executed, a grant in solemn form is not revocable. But there are numerous exceptions to the finality of a grant in solemn form. Mason and Handler, **Wills Probate and Administration Service New South Wales** para [6061] list some of the circumstances in which these exceptions arise as:

“(a) a later will is subsequently discovered (cf Clyne, “Revocation of Probate Granted in Solemn Form” (1959) 33 ALJ 232);

(b) it later emerges that the testator married after the execution of the will (cf s 15 [1057]) or that the testator's marriage was terminated after execution (cf s 15A [1058])

(c) the judgment was obtained by fraud: **Birch v Birch** [1902] P 130;

(d) there was some procedural irregularity or unavoidable accident which prevented the party opposing from taking part in the proceedings: **Re Barraclough** [1967] P 1; **In the Estate of Langton** [1964] P 163; and see Pt 40 r 9 of Supreme Court Rules 1970."

As well, and most importantly, a person who has an interest in whether a grant is made in a particular estate but does not have notice of the proceedings, and a person who has notice of the proceedings but does not at that time know facts which gave him or her an interest, is not bound by the grant: **Young v Holloway** [1895] P 87; **Osborne v Smith** (1960) 105 CLR 153 at 158-9; **In the Estate of Langton, dec'd** [1964] P 163. Further, a grant in solemn form can be revoked if, for instance, the executrix misbehaves, but in that circumstance the appropriate remedy is to make a grant of letters of administration with the will annexed, concerning the will which has already been decided to be the last valid will which the deceased made.

Because of these exceptions to the finality of a grant in solemn form, both the Court, and the litigants, have an interest, before a grant in solemn form is made, in achieving as high a level of confidence as is possible that everyone who has an interest in the outcome has had the opportunity to be heard. There are two types of procedural step that aim to achieve this.

Caveats

The first type of procedural step which aims to ensure that a probate suit is properly constituted applies in a situation where someone believes that a grant might be sought in a deceased estate, in which that person claims to have an interest. Such a person can lodge a caveat in the registry of the Court, under the power conferred by section 144 **Wills Probate and Administration Act 1898**.

After the enactment of the **Supreme Court Act 1970**, there were two different types of caveat:

(1) A caveat requiring proof in solemn form of a will may be lodged under Part 78 Rule 62 **Supreme Court Rules 1970**. (Part 78 **Supreme Court Rules 1970** continues to govern probate matters notwithstanding the enactment of the **Uniform Civil Procedure Rules 2005**.) That type of caveat is one which entitles the caveator to raise any matters which go to due execution of the will: **Hay v Simpson** (1890) 11 NSWLR 109, 114-115; **Beatson v Perry** (1906) SR 167, 168, 169; 23 WN 51, 52; **Hughes v Public Trustee** 19th August 1980 Court of Appeal (unreported) at 2 of Transcript of Judgment per Hutley JA; **Azzopardi v Smart** (1992) 27 NSWLR 232 at 236-238; Hastings and Weir: **Probate Law and Practice** 2 Ed. (1948) 322. It has been held that an allegation of forgery is one which goes beyond challenging due execution: **Ragany v Pusztai** (Powell J, 19 June 1992, unreported). As Powell J put it in **Gurr v Harris; the Estate of the Late Ethel Williams Simmons deceased** (18 September 1992 unreported):

"... a Caveator seeking only proof in solemn form is limited to putting due execution in issue, and to cross examining the attesting witnesses as to that issue; such a Caveat does not, as most practitioners seem to believe, confer on the Caveator some form of roving commission entitling him, even in the absence of evidence, to raise any, and every, ground of invalidity which may take his fancy.

(2) A general caveat is lodged under Part 78 Rule 61 **Supreme Court Rules 1970**. Any person who claims to have an interest in the estate may lodge such a caveat. A caveat of this kind requires that no grant of probate or reseal be made in the estate without prior notice to the caveator. It is this type of caveat which must be used to raise any issues going to the validity of the will other than lack of due execution. Thus if, for instance, someone wants to allege that a will is invalid because the testator lacked testamentary capacity, a general caveat must be lodged.

Since the enactment of the amendments to the **Wills Probate and Administration Act 1898** which allowed informally executed documents to be admitted to probate, there has also been a third type of caveat, whereby a person who claims he or she would be affected by a grant of probate of an informally executed document requires that no grant of probate of such a document be made without that person being given an opportunity to be heard: Part 72 Rule 62A **Supreme Court Rules 1970**.

All caveats stay in force for six months from the date of lodgement, unless the court extends the period of the caveat: Part 78 Rule 63 **Supreme Court Rules 1970**. As well, the caveator can sometimes withdraw the caveat (Part 78 Rule 64-67), or there can be contested interlocutory proceedings about whether the court should order that the caveat cease to be in force (Part 78 Rule 69).

It is an essential requirement of a valid caveat that the caveator have an interest in the relevant estate. As Powell J put it in **Westall v Morton; the estate of Nita Helen Morrissey deceased** (18 September 1992 unreported):

"... 1. although the provisions of s144 of the **Wills Probate and Administration Act 1898** ("the Act") would seem to indicate that it is open to any person to lodge a Caveat, it is to be remembered that Probate litigation is what might conveniently be called "interest litigation", it following that a Caveator must show that

he has a relevant interest in the Estate of the relevant deceased (see, for example, **Bascomb v Harrison** (1849) 2 Rob 118; 163 ER 1262; **Bull v Fulton** (1942) 66 CLR 295, 337 per Williams J; **Re Devoy; Fitzgerald v Fitzgerald** (1943) QSR 137; **Hughes v Public Trustee** 19th August 1980 Court of Appeal (unreported) at 2 of Transcript of Judgment per Hutley JA;

2. put compendiously, a Caveator will show a relevant interest if he is able to show that his rights will, or may, be affected by the grant (**Re Devoy; Fitzgerald v Fitzgerald** (supra)). Thus, the executor of, or a beneficiary under, another Will than that propounded has a relevant interest in the Estate of the relevant deceased, as also do the next of kin, unless there are other Wills than that sought to be propounded, the validity of which other Wills is not impugned. However, a creditor does not have a relevant interest unless he has obtained a grant of administration (**Burroughs v Griffiths** (1754) 1 Lee 544; 161 ER 201; **Dabbs v Chisman** (1810) 1 Phill 159; 161 ER 946; **Menzies v Pulbrook** (1841) 2 Curt 845; 163 ER 605)."

There is further consideration of what counts as a relevant interest in Mason & Handler, **Wills Probate and Administration Service New South Wales**, para [1677.4].

A caveator who has filed a general caveat is expected, on the return of a summons for an order that the caveat cease to be in force, to have available for filing evidence demonstrating how the interest the caveator claims arises, and raising a prima facie case of the grounds of invalidity relied upon; if that evidence is not available it is likely that the caveat will be ordered to cease to be in force, with costs against the caveator: **Beatson v Perry** (1906) 6 SR 967; **In the Will of O'Driscoll** (1929) 29 SR 559; **Ragany v Pusztai** (Powell J, 19 June 1992, unreported, but accessible online in Butterworths unreported judgments).

The caveat is a document lodged in court, in connection with court proceedings which are on foot or anticipated (i.e., the grant of probate of the will to which the caveat relates) and might result in interlocutory proceedings to have the caveat cease to be in force. Thus, a lawyer acts properly in making allegations of impropriety in a caveat only if the lawyer has the same sort of basis for making those allegations as would be needed to make corresponding allegations of impropriety in a pleading: Campbell, "The Purpose of Pleadings" (2004) 25 Australian Bar Review 116 at 125 ff. It follows that no lawyer should be involved in lodging a caveat on a speculative basis, in the hope that some evidence on which it could properly be supported in court might turn up. Practitioners might read the decision in **Ragany v Pusztai** to appreciate the stringency of the criticism with which their conduct might be met if they ignore these precepts.

Citations

The second type of procedural step which aims to ensure that a probate suit is properly constituted is the issuing of a citation.

There are two different types of citation concerning wills. One of them is used if a person is named as executrix in a will, but is not taking steps to obtain a grant of probate of that will. In that situation, a person who has an interest in probate of that will being granted can cause a *citation to take probate* to be issued: section 69 **Wills Probate and Administration Act 1898**, Part 78 Rule 52 **Supreme Court Rules 1970**. If an executrix named in a will is not seeking probate of it, a citation to seek probate can also be issued by a person who has an interest in establishing that that will is not valid, so that probate of a different will may be obtained or so that it can be established that the deceased died intestate. In the latter of these situations, it would be appropriate to ensure that other claims were made in the suit, by cross-claim, so that all questions arising about who was entitled to a grant of representation were decided in the one suit.

If there are contentious proceedings for a grant, any party to those proceedings can apply to have a person who is not presently a party, but who has an adverse interest to that of the applicant, to be issued with a *citation to see the proceedings*: Part 78 Rule 53 **Supreme Court Rules 1970**. One common situation in which this type of citation is issued is where an executrix named in a will wishes to seek a grant, and wants to ensure that some person whose interests might be affected if a grant were to be made is bound by the court's decision. One sort of person who might fall into that category is someone who is named as either executrix in, or beneficiary under, a will that the deceased made, but which is not the will of which the executrix is seeking probate. Such an alternative will might be an earlier will, or a later will, than the will of which the executrix is seeking probate, or it might be an informal document which might possibly be the subject of a grant under section 18A. Another sort of person who might fall into that category is someone who would take on intestacy, if it were to turn out that the deceased had left no valid will at all. A citation to see proceedings can be issued other than by an intending executrix, however -- anyone who is already a party to the proceedings can issue such a citation.

When a person has been served with a citation, they have a period of time within which to elect whether to become a party, or to be bound by the result if they choose not to become a party: Part 78 Rule 53, 54 **Supreme Court Rules 1970**.

Administrative and Contested Grants of Letters of Administration

Any grant of letters of administration on intestacy is a grant by the court, and there is no distinction drawn between grants

in common form and in solemn form, so far as that type of letters of administration are concerned. Even so, that type of letters of administration might issue as a result of a "hearing" on the papers and in Chambers by the Registrar, or following a contested hearing.

Further, it is possible for there to be a grant in solemn form of letters of administration with the will annexed, if a will has been proved in solemn form, but the will does not appoint an executor, or for any reason the appointed executor is unwilling or unsuitable to act.

In relation to proceedings for a grant of letters of administration, it is also possible for a person who has a claim to be granted letters of administration to have a citation issued to anyone who has a superior title to obtain a grant of administration, requiring that person with a superior title to pray for administration: Part 78 Rule 51 **Supreme Court Rules 1970**.

Practical messages concerning constitution of a probate suit

Usually, the Registrar will not allow a contested probate matter to be fixed for hearing unless he is satisfied that he is aware of all the various realistic claims there might be concerning what is the last valid will of a particular testator, and that all appropriate people have been cited or are otherwise joined to the suit. However, leaving it to the Registrar to sort out the constitution of the suit could cause delay. It is more efficient if you work out yourself, as best you can, who ought be parties to the suit, and make sure that all those parties are cited or in some other fashion bound to the result of the proceedings.

As explained earlier, the lodgement of a caveat can give rise to an interlocutory hearing, in a piece of probate litigation, about whether the caveat should remain in force. In the ordinary course of things, an application that a caveat not remain in force is made by a motion, returnable before the Registrar. Such applications are, if possible, referred by the Registrar to the Probate Judge on the return day. The practical message for applicants in such a case is: make sure that you have all the evidence that you need for your application prepared in sufficient time before the first return day. The practical message for respondents in such a case is: have your evidence prepared and be ready to argue the case on the return day, as the Registrar will refer it if he can.

Applications for probate concerning informal wills

Where a person died after 1 November 1989 leaving a document which purports to contain testamentary intentions, probate of that document can sometimes be granted under section 18A **Wills Probate and Administration Act 1898** even if the execution of that document has not been carried out in the way that section 18 **Wills Probate and Administration Act 1898** requires.

There are special provisions under Part 78 Rules 34E – 34J **Supreme Court Rules 1970** to achieve a high level of practical assurance that all people whose interests might be affected by the granting of probate of an informal will are bound by it. Those procedures require the filing of the consent of an affected person, or the service of a notice, in a particular prescribed form, upon that person, or else a decision by the Court that consent, or service of the notice, can be dispensed with. If a person upon whom one of these notices is served does not consent to the granting of probate of the informal document, that person can become a defendant in contested litigation. These rules are designed to achieve the same practical objective as the issuing of citations, but they achieve that practical objective by a different procedural means.

If the procedures have been gone through to get the suit properly constituted, and the evidence is in proper form, and there is no opposition to the grant, the Registrar will endeavour to refer a section 18A application to the Probate Judge on the first return date. The practical message is: try to have such applications ready on the first return date.

What needs to be pleaded and proved in contested proceedings -- interaction of onus, presumptions, and pleadings

In probate litigation there is a complicated interaction of the law concerning onus of proof, presumptions, and pleadings.

This is not the place for a full exposition of those topics. The statements of legal principle concerning what needs to be proved, and onus of proof, that are repeatedly referred to are those contained in **Bailey v Bailey** (1924) 34 CLR 558 and **Estate of Hodges, dec'd; Shorter v Hodges** (1988) 14 NSWLR 698 at 704 - 707. The whole question of what needs to be established for testamentary capacity has recently been helpfully reviewed by Burchett AJ in **Donato v Mangravite, Estate of Donato** [2005] NSWSC 488. What I intend to deal particularly with is how onus of proof and presumptions affect pleading.

While it is necessary, if there is an issue about it, for the person propounding a will to prove that the testator knew and approved of the will, and had capacity to make a will, and intended the particular document which was actually executed to operate as his will (had *animus testandi*, in the Latin tag sometimes used) those matters would usually be presumed, through the operation of a presumption of fact, if an instrument appears on its face to be regular, and to have been

regularly executed. Williams Fullagar and Kitto JJ in their joint judgment in **Boreham v Prince Henry Hospital** (1955) 29 ALJ 179 at 180 said:

“The proper approach of the Court to the question whether a testator has testamentary capacity is clear. Although proof that a will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator’s competency, the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given.”

Ordinarily, in a statement of claim seeking probate in solemn form, a plaintiff should plead the death of the deceased, that the deceased left property in NSW, the facts by which the plaintiff claims entitlement to the grant, the execution of the will, the attestation of the will, and advertisement of the application. A precedent for the form of a statement of claim is contained in Mason and Handler, **Wills Probate and Administration Service, New South Wales**, Para [6081]. (The English form of statement of claim, a precedent of which is in Tristram & Coote’s Probate Practice, 19th ed 1946, p 1160, is even briefer than this, and is not recommended.)

It is not the usual practice for the plaintiff to plead in the statement of claim either testamentary capacity, or that the testator knew and approved the contents of the will, or that the testator executed the document intending it to be his last will. The reason for proceeding this way is that, if a defendant were to not admit those allegations, the pleadings could thereby give rise to a false issue. However, if a plaintiff is in a situation of recognising at the outset that there is going to be an issue about, for instance, capacity, or knowledge and approval, it can sometimes be appropriate to include those allegations in the statement of claim. One situation where the plaintiff might recognise the inevitability of such an issue is where the will on its face was bizarre.

The common sense of proceeding in this way, to ensure that only real issues are fought, is quite clear. As well, I think that a justification for this practice which has grown up can be found consistently with the rules of pleading. There is a pleading rule, contained in Rule 14.11 **Uniform Civil Procedure Rules 2005**, that:

If it is a condition precedent necessary for a party’s case in any pleading that:

- (a) a thing has been done, or
- (b) an event has happened, or
- (c) a state of affairs exists, or has existed at some time or times, or
- (d) the party is ready and willing, or was at all material times ready and willing, to perform an obligation,

a statement to the effect that the condition has been satisfied is taken to be implied in the party’s pleading.

It seems to me that it is possible to regard knowledge and approval, capacity, and *animus testandi* as conditions precedent to the case of a person seeking to propound a will. Thus, allegations of these matters are taken to be implied in a statement of claim seeking probate.

There are two other pleading rules that are relevant here. Rule 14.14 **Uniform Civil Procedure Rules 2005** includes:

- (2) In a defence or subsequent pleading, a party must plead specifically any matter:
 - (a) that, if not pleaded specifically, may take the opposite party by surprise, or

Rule 14.26 includes:

- (1) An allegation of fact made by a party in a pleading is taken to be admitted by any opposite party required to plead in response unless:
 - (a) in the pleading in response, the opposite party traverses the allegation, or
 - (b) a joinder of issues under rule 14.27 operates as a denial of the allegation.

(2) A traverse may be made by denial or by a statement of non-admission, either expressly or by necessary implication, and either generally or as to any particular allegation.

The effect of those two last mentioned rules is that, if a defendant in a suit for probate in solemn form wishes to contest knowledge and approval, capacity, or *animus testandi*, the defendant should raise that issue in his or her defence. If the defendant does not raise the issue in his or her defence, the implied allegations concerning those three matters will be taken to be admitted.

The situation concerning pleading of these matters is, it seems to me, closely analogous to the situation concerning pleading a statement of claim for breach of contract. There, a plaintiff does not plead that the contracting parties had capacity to enter a contract, even though capacity to enter a contract is a legal pre-requisite to there being a contract, and if the defendant were to deny that any contracting party had capacity, the legal onus of proving capacity would lie on the person alleging the contract had been entered.

The situation concerning the pleading of capacity, knowledge and approval, and *animus testandi* differs, it seems to me, from the situation concerning the deceased having died leaving property in New South Wales. For the deceased to have died leaving property in New South Wales is a necessary condition for the Supreme Court of New South Wales to have jurisdiction to make a grant at all. In this way, dying leaving property in the state is more than a mere condition precedent to a cause of action.

There are professional constraints on lawyers being involved in the raising of baseless allegations in pleadings. Any contesting, in a defence, of knowledge and approval, capacity, or *animus testandi* would need to be done within the confines of those professional constraints.

If, notwithstanding those constraints, a defendant raised an issue of knowledge and approval, capacity, or *animus testandi*, and presented absolutely no evidence on those topics, and the will looked regular on its face and appeared to be regularly executed, the operation of the presumptions of fact mentioned earlier would ordinarily be sufficient to enable those issues to be treated as proved. (In a similar fashion, if a defendant to an action for breach of contract alleged that the plaintiff lacked capacity to enter a contract, but presented no evidence on that topic, the factual presumption of capacity of an adult person would suffice to discharge the plaintiff's legal onus of establishing the issue so raised.)

However, if the defendant raises some evidence to show that there is a real question concerning any of capacity, knowledge and approval or *animus testandi*, the onus of proof of establishing them lies on the person propounding the will.

Testamentary capacity of knowledge and approval of the will

Deciding whether a person has testamentary capacity is deciding whether he has the mental skills needed to be able to make a will. Before probate is granted, there can also be a separate and different question, to do with whether, if the testator has testamentary capacity, that capacity was in fact exercised on the occasion of making the will in question. That separate and different question concerns whether the testator knew and approved the contents of the will. To know and approve the contents of the will involves the testator *understanding* the terms of that particular will, and *deciding* that he actually wants it to be his will. Understanding that matter, and deciding that matter, are both mental acts of the testator, and are particular exercises of the capacity to make a will.

The way one proves knowledge and understanding is, usually, by proof

- Of testamentary capacity (if that is in issue),
- that the will was read over to the testator,
- that to the necessary extent was explained, and
- that his response was the type of response that a person who understood it would give.

If the will in question is a really simple will (for instance, one which just appointed an executrix, and then makes a handful of gifts without any complications like substitutionary gifts, and where there are no special powers conferred), and there is no reason to believe that the mental faculties of the testator might be impaired in the slightest, it might sometimes be sufficient to show that the testator was given the opportunity to read the will to himself, and appeared to understand it, and said that that was what he wanted. However, if there is the slightest doubt about these things, by far the most satisfactory way of establishing that a testator really understood the will is by showing that it was read out aloud, explained orally, face-to-face. If the case is one where knowledge and approval were in issue but testamentary capacity was not, it might be prudent to also give evidence of the circumstances of giving instructions for the will.

Proof of testamentary capacity

Deciding whether a particular testator had testamentary capacity is a decision about a question of fact. It is the type of factual decision which is a conclusion, a judgment based on a variety of pieces of evidence.

The factual matters that are relevant to the court's ultimate judgment about whether a person has testamentary capacity can be influenced by some matters of law, about the nature and manner of operation of a will. One important such matter of law is that the will disposes of the property of a deceased person after death. However, there are far more matters of law than that which are relevant to the manner of operation of a will which can bear upon questions of testamentary capacity. They include that a will is a document that operates from death, is revocable until death, is able to revoke prior wills, is able to appoint an executrix (i.e. a person who will have certain duties, powers and discretions that the law automatically confers on an executrix concerning the collection and distribution of the deceased's property), that it can confer special powers on an executrix that the executrix does not automatically have, and that it can limit the operation of certain powers that the executrix would automatically have if the will did not say otherwise. Whether all of these matters are relevant to a decision about whether a particular testator had testamentary capacity will depend upon the particular will that he has made.

The question of whether a person has testamentary capacity is one that is asked as at a particular time, namely the time when the will is made. More particularly, it is the time of giving instructions for a will -- if a person has capacity at the time of giving instructions, but deteriorates mentally between that time and the time of execution, the will can be valid if at the time of execution the testator can understand that the document being executed is the document he instructed be prepared, even if he would not be capable of giving those instructions afresh.

The question of testamentary capacity is posed in a general way -- does the person have capacity to make a will. That is because the exercise of making a will involves being able to make choices between the alternative wills that that person might make. But, like many legal questions, how one goes about answering the question of whether a person has legal capacity is influenced by the purpose for which the question is being asked. In the context of a probate suit, that purpose is deciding whether *a particular document* that the testator in question has executed is a valid will. So the choices likely to have been involved in making *that particular will* are of particular importance.

The usual authority quoted concerning testamentary capacity is **Banks v Goodfellow** (1870) LR 5 QB 549 at 565. There Cockburn CJ said:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act, and its effects; shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

That passage is quoted repeatedly in later cases.

But one needs to remember what it is. First, it is a statement made in a case where the testator suffered from a serious mental illness, and the question was whether that illness had influenced his will making. That is not the usual context in which, these days, questions of testamentary capacity arise. Concerning the more usual situation, Cockburn CJ said at 566:

"It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause — namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains ..."

He approved, at 566-7, the following passage from a New Jersey case:

"...he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For, most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they could in comprehending business in some measure new."

Cockburn CJ's own conclusion, at 569, concerning testamentary capacity where people were not mentally ill but had impaired mental power was:

“... the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding.”

Second, the much quoted paragraph from ***Banks v Goodfellow*** is not a set of propositions of law. The relevant proposition of law here is a very simple one, namely that to be valid a will must be the will of a free and capable testator. Whether any particular testator is a capable testator is a question of fact.

Third, what ***Banks v Goodfellow*** provides is a set of factual guidelines, a reminder of what facts usually need to be established to conclude that a testator was capable. It is nothing like a set of necessary and sufficient conditions for proving testamentary capacity. There are some things that, in relation to a particular will, ***Banks v Goodfellow*** does not mention at all -- e.g. it does not consider the identity of the executrix, and it does not consider the powers conferred upon the executrix. If a particular will appointed a particular person as executrix, and conferred a significant power of advancement on the executrix relating to a gift in favour of that executrix's children, a question could arise of whether the testator had the capacity to understand those provisions adequately.

Fourth, there is also some imprecision in how the guidelines in ***Banks v Goodfellow*** are stated -- to understand the "extent" of assets, it is not necessary for the testator to be able to list every stock in his share portfolio and its value -- but how much short of that is good enough? Is it enough if a testator knows his parents left him some shares? ***Banks v Goodfellow*** does not answer questions like these.

To some extent there is a policy judgment involved in where the line is to be drawn, about how much understanding of assets will be required before, as an application of a judge-made law, a person *ought* to be deprived of the ability to make a will. As well, this is a situation where ostensive definition has a role to play in the law [2] -- by seeing practical examples of how judges have actually applied the standard one comes to an understanding of what degree of detail is needed for a person to understand the "nature and extent" of his assets, for the purpose of having testamentary capacity.

It is at the level of policy that there has been a change in how ***Banks v Goodfellow*** is applied, as a result of particular social changes. The relevant social changes involved here are the greater tendency of people to live to an old age, a greater tendency of people to end their lives with some measure of mental deterioration, and changes in the type of assets that people own.

That change was recognised by Windeyer J in ***Kerr & anor v Badran & anor Estate of Badran [2004] NSWSC 735 (17 August 2004)***, where his Honour said:

“49 In dealing with the ***Banks v Goodfellow*** test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing “the extent” of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life. The decision of Gleeson CJ in ***Estate of Griffith dec'd; Easter v Griffiths*** (unreported NSWCA 7 June 1995) must be kept in mind where he said:

”The formulation of the onus of proof, well established by authority and not in dispute in the present case, invites caution. The power freely to disclose one's assets by will is an important right, and a determination that the persons lacked (or, has not been shown to have been possessed) a sound disposing mind memory and understanding is a grave matter. Where a testatrix exhibits florid symptoms of psychotic disturbance, such a conclusion may be reached relatively easily. However where, as in the present case, what is claimed is that a woman who presented to the world an appearance of intelligence and rationality, had formed an aversion to her child so unfounded and unreasoning that it evidences an unsoundness of mind, the

decision may be very difficult.”

This, of course, was a case of alleged delusion, but the general requirement for care is involved in all contested probate actions. Although he was in dissent, Kirby P in paragraph 8 of his judgment, emphasised the need for caution and stated that medical evidence must be carefully looked at to ensure that it was considered in light of the relevant test and not what the medical expert using medical terminology considered to be the legal position.

50 Next it is important to bear in mind the decision in *Worth v Clasohm* (1952) 86 CLR 439. This explained that in a case where a doubt as to capacity is raised – thereby as explained in *Shorter*, satisfying the evidentiary onus on the defendant, the onus passing to the propounder to satisfy the court that the will propounded is valid – this does not mean that a doubt is enough; the doubt must be such that the court considers it sufficient to prevent its finding for the will propounded.

There are three types of evidence from which a decision about testamentary capacity is made. One type -- and a very important type -- is incidents that can be recounted by people who knew the testator around the time of the making of the will, where the incidents show either a failing, or a success, in some task relevant to mental capacity. The most important example of this is evidence from the solicitor who took instructions for the will. If a solicitor taking instructions for a will is doing the job properly, the solicitor will see the testator personally, and alone, and will discuss all the topics that need to be considered when making the will. The content of that conversation, how the testator responds to questions the solicitor asks, whether the testator can give sensible explanations for his choices, and how firm the testator is in his wishes, can all be relevant matters. Indeed, if a solicitor knows that he or she is being asked to draft a will in circumstances where there could later be a dispute about testamentary capacity, it is a good idea for the solicitor to ask questions directed to each of the matters in *Banks v Goodfellow*, as well as any other matters which are peculiarities of the will which the testator is considering making and which a capable testator would need to be able to understand, and for the solicitor to make an extremely detailed file note of the conversation.

Often visitors to an elderly testator can provide useful evidence of whether that testator still holds in his memory the various people who might be possible objects of testamentary bounty, recalls where those people fit into the family structure, remembers visits he has had when such visits have occurred, and remembers news given to him about family members and close friends.

If there is a solicitor who has drafted other wills for the testator, or has carried out business transactions for the testator, evidence of how the testator fared in giving instructions for and understanding those business transactions can be useful -- though, for the reasons referred to in the New Jersey case which Cockburn CJ quoted in *Banks v Goodfellow*, other business transactions may require a higher degree of capacity than does making a will.

Other lay evidence could go to any strange notions that the testator has -- a particularly common strange notion of some elderly people is to believe that someone close to them is stealing minor items of little value from them.

The sorts of lay evidence that can cast light on the mental condition of the testator are as various as human personality is various. From all the lay evidence, the court can, mosaic like, build up a picture of the sort of person the testator was.

A second type of evidence which can be particularly useful is evidence from the treating doctor or doctors of the testator, or other qualified health professionals who have examined the testator, concerning any observations or diagnoses made, relative to cognitive functioning. If the testator lives in an institution, like a hostel or a nursing home, and the institution is one which receives federal government subsidy (as most of them do) a place in that institution can be offered only with the permission of the Aged Care Assessment Team (ACAT) for the area in which the institution is located. To decide whether to grant that permission, an ACAT social worker interviews the testator, and usually administers one or more tests of cognitive functioning -- nearly always the mini-mental test, and sometimes others. Unless the testator has deteriorated significantly from the time of entering the institution, the results of those tests could cast light on the testator's mental capacity.

As well, the level of subsidy that the institution receives for a resident depends on a categorisation of the resident. If the institution is to receive a significantly higher level of subsidy for the resident than was applicable at the time the resident first entered the institution, it is necessary for the resident to be reassessed by the relevant ACAT.

There is a third type of evidence that is often presented in probate cases where capacity is in issue. If the testator has been admitted to a hostel or nursing home, or has been hospitalised, as a matter of course a set of nursing notes is produced, of observations of the residents that the nursing staff make. It is quite common for evidence in a testamentary capacity case to include the nursing notes, and for an expert from a discipline experienced in assessing elderly people to express his or her views about whether the testator does or does not pass each of the *Banks v Goodfellow* tests. This type of evidence is useful, but its limitations need to be borne in mind.

First, an opinion expressed by someone who has never seen the testator has serious limitations.

Second, the person expressing the view cannot come to a view more reliable than that of the nursing notes on which that view is based. Often nursing notes do not focus on matters which would be relevant to testamentary capacity (understandably, because nursing notes are largely to assist in the ongoing medical and nursing care of the testator).

Sometimes, they used terms which are too imprecise to be very useful -- saying that the testator "was confused this morning" is not much use by itself, if one does not know what the topic was that the testator was confused about, and how that confusion manifested itself. As well, the nursing notes do not give a balanced picture. One reason for the lack of balance is that there is no point in nursing notes recording occasions when the testator demonstrates good mental functioning in tasks relevant to testamentary capacity. Another is that it is, however, financially important for the management of an institution to be able to demonstrate that a resident needs a higher level of care and that for which the present level of subsidy is paid -- thus a well-managed institution will be careful to record instances of mental failure by the resident, so that there is evidence to present to ACAT in support of an application for a higher level of subsidy.

The importance of lay evidence, and the limitation on usefulness of expert evidence from people who have never seen the testator, has been expressly recognised in **Kerr v Badran** [2004] NSWSC 735 and **Revie v Druitt** [2005] NSWSC 902 at [34]. Indeed, if a plaintiff who had opportunity to observe the deceased fails to give lay evidence of his or her observations concerning the capacity of the deceased, the court may draw a **Jones v Dunkel** (1959) 101 CLR 298 inference, that any such evidence, if given, will not help the plaintiff. That was the situation that the plaintiff in **Kerr v Badran** [2004] NSWSC 735 found himself in (at [53]).

The natural bent of medical practitioners called upon to give expert evidence is to express their conclusion in terms of recognised medical conditions. That is of limited assistance to the court. As Kirby P. said in **Easter v Griffith** (unreported, decided on 7 June 1995, at 6) :

"In judging the will propounded, and the challenge to it the court must consider all of the facts proved which are relevant to the testamentary capacity of the testator. It must not be deflected into a consideration of medical evidence still less of jargon as to whether particular conditions such as 'delusion' or 'paranoia' have been established."

Lost wills

The present practice of the Court concerning whether it will presume that a will which has been executed, but is not to be found upon the testator's death, has been revoked is that found in **Cahill v Rhodes/Rhodes v Cahill** [2002] NSWSC 561

Applications for leave for a minor to make a will

Applications under section 6A **Wills Probate and Administration Act 1898** for leave for a minor to make a will are not strictly a probate matter, but there is an administrative practice of having such matters dealt with by the Probate List Judge, as an aid to consistency in decision-making. Such applications are usually made on an ex parte application. If you have such a matter, you will minimise costs for your client if the matter is made returnable in the first instance before the Probate List Judge when the Probate List is being heard, if all the evidence to support the application is available on the first return date, and you are ready to run the application on the first return date.

Evidence in Family Provision Act applications

There is a very serious problem concerning costs of **Family Provision Act** matters getting out of hand, and being disproportionate to the amount at issue. It is not assisted by practitioners (at least some of whom seem to be accustomed to practising in the Family Court) drafting affidavits which go into the most minute detail of family circumstances.

While it is hard to say that any particular detail of family circumstances is not relevant, there comes a point beyond which a law of severely diminishing returns sets in, so far as the provision of extra information about family circumstances is concerned. For most **Family Provision Act** cases, the facts which are by far the most important ones can be set out on a couple of sheets of paper. They are:

Name of deceased:

Date of death:

Age at death:

Died testate/intestate:

Date of Grant:

Person(s) who obtained Grant:

Family who survived deceased, age, and relationship of each to deceased:

If testate, summary of dispositive provisions of will:

The nature and value of the assets and liabilities at the date of death [3]

(b) what is or is likely to be the nature and value of [4]:

(i) any distributed estate, and

(ii) the net distributable estate,

(c) what is the nature and value of any property which is or may be the subject of any prescribed transaction [5],

(d) the names and addresses of every person who is or may be [6]:

(i) an eligible person (designating as a person under legal incapacity any eligible person who is or may be a person under legal incapacity), or

(ii) a person beneficially entitled to the distributable estate, or

(iii) a donee, within the meaning of section 21, or

(iv) a person holding property as a result of a distribution from the estate,

(e) the persons to whom notice was given under clause 9 (2) of Schedule J Supreme Court Rules [7]

If claim made for notional estate, assets sought to be included in notional estate:

Assets and liabilities of plaintiff [8]:

Income and expenditure of plaintiff if disclosed in the evidence [9].

Brief statement of any special needs of plaintiff [10]:

Brief statement of any special claims of plaintiff [11]:

Travelling much beyond the scope of these facts is simply a waste of the client's money and a waste of the court's time. It is the repeated experience in **Family Provision Act** matters that factual matters of detail are set out at length in affidavits, replied to at length in affidavits, sometimes cross-examined on at length, and then never mentioned or in any way referred to in submissions. The submissions in a case like this are a summary of the reasons why one side says that the Court should give a decision of a particular type. If facts are not important enough to be mentioned or referred to in submissions, they probably do not need to be proved at all.

23 August 2006

ENDNOTES

[1] **J C Campbell** Judge of the Supreme Court of New South Wales. I am grateful for discussions with Young CJ in Eq and Windeyer J on the topic of this paper. Any remaining errors are, of course, my own. This paper was delivered to a seminar organised by NSW Young Lawyers on 23 August 2006.

[2] Ostensive definition is explained in **Re GHI (a protected person)** (2005) 221 ALR 589, [2005] NSWSC 581 at [20]; **Sanpine v Koopahtoo Local Aboriginal Land Council** [2005] NSWSC 365 at [177]; **Maher v Bayview Golf Club** (2004) 12 BPR 22,457, [2004] NSWSC 275 at [39]-[57].

[3] This information can be supplied by referring to the appropriate paragraph of the executrix's affidavit required under Schedule J. Supreme Court Rules

[4] This information can be supplied by referring to the appropriate paragraph of the executrix's affidavit

[5] This information can be supplied by referring to the appropriate paragraph of the executrix's affidavit

[6] This information can be supplied by referring to the appropriate paragraph of the executrix's affidavit

[7] This information can be supplied by referring to the appropriate paragraph of the executrix's affidavit

[8] if disclosed in the evidence. This item can be completed by reference to the appropriate paragraphs of the affidavits

[9] This item can be completed by reference to the appropriate paragraphs of the affidavits

[10] e.g., to complete university education, that plaintiff has care of a disabled child

[11] on deceased e.g., worked on deceased's farm for 20 years at low pay

Some Aspects of Privilege Concerning Communications with Lawyers

Some Aspects of Privilege Concerning Communications with Lawyers [1]

It is impossible to cover, even sketchily, all aspects of lawyer client privilege in litigation in ¾ hour. I shall focus on three specific aspects of that topic.

Part A: When Does the Common Law Test for Privilege Apply, Rather Than the *Evidence Act* Test?

The Common Law Test of Legal Professional Privilege

The common law recognised legal professional privilege. *Cross on Evidence*, 7th Australian edition [2] para [25210] summarises when it arises:

"In civil and criminal cases, confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser if made either (1) to enable the client to obtain, or the adviser to give, legal advice, or (2) with reference to litigation that is actually taking place or was in the contemplation of the client. There is an unresolved controversy as to whether there is a single privilege with two applications, or two privileges with different provinces and functions.

Documents prepared by or communications passing between the legal adviser or client and third parties need not be given in evidence or otherwise disclosed by the client and, without the consent of the client, may not be given in evidence or otherwise disclosed by the legal adviser if they come within (2) above." (Footnotes omitted)

At common law legal professional privilege is a substantive right, not a mere matter of court procedure: *Baker v Campbell* (1983) 153 CLR 52 at 88, 95-96, 116-117, 131-132; *Carter v The Managing Partner, Northmore Hale Davey & Leake & Others* (1995) 183 CLR 121. One of the consequences of it being a substantive right is that once the conditions for the existence of legal professional privilege are established, there is no room for the court to decide whether, in light of some particular public interest, the privilege should be overridden or disregarded: *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64-65 per Mason and Wilson JJ; *Carter*, supra, at 128, 134, 166.

The Evidence Act Test of Client Legal Privilege

The *Evidence Act 1995 (Cth)* and the *Evidence Act 1995 (NSW)* introduced a different concept, that of client legal privilege. There are three different sections that state when such a privilege can arise:

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer, or
- (b) a confidential communication made between 2 or more lawyers acting for the client, or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer, for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

119 Litigation

Evidence is not to be adduced if, on the objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
- (b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

120 Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the party and another person, or

(b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party,

for the dominant purpose of preparing for or conducting the proceeding.

Because of the wording being "*evidence is not to be adduced if ...*", these sections only apply to an activity which counts as the adducing of evidence. Clearly, giving of evidence at a trial, or giving evidence in court for the purpose of an interlocutory hearing, counts as the adducing of evidence. There are also some situations outside of the taking of evidence in a trial or interlocutory hearing which count as adducing of evidence - e.g. if evidence is being taken in a compulsory examination in a liquidation: **Doran Constructions Pty Limited (in Liquidation)** (2002) 194 ALR 101; [2002] NSWSC 215 at [87] – [112].

But there are many situations that do not amount to the adducing of evidence, but where the common law recognised legal professional privilege as being able to exist. Various examples are found in the pre-trial phase of litigation, such as when a person was providing discovery, answering interrogatories, answering a subpoena or answering a notice to produce documents. As well, precisely because the common law recognised legal professional privilege as a substantive right, that privilege could arise completely outside the scope of litigation, such as when a person was subjected to a search warrant (**Baker v Campbell** (1983) 153 CLR 52), or was answering inquiries from some sort of governmental official who had a power to require answers, unless the legislation which gave that power showed an intention that legal professional privilege would not apply (**Corporate Affairs Commission (NSW) v Yuill** (1991) 172 CLR 319; **Federal Commissioner of Taxation v Citibank Ltd** (1989) 20 FCR 403; 85 ALR 588; **Australian Competition and Consumer Commission v Daniels Corp International Pty Ltd** (2001) 108 FCR 123; (2001) 182 ALR 114)

Differences Between Legal Professional Privilege and Client Legal Privilege

Esso Australia Resources Limited v Commissioner of Taxation [1999] HCA 67, (1999) 201 CLR 49 held that legal professional privilege arises at common law if there is a *dominant* purpose of seeking legal advice, rather than a sole purpose. Prior to that decision, **Grant v Downs** (1976) 135 CLR 674 had been thought to decide that legal professional privilege at common law was confined to confidential communications and documents brought into existence for the *sole* purpose of being submitted to legal advisers for advice or for use in legal proceedings.

Replacement of the "*sole purpose*" test with a "*dominant purpose*" test was one of the aims of the introduction of the **Evidence Act** regime of client legal privilege. However, the difference between a sole purpose test and a dominant purpose test was not the only difference between the common law and the statutory regime at the time the **Evidence Act** was introduced. I will not attempt to spell out all of the circumstances in which the operation of the common law of legal professional privilege is different to that of the **Evidence Act** regime of client legal privilege, even after the decision in **Esso** restored the "*dominant purpose*" test to the common law. It suffices for present purposes to say that there continue to be some important differences. One concerns the way in which the respective privileges can be lost. Another is the novel privilege given to unrepresented litigants by section 120 **Evidence Act**.

Which Test Applies Outside the Tendering of Evidence or a Court's Pre-Trial Procedures?

It remains the law, as applied in both state courts and the Federal Court, that any questions of legal privilege arising in relation to matters which are not the adducing of evidence or a court's own pre-trial procedures, are governed by the common law.

Which Test Applies to Pre-Trial Procedures for Litigation?

After the introduction of the **Evidence Act**, some judges took the view that there was an undesirable lack of coherence in a court applying the common law test of legal professional privilege to its pre-trial procedures, but then applying the **Evidence Act** test of client legal privilege to decide, at a trial, what evidence was admissible. There were various attempts by court decisions to resolve that perceived lack of coherence and find a way in which the **Evidence Act** provisions could be applied in pre-trial procedures, either by giving a wide construction to the terms of the **Evidence Act** which stated when the **Evidence Act** provisions apply, or by treating the common law as having been altered in consequence of the introduction of the **Evidence Act**. However it is not necessary to go into those decisions in any detail, because the High Court has now decided that the **Evidence Act** test of client legal privilege does not apply outside the context of adducing evidence in court, and does not result in any alteration of the common law: **Northern**

Territory v GPAO (1999) 196 CLR 553 at 571, [16]-17] per Gleeson CJ and Gummow J, 629 [199] per McHugh and Callinan JJ, 650 [254] per Hayne J; **Esso Australia Resources Ltd v FCT** (1999) 201 CLR 49 at [16]-[17], [28] per Gleeson CJ, Gaudron & Gummow JJ, [64] per McHugh J and [144], [149] per Callinan J; 168 ALR 123; [1999] HCA 67; **Mann v Carnell** (1999) 201 CLR 1 at [27] per Gleeson CJ, Gaudron, Gummow and Callinan JJ, and [144] per Kirby J; [1999] HCA 66. I mention the earlier attempts to apply the **Evidence Act** tests to pre-trial procedures only to warn that they exist, and do not state the present law.

But neither do these decisions of the High Court provide a complete statement of the present law on the topic of when the **Evidence Act** test of client legal privilege applies. This is because the effect of those decisions has been modified by legislation in relation to the pre-trial procedures in New South Wales courts, and also in the Federal Court. However those legislative modifications are not identical. This provides a quite important difference between the way in which privilege operates in the New South Wales court system, by comparison with the Federal Court.

The Situation in New South Wales Courts

The present situation in New South Wales is that there are rules of Court that make the **Evidence Act** rules concerning privilege applicable to a court's pre-trial processes.

The way in which the **Uniform Civil Procedure Rules 2005 (NSW)** (hereinafter called the "**UCP Rules**") achieve this is through definitions, in the Dictionary at the end of the Rules:

privileged document means a document that contains privileged information.

privileged information means any of the following information:

(a) information of which evidence could not, by virtue of the operation of Division 1 of Part 3.10 of the *Evidence Act 1995*, be adduced in the proceedings over the objection of any person,

(b) information that discloses a protected confidence, the contents of a document recording a protected confidence or protected identity information (within the meaning of section 126B of the *Evidence Act 1995*) where:

(i) consent by the protected confider (within the meaning of section 126C of that Act) has not been given to disclosure of the confidence, contents or information, and

(ii) section 126D of that Act would not operate to stop Division 1A of Part 3.10 of that Act from preventing the adducing of evidence in respect of the confidence, contents or information,

(c) information of which evidence could not be adduced in the proceedings by virtue of the operation of section 126H of the *Evidence Act 1995*,

(d) information that tends to prove that a party by whom a document is required to be made available, or by whom an interrogatory is to be answered, under section 128 of the *Evidence Act 1995* or section 87 of the *Civil Procedure Act 2005*:

(i) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(ii) is liable to pay a civil penalty,

(e) information the admission or use of which in a proceeding would be contrary to section 129 of the *Evidence Act 1995*,

(f) information that relates to matters of state within the meaning of section 130 of the *Evidence Act 1995*,

(g) information to which section 131 of the *Evidence Act 1995* applies,

(h) information:

(i) the disclosure of the contents of which, or

(ii) the production of which, or

(iii) the admission or use of which,

in the proceedings would be contrary to any Act (other than the *Evidence Act 1995*) or any Commonwealth Act (other than the *Evidence Act 1995* of the Commonwealth),

but does not include information that the court declares not to be privileged information for the purposes of those proceedings.

To understand those definitions, Part 3.10 of the **Evidence Act** extends from section 117 to section 134 inclusive, and Division 1 of Part 3.10 extends from section 117 to section 126 inclusive. It is Division 1 of Part 3.10 which includes all the sections on client legal privilege. Thus, any document or information which contains material which would be the subject of client legal privilege at trial falls within the scope of "privileged document" and "privileged information" in these definitions, and as well documents or information which contain various other types of privileges also fall within "privileged document" and "privileged information".

The definitions of "privileged document" and "privileged information" feed into and give content to various of the more specific rules in the **Uniform Civil Procedure Rules 2005**.

Rule	Substance
1.8	Court to decide questions of privilege, and can order document concerning which claim for privilege exists to be produced to the court for inspection
1.9	Objection may be taken on the ground of privilege concerning (a) documents ordered to be produced, whether on subpoena or otherwise, (b) documents required to be produced by a notice to produce (c) questions put in an examination before the court or an authorised officer. If such objection is taken the document need not be produced, or the question answered, unless and until the claim to privilege is overruled.
5.7	Privileged documents not required to be produced in pre-trial discovery
21.3(2)(d)	List of documents prepared for the purposes of discovery to "identify any document that is claimed to be a privileged document, and specify the circumstances under which the privilege is claimed to arise."
21.4 (2)	Affidavit which accompanies a list of documents to "state, in respect of any document that is claimed to be a privileged document, the facts relied on as establishing the existence of the privilege."
21.5	Exempts privileged documents from production upon discovery
21.6	Ongoing discovery obligation if a document concerning which privilege was claimed is found not to be, or to have ceased to be, privileged.
21.11	A party served with a notice to produce by another party, which is returnable before the hearing, need not produce privileged documents
22.2	A proper objection to answering an interrogatory is that the answer could disclose privileged information
31.4	Direction to serve witness statements does not deprive a party of a right to treat any communication as privileged

The result is that in all pre-trial procedures in NSW courts, the **Evidence Act** test of client legal privilege applies.

The Situation in the Federal Court

The **Federal Court Rules** have certain rules that, on the face of them, seem different only in matters of drafting style to some of the New South Wales rules. For example:

O 15A R 2	Privileged documents not required to be produced by an order for pre-trial discovery
O 15 R 6(4)	List of documents to identify claim for privilege
O 15 R 10(2)(b), 11, 14	Claim for privilege concerning documents required to be produced
O 16 R 6(3)(c)	Claim for privilege can be a ground for objecting to answering an interrogatory
O 33 R 11	Documents are not required to be produced pursuant to a subpoena or other court order, or questions answered in the course of examination, if proper claim for privilege made

However that apparent similarity does not survive analysis. Order 33 Rule 11 **Federal Court Rules** has, since June 2002, contained its own special definition, that

(5) In this rule:

ground of privilege means a ground on which a person may rely to make an objection under Part 3.10 of the *Evidence Act 1995*.

What that means is that it is only in the situation with which Order 33 Rule 11 deals -- i.e. when documents are produced pursuant to subpoena or other court order, or questions are answered in the course of examination -- that Order 33 Rule 11(5) requires the **Evidence Act** test of privilege to be adopted.

Order 33 Rule 12 **Federal Court Rules** establishes the procedure for one party to proceedings to serve on the other a notice to produce, and gives it the same effect as a subpoena for production. Thus, if any question of privilege were to arise concerning whether a claim for privilege was validly made concerning documents required by a notice to produce, that question would be decided under Order 33 Rule 11, with its extended definition of "*ground of privilege*".

However, there is no overriding definition of "*privilege*" or "*privileged document*" in the **Federal Court Rules**, which feeds into all of the specific rules concerning pre-trial procedures the rules of privilege that would apply in a Court proceeding under the **Evidence Act**. While Order 33 Rule 11 applies to any situation where the court *orders* production of documents, the obligation of a party to give discovery is triggered under Order 15 Rule 1 by the service of a notice with the leave of the court, and the obligation to answer interrogatories is triggered under Order 16 by the filing and service of a notice to answer interrogatories with the leave of the court. Once the notice to give discovery, or notice to answer interrogatories, is filed and served, it is the rules themselves, rather than an order of the court, which provides the obligation to give the discovery, or to answer the interrogatories. That is a sufficient reason why Order 33 Rule 11 does not apply to someone who is responding to a notice to give discovery or a notice to answer interrogatories.

Of course, the Federal Court can also make specific orders concerning discovery or interrogatories. If a specific order to produce documents on discovery is made, that could trigger the **Evidence Act** definition of "*ground of privilege*" applicable under Order 33 Rule 11. And the likelihood is that if ever there were a real dispute about whether a notice to give discovery had been properly complied with, that dispute would eventually be resolved by the court making an order. Thus, at least concerning production of documents on discovery, Order 33 rule 11 could then apply.

However, Order 33 rule 11 in its present form is incapable of applying to an order that interrogatories be answered, as Order 33 Rule 11 is restricted to questions put "*in the course of examination*". Order 1 Rule 4 extends the definition of "*examination*" a little beyond its ordinary meaning, but probably not so far as to encompass the answering of interrogatories.

A further restriction on the circumstances in which Order 33 Rule 11 applies may arise from the decision of the Full Federal Court (Branson, Allsop and Edmonds JJ) in **Seven Network Limited v News Limited** [2005] FCAFC 125; (2005) 144 FCR 379. Its first holding was, in broad terms, that Order 33 Rule 11 only applies when the court is conducting a hearing, or on some other occasion when evidence is taken, or (possibly) is capable of being taken. As Rule 11(3) says that subrule applies "*whether on a trial or hearing or on any other occasion*", and Order 1 Rule 4 includes definitions that "*trial includes any hearing other than an interlocutory hearing*", and that "*hearing includes any hearing before the Court, whether final or interlocutory, and whether in open court or in chambers*", the range of occasions when a matter is before the court when Order 33 Rule 11 might apply, in accordance with that first holding, is potentially fairly wide.

As well, however, Branson J (with whom Allsop and Edmonds JJ agreed [3]) explained the rule, at [17] as applying "*in circumstances in which the order to produce the document or thing is made to facilitate its being immediately adduced in evidence.*" (Her Honour was only dealing with the rule insofar as it related to the production of documents or things, because it was production on a subpoena returnable before the start of the trial that was the particular fact circumstance giving rise to that case.) That purposive test would mean that if, for instance, a subpoena was returnable at the hearing of an application for an interlocutory injunction or for security for costs, where evidence would be taken, but where the precise documents called for by the subpoena were not intended to be tendered at that hearing, Order 33 Rule 11 would not apply, even though the occasion of that hearing fits within the literal words of Order 33 Rule 11 on one reading of them.

I suspect that there will be some difficulties in applying the purposive test in practice - it is a legitimate use of a subpoena to obtain and inspect a document even if it is not admissible as it stands and notwithstanding that the party seeking inspection has not given any undertaking to tender it or use it in cross examination [4], so will that test require an examination of the purpose for which each document called for by a subpoena has been required to be produced, before one can tell whether the common law rules of privilege or the **Evidence Act** tests apply? And what counts as being "*immediately*" adduced in evidence -- if a subpoena is returnable at the start of a trial which is scheduled to run for several months, is that immediate enough?

My present aim is not to answer questions such as these, but to point out that they exist.

Subject to one other consideration which I will discuss immediately after this, the result of all this is that, in the Federal Court, for some pre-trial court procedures the **Evidence Act** rules relating to client legal privilege apply, and for others the common law rules of legal professional privilege apply, and very close attention to the detail of the particular situation, and the rules applicable, is needed to decide which is which.

The Possibility of Court Rules being Ultra Vires

What I have said so far proceeds on the assumption that the various Rules of Court to which I have referred are valid. There is room for argument about that assumption.

(a) Federal Court

Whatever the proper scope of Order 33 Rule 11 might be, there will be some occasions when it will result in documents which are the subject of legal professional privilege at common law, but not the subject of client legal privilege in accordance with the tests of the **Evidence Act** being produced on subpoena or notice to produce, and made available for inspection [5]. There is a question about whether it can validly do so.

Section 59 **Federal Court of Australia Act 1976** sets out the rule-making powers of that court. Section 59(1) confers a power to make rules

“for or in relation to the practice and procedure to be followed in the Court ... and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.”

It is arguable that changing the common law concerning legal professional privilege is beyond the scope of “*practice or procedure*”, and beyond the scope of things incidental to practice or procedure, and so not justified by the first part of section 59(1).

The “*necessary or convenient*” limb of section 59(1) is a provision which does not enable

“... regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.”: **Shanahan v Scott** (1957) 96 CLR 245 at 250.

For other authority concerning the scope of a power to make regulations when “*necessary or convenient*” see Pearce and Argument, **Delegated Legislation in Australia**, 2nd edition, paras [14.2]-[14.7]. There does not seem to be anything in the **Federal Court of Australia Act 1976** which suggests that changing the common law about legal professional privilege is one of, or part of, the ends of that Act. Thus it is arguable that the “*necessary or convenient*” power in section 59(1) is not enough to justify Order 33 Rule 11(5).

Section 59(2) makes provision for the making of rules in relation to certain specific topics, which by and large are matters of practice and procedure. One of them is section 59(2)(p),

“the means by which particular facts may be proved and the mode in which evidence of particular facts may be given.”

That provision justifies the Court in passing rules about proof of facts at a hearing by some means not allowed by the rules of evidence: **Pearce v Button** (1986) 8 FCR 408; 65 ALR 83 at 97. However the rules of evidence have ordinarily been regarded as rules of practice and procedure, and so would readily fit within section 59(2)(p). Alteration of substantive common law rights could be argued to go beyond “*the means by which particular facts are proved*”, and beyond “*the mode in which evidence of particular facts may be given*”.

It is hard to see any other provision of section 59 **Federal Court of Australia Act 1976** which would justify the making of Order 33 Rule 11(5).

By comparison, section 59(2B) **Federal Court of Australia Act 1976** contains specific power for the rules of Court to make provision for amendment of documents in a proceeding where the effect is to deprive a person of a defence arising because of the expiry of a period of limitation. The Federal Court Rules contain a provision, in Order 13 Rule 2, which empowers the court to sometimes permit an amendment to introduce into existing proceedings a statute barred cause of action. At least sometimes (as happens with section 63 **Limitation Act 1969 (NSW)**) the expiry of a limitation period bars not only the remedy, but also the right, so depriving someone of the benefit of a limitation period is taking away a substantive right from them. The drafter of section 59 wisely included a specific provision to empower the Federal Court to change substantive rights by a rule that allowed a statute barred cause of action to be pleaded sometimes. (This subsection seems to have been adopted following some doubts about the validity of Order 13 Rule 2 expressed in **Wardley Australia Ltd v State of Western Australia** (1992) 175 CLR 514 by Toohey J at 559-562, and Deane J at 545.)

The general words of section 59(1) and (2) would in the ordinary course be construed using the presumption that legislation is taken not to alter common law rights unless it makes clear that it intends to alter them: see Pearce and Geddes, **Statutory Interpretation in Australia**, 5th ed, para [5.21]-[5.27]. There does not seem to be any specific power

in section 59, analogous to section 59(2B), which enabled the Federal Court to make rules of Court which can modify substantive rights arising by reason of legal professional privilege at common law.

Another provision that confers a rule-making power on (*inter alia*) the Federal Court is section 193 **Evidence Act 1995 (Cth)**. I will not examine it in detail, but it does not seem to be wide enough to enable rules of court to take away a common law right.

Some authorities which bear, though not directly, on the question of whether Order 33 Rule 11(5) is ultra vires can be found in **Harrington v Lowe** (1996) 190 CLR 311; **General Mediterranean Holdings SA v Patel** [2000] 1 WLR 272; **Medcalf v Mardell** [2003] 1 AC 120 at 136 [24], 145 [60]; **Air Link Pty Ltd v Paterson (No 2)** (2003) 58 NSWLR 388 (though the precise basis upon which that decision was arrived at was not adopted by the High Court in **Air Link Pty Ltd v Paterson** [2005] HCA 39; (2005) 79 ALJR 1407); and in Pearce and Argument, **Delegated Legislation in Australia**, 2nd ed, para [19.24]-[19.34].

If Order 33 Rule 11(5) is ultra vires, there will then be a question of whether it can be severed or read down, and if so what the result of that severing or reading down is.

It is beyond the scope of this paper to consider in any greater detail the question of whether Order 33 Rule 11(5) is invalid. It suffices to say that if it is the effect of Order 33 Rule 11(5) to modify a substantive right of legal professional privilege, it is arguable that that rule is beyond the scope of the rule-making power. If Order 33 Rule 11(5) is beyond the scope of the rule-making power, and cannot be severed, that would mean that all pre-trial procedures in the Federal Court have questions of privilege concerning legal advice or litigation decided by reference to the common law test of legal professional privilege.

(b) Supreme Court

The situation of the **Uniform Civil Procedure Rules** in New South Wales is different. Section 9 **Civil Procedure Act 2005** provides:

(1) The Uniform Rules Committee may make rules, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed by rules or that is necessary or convenient to be prescribed by rules for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), rules under this section may make provision, in relation to all civil proceedings in respect of which a court has jurisdiction (however arising), for or with respect to the matters specified in Schedule 3.

(3) On the commencement of this section, the rules set out in Schedule 7 are taken to have been made under this section, and may be amended and repealed accordingly.

The provisions of the **UCP Rules** which I have referred to above, which apply the **Evidence Act** test of client legal privilege to the court's interlocutory procedures, are ones which were included in Schedule 7 of the **Civil Procedure Act** when that Act was passed. Thus, those rules have the status of legislation, not of mere delegated legislation. And thus there is no scope for them to be ultra vires a rule-making power.

There is some scope for amendments to those rules to be validly made in the future. The general rule-making power contained in section 9(1) is not confined by reference to matters of practice and procedure. The scope of "*any matter that by this Act is required or permitted to be prescribed by rules*", in section 9(1), would at the least include rules "*for or with respect to the matters specified in Schedule 3*" referred to in section 9(2). The "*matters specified in Schedule 3*" include:

2 The rights and obligations of parties, prospective parties and other persons as to examination, interrogatories, discovery and inspection in relation to civil proceedings and prospective civil proceedings.

...

7 The admission and exclusion of evidence and the manner in which evidence is to be tendered.

...

32 Any matter for which the rules set out in Schedule 7 made provision when that Schedule commenced.

If the provisions of the rules which apply the **Evidence Act** test of client legal privilege to the courts interlocutory procedures were to be amended by the Uniform Rules Committee in the future, these seem to be the provisions one would look to to see whether there was a head of power which justified the amendment. Of course any amendment would need to be considered in its own terms, but these heads of power seem to provide some room for amendments to the rules which now require the **Evidence Act** test of client legal privilege to be used in the court's pre-trial procedures to be

made validly by a process of delegated legislation.

There would be a similar difficulty in using the "*necessary or convenient*" limb of section 9(1) **Civil Procedure Act** to justify the provisions of the **UCP Rules** which apply the **Evidence Act** test to pre-trial procedures, as I have mentioned earlier concerning using the corresponding limb of section 59(1) of the **Federal Court of Australia Act 1976**.

The result is that the **UCP Rules** in New South Wales that apply the **Evidence Act** test of client legal privilege to pre-trial procedures do not seem to be at the same risk of invalidity as is Order 33 Rule 11(5) **Federal Court Rules**. Thus one can be reasonably confident that the **Evidence Act** test of client legal privilege applies to all of a court's pre-trial processes in NSW courts.

Part B: Professional Confidential Relationship Privilege

Another area of difference between New South Wales courts and Federal courts concerning disclosure of communications between a person and his lawyers can arise from the fact that the New South Wales **Evidence Act** contains a Division IA of Part 3.10, which runs from section 126A to section 126F. The **Evidence Act** of the Commonwealth contains no analogous provisions. The Division relates to what is called "*professional confidential relationship privilege*", and confers on the court a discretionary power to direct that evidence may not be adduced in a proceeding if, broadly, it would disclose a communication made by a person in confidence to another person in the course of a professional relationship.

In its terms, there does not seem to be anything stopping that Division from applying to confidential communications between a person and his or her lawyers, in the course of a relationship of lawyer and client. In **Urquhart v Lanham** [2003] NSWSC 109 the question arose of whether inspection would be permitted of a will, produced on subpoena from a solicitor's file. I was not satisfied that a claim for client legal privilege had been made out, but still went on to consider the application of section 126B in relation to the will, and ultimately declined to permit inspection of it. [6]

These days, Rule 1.9 **UCP Rules** requires, amongst other things, a claim that a document ought not be inspected on the grounds of professional confidential relationship privilege to be given effect to unless and until the Court decides that "*the objection is overruled*". Rule 1.9 is fairly terse in its words, but its clear object is to have the **Evidence Act** categories of privilege apply to pre-trial procedures in the same way as they would apply to a trial. A possible difficulty in carrying through that object is that the discretion to permit disclosure of protected confidences, under section 126B is one which is exercised by reference to a variety of factors which relate to the role which the evidence in question plays in the proceeding. It may be that, prior to the trial, it is not possible to take all of these factors into account in the same way that a trial judge could. Alternatively, perhaps the task of a court in deciding, prior to a trial, whether to deny access to a document on the ground of professional confidential relationship privilege is to assess, on such information as the parties then choose to put before it, how the various factors which can be taken into account under section 126B appear, at the time of the evaluation of those factors, to weigh up.

In **Wilson v State of New South Wales** [2003] NSWSC 805 a pragmatic approach had been taken to the question of whether inspection of a document concerning which such a claim for privilege was made should be allowed before the trial, by standing that question over to be determined by the trial judge. That trial judge, Bell J, decided the question of whether access should be permitted after hearing the opening in the case at the trial. Her Honour held that it was appropriate to take into account the various factors listed in section 126B(4) in deciding whether to permit inspection. An interesting question which is still open concerns how a judge, other than the trial judge, would deal with this problem if asked to answer it prior to the trial. Perhaps one day a judge will need to turn his or her mind to that question in more detail than I have sketched here.

Part C: Practicalities of Making or Testing a Claim for Privilege

Two different matters are relevant to this topic. One of them relates to the evidence by which disputed claims of privilege are decided by the court. The other relates to the procedure that is involved in having the court decide a disputed claim for privilege.

Part C1 – Evidence Concerning Disputed Claims of Privilege

The Need for Affidavit Evidence

Unless the parties to a dispute agree that the court can act on the basis of informal material, like statements from the bar table, any disputed question concerning privilege needs to be decided by putting evidence relevant to that disputed question before the court. That means that the party who asserts a claim to privilege will need to file and serve affidavit evidence, which proves the relevant facts. And if the opposite party wishes to have the court take into account any facts which tend to suggest that there never was a privilege, or to contend that, if ever there was a privilege, there are facts which mean that it has been lost, that opposite party will need to file affidavit evidence that proves those facts.

Can Hearsay Evidence be Used?

Section 75 **Evidence Act** provides that:

"In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who

adduces it also adduces evidence of its source."

It is to be noted that section 75 makes the question of whether hearsay is admissible depend upon the character of the *proceeding*, as being interlocutory or not, not upon whether the *order* actually made is final or interlocutory. It is possible for a final order to be made in an interlocutory proceeding: **Attorney-General v Great Eastern Railway Co** (1879) 11 Ch D 449; **Cuthill v State Electricity Commission (Vic)** [1981] VR 908 at 920-1; **Gilbert v Endean** (1878) 9 Ch D 259. Thus, to decide whether hearsay evidence is admissible in deciding whether a communication or document is the subject of privilege, it is not necessary to enter into the complexities of which orders are final, and which orders are interlocutory: cf notes to section 101 **Supreme Court Act 1970** in Ritchie, **Supreme Court Practice**.

It is conceivable that a proceeding in which a question of privilege needed to be decided is itself a final proceeding -- e.g., if what was sought was a declaration that a particular document was the subject of legal professional privilege or client legal privilege, or an injunction against disclosing a document on the ground that it was privileged. In that type of proceeding, hearsay evidence would not be admissible to prove the privilege.

If the question of inadmissibility by reason of privilege arises in the course of the final hearing of a case, the subject matter of which is something other than the privilege itself, it seems to me that the better view is that the part of the hearing which decides that question of admissibility is itself an interlocutory proceeding, even though it takes place in the midst of a final hearing. That there can be a hearing within the hearing has long been recognised by the common law, with the practice of conducting a *voir dire* to decide if evidence is admissible. The practice of conducting a *voir dire* is continued by section 189 **Evidence Act**. Section 189 refers to that question of admissibility of evidence that is decided on a *voir dire* as being a "*preliminary question*". That seems to me to be sufficient to amount to the **Evidence Act** itself recognising the deciding of that question of admissibility as being an interlocutory proceeding. As well, it would not be a very satisfactory state of the law if hearsay were to be admissible if a question of admissibility was decided in advance of the final hearing, but not admissible if the selfsame question was decided in the course of a final hearing.

But just because hearsay evidence is admissible does not necessarily mean that the case for a particular document or communication being privileged can safely be made on the basis of hearsay evidence alone. It is still necessary for the court to be satisfied that it is more likely than not that the elements of the claim for privilege are made out. And in taking into account whether sufficient evidence has been presented on a topic to satisfy the onus of proof, the court always takes into account the capacity of a particular party to call or present evidence on a particular topic: **Ho v Powell** (2001) 51 NSWLR 572 at 576.

The Substance of the Evidence Needed

In deciding whether privilege exists, the court acts on the same basis as it acts concerning other interlocutory decisions, of enquiring whether there is prima facie evidence of those facts which are the basis for the grant of the particular interlocutory relief in question and a reasonably arguable basis for any question of law involved: eg as to facts **Wendo v R** (1963) 109 CLR 559 at 572-3; **DPP v Alexander** (1993) 33 NSWLR 482 at 493; **Attorney-General (NT) v Maurice** (1986) 161 CLR 475 at 491. The joint judgment in **Cardile v LED Builders Pty Ltd** (1999) 198 CLR 380 took this approach, enquiring what the facts of that case showed on a prima facie basis at 406 [60], and 407 [64], and saying at 408 [68] "*LED has to show a reasonably arguable case on legal as well as factual matters*".

The evidence that is needed to sustain a claim of privilege is evidence that will make out each element of the particular privilege which is being claimed. For instance, one element of the privilege is that the communication in question was confidential -- thus the confidentiality of the circumstances in which the communication was made needs to be established. As well, to prove that a communication was made for the dominant purpose of seeking legal advice, it will be necessary for there to be evidence from the person who made the communication as to what his or her purpose was in making it, or else evidence from which the court can infer what that purpose was. As it is the person who makes the communication whose purpose matters, the best evidence on this topic comes from the person who made the communication, not from the person who received it.

Sometimes, careful legal analysis is needed to identify just what are the facts that need to be proved to make out a claim of privilege, or to show that a privilege has been lost. For example, section 124 **Evidence Act** applies if two or more parties have jointly retained a lawyer in relation to the same matter. In deciding whether a particular communication with a solicitor was the subject of a joint privilege, I said in **Re Doran Constructions Pty Ltd (in liq)** (2002) 194 ALR 101; (2002) 168 FLR 116; (2002) 20 ACLC 909; [2002] NSWSC 215:

"[64] *Phipson on Evidence*, 13th ed, para 15-11 states the relevant common law rule as follows: Where two parties employ the same solicitor, the rule is that communications passing between either of them and the solicitor, in his joint capacity, must be disclosed in favour of the other -- eg a proposition made by one, to be communicated to the other, or instructions given to the solicitor in the presence of the other, though it is otherwise as to communications made to the solicitor in his *exclusive* capacity.

[65] It is to be observed that, according to this statement of the rule, the mere fact of employment of the same solicitor by two people is not enough to give rise to a "joint retainer" for the purpose of this rule concerning privilege. As well, the capacity in which a communication was made needs to be considered.

[66] That one needs to consider not just whether there was a joint retainer, but also the capacity in which

the communication was made is consistent with the basis on which legal professional privilege exists at all at common law. In *Minter v Priest* [1930] AC 558 at 568 Lord Buckmaster said:

The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection.

[67] In other words, the communication which is protected by the privilege must be one which is made or received by a lawyer in the capacity of lawyer: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at 129, 136, 138.

[68] The need to consider both whether there has been a joint retainer, and whether a particular communication has been made to a lawyer in his capacity as jointly retained lawyer, emerges with greater clarity from one of the cases relied on as authority in the paragraph of *Phipson* which I quoted above at [64].

[69] In *Perry v Smith* (1842) 9 M & W 681; 152 ER 288, the vendor of real estate sued the purchaser for not taking title at the correct time. The purchaser pleaded that the vendor was not ready to settle at the correct time. They had employed a common solicitor. That solicitor gave evidence that the purchaser had told him he could not have the purchase money ready on time, and asked for an extension of time, in consequence of which the vendor was not ready to settle on the contracted-for day. The defendant objected that this communication was privileged. That contention was rejected. Parke B said:

If the party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. It is plain this was not, but in his adverse character of attorney for the vendors. The attorney, therefore, stood in the character of an ordinary witness, and the evidence was properly received

[70] Alderson B said:

It is clear that the communication made to this witness was made to him in his character of attorney for the vendors, on whose part he was applying for payment.

[71] While there is this distinction between the employment of the solicitor, and the character in which a communication is made, I do not accept that it requires each individual sentence spoken in the course of a single meeting to be individually analysed. Further, in my view, the deputy registrar was mistaken in deciding the question of whether there was joint privilege by requiring Mr Freeman to decide whether any particular question asked, about what transpired in the meeting, touched on advice given to Doran Constructions.

[72] Rather, whether there is a communication made to, or from, a solicitor in his or her joint capacity is decided by objective evidence about whether the occasion for the communication was one where the solicitor was being asked to advance the purpose for which he or she was jointly consulted. It is appropriate to apply here the same test as Lord Buckmaster applied in *Minter v Priest* for the purpose of deciding whether a privilege arose at all, namely that the communication which is one made to the solicitor in his or her capacity as a jointly retained lawyer, "... must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship".

[73] That it is at this level of generality that one decides whether a joint privilege exists, is demonstrated by the language in which *Cross on Evidence*, Aust ed, current electronic version, para [25265] explains joint privilege.

A "joint privilege" arises where two or more persons communicate with a legal advisor for the purpose of retaining that legal advisor's services or obtaining that legal advisor's advice, eg two persons for their mutual benefit stating a case for the opinion of counsel, or communications between a solicitor and a wife acting collusively with her husband in divorce proceedings. A joint privilege also arises where one of a group of persons in a formal legal relationship communicates with a legal advisor on a matter relating to that relationship, eg partner and partner, trustee and beneficiary (unless the existence of the trust is the very matter in dispute in the litigation), company director and shareholder, and joint venturers. A joint privilege also exists as between claimants under a testator's will and the executors as against the rest of the world. Where the communications relate to matters outside the joint relationship, they are privileged in favour of the person who communicated with the lawyer against the other party to the relationship, even if the latter funded the expense of the communication, eg communications between a local authority and its solicitors against a rate payer in matters not connected with the rates, or communications between a lawyer and a company in litigation with a shareholder. [citations omitted]"

This provides just one example of the type of analysis of the law on a topic that should precede the preparation of evidence concerning the topic. If you haven't worked out what all the elements are of the legal right you are seeking to establish, it will only be by good luck that you are likely to actually prove each of those elements, or have the judge in possession of all the information concerning each of the elements which assists your case. "*Just telling the story*" is not enough -- it needs to be told in a way that you are confident covers all the elements of the legal right involved.

Part C2 - Procedure for Making a Claim of Privilege

Discovery

A list of documents created for the purposes of giving discovery is required to identify the documents and, concerning any document for which privilege is claimed, state the facts and circumstances by reason of which privilege is claimed: Rule 21.3(2)(d) **UCP Rules; Order 15 Rule 6 Federal Court Rules**, and the form of affidavit prescribed by Form 22. The list of documents must be accompanied by an affidavit, which states the facts relied on as establishing the existence of the privilege: Rule 21.4(2) **UCP Rules; Order 15 Rule 6 & Rule 9 Federal Court Rules**. The obligation under Rule 21.5 **UCP Rules** for the party who gives discovery to then produce documents for inspection by the other side relates only to documents concerning which a claim for privilege has not been made. The same effect is achieved in the Federal Court through Form 22.

Thus, if the party upon whom a list has been served wishes to challenge the claim for privilege that has been made, that party needs to file and serve a notice of motion, seeking an order that certain documents (i.e., the ones concerning which the claim for privilege is being challenged) be produced for inspection. That notice of motion would need to be accompanied by affidavit evidence, which sets out any facts upon which the moving party proposes to rely in support of its contention that privilege does not attach to the documents.

When served with such a notice of motion, or indeed as a result of communication between the solicitors before service of the notice of motion, a party making the claim for privilege might wish to supplement the evidence upon which it seeks to rely to support its claim for privilege.

In both the Federal Court and the Supreme Court, there is a specific power which enables the court to inspect the documents in question, for the purpose of deciding any question of privilege: Rule 1.8 **UCP Rules, Federal Court Rules** Order 15 Rule 14 and Order 33 Rule 11(1). There is no real risk of those particular provisions of **Federal Court Rules** being invalid, because the common law itself allowed the court to inspect documents for the purpose of determining a disputed claim of privilege: **Grant v Downs** (1976) 135 CLR 674 at 689; **Esso Australia Resources Limited v Commissioner of Taxation** [1999] HCA 67, (1999) 201 CLR 49 at [52], 70.

It is also possible, in appropriate cases, for a court to permit cross-examination of a deponent of an affidavit claiming privilege: **Esso Australia Resources Limited v Commissioner of Taxation** [1999] HCA 67, (1999) 201 CLR 49 at [52], 70 per Gleeson CJ Gaudron and Gummow JJ; [65], 74 per McHugh J. The traditional approach of the court was not to permit cross-examination on an affidavit which claimed privilege: **Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd and others** (1990) 20 NSWLR 359, **Falk v Finlay** [1999] NSWSC 1284 at [48] – [52] and cases there cited. However there was some movement away from that position by Gummow J. as a judge of first instance in **Hartogen Energy Ltd (in liq) v Australian Gas Light Co** (1992) 36 FCR 557; (1992) 109 ALR 177; (1992) 8 ACSR 277, and it is that approach which the majority of the High Court has now endorsed. There is still considerable reluctance on the part of some judges to allow cross-examination on an affidavit claiming privilege (see eg **Seven Network Limited v News Limited** [2005] FCA 915 per Graham J), and I doubt that any clear practice has yet grown up about what sort of circumstances will justify such a cross-examination.

Subpoenas and Notices to Produce

If the recipient of a subpoena wishes to claim that privilege exists in relation to a document called for by the subpoena, it is still that person's obligation to bring the document to court in answer to the subpoena. Upon bringing the document to court, the claim for privilege is then made. The usual way of doing it is by affidavit evidence that sets out the facts by reference to which the claim for privilege is made, and that exhibits the document to an affidavit – usually as a confidential exhibit which is not served on the other side.

When a document is produced to the Court under subpoena, the approach that the Court should adopt is that laid down by the Court of Appeal in **National Employers' Mutual General Association Limited v Waind and Hill** [1978] 1 NSWLR 372.

There, at 381 - 385 Moffitt P said that when a person was obliged by subpoena to bring documents to court:

“ ... there are three steps. The first is obeying the subpoena, by the witness bringing the documents to the court and handing them to the judge. This step involves the determination of any objections of the witness to the subpoena, or to the production of the documents to the court pursuant to the subpoena. The second step is the decision of the judge concerning the preliminary use of the documents, which includes whether or not permission should be given to a party or parties to inspect the documents. The third step is the admission into evidence of the document in whole or in part; or the use of it in the process of evidence being put before the court by cross-examination or otherwise. It is the third step which alone provides

material upon which ultimate decision in the case rests. In these three steps the stranger and the parties have different rights, and the function of the judge differs.

Upon the first step the person to whom the subpoena is addressed may seek to, and have, the subpoena set aside on the ground that it was improperly issued and an abuse of the power to compel the production of documents in any one of a number of ways. Such a case is where the subpoena is used for the purpose of discovery....

The issue of a subpoena may involve an abuse of the power in other ways ... Thus, it would be an improper use of the subpoena if it were not sought for the purpose of the litigation, but for some spurious purpose, such as to inspect the documents in connection with other proceedings, or for some private purpose, or in collusive proceedings to give them publicity. A witness might argue the documents must be sought for some undefined spurious reason, as they have no conceivable relation to the proceedings. The court would jealously consider any of such submissions having regard to the invasion of the private rights of the stranger occasioned by the operation of the subpoena.

The second step is when the documents are produced to the court by the witness, the subpoena not having been set aside, *and any other objection to their production, such as on the ground they were privileged*, having been rejected. At this point documents are in the control of the court, pursuant to the valid order of the subpoena. As pointed out in *Small's case* ((1938) 38 S.R. (N.S.W.) 564, at p. 574; 55 W.N. 215) at this time the witness may state he objects to their being handed to the parties for inspection. If he states he does not object to the parties inspecting the documents, or by lack of objection is taken to have no objection, no doubt normally there would be little reason not to permit inspection by either party. However, the documents are under the control of the judge and, even if the witness has not objected, there may be good reason in the elucidation of the truth why the judge may e.g. defer inspection by one party or the other. Indeed, no doubt, he will normally defer inspection by a party who has not issued a subpoena until his opponent has an opportunity to use the documents in cross-examination. There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party nor the witness. It may well be that the documents are the property of some institution, but relate to private matters concerning some person and the officers of the institution do not take objection on the basis that the responsibility for disclosure rests with the court. The documents are in its control and are used on its responsibility so far as properly required for the purpose of the proceedings...

The crucial question in relation to the exercise of the discretion to permit inspection in the second step is whether the documents have apparent relevance to the issues. It is at the third step that questions between the parties of relevance in fact and admissibility are ruled upon. The judge is in some difficulty in determining whether the documents are relevant prior to the presentation of the evidence or at the commencement of the case. If there is particular objection from the witness, or questions of privacy are involved, no doubt procedures can be adopted to ensure that only relevant documents are inspected. In other cases, it would appear appropriate to proceed to exercise the discretion, provided the documents are apparently relevant or are on the subject matter of the litigation. However, the limitation on the exercise of the judge's discretion to allow inspection is that the document contains information of apparent relevance to the issues. Once the judge has that opinion, inspection will normally be allowed, notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination." (emphasis added)

In accordance with that authoritative statement of principle, it is part of the second step to decide whether an objection based upon privilege ought be upheld.

Similar powers exist concerning the court itself inspecting the documents to decide the question of privilege, and permitting cross-examination on an affidavit claiming privilege, as arise concerning claims for privilege made on discovery.

Sometimes, if it is undesirable for the judge who will hear the case to see the document in relation to which the claim of privilege is made, it might be appropriate for the court to decide that the question of privilege should be decided by a different judge.

Objection Taken to Questions in Oral Examination

There are serious practical difficulties in devising a procedure, analogous to the court inspecting a disputed document for itself, which can be used to decide whether a claim of privilege concerning a question asked in oral examination will be upheld. It would, theoretically, be possible to close the court, and for the judge to hear the answer in the absence of all representatives of the other side, and, having heard it, decide whether it really did disclose privileged information. However that radical departure from the usual principle of an open trial is one which the courts in practice have not adopted. That is why, in relation to questions asked in oral examination,

"If a lawyer swears that a question cannot be answered without disclosing communications made professionally by the client, that oath is conclusive unless it appears from the nature of the question (or

indeed the proven circumstances in which the communications were made) that the privilege cannot be applicable." (*Cross on Evidence* (Australian Edition, current electronic version) para [25270]).

But there are ways of testing a claim for privilege, by some examination of the circumstances surrounding the occasion when the disputed communication was made, which do not involve a disclosure of the communication itself. It will be a matter for a trial judge to decide by reference to the circumstances of an individual case whether this sort of path should be gone down at all, and if so how far and subject to what limitations.

Objections to Interrogatories

Much the same considerations apply to testing a claim for privilege concerning an answer to interrogatories as applies concerning a claim for privilege concerning a question asked in oral examination. Such differences as there are arise from the fact that any question about the adequacy of an answer to interrogatories does not occur in the midst of a trial, and hence there can be a greater focus on that particular question, and there is not quite the same time pressure as arises when part of the time allocated for hearing needs to be used to decide an adjectival question.

8 March 2006

END NOTES

[1] By the Hon. JC Campbell, Judge of the Supreme Court of New South Wales. This paper was delivered under the auspices of the College of Law on 8 March 2006 in the lectures called "The Judges' Series".

[2] Current electronic version

[3] There might be room for debate about whether the agreement of Allsop J was complete – para [33] of his judgment could be read as favouring a test whereby the fact that a particular court hearing is an occasion where evidence can be taken is sufficient to attract O 33 R 11.

[4] *National Employers' Mutual General Association Limited v Waind and Hill* [1978] 1 NSWLR 372 at 385

[5] In *Seven Network Limited v News Limited* [2005] FCAFC 125; (2005) 144 FCR 379 at [17] Branson J said "the intended effect of O 33 r 11 is to remove the obligation that would otherwise arise in these circumstances for an objection to the production of the document to be determined according to common law principles notwithstanding that its admissibility into evidence will be governed by the Evidence Act." Allsop J, (with whom Edmonds J also agreed) at [33] said "Rule 11 seeks to make clear that at the operation of the trial or hearing or other reception of evidence the production of documents under subpoena will be governed by the Act. Such a course ensures that during the process of the trial or hearing or other reception of evidence there will not be two regimes under which to analyse privilege: that is, the Act at, but only at, the immediate point of adducing evidence, and the common law at the point of answering a call or subpoena."

[6] I recognise that there is a deficiency in the reasons for judgment in that case. It arises from the fact that it was an extempore judgment, and I was not referred in argument to the provisions of the then Part 36 Rule 13 **Supreme Court Rules**, the predecessor of Rule 1.9 **UCP Rules**. I do not think, however, that the deficiency is one that was critical to the outcome.

Variation of Church Trusts

Variation of Church Trusts[1]

By J C Campbell.

Basics of the law of trusts

A trust exists when one person (called the trustee) holds particular property for the benefit of ascertainable people or purposes, in a manner permitted by the law. The general law of trusts requires that the trust property must be certain, the identity of the trustee must be certain, and the beneficiary of the trust must be certain and of a kind permitted by the law. The types of trusts that are permitted by the law are trusts for persons, or for purposes that are charitable, or for a very limited set of anomalous non-charitable purposes (animals, monuments, some isolated purposes of unincorporated associations like clubs, and a few other isolated curios).

The Church and the History of Trusts

There is a very early connection between the Church and the development of trusts. The use, the predecessor of the trust, was used by men who went to the Crusades and wanted to make provision for the administration of their property while they were away. Friars who were bound by oaths of poverty could not own land, but the faithful could provide for them by conveying land to someone "to the use of" the friars.

There was a particular relationship of the Church to charitable trusts. Part of it was an ongoing tussle between the Church, which collected gifts for charitable purposes and held them in perpetuity, and legislators who tried to put a brake on alienation in perpetuity, as it stopped the collection of medieval taxation (in the form of feudal dues such as wardship, marriage and primer seisin, which became due on occasions measured by incidents in the life of a natural person, and so could not be collected if the landholder was a charitable corporation).

And there was a particular relationship of the church to the development of the *cy près* doctrine concerning charitable trusts. Sheridan & Keeton, *The Modern Law of Charities* (3rd edition, 1983), say, at page 1-2:

"... in Western Europe as a whole, from the time of Justinian, the church had been claiming the right (which was recognised by imperial constitutions) to supervise legacies devoted to pious uses... the bishop was bound to see that the legacy was paid out and properly applied, and he might also appoint persons to administer the funds that were devoted by the testator to the service of God and to works of mercy. From that jurisdiction in respect of pious gifts there developed the general jurisdiction of the ecclesiastical courts in testamentary matters. When, after the Norman conquest, a separate system of ecclesiastical courts was introduced into England, it included both the jurisdiction in testamentary causes and that in respect of pious gifts and legacies.

During the period in which charitable gifts were protected in the ecclesiastical courts they acquired three distinct characteristics, which still survive – (1) the privilege of indefinite existence; (2) the privilege of being valid, even if the gift was in such general terms that it would be void for uncertainty if for non-charitable purposes, so long as it was clear that the property was to be devoted only to charity; and (3) the privilege of obtaining fresh objects, if those laid down by the founder were, either initially or subsequently, incapable of execution, provided (in cases of initial impossibility) that the testator had shown a general intention to benefit charity. That is the first, and most possibly the most important, application of the *cy près* doctrine ... that is entirely in accordance with the rule that the intention of the donor must be carried out, for the donor's intention was to benefit his soul by charitable works. If the gift failed through failure of the particular object, the donor's intention was defeated."

The same authors, at p 172 say:

"It is not known whether "*cy- près*" by derivation, signifies "near this" ("*ici- près*") or "as near as possible" to the declared object ("*aussi- près*")... in reported applications of the doctrine, the courts have consistently preferred the second meaning, although earlier a more liberal attitude may have prevailed. That is more probable since originally the jurisdiction to apply charitable gifts *cy près* was exercised by the ecclesiastical courts, which in turn had been influenced by the doctrines of the later Roman Law. See **A-G v Lady Downing** (1767) Wilm 1, 33 citing Digest XXXIII:2:16. The church courts exercised considerable freedom in applying to specific charitable purposes personal property which a deceased had devoted to works of piety and charity generally, since those gifts were regarded as conferring spiritual benefits on the testator. When the Court of Chancery assumed jurisdiction, and especially after 1660, it took over the rules which the church courts had developed, including the *cy- près* doctrine. That development has been summed up ... in the following terms –

... two factors contributed to the liberal construction of gifts to charity. First, there was the wholesale reception of the civil law rules of construction into the church courts, of which the doctrine of *cy près* was one. Secondly, the theological implications of legacies to religious charities, which were deemed to confer spiritual benefits of the testator, had the natural result of the emphasis being placed on the object rather than the mode. These two factors were interconnected and both had the effect of fixing this branch of equity in a mould in which it has since remained."

The modern influence of this history is not only in the equity court having adopted principles that began in the ecclesiastical courts. As will be seen, modern legislation embodies something like the ancient jurisdiction of the Church's own internal institutions to decide how property held on trust for religious purposes should have the purpose for which it is used reallocated.

The modern scope of charitable trusts for religion

It is well established that trusts for the advancement of religion can be charitable: ***Income Tax Special commissioners v Pemsel*** [1891] 2 AC 531 at 583. While there is some case law about what are the outer limits of "advancement of religion", and there has been some change over time concerning what is a valid trust for the advancement of religion, I will not explore that here. But being for the advancement of religion is not sufficient to make the gift charitable – as well it must be (A) of a public nature, (B) for the benefit of the public, and (C) able to be controlled by the court.

(A): If a gift for religious purposes is also restricted so that only a limited class of persons can take the benefit, the element of public purpose is missing: ***Re Mills*** (1981) 27 SASR 200; ***Davies v Perpetual Trustee Co Ltd*** [1959] AC 439.

(B): The House of Lords has held that a gift to a closed community of nuns does not have the necessary element of public benefit: ***Gilmour v Coats*** [1949] AC 426. Nor does a gift to maintain a private chapel in a private house: ***Hoare v Osborne*** (1886) LR 1 Eq 585.

(C): Controllability by the Court involves at the least that the trust is sufficiently certain, and that there are the means for telling whether trustees are, or are not, carrying out the terms of the trust.

The modern operation of *cy près*

There are two different types of schemes which the courts can direct concerning the operation of charitable trusts. The first is a scheme for the administration of the trust where the donor's directions were insufficient. The second is where the donor's directions were sufficiently certain, but either it is at the outset, or later becomes, impossible or impracticable to carry out those directions, or if the carrying out of those directions does not exhaust the fund. It is the second sort of scheme which is a *cy près* scheme.

Before there can be a *cy près* scheme, where there is initial impossibility to carry out the donor's directions, there must be a general charitable intention. If the donor's intention is that charity will be benefited in the precise way laid out by the terms of his gift and in no other, there can be no settling of a *cy près* scheme – in that case if the donor's intention cannot be carried out, then there is a resulting trust to the donor.

There is no requirement for a general charitable intention before a scheme can be settled when there is supervening impossibility, or concerning the situation where the directions of the testator can be fully carried out without exhausting the fund – in those cases, the view is taken that, once the gift has been applied to charity, it should continue to be, regardless of whether there is a general charitable intention.

If a donor has made a gift in the form "to religious purpose A, but if that cannot be done to (something or someone else)", there is no scope for the operation of a *cy près* scheme if A cannot be done. Impracticability of performing the gift looks to the *whole* of the gift, not to just one element of it.

The fundamental requirement to construe the gift and identify the trustee.

It is always necessary to carefully construe the gift to ascertain whether there is any trust at all, whether any such trust is charitable, and which person or corporation (if any) is the trustee of any charitable trust. This exercise of construction very frequently is far more important to the outcome of any question about what, if anything, can be done to alter the terms of a charitable gift than is any legal rule of a more general kind.

Questions of construction of the gift are infinitely various. I mention just a couple.

There can be gifts that are to bodies or institutions that have charitable purposes, which are construed as being for the purposes of those institutions. That can happen whether the body or institution is incorporated, or unincorporated. There is no presumption in NSW law that a gift to an unincorporated body with charitable objects is for its objects, while a gift to an incorporated body with charitable objects is for that body absolutely: ***Montefiore Jewish Home v Howell & Co (No7) Pty Ltd*** [1984] 2 NSWLR 406 at 414-6. That there is no such presumption in NSW law is important if there is a gift to a corporation with charitable objects, but that corporation has gone out of existence by the time the gift becomes operative – the lack of the presumption means that it is more likely, in that situation, that the property can be applied *cy près* rather than going on a resulting trust to the donor. A bequest made in such terms as "to such charitable institutions

as my trustee may select" will be interpreted as a gift for charitable purposes, and will be a valid charitable trust: see **Smith v. West Australian Trustee Executor & Agency Co.** (1950) 81 CLR 320

Churches in Australian law are voluntary unincorporated associations. It may be more accurate to say that a church is a collection of different voluntary unincorporated associations – while a church considered as a whole is one such association (and it makes sense to say that people in Broome and Hobart are members of the one church, even if they have never heard of each other), there are many subsidiary organisations within the one church, each with its own membership and structure and rules – the various associations, clubs and committees.

A voluntary unincorporated association cannot hold property in its own right. However, it can have trustees who hold property on trust for the purposes of the association. Before that can happen, the requirements for a valid trust have to be made out – ie that the property is held for the personal benefit of the members of the association, or is subject to a valid power of appointment among certain members of the association, or else it is held for a purpose trust of a kind that the law regards as a valid trust purpose. Alternatively, even if there is no valid trust relating to the property of a voluntary unincorporated association, there can sometimes be an enforceable contract between the members that certain property will be applied for certain purposes, and through the adoption of certain procedures.

Sometimes there are bodies with corporate personality associated with churches – the prime example is the property trusts, and other bodies which are given corporate status, by the special legislation that has been passed in relation to all or most of the major denominations. As well, there is nothing to stop a church from having associated with it a company incorporated under the **Corporations Act 2001**, or an association incorporated under the **Associations Incorporation Act**. If there is a gift to a corporate entity incorporated under the **Corporations Act** or the **Associations Incorporation Act**, that corporate entity can own the property outright, and do with it what it likes, without regard for any considerations of the law of trusts. Whether the donor actually intended such a corporate entity to own the property outright, rather than hold it on trust, is a matter of construction of the particular gift.

However, the situation may be otherwise for the incorporated church property trusts. They each need to be considered individually, but I later consider one example of such a trust which, on the proper construction of the statute which set it up, is required to hold property only for charitable purposes.

What counts as cy près.

Despite the fairly generous range within which the ecclesiastical courts once applied property which had been given to charitable purposes (see p 2 above), the courts have now fixed on the narrower meaning of cy près. The courts will apply property cy près to the purpose which is charitable in the eyes of the law, and the *closest way which is practicable* to that laid down by the donor. Even if the particular enthusiasm of the donor is one which has gone somewhat out of fashion, or if current opinion is that there are better ways of achieving the general objective of the donor than the way he chose, nonetheless the Court must choose the way which is now available and is closest to the donor's intention

The practical operation of this is illustrated by **McLean v Attorney General of New South Wales** [2002] NSWSC 377 and **McLean v Attorney General of New South Wales** [2003] NSWSC 853. With some oversimplification, there was a gift in a will to a charitable association for the purpose of a school in a particular country town which provided for disabled children of the district. By the time the case came before the court, decades after the will had been made, the Education Department had taken over all the education of such children (so that the association to whom the gift had been made no longer carried on the school that it once had carried on), and a practice had developed of teaching some children who had disabilities in "mainstream" classes, rather than in segregated schools, though there were also still some segregated schools for such children. There may well have been a lot to be said, as a matter of educational policy, for teaching those children in "mainstream" classes if it were possible. However, because it was *possible* to carry out the gift by giving it to those specialised schools which continued to serve the children of the locality in which the testator was interested, applying the gift cy près meant that the children who were taught in the "mainstream" classes did not benefit from it.

The effect of the Charitable Trusts Act 1993

Charitable trust proceedings (which includes proceedings for a cy près scheme) can be brought in the Supreme Court only with the authority of the Attorney General, or the leave of the court: s 6. However, leave of the court can be granted retrospectively (or, as it is called, *nunc pro tunc*: **Royal Society for the Prevention of Cruelty to Animals v Coshott** (Hodgson J, Supreme Court of NSW 7.8.1997, unreported)).

The circumstances in which the original purpose of a charitable trust can be altered to allow the trust property or any part of it to be applied cy près is widened somewhat, to include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust: s 9 (1). In other words, complete or near impossibility of carrying out the trust is no longer required before a cy près scheme can be settled. However, that section, using as it does the expression "cy près", continues to require the closest practicable method of applying the trust property to be adopted.

There is a new requirement, in section 10 (2), that a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust. That has the effect of making it easier to show, for a case where there is initial impossibility, that a cy près scheme should be settled, but does not remove the need to show that there is a charitable purpose before such a scheme can be settled. How it operates was explained in

Public Trustee v Attorney General of New South Wales (1997) 42 NSWLR 600, at 609, where Santow J, said, concerning section 10 of the **Charitable Trusts Act 1993** :

“The defendant submits that this section alters the common law in providing a presumption of a general charitable intention. This presumption, however, is not concerned with whether the intention is charitable, but rather whether it is general. At common law there is no presumption in favour of a general as opposed to a particular charitable intention, although little is required to find a wider charitable purpose as the essential object of a charitable trust: **Attorney-General (NSW) v Perpetual Trustee Co (Ltd); Attorney-General (NSW) v Public Trustee** . It must be correct, as submitted by the plaintiff, that s 10 is directed toward amendment of this rule only. There is nothing in the section which alters the requirement that before a general charitable intention becomes relevant, the court must find that the gift is for a charitable purpose.”

There is a power, under sections 12 – 22, for the Attorney General to establish *cy près* schemes by an administrative process where the value of the trust property affected by the scheme does not exceed \$500,000. However, that administrative process does not exclude the jurisdiction of the court. Further, when the power is to establish a “*cy près* scheme”, it would need to be exercised within the same limits as the Court operates when settling such a scheme.

Section 23 in effect re-enacts the former section 37D **Conveyancing Act 1919**, in providing that a trust is not invalid merely because some non-charitable and invalid purpose as well as some charitable purpose is or could be taken to be included in any of the purposes to or for which an application of the trust property or any part of it is directed or allowed by the trust. In such a case the trust is read down to include only the charitable purposes. Formerly, if there was a gift for charitable and non-charitable purposes, it was regarded as too uncertain to be enforceable.

The possibility of statute permitting application of property for purposes in ways not within the general law of trusts

Bathurst City Council v PWC Properties Pty Ltd (1998) 195 CLR 566 concerned whether land which had been given to a Council for the purpose of a car park counted as “land is subject to a trust for a public purpose”, within the meaning of the **Local Government Act**. It was not subject to an express trust in the usual sense of the law of trusts, and, while the purpose of holding land for a car park could be a public purpose which was charitable, there were fundamental difficulties in the way of the Court deciding that the land was held on a constructive trust by the Council for that purpose. Nonetheless, the High Court held that the land fell within the description, because in the context of the statute “trust” did not have its usual technical meaning. The term “trust” included (at 592)

“... those governmental responsibilities which, while not imposing a trust obligation as understood in private law, may fairly be described as a “statutory trust” which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in the simple. The trust was “not a trust for persons but for statutory purposes”.”

It is a matter of the construction of the legislation governing the property dealings of a particular denomination whether there is any such “statutory trust”, which applies outside the realm of the law of charitable trusts. If there has on the proper construction of the legislation been a permission granted to a church to use property in a way which is not permissible under the law governing charitable trusts, it is that statutory permission which sets the bounds of the authority of the church to deal with the property, not the law of trusts.

Whether any such permission has been given requires the particular piece of legislation that governs a particular denomination to be construed closely. There are family resemblances between the various pieces of legislation which set up the property trusts of the churches, but they are not identical.

Taking as an example the **Presbyterian Church (New South Wales) Property Trust Act 1936**, there are some provisions that seem, reading particular provisions in isolation, to authorise the holding or application of property for purposes that are not charitable.

Examples are (with bold italics to show the particular words which might lead to that conclusion):

9 Vesting of property in Trustees

All lands tenements and hereditaments (including chattels real) together with all rights easements and appurtenances relating thereto or belonging **and all personal property** which were at the date of the election of the Trustees vested in the Trustees of the Presbyterian Church of Australia in the State of New South Wales and all such of the same as may then or at any time or times thereafter belong whether in possession reversion remainder or expectancy to or be held by any person firm or company in trust for the Presbyterian Church of Australia in the State of New South Wales generally or for any congregation thereof or any activity fund service institution or interest of the said church or in any way connected therewith **shall** without any conveyance or

transfer **vest in the Trustees** on and from the date of their election and all such together with such other property as may be acquired by the Trustees or which may become vested in them under this Act **shall be held by them subject to any express trust affecting the same respectively to be dealt with upon the trusts and with the powers, authorities and discretions and subject to the terms and conditions and provisions of this Act and subject to no other trusts or provisions whatsoever.** ...

12 Power to make regulations

The **General Assembly may make regulations** for the purchase or acquisition of freehold or leasehold **property as an investment** for the funds of the church or **for any particular use activity service or object or for the purposes of the church generally** ...

14 Trust property now held

Subject to the terms and provisions of this Act **all property held by the Trustees** shall so far as the same is **not subject to any express trust** be held and **dealt with** by them **in such manner as they may in their discretion think best**. Provided always that the General Assembly may from time to time give such directions or instructions to the Trustees with regard to any matter affecting any property **held by them for the church generally or for any fund institution activity or service thereof** as it may deem expedient and all such directions and instructions shall be followed and obeyed by the Trustees. ...

16 Disposition of rents etc of glebe lands

The **Trustees shall** out of the **net rents and profits received** by them from any **glebe and other lands** belonging to any congregation after payment thereof of all rates taxes and impositions insurance premiums and cost of repairs thereto and improvement and maintenance thereof and interest on any loans made on the security of such lands in the first place pay to the minister for the time being of the said congregation during each year a sum of three hundred dollars (exclusive of stipend from other sources) and in the next place shall **apply** such part of the remainder of the said rents and profits towards the **building improving enlarging or maintaining of the church or minister's dwelling-house** belonging to such congregation as may be required for such purposes and shall **apply the balance** if any firstly **to such social, religious, educational, charitable or other purpose within the parish** and then to **purposes otherwise connected with the Presbyterian Church in New South Wales as they may determine.** ...

20 Trustees' powers to sell etc and disposal of proceeds etc

Subject as before enacted it shall and may be **lawful for the trustees** from time to time and at all times hereafter **to sell any real and personal property** now hereby vested in them or which shall hereafter vest in shall vest in by public auction or private contract as they may deem expedient at such prices as can be reasonably obtained for the same and when sold convey the property sold or any part thereof and thereupon the same shall vest in the purchasers their heirs executors administrators and assigns according to the estate and interest of the Trustees therein absolutely freed and discharged from all trusts. The **Trustees shall stand possessed of the net moneys obtained** from any mortgage given as aforesaid and the net moneys arising from the sale or resumption of any property sold or resumed after payment and satisfaction of mortgage and other moneys chargeable against any such property and **apply the same** with the consent of the General Assembly **in or towards the erection of buildings for the congregation to which the property mortgaged sold or resumed belongs the improvement repair enlargement or maintenance of the church the minister's dwelling school house and hall property of the congregation or in the purchase of other property and/or the erection of buildings for such congregation or otherwise use the same for the benefit of such congregation as the General Assembly shall direct**, and if there shall be no congregation or if any such property shall be **held for the church generally or for any fund institution activity or service thereof** then the Trustees shall apply such net moneys according to the direction of the General Assembly.

There are also other sections that, considered in isolation, have a flavour of the Trustees being able to use church property for purposes that are not strictly charitable. However, that Act has been construed so that, concerning property which is not subject to any express trust, but which is held for the church,

"... such property is held upon trusts for the advancement of religion. The discretions and powers vested in

the Trustees and the General Assembly in relation to that property should not be read as empowering them to apply the property otherwise than for the advancement of religion. The more reasonable construction is that wide terms are used, not to enable the Trustees and the General Assembly to apply the property to purposes other than the advancement of religion, but to enable them to administer the property at their absolute discretion within the very wide ambit of the impressed charitable trust. "No rule is better established than that where two meanings are possible you must take the more reasonable one": *Dickason v. Edwards*(25), per Isaacs J. The choice appears to lie between construing the trust upon which the Trustees hold the property as a trust for the advancement of religion, or as a trust for any purpose whatsoever; and if so, the first alternative seems to me to be the more reasonable one.

(per Rath J, *Presbyterian Church (NSW South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 at 628, a decision affirmed on a case stated to the Court of Appeal: *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387).

A relevant factor was that it is recognised that a church is the sort of body which carries out some activities which, considered in isolation, are the type of activities which need not be charitable, but which, when carried out in the context of the operation of a church, are for the advancement of religion. As the High Court put it in *Congregational Union of New South Wales v. Thistlethwayte* (1952) 87 C.L.R. 375, at p. 442

"We are here concerned with the question whether a particular corporate body is a charitable institution. Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion ... The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said, *mutatis mutandis*, of the other object, the preservation of civil and religious liberty. The object is to preserve civil liberty so that Congregationalists may worship according to their religious beliefs."

Rath J explained it further at 629:

"The key to the construction of the Act is to be found in repeated reference to the function of the Trustees as holding property in trust for the Presbyterian Church of Australia in New South Wales. Powers and discretions are conferred upon the Trustees and the General Assembly for the execution of that trust. It is not right, in my opinion, to regard the wide language in which those powers and discretions are described as derogating from the manifest charitable intention of the Act regarded as a whole. The language is wide so as to ensure that church property may be applied in any way the Church determines, within the limits of the charitable purpose."

And that conclusion, about the trusts on which the church holds property actually being charitable, notwithstanding some indications which in isolation might suggest otherwise, is most important for the availability to the churches of rating exemptions, such as was under question in the case before Rath J. While rating exemptions must each be construed individually, it is a frequent theme that they are available only for activities, or institutions, that are charitable. The tussle between the churches and the secular authorities over taxation of church property is not over.

Special cy près - like provisions relating to church property

But, even though the general property of a church is held on trust for charitable purposes, there are frequently provisions within the statute setting up the property trust of a church which confer upon the church itself powers analogous to those which the court has to apply trust property *cy près*.

An example provided by the *Presbyterian Church Property Trust Act 1936* is as follows:

10 Variation of Trusts

(1) Subject to this section, where the General Assembly has, by resolution, declared:

(a) that, by reason of circumstances arising since the creation of the trusts (including trusts declared pursuant to this section) upon which property specified in the resolution is by this Act vested in the Trust, it has, in the opinion of the General Assembly, become impossible or inexpedient for the Trust to carry out or observe those trusts, and

(b) that the property so specified should, in the opinion of the General Assembly, be held upon such trusts for, or for the use, benefit or purposes of, the Presbyterian Church of Australia in New South Wales as it specifies in the resolution,

the property to which the resolution relates shall thereafter be held by the Trust upon the trusts specified in the resolution, freed and discharged from the trusts upon which it was held immediately before the resolution.

That subsection, taken by itself,

- (1) applies even to property which is given on specific trusts, provided only that the property vests in the Trustees by virtue of the Act
- (2) allows the variation of the trusts on which property is held time after time
- (3) makes the question of whether the circumstances in which the trusts can be varied have arisen dependent on the opinion of the General Assembly
- (4) requires the precise opinion which the General Assembly must form to be that it has become "impossible or inexpedient" for the Trust to carry out or observe those trusts – it is not clear whether this is a less demanding standard that now applies when a court is asked to consider whether a *cy près* scheme should be ordered, since s 9 (1) **Charitable Trusts Act 1993** (on page 7 above) has come into effect.

It is clear that the subsection applies to all property which "is by this Act vested in the Trust". But there is a question of construction about what that expression means. One alternative is that it is only property that is identified in s 9 (on page 9 above). And it is arguable that, while s 9 is wide in what it says is "by this Act vested in the Trust", the expression it does not extend to property that is specifically given to the Trust itself – that property vests in the Trust by the terms of the gift, not by the Act. A contrary view is that in s 10 "vested in the Trust" does not mean "has gone through a process of vesting, where by the operation of the Act property comes to be transferred from one holder to the Trust", but rather refers to property which, in accordance with the Act, comes to be held by the Trust. Some support for that view comes from the fact that "vested" is a word which can refer to the state of being owned by someone, rather than the process whereby it comes to be owned by that person. That use of the word arises from the fact that "vested" is derived from the Latin for "clothed", and "clothed" can refer to the process of becoming clothed, or to the fact that one is clothed. I note in this respect that s 9 contemplates that property, other than property that has undergone a *process* of vesting, may be "acquired by the Trustees". I do not seek to solve this problem of construction, and mention it as an illustration of the close attention that must be paid to the terms of the particular statute which governs a particular church property trust.

(2) The General Assembly shall not make a declaration under subsection one of this section unless it has been requested so to do by the Trust and the Trust shall not, where the property in question is congregational property, make such a request unless it has first received and considered a report on the matter by the Presbytery of the bounds.

(3) Subject to subsection four of this section, the trusts upon which property is to be held pursuant to subsection one of this section shall be as nearly as practicable the same as the trusts upon which it was held immediately before the resolution referred to in that subsection including, in the case of property held on behalf of a congregation that continues as a congregation after the resolution, trusts whereby the property is to be dealt with for the use and benefit of that congregation.

This subsection imposes a requirement that the new trusts imposed shall be, for all practical purposes, decided by reference to the same criteria as the court uses in deciding whether to settle a *cy près* scheme.

(4) Subsection three of this section shall not apply to or in respect of a resolution referred to in subsection one of this section where, by the resolution, the General Assembly has further declared that, to the extent that subsection three of this section has not been complied with, the circumstances referred to in subsection one of this section have rendered it impossible or inexpedient to do so.

However, this subsection enables the General Assembly, when it has passed the appropriate form of resolution, to alter the purposes for which property is held within a wider ambit than would be open to a court in settling a *cy près* scheme. But it would still be necessary for the power to be exercised within the overall limits of the charitable purposes for which all of the Church's trust property must be used, and subject to some other controls which I mention below.

(5) A document that purports to be a copy of a minute of a resolution referred to in subsection one of this section shall, if certified by the Clerk of the General Assembly for the time being to be such a copy, be conclusive evidence that the resolution was, on a day specified by the Clerk in the certificate, duly made by the General Assembly and that all conditions precedent to the making of such a resolution were fulfilled.

This subsection, which has the appearance of a machinery provision, is likely to be of great practical importance in the actual carrying through of changes in the purposes to which property is put. However I doubt that it would be construed so widely as, for example, to confer conclusiveness on a change to a purpose which was not charitable at all, or where there was a lack of bona fides in the issuing of the certificate.

There are also provisions by which, without any changing of the purposes for which a particular trust fund is required to be used, can have the effect that trust funds can be made available for purposes of the church different to those set out in the trust instrument. This can in some circumstances be achieved through the investment powers which relates to trust funds.

21A Investment of trust funds

The Trustees, unless forbidden by the terms of any express trust, may invest any funds in their hands, whether at the time in a state of investment or not, in any form of investment authorised by law for the investment of trust funds or by the General Assembly

The form of investment of a trust fund is now not rigidly prescribed by the general law, but measured by a standard of prudence (s 14 – 14DB *Trustee Act 1925*, introduced by the *Trustees (Discretionary Investment) Act 1997*). While in theory this section confers an even wider power of investment on the Trustees, it is hard to see how a proper exercise of their powers of investment would enable them to invest in something that did not meet the present standards of the general law for investment of trust funds.

21B Blending of trust funds

(1) If the Trustees hold money on trust for different trusts, including different purposes or activities of the Church, it is lawful for the Trustees from time to time to invest the money or any part or parts of the money as one fund and to distribute income arising from the investment rateably among the several trusts for which the money so invested is held and any loss arising from the investment shall likewise be borne rateably.

(2) The Trustees may **make advances** out of the money referred to in subsection (1) **for any activity, service, institution or interest of the Church.**

(3) Any sum advanced under subsection (2) shall be deemed an investment of the money and shall bear interest at a rate fixed by the Trustees and the sum advanced and the interest thereon shall be deemed to be a charge on all assets which are held by the Trustees for the relevant activity, service, institution or interest of the Church in respect of which the advance is made.

The power to make advances, in subsection (2), is a particularly wide one. Of course, the powers conferred by section 21A and section 21B would need to be used in a way such that the use made of the trust funds was fairly characterised as an investment, with the purpose to which the trust fund is dedicated still being pursued, and so that it was the pursuit of the purpose of the trust fund was the primary objective. Nonetheless these investment powers enable incidental use to be made of trust funds, in a way which in fact achieves a purpose additional to that of the trust, without any type of *cy près* scheme.

The way in which these particular statutory *cy près* provisions operate in practice has been described by Rath J in *Presbyterian Church (NSW South Wales) Property Trust v Ryde Municipal Council* [1977] 1 NSWLR 620 at 630:

“... the Act, on its proper construction, in my view leaves it to the discretion of the Trustees and the General Assembly to determine what agencies are conducive to the fundamental purpose of the advancement of religion. It is the intention of the Legislature that the Trustees and the General Assembly should be the judges of that matter. That is the "parliamentary bargain" embodied in the Act. As such judges they would be required, as part of that bargain, to act reasonably and in good faith.”

The reference to the “parliamentary bargain” is to the fact that the Act in question is a Private Act of Parliament, obtained by counsel persuading Parliament to pass the Act.

Controllability of the Statutory *Cy Près* Scheme By the Court

Even though the Act makes the Trustees and the General Assembly the judges of what purposes are for the advancement of religion, that does not have the effect that the various trusts which the Trustees and the General Assembly can alter can cease to be charitable trusts for the advancement of religion, in the particular way contemplated by the Act. If the Trustees and the General Assembly were to take a view of what was for the advancement of religion which is not reasonable and in good faith (and if they decided on a purpose which was outside the realm of what was legally possible to be charitable, and of the type contemplated by the Act, it would follow that their decision was not reasonable), it would be open to the court to declare that that was what they had done, and set their decision aside. The power which the General Assembly is exercising under s 10 is a statutory power, and like all exercises of statutory power is

subject to the controls which administrative law imposes on it, These are both controls concerning the type of decision which is within the scope of the power conferred, and concerning the remedies which the Court can provide if there is a purported exercise of power which is outside the proper scope of the power. This is not the place for a full recital of the controls which the administrative law imposes on statutory decision makers. But as an example, if there were to be a denial of natural justice in the process by which a decision was arrived at, it would be open to the courts to so decide. There might be room for debate about whether, if the General Assembly decided to devote property to some purpose radically different to that nominated by the donor, when there were others available which were much closer to the donor's wishes, that was a valid exercise of the power, or whether it was the sort of decision that a reasonable decision maker would not have come to. There might be room for debate about whether a decision was vitiated by taking into account an irrelevant consideration.

Thus, the fundamental requirements of the law of charity, which are the framework within which the Trustees and the General Assembly must always work, are complied with when a valid decision is made under s 10. The requirement of controllability by the Court, before there is a valid charitable trust, is satisfied by the availability of these administrative law remedies against decisions which are out of the bounds of permissible ones.

It remains, however, that, even though when the Trustees and the General Assembly are deciding what alterations to make to the trusts on which the general property of the church is held, they must work within the scope of what is charitable, and charitable in the particular way contemplated by the Act, they have a wider scope to alter the trusts than a court exercising its jurisdiction to effect cy près schemes would have, and a wider scope than the Attorney General exercising the statutory power of making cy près schemes under the **Charitable Trusts Act 1993** would have. Further, they have the great practical advantage of being the ones who have the first say about what alternative purpose is proper, and the measure of freedom of decision making which arises where the controls which the law imposes on their decision are the controls of the administrative law, rather than controls that are based on the merits of the decision which has been made.

End Note

[1] An edited version of a paper delivered to the NSW Church Law Forum on 18 August 2005. The editing reflects some of the discussion which occurred when the paper was delivered.

How To Get Paid - Notes for Trustees

How To Get Paid - Notes for Trustees

Justice J C Campbell[1]

The process of development of trust law - its origins in the law concerning uses, its early concern to benefit members of the family of the person who had set up the trust, and the practice of having such trusts administered by family friends or relations- led to it being the usual practice that trusteeship was a voluntary office.

The concern of this paper is when and how trustees can get paid for their ordinary work in administering trusts - ie, work which the trustee does himself or herself, and not extending to the trustee's costs of involvement in litigation. There is a well-defined set of principles which deal with how a trustee is paid for the legal costs involved in litigation, which depends on whether or not the proceedings are essentially adversary or administrative: **Murdocca v Murdocca (No2)** [2002] NSWSC 505 at [43] - [78]; **Hypec Electronics Pty Limited (in liq) v Mead; BL & GY International v Hypec Electronics Pty Limited (in liq)** [2004] NSWSC 731; (2004) 50 ACSR 448 at [85] - [86]. They are not the concern of this paper.

If there is an express charging clause in the instrument creating the trust, which not only authorises charging, but indicates with sufficient clarity the rate of charging for the types of work done, the trustee has no problems in establishing entitlement to be paid. (However such a clause gives the trustee a different problem, namely the higher standard of duty which is required of the remunerated professional trustee by comparison with the unpaid amateur: **Bartlett v Barclays Trust Co (No 1)** [1980] Ch D 515 at 534; **Wilkinson v Feldworth Financial Services Pty Ltd** (1998) 29 ACSR 642; (1998) 17 ACLC 220 at 234-5.)

The inherent jurisdiction of court to permit trustees to charge is explained in **Re Application of Sutherland** [2004] NSWSC 798; (2004) 50 ACSR 297; (2004) 22 ACLC 1326:

11 Although generally a trustee is not entitled to remuneration for his time and trouble in execution of the trust, there is an inherent equitable jurisdiction to allow a trustee remuneration, which is usually exercised sparingly and in exceptional cases: **In Re Worthington, decd; Leighton v MacLeod** [1954] 1 WLR 526. This inherent jurisdiction can be exercised in circumstances such as where the duties are extensive and the trustee can perform them only by seriously sacrificing his own interests (**Marshall v Holloway** (1820) 2 Swans 432 at 452-3, 36 ER 681 at 689; **Re Cox's Will** (1890) 11 LR (NSW) Eq 124), where the trustees are not prepared to act without being remunerated and no alternative trustees can be found (**In re Freeman's Settlement Trusts** (1887) 37 Ch D 148), or where it is otherwise advantageous to the trust estate to allow the remuneration (**Plomley v Shepherd** (1896) 17 LR (NSW) Eq 215; **Johnston v Johnston** (1903) 4 SR (NSW) 8 at 11-12). In exercising that jurisdiction one factor that the Court takes into account is whether there is really any practical alternative to allowing the remuneration: even before the time when there were trustee companies who were authorised to act as trustees for a remuneration, the Court recognised that if no trustee could be found who was willing to act without remuneration, the alternative was for the trust to be administered by the Court, in which case it was " at best unprofitably invested and generally frittered away ": **Richardson v Allen** (1870) 10 SCR (Eq) 1 at 3; **Re Cox's Will** (1890) 11 LR (NSW) Eq 124 at 126.

12 The Court's inherent jurisdiction to allow remuneration to a trustee is wide. It exists whether the appointment of the trustee was made by the Court or not: **In Re Masters, decd** [1953] 1 WLR 81. It extends to allow the Court to approve the retention of remuneration for future work done, as well as past work done: **Nissen v Grunden** (1912) 14 CLR 297 at 307-8; **In re Keeler's Settlement Trusts** [1981] 1 Ch 156 at 161-2; **Re White; Tweedie v Attorney-General**(2003) 7 VR 219 at 233. It allows the court to authorise payment of remuneration at a higher rate than that originally allowed by the trust instrument: **In Re Duke of Norfolk's Settlement Trusts; Perth (Earl) v Fitzalan-Howard** [1982] Ch 61. It extends to allowing remuneration to constructive trustees: **Boardman v Phipps** [1967] 2 AC 46; **In re Jarvis, decd; Edge v Jarvis** [1958] 1 WLR 815 at 820. It extends to permit the Court to allow remuneration to a trustee for work he does in acting as director of a company in which the trust funds are invested: **In re Keeler's Settlement Trusts** [1981] 1 Ch 156 at 162. Whether the jurisdiction is actually exercised in any particular factual circumstances is, of course, a completely separate question to whether the jurisdiction exists.

As well, there is a power in the court to allow remuneration from the trust assets to a liquidator of a company which is a trustee, and who comes, through his or her role as liquidator, to in effect be administering the assets of a trust: **In re Berkeley Applegate (Investment Consultants) Ltd (In Liquidation); Harris v Conway** [1989] 1 Ch 32; **Re Eastern Capital Futures LTB** (1989) 5 BCLC 223; **Re G B Nathan & Co Pty Ltd (In Liq)** (1991) 24 NSWLR 674; **13 Coromandel Place Pty Ltd v C L Custodian Pty Ltd (in liq)** (1999) 30 ACSR 377; **Re French Caledonia Travel** [2003] NSWSC 1008; (2003) 59 NSWLR 361 ; (2003) 48 ACSR 97; (2003) 204 ALR 353; (2003) 22 ACLC 498 at [207] - [217]; **Re Application of Sutherland** [2004] NSWSC 798; (2004) 50 ACSR 297; (2004) 22 ACLC 1326 at [13] - [16].

The jurisdiction arises in all these circumstances because it is the equity court which decides whether a dealing with trust property is one which the trustee is able to engage in consistently with his obligations of conscience that relate to

the property. Taking money out of the trust property for the trustee to keep is just one type of dealing with the trust property.

If an application for trustee remuneration is made in the inherent jurisdiction of the Court, the Court will be concerned to ensure that, by whatever is the appropriate procedural device in the particular case, the beneficiaries, or a representative of the beneficiaries, have an opportunity to question the factual basis of the claim, both as to the principle of what amounts should be paid, and as to quantum. In **Re Application of Sutherland** [2004] NSWSC 798; (2004) 50 ACSR 297; (2004) 22 ACLC 1326 I adapted the procedure used by the Court in approving remuneration for a liquidator to this task. That is not the only procedural device available for this purpose.

There is a close analogy between trusteeship and executorship so far as rationale for payment for the services of the trustee or executor is concerned. While there are clear and well-recognised differences between trusteeship and executorship, both are offices whose holder has a fiduciary obligation to administer property for the benefit of others. The New South Wales Supreme Court was given jurisdiction to grant commission to executors very early in its history. The grant of jurisdiction was contained in **Charter of Justice 1823**, section xvii

"... it shall be lawful for the said Court to allow to the executor or administrator of the effects of any deceased person (except as herein mentioned) such commission or percentage out of their assets as shall be just and reasonable for their pains and troubles therein. Provided always that no allowance whatsoever shall be made for the pains and trouble of any executor or administrator who shall neglect to pass his accounts at such time or to dispose of any money would chattels for securities with which he shall be chargeable in such manner and in pursuance of any general or specific rule or order of the said Court shall be requisite."

There is a usual principle of executors charging by one rate of commission on capital, and another rate of commission on income, rather than on time charging. If the executor is a professional such as a solicitor or accountant, he or she is entitled to charge professional rates only for those tasks which are professional tasks: **Re The Estate of D A Lindsay** [2004] NSWSC 578 at [8] - [9]. The same will apply to trustees charging. There are many other principles concerning executor's charging which could usefully be looked at in deciding what principles to apply concerning trustee's remuneration - see generally **Vance on Executor's Commission**.

The very fact that there is this jurisdiction to grant commission to executors has an effect on how the inherent jurisdiction to grant remuneration to trustees is exercised - so far as whether it is proper for a fiduciary to keep some of the property he has control of is concerned, it is hard to see why there ought be any difference between a trust that arises under a will and a trust that arises inter vivos.

Application of principles re trustees charging to appointment of trustees for sale

A particular application of the inherent jurisdiction concerning remuneration of trustees arises when the Court is asked to appoint trustees for sale, and also to approve remuneration for those trustees in advance, at the time order appointing them. In **Anson v Anson** [2004] NSWSC 766 I considered the situation in these terms:

74 Usually, before the Court appoints trustees for sale, evidence is needed of the consents of the proposed trustees for sale, and of the fitness of the proposed trustees for sale (which might sometimes be appropriately proved by proving that they were registered liquidators): *Nevill & Ashe, Equity Proceedings with Precedents (New South Wales)* para [1016].

75 As well, if an order for remuneration of the trustees is to be sought at the same time as they are appointed, evidence to justify that order will be needed. Trustees for sale appointed under section 66G, like all trustees, are not entitled to remuneration for their time and trouble in executing the trust, unless (a) all beneficiaries agree, or (b) a person, or people, agree to pay the trustees from their own money, or (c) a case is made for the Court to authorise, in the exercise of its inherent jurisdiction over trusts, the payment of remuneration to the trustee. If the Court grants authorisation of this lastmentioned kind, the remuneration of the trustees is treated as an expense of administration of the trust and hence can be recouped from the trust property.

...

77 If a plaintiff seeking appointment of trustees for sale of land wanted to have those trustees remunerated from the trust property, and no application was made at the time of seeking appointment of the trustees for them to be remunerated, then (a) it would be necessary for an application for remuneration of the trustees to be brought in separate proceedings, and (b) there is a risk that that application might not succeed. Both of these consequences are ones that the plaintiff might well find unattractive. Hence a plaintiff seeking appointment of trustees for sale sometimes also seeks an order empowering the trustees to charge, on a specified basis, for acting as such, and authorising those charges to be paid out of the proceeds of the sale of the land.

78 However, if such an order is to be made, the plaintiff must notify the defendant (most conveniently, though not necessarily, in the initiating process) that it proposes to seek such an order, and of the evidentiary foundation on which the order is sought. That evidentiary foundation will include evidence that circumstances exist which warrant the Court making an order, under its inherent jurisdiction, for remuneration of the trustees, the basis of charging which the trustees propose to adopt, and that that basis is a reasonable one. If the defendant is notified that the order is to be

sought, and the basis on which it is sought, it will then be open to the defendant to file its own evidence on that topic, if it wishes. It might happen, for instance, that the plaintiff cannot find suitable trustees who are prepared to act without remuneration, but the defendant can find suitable trustees prepared to act without remuneration, or suitable trustees prepared to act for a lesser remuneration than that which the candidates of the plaintiff would charge.

End Note

[1] This is an edited version of a paper delivered to the Annual Dinner of the Society of Trust and Estate Practitioners on 17 November 2004

The Purpose of Pleadings

The Purpose of Pleadings[1]

KEYWORDS

PLEADINGS - judge, and - purpose of - as advocacy - as communication - rules of - drafting - solicitors, and - barristers, and - "material facts" - gathering evidence -surprise - embarrassment - fair trial, and - striking out - professional constraints on - verification of.

ABSTRACT

This article seeks to explain how the court rules and professional rules governing pleading can be better understood if one understands the actual circumstances in which pleadings are used, for what purposes they are used, and the harm that can come from their abuse.

INTRODUCTION

Often pleading is approached as a set of rules. And there are expressly laid down sets of rules about pleading. In fact, there are two different types of rules about pleadings - those contained in the rules of various courts, and those that set out standards for proper professional conduct. Each of these types of rules is important. Indeed, any practical question about a pleading will ultimately be decided by reference to these rules. However, I would like to look at pleading from a different perspective, namely from the role that pleading plays in the process of dispute resolution by litigation. What I hope to achieve by doing this is to help you better understand the rules themselves, by appreciating the circumstances in which pleadings are used, the purposes they achieve, and the harm that can come from their abuse.

Understanding the purpose of pleadings is not an optional extra: many of the rules concerning pleadings are cast in language which has purposive concepts built into it, so that they only make sense if you understand how pleadings operate in practice and what purposes they seek to achieve. I give some specific examples of rules which have purposive concepts built into them later in this paper.

PLEADINGS AND THE JUDGE

Let me start with where pleadings fit into the way that a Judge goes about deciding a case. The pleadings are often the first documents concerning a case that a judge reads. In the Federal Court of Australia, where there is an individual docket system, cases are allocated to a judge very soon after proceedings are started. So at the time of the first directions hearing in the Federal Court, the only documents that the judge will have available to read, to let him or her know what the case is about, are the pleadings. In the Supreme Court of New South Wales, files are allocated to a trial judge at a time when much of the pre-trial preparation has been done, but just the same, the judge to whom a file is allocated will often choose to read the pleadings first, to find out what the case is about.

The judge refers to the pleadings in the course of the trial, for the purpose of deciding whether evidence is admissible[2] - for it is by reference to the pleadings that the issues in the case are identified, and an item of evidence is relevant only if it can affect whether a fact in issue really exists[3],[4].

(While parties can choose to disregard the pleadings and fight issues at the trial which are not raised by the pleadings, [5] this is an undesirable practice,[6] and anyone approaching a trial would be foolish to rely on being able to run a case that is not clearly set out in the pleadings.)

Pleadings are sometimes referred to in the course of address, as the party who propounded a pleading seeks to demonstrate to the judge that the case set out in a pleading has been made out, or as the opposing advocate seeks to demonstrate that what has actually been proved falls short of the case which had been pleaded.

Finally, the judge, in the course of writing the judgment, frequently goes back to the pleadings to find a clear articulation of the allegations which have been made on either side.

The rule whereby if a pleading alleges or otherwise deals with several matters, the pleading shall be divided into paragraphs, and each matter shall, so far as convenient, be put in a separate paragraph[7], looks to be quite a mechanical rule, but its purpose arises from the way in which pleadings are used in practice to identify issues[8]. A judge or a practitioner coming to a pleading should be able to write against any paragraph in a statement of claim whether the allegation in it is admitted, not admitted, or denied. It is common, for those actually using pleadings in practice, to annotate a pleading to show whether the allegations in it are admitted, denied, not admitted, or the subject of some special pleading - that is how you identify what the issues are. If, in relation to a paragraph in a pleading, one

finds that part of it is admitted, while part of it is not, that is often (though not always) because there has been a breach of this rule.

PLEADINGS AS ADVOCACY

Because a pleading is used in these various ways by a judge, repeatedly and at all stages of the litigation process, it operates, in some respects, as a piece of advocacy. A statement of claim is a document which should be able to provide an answer to the judge's ultimate question to the advocate for a party, "why should your client win?". Likewise, a statement of defence should provide an answer to the judge's ultimate question to the advocate for a defendant "why should your client win?", or "why should the other side's win be limited?". In preparing the pleading, the same qualities are needed as are needed for good advocacy - a clear understanding of legal principle is needed so that all the material facts necessary to justify a remedy are pleaded, and only those facts. Clarity of expression in English is needed to make it clearly understood. Making the pleading as brief as the nature of the case permits^[9] also assists in it being understood and being persuasive^[10]. For these reasons, among others, it is not an accident that pleading has traditionally been performed by advocates.

THE SOLICITOR'S ROLE IN PLEADING

None of this is to say that solicitors should not draw pleadings. Solicitors can, and do, act as advocates in the court. There are some lawyers - and some solicitors will be among them - that are good at analysis and at expressing themselves on paper, but who do not like oral advocacy. Conversely, there are some barristers who draft pleadings which fail to show a clear understanding of legal principle, clarity of expression and brevity. Sometimes, a client's resources are such that he or she can only afford to employ one lawyer. My point in making the remarks I have so far to this audience is to dispel any notion there might be, that pleading is some sort of an unimportant preliminary to getting a trial on. It is not. From the judge's perspective, a pleading is a most important document.

Further, the effect of a pleading being inadequate can be very serious for the client. At worst, a defective pleading can mean a case is lost which could have been won. Short of that disaster, an inadequate pleading can cause expense and delay as the lawyers argue about whether the pleading is adequate or not, and about whether amendments should be allowed.

Every solicitor conducting a piece of litigation needs to decide whether he or she will do the pleadings himself or herself, or whether that task will be referred to the Bar. Even if the solicitor decides to refer the task to the Bar, there is still an important choice to be made about which barrister will be briefed. The counsel who is good at drawing pleadings is not necessarily the same counsel who you would choose to run the case - just as the counsel who you would use to run a trial is not necessarily the same counsel you would choose to run an appeal. Even if the solicitor decides to brief a member of the Bar to draft pleadings, that decision about who to brief is a very important one, and requires the solicitor making the decision to have a good grasp on the role which pleadings play, as well as a knowledge of the strengths and weaknesses of the skills of the barristers proposed to be briefed.

PLEADING AND PREPARATION OF YOUR OWN CASE

The need to articulate one's case in a pleading operates as a constant discipline on the lawyers who are running a case:

* The need for producing a proper pleading requires them to think, at an early stage, about what it is that they need to allege and prove.

* As a case advances in preparation, the pleadings need to be reconsidered from time to time. Sometimes, this reconsideration will result in the need to amend the pleadings. For example, if new counsel come into a case, that counsel might be of the view that there is a cause of action, or defence, available which has not been pleaded, and which should be. Sometimes new facts emerge - for example, following discovery - which suggests that the case you've actually got is different to the case that you thought you had. If the difference is sufficiently fundamental, that might result in a need to amend pleadings at that stage. One of the reasons why the courts are comparatively liberal in allowing amendment of pleadings (if it can be done without injustice to the other party) is that it is recognised that a pleading needs to be articulated at an early stage of preparation of a case, that the pleading is very important for articulating the case which the party wishes to present, and that, in the course of preparation of the case, the way in which a party wishes to present its case might change.

* The pleadings are an important document for communication within one's own legal camp. Whenever a new lawyer comes into a case which is already under way, that lawyer will often go to the pleadings at an early stage to understand the case.

Material Facts

The court rules require the pleader to set out only, in summary form, a statement of the material facts on which he relies [11], but not the evidence by which those facts are to be proved.[12]

The material facts are the ones which matter. And any classification of things into those which matter, and those which do not matter, is dependent upon understanding the purpose for which things of that type are supposed to matter. Thus, this rule, which looks at first sight to set out some sort of objective criterion, has a strong purposive element in it[13].

The New South Wales Court of Appeal has recently stated that:

"(1) "Material" means material to the claim, that is, to the cause or causes of action which are relied on.

(2) The requirement of a statement of material facts does not exclude the allegation of legal categories, such as duty of care, fiduciary duty, trust and contract.

(3) The general requirement to avoid surprise means that material facts must be stated in such a way that a defendant can understand the materiality of the fact, that is, how they are material to a cause of action."[14]

The Full Federal Court has recently said:

"The requirement imposed by FCR O 11, r 2, that a pleading contain a statement in summary form of the material facts on which the party relies, is to be understood by reference to the functions of pleadings. Thus it is a well-established rule that the permitted level of generality of a pleading must depend on the general subject matter and on what is required to convey to the opposite party the case that is to be met: *Ratcliffe v Evans* [1982] 2 QB 524 (CA). For example, in some circumstances, it may be permissible to plead a conclusion rather than the material facts underlying the conclusion: *Kernel Holdings Pty Ltd v Rothmans of Pall Mall Australia Pty Ltd* (Fed C of A, French J, 3 September 1991, unreported); *Queensland v Pioneer Concrete (Qld) Pty Ltd* (1999) ATPR 41-691 (Drummond J) at 42,829."[15]

How do you go about finding what are the material facts which need to be pleaded? Unless you have an encyclopaedic knowledge of the law, or the case you are pleading is a very simple and routine one, you need to go to one or more reference sources. This might be a book of pleading precedents like *Bullen and Leake*,[16] a textbook which identifies the elements of a cause of action, or an encyclopaedic work like *Halsbury*[17] which seeks to distil the principles of law applicable in a particular area. If a case is not a routine one it is often necessary to go to the law reports to study the reasons judges have given for why it is that a particular plaintiff has succeeded, or has failed. If you record in writing the research done at the time of preparing a pleading, that can often be a useful quarry of information when the time comes to run the case, particularly for the purposes of making submissions.

A statement of claim contains both a statement of material facts, and a statement of the relief which is sought.[18] It is part of the obligation to plead all material facts that the pleading should allege the facts which show there has been a legal wrong, and also allege any facts which justify the grant of the particular remedy which is claimed. For instance, if you are pleading a case where there is a breach of contract, and you want a remedy of an account of profits, you need to plead the facts which justify that particular remedy - this might be that there is also a breach of fiduciary obligation, or facts which show that there has also been an abuse of obligations of confidence attached to information, or (more controversially) circumstances which justify the imposition of a constructive trust.[19] If you are suing a defaulting debtor, and want interest to accrue on the judgment at a special rate that the debtor has agreed to, you need to include in the body of the pleading the contractual term where the debtor agreed to pay that special rate, and in the prayers for relief a claim for interest at that same rate.

One important benefit for the pleader of a statement of claim, in pleading all material facts, is that the defendant must state, in his defence, whether each of those facts is admitted, denied, or not admitted. If a fact which is really material is not pleaded, but is merely included in some particulars, the defendant need not respond to that allegation at all. There is considerable benefit for a plaintiff in requiring a defendant to respond expressly and one by one to all of the material allegations in the plaintiff's case.

Pleading and evidence gathering

The need to draw a pleading also guides a lawyer in the process of collecting evidence, and preparing witness statements. The statement of material facts in a draft pleading, or in the sort of legal sources you would turn to to identify what are the elements of a cause of action or defence, will provide a checklist against which you can measure the facts you can actually prove. If there is a material fact which you need to be able to include in a properly pleaded case, but which you cannot prove at all, that is a hole in your case. If there is a material fact which you cannot prove very well or very convincingly, that is a weakness in your case. Once a hole or weakness is discovered, this in turn lets the lawyer preparing the case either set about getting more evidence, or making more enquiries to enable the holes to be plugged or the weaknesses to be shored up. You do this either by asking your client whether there is a part of the story that he or she hasn't told you, or by yourself setting out to discover from some other source whether the facts exist. It also lets the pleader advise the client about the strength of the case. I remember occasions at the Bar where the advice I gave a client was, "I can't draw a proper pleading on the strength of what you've told me."

PLEADINGS AND YOUR OPPONENT

Another function of the pleading is to be a communication to your opponent. Your pleading needs to let your opponent know what your complaint is, or what your defence is. When I say "your opponent", I mean by that, both the client on the other side, and the lawyers on the other side.

One purpose of a pleading doing this is that "it is a basic requirement of procedural fairness that a party have the opportunity of meeting the case against him or her".[20] Another purpose of letting your opponent know your case is that if you proceed on the basis that the opposing lawyers understand the law, and can see whether the allegations in the statement of claim amount to a good cause of action, or provide grounds for a particular remedy, your pleading can, at best, convince them that you will probably win, and so you will be able to settle the case. That is very successful advocacy indeed. Short of that, a good pleading can significantly narrow the matters that are in dispute between the parties. It can also give a defendant an understanding of the case which allows it to make a payment into court,[21] or an offer of compromise.

Surprise

The rule which requires that you plead any matter which might take your opponent by surprise,[22] has a role to play concerning how pleadings work as a communication with your opponent. This is not just a rule which is directed at surprise in the course of the actual conduct of a case in court, and designed to avoid unnecessary adjournments if your opponent finds it is not in a position to meet the case you are actually making. As well, it is a rule which is designed to ensure that your real position is understood by your opponent, so that your opponent can sensibly assess its prospects in the litigation.[23]

Embarrassment

Another rule allows a pleading to be struck out if it is embarrassing.[24] Just as the rule about surprise is concerned with the effect that a pleading has on your opponent, so the rule about a pleading not being embarrassing deals with the effect that the pleading is likely to have on your opponent. One of the purposes of that rule is, like the rule requiring pleading of any matter which might take your opponent by surprise, to let your opponent know what your case really is. But there are other purposes too.[25]

When a lawyer says that an allegation in a statement of claim is embarrassing, the lawyer is not using the most common meaning of "embarrassing" - he or she does not mean that the pleading alleges something unpleasant or discreditable which the defendant would much rather have not been said. Rather, the meaning of "embarrassment" which is relevant here is like the use that is involved in saying someone is financially embarrassed when they have a debt which they are obliged to pay but cannot pay. In the sense relevant to pleading, embarrassment is the situation which a defendant is in when it is under an obligation under the court rules to file a defence, but cannot do so because of deficiencies in the statement of claim, or when the pleading does not make clear the case which the opposite party must be ready to meet. In the words of Cotton LJ in *Philipps v Philipps*: [26]

"It is absolutely essential that the pleading, not be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial."

The case law explains what is meant by "embarrassing" through examples. It would be impossible to give an exhaustive list, but ways in which a statement of claim can be embarrassing include:

- * if it leaves the defendant in a situation of not knowing what evidence he ought to file in order to meet it, or if it contains statements which are irrelevant to the relief sought; [27]
- * if its language is so general that it is not clear what is being alleged; [28]
- * if it "leaves obscure the facts said to give rise to the duty of care and the content of the duty of care"; [29]
- * if it makes an allegation which could found a liability in the defendant only if taken in conjunction with some other fact which is not pleaded; [30]
- * if it uses terminology in a way which is not consistent, and it is not clear which of two or more possible meanings of a word is intended by a particular allegation; [31]
- * if it "leaves the accused in a position of material prejudice, derived from the incapacity to know with clarity what case is to be met"; [32]
- * if it makes allegations against several defendants, and it is not clear what allegation is made against which defendant; [33]
- * if a duty of some particular legal type is alleged to exist without a statement of the facts by virtue of which it exists; [34]
- * if it pleads matter in anticipation of a particular defence being raised, when that matter should be reserved for pleading in the reply when, and if, that defence is raised; [35]

* if an allegation "is a prediction rather than an allegation of fact and is thus not capable of admission or denial by the defendants";[36]

* if it uses imprecise and inappropriate language;[37] or

* if it is "poorly expressed and ... confusing",[38] or "susceptible to various meanings".[39]

When pleading in the alternative becomes embarrassing

A plaintiff may plead two or more inconsistent sets of material facts and claim relief concerning them in the alternative, and may rely upon several different rights alternatively, although they may be inconsistent.[40] However, there are limits on when this can be done, arising from the notion of when a pleading is embarrassing. One is that whenever alternative cases are alleged, the facts relating to those cases should be stated separately, and should not be mixed together, so as to show on what specific facts each alternative cause of action is based.[41] Another is that allegations of facts in the alternative cannot be made where one of those sets of facts must be known to the party pleading to be false. Such a pleading is embarrassing and will be struck out.[42]

Embarrassing a fair trial

One of the senses of "embarrassing" which is involved in this rule is that a pleading embarrasses the fair trial of the action. It is on the basis that the pleading embarrasses the fair trial of the action that a court will often not be prepared to engage in a job of careful dissection of a statement of claim, to separate the good from the bad, if it is shown to contain some elements which should be struck out. The response of the court to a pleading which is partly good and partly bad will depend on the particular pleading.[43] But there is a well established practice that, although some cause of action might be able to be gleaned from the statement of claim, if there is a failure to plead material facts or there is confusion in the pleading which has a tendency to cause prejudice, embarrassment and delay in the proceedings,[44] or if there are good claims in a statement of claim, which are so intertwined with bad ones that a fair trial on the basis of the statement of claim would be impossible, the whole of the statement of claim is struck out.[45]

Striking Out Pleadings

If a pleading is served which does not allege a cause of action, or a defence, which is available as a matter of law, the party on whom it is served can move to strike it out. There are many important analyses of the law that have taken place in court on a motion to strike out a pleading, or on its procedural predecessor, demurrer. Well-known examples are *Donoghue v Stevenson* [1932] AC 562, and *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1970) 122 CLR 628; [1971] AC 793. The dispute that is being decided on a strike out motion, is whether the allegations made in the pleading allege a cause of action which is known to the law, or found a claim for remedy in a way known to the law, or state a defence known to the law.

That a statement of claim, or a defence, can be struck out in whole or part, is useful for the efficiency of the court system, in that it can prevent hopeless claims or hopeless defences from going to trial. But it is also quite useful for the parties. If, at a comparatively early stage of the litigation process, they know that a particular claim or defence is not available, that knowledge reduces the scope of uncertainty about the whole litigation, and increases the prospect that the whole of the litigation will settle.

There are tactical considerations in a lawyer deciding whether to run a strike out application. There is often no point in doing so, if any defect in the pleading can be cured. To run a strike out application in those circumstances is just to give your opponent a tutorial on how to run his or her case. Sometimes, though, if a pleading has a deficiency which cannot be cured, it can be a very effective way to end the litigation. Sometimes also, if the pleading is such a mess that you really don't understand what the case you are called on to meet is, and efforts to resolve the inadequacies of the pleading through correspondence with the other side, or calling to talk to them, have failed, you need to take a motion to strike out. Here, the notion of a pleading being embarrassing comes in.

If you are contemplating taking a strike out motion, it is important to try and sort out the difficulties you have with the pleading with the other side, before approaching the court. Part of the reason is that the court does not appreciate being asked to decide this sort of dispute if no attempt has been made to sort it out informally - it really can be a waste of the court's time. As well, you owe it to your opponent as a matter of professional courtesy to try and sort it out. The allegation you are making, when taking a strike out application is, fundamentally, that the opposing pleader is a lawyer who has made an error of law in the pleading. Now there can be differences of opinion between competent lawyers about what allegations make a sustainable pleading, and what do not, but not all strike out claims fall within this area of legitimate difference of opinion. If what you allege is an elementary error in failing to plead an element of a cause of action, or the basis for a remedy claimed, you really should talk to your opponent about it before you go to court on a strike out. You also owe it to your client and yourself not to bring a strike out motion without having endeavoured to resolve the problem with the other side. If a pleading problem which could readily have been cured by discussion is brought to court, the court may well make an order that the person who failed to have the discussion pay the costs.

PROFESSIONAL CONSTRAINTS ON PLEADING

There are now many rules which impose professional constraints on pleading, some coming from the Bar Association and the Law Society, some from the rules of court. Though they are numerous, they have two objectives in common. One is to ensure that the very significant power which lawyers have to make detrimental allegations about someone under cover of court proceedings is used responsibly. The other is to do with time and money. Anyone called on to meet an allegation in litigation is virtually compelled to spend time and money in doing so. An order for costs at the end of the proceedings does not provide a full indemnity for all the time and money involved. These rules try to ensure people are not compelled to expend their own resources in this way unless there is a good reason.

The New South Wales Barristers' Rules[46] contain the following:

"36 A barrister must not allege any matter of fact in:

(a) any court document settled by the barrister

...

unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

37 A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:

(a) available material by which the allegation could be supported provides a proper basis for it; and

(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

...

39 A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 36 and 37 apply, as a reasonable ground for holding the belief required by those rules..."

Rules in identical terms to Bar Rules 36 and 37 appear as Rules A36 and A37 in the Revised Professional Conduct and Practice Rules 1995 of the Law Society of New South Wales. The Law Society Rules also contain Rule A39, which is an analogue of Bar Rule 39, but which applies in circumstances where the practitioner who draws the pleading is instructed by another practitioner. This has the effect that when a solicitor drafts a pleading for his own client, he has a somewhat more onerous obligation than does the barrister (or solicitor advocate) who drafts a pleading on instructions from a solicitor - the solicitor who prepares a pleading for his own client cannot rely on the view of anyone else about whether there are reasonable grounds for an allegation made in the pleading. When a solicitor is called on to give instructions to a barrister, or to another solicitor who is drafting a pleading, under Rule 39 or Rule A39, the solicitor would, of course, be subject to constraints of professional propriety in expressing the opinion that the material available to him gives reasonable ground for holding the belief required by Rules 36 and 37, and A36 and A37.

These rules do not require the pleader to prejudge the client's case. However, without me trying to expound the full scope of the rules, they do prevent a pleader from making allegations which are just wishful thinking, or otherwise without a proper factual basis.

For many (but not all) types of pleadings, Part 15 Rule 23 of the Supreme Court Rules (NSW) requires the pleading to be verified. (There is no corresponding Rule under the Federal Court Rules or the rules of any other State or Territory Supreme Court, but it is comfortably within the powers of the Federal or Supreme Court judge, in giving directions, to order that a pleading be verified in a particular piece of litigation.) The affidavit which makes this verification, is required to state:

"(i) as to any allegations of fact which the pleading traverses by a denial - that the deponent believes that the allegations are untrue;

(ii) as to any allegations of fact which the pleading traverses by statements of non-admission - that, having made reasonable enquiries, the deponent does not know that the allegations are true;

(iii) as to any allegations of fact in the pleading - that the deponent believes that the allegations are true."[47]

It is, broadly, the client who must swear this affidavit. However, the solicitor who arranges for the client to swear the affidavit has the same responsibilities concerning the affidavit which verifies a pleading as he or she has concerning any other affidavit which a client or witness swears under his or her supervision. These include not allowing the client to swear an affidavit the solicitor knows is false,[48] or which the solicitor knows will create a misleading impression.[49] As well, there is the responsibility of the solicitor under Rule 17.2 of the Revised Professional Conduct and Practice Rules

1995[50], which says:

17.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:

17.2.1 factual material already available to the practitioner provides a proper basis for the allegation;

17.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and

17.2.3 the client wishes the allegation to be made after having been advised of the seriousness of the allegation.

If the pleading alleges criminality, fraud, or other serious misconduct, then the affidavit verifying the pleading comes under this Rule. These responsibilities of the solicitor concerning the affidavit verifying a pleading, apply even if the pleading itself was drafted by a barrister, or by another solicitor.

And a solicitor has an ongoing responsibility, in relation to the accuracy of an affidavit verifying a pleading, under Rule 17.1[51]:

17.1 If a practitioner is:

...

17.1.2 informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular;

and the client will not ... allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.

The Federal Court has a pleading rule (Order 11, rule 1A), which is not mirrored in the NSW rules[52], whereby a pleading must set out the name of the person who prepared the pleading, and include a statement by the person that the person prepared the pleading. This is a very useful Rule for maintaining the quality of pleadings - after all, what practitioner wants to be advertised as being the author of a pleading which is sloppy or incompetent?

A further practical limitation on pleading arises from Part 15A of the NSW rules, introduced at the beginning of the year 2000. (There is no corresponding provision in the Federal Court or in any of the State or Territory Supreme Courts.) That Part requires a party to make allegations of fact in a pleading only when it is reasonable to do so, and to put in issue that allegation of fact in a pleading only when it is reasonable to do so. In the course of final submissions, any party can request the judge or master hearing the case to make a finding that there has been a breach of this obligation, and to issue a certificate that there has been a breach of it. If such a certificate issues, Part 52A rule 11A enables the court to take into account, when making a costs order, any non-compliance with Part 15A rule 1. Further, if a certificate is issued under Part 15A, the party in whose favour the certificate is issued, is entitled to have costs of the issue to which the certificate relates on an indemnity basis, unless the court otherwise orders.

A final constraint is the requirement under section 198L Legal Profession Act 1987 (NSW)[53] whereby:

"(2) A solicitor or barrister cannot file originating process or a defence on a claim for damages unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success."

The critical expressions in this subsection are defined in section 198J:

"(2) A fact is provable only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.

...

(4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim."

If a solicitor or barrister provides legal services on a claim for damages, or defence of such a claim, without reasonably believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success, this can count as professional misconduct or unsatisfactory professional conduct.[54] Further, costs orders can be made against legal practitioners who provide legal services to a party without reasonable prospects of success.[55]

1 By the Hon J C Campbell, Judge of the Supreme Court of New South Wales. This is a revised version of a lecture

delivered under the auspices of the Law Society of New South Wales on 3 March 2004 in the lectures called The Judges' Series. I am grateful to Mr Donald Mitchell for assistance with research.

2 *Miller v Cameron and Others* (1936) 54 CLR 572 at 576-7; *Dare v Pulham* (1982) 148 CLR 658 at 664

3 Section 55 Evidence Act 1995 (Cth) and (NSW)

4 Particulars are also referred to for the purpose of deciding questions of admissibility, because particulars can further limit the issues which are to be tried and the nature of the case which a litigant presents.

5 *Dare v Pulham* (1982) 148 CLR 658 at 664; *Miller v Cameron and Others* (1936) 54 CLR 572 at 576-7, 580, 582

6 *London Passenger Transport Board v Mossop* [1942] AC 332 at 340, 347, 351, 356

7 Federal Court Rules ("FCR") O 11, r 1; High Court Rules ("HCR") O 20, r 4(2); Australian Capital Territory Supreme Court Rules ("ACT") O 23, r 4(1); New South Wales Supreme Court Rules ("NSW") Pt 15, r 6; Northern Territory Supreme Court Rules ("NT") r 13.01(1)(d); Queensland Uniform Civil Procedure Rules ("Qld") r 146(1)(f); South Australia Supreme Court Rules ("SA") r 46A.02(c); Tasmania Supreme Court Rules ("Tas") r 227(2); Victoria Rules of the Supreme Court ("Vic") Ch I r 13.01(2); Western Australia Rules of the Supreme Court ("WA") O 20, r 7(2)

8 This is the first of the examples of pleading rules which have purposive concepts built in

9 FCR O 11, r 3; HCR O 20, r 2(4); ACT O 23, r 2; NSW Pt 15, r 8; Qld r 149(1)(a); SA r 46A.02(a); Tas r 227(1)(a); WA O 20, r 8(1). In the Northern Territory and Victoria the rules only extend so far as to require that pleadings be in summary form: NT r 13.02(1)(a); Vic Ch I, r 13.02(1)(a)

10 This is the second of the examples of pleading rules which have purposive concepts built in

11 *Davy v Garrett* (1878) 7 Ch D 473; *Rassam v Budge* [1893] 1 QB 571; *Murray v Epsom Local Board* [1897] 1 Ch 35

12 FCR O 11, r 2; HCR O 20, r 4(1); ACT O 23, r 4(1); NSW Pt 15, r 7; NT r 13.02(1)(a); Qld r 149(1)(b); SA r 46A.02(b); Tas r 227(1)(b); Vic Ch I, r 13.02(1)(a); WA O 20, r 8(1)

13 This is the third of the examples of pleading rules that have purposive concepts built in

14 *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135 at 142-143

15 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at [132]

16 *Bullen and Leake and Jacob's Precedents of Pleading*, 15th ed, Sweet & Maxwell, London, 2004

17 *Halsbury's Laws of Australia*, Butterworths, Sydney

18 Though in the Federal Court it is done by incorporating by reference the relief claimed in the Application.

19 *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 at [78]-[85]

20 *Per Mason CJ and Gaudron J, Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 290. See also *Gould and Birbeck and Bacon and Another v Mt Oxide Mines Limited (in liquidation) and Others* (1916) 22 CLR 490 at 517; *Dare v Pulham* (1982) 148 CLR 658 at 664

21 *Dare v Pulham* (1982) 148 CLR 658 at 664

22 FCR O 11, r 10(b); HCR O 20, r 16(b); ACT O 23, r 15; NSW Pt 15, r 13; NT r 13.07(1)(b); Qld rr 149(1)(c), 155(4); SA r 46A.03(b); Tas r 251(b); Vic Ch I, r 13.07(1)(b); WA O 20, r 9(1)(b)

23 This is the fourth of the examples of pleading rules which have purposive concepts built in

24 FCR O 11, r 16(b); HCR O 20, r 29; ACT O 23, r 28; NSW Pt 15, r 26; NT r 23.02(c); SA r 46A.18(c); Vic Ch I, r 23.02(c); WA O 20, r 19(1)(c). Queensland and Tasmania contain similar provisions: Qld r 171(1); Tas r 258(1)

25 This is the fifth of the examples of pleading rules which have purposive concepts built in

26 (1878) 4 QBD 127 at 139

27 *Davy v Garrett* (1877) 7 Ch D 473 at 483, 486, 488; *In re W R Wilcocks & Co Ltd* [1974] 1 Ch 163 at 166-167.

28 *Tsatsoulis v Westpac Banking Corp* [1999] NSWSC 193 (Rolfe J, 15 March 1999) at [85], [123]

29 *Agius v State of New South Wales* (2002) Aust Torts Reports 81-656; [2001] NSWCA 371 at [35].

30 *Re Modular Furniture Pty Ltd* (1981) 5 ACLR 463 at 466

- 31 Garden Mews-St Leonards Pty Ltd v Butler Pollnow Pty Ltd (No.2) (1984) 9 ACLR 91 at 93
- 32 Chew v R (1991) 5 ACSR 473 at 550 (WA Full Court)
- 33 State of South Australia v Peat Marwick Mitchell & Co (1997) 24 ACSR 231 at 255
- 34 Charlton v Baber (2003) 47 ACSR 31 at [19]
- 35 Church Of Scientology v Woodward (1980) 31 ALR 609 at 623
- 36 East-West Airlines (Operations) Ltd v Commonwealth Of Australia (1983) 49 ALR 323 at 325
- 37 McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409 at [102], [104]
- 38 McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409 at [255]
- 39 Bartlett v Swan Television & Radio Broadcasters Pty Ltd (1995) ATPR ¶41-43 at 40,889; Bright v Femcare Ltd (2000) 175 ALR 50 at [26]
- 40 Phillips v Phillips (1878) 4 QBD 127 at 134; Re Morgan (1887) 35 Ch D 492; Delfino v Trevis (No 1) [1963] NSW 191 at 196
- 41 Davy v Garrett (1878) 7 Ch D 473 at 489
- 42 Brailsford v Tobie (1889) 10 ALT 194; Issitch v Worrell (2000) 172 ALR 586 at [34]
- 43 Bride v Stewart (18 January 1990, Fed C of A, French J, unreported) at 8-9
- 44 Commonwealth Industrial Gases Ltd v Top Australia Ltd (16 April 1993, Fed C of A, O'Loughlin J, unreported) at 20; Leaney v Olmstead Pty Ltd (1994) 51 FCR 240 (Fed C of A, Branson J)
- 45 Coe v Commonwealth (1979) 24 ALR 118 at 132; (1979) 53 ALJR 403 at 409, per Jacobs J; Turner v Bulletin Newspaper Co Pty Ltd (1974) 131 CLR 69 at 87-8; (1974) 3 ALR 491, per Menzies J; Trade Practices Commission v Australian Iron & Steel Pty Ltd (1990) 92 ALR 395 at 413; (1990) 22 FCR 305
- 46 The rules extracted in this section are identical to those contained in Rules 36, 37 and 39 of the Australian Bar Association Model Rules 2002 and the Northern Territory Bar Association Barristers' Conduct Rules. Similar, although not identical, provisions appear in the Bar rules of all the other State and Territory Bar associations: Rules 35 and 36 The Australian Capital Territory Barristers Rules; Rules 37 and 38 Bar Association of Queensland 2004 Barristers Rules; Rule 29 Tasmanian Bar Association Professional Conduct Guidelines; Rules 32 and 34 The Victorian Bar Inc Practice Rules; Rules 35 and 36 The Western Australian Bar Association (Inc) Conduct Rules
- 47 Pt 15, r 23(4)(b). But see also Pt 15, r23(6)
- 48 Myers v Elman [1940] AC 282 at 292-293
- 49 In Re Thom (1918) 18 SR (NSW) 70
- 50 This is reflected in Rule 16.2 of the Law Council of Australia's Model Rules of Professional Conduct and Practice ("Law Council Model Rules")
- 51 A similar provision is contained in Rule 15.1 of the Law Council Model Rules
- 52 The other State and Territory Supreme Court Rules have provisions that are somewhat similar to FCR O 11, r 1A: ACT O 23, r 4A; NT r 13.01(2); Qld r 146(1)(g); SA r 46A.02(e); Tas r 226(c); Vic Ch I, r 13.01(3); WA O 20, r 7(5)
- 53 Similar, although not identical, provisions appear in s90A Industrial Relations Act 1996 (NSW); Pt 14.2 Civil Law (Wrongs) Act 2002 (ACT); and Pt VIA, Div 3, Subdiv G Workplace Relations Act 1996 (Cth)
- 54 Sections 198J(1), (5), 198L(1).
- 55 Section 198M

Contempt By Frustrating Injunctions

Contempt By Frustrating Injunctions^{[1],[2]}

Jockey Club v Buffham-- the facts

1. **Jockey Club v Buffham** [2003] QB 462 was decided on 13 September 2002. The Jockey Club regulates horse racing in Britain. Mr Buffham was its head of security. He retired, and on his retirement entered a contract not to disclose any trade secret or any confidential information about the business, finances, dealings, transactions or affairs of the Jockey Club, or any confidential information concerning any investigations carried out by the security department, except insofar as that information might have come into the public domain. He agreed immediately to return to the Jockey Club all its documents.

2. In fact he did not return all the Jockey Club's documents. He showed various of them to media organisations, and spoke about them to those media organisations. It came to the attention of the Jockey Club that he had been doing so, and it took proceedings against him for an injunction. Those proceedings were settled, by an injunction requiring that he

"... must not without the claimant's prior written consent to do any of the following acts... namely divulging to any person whatsoever or otherwise making use of any trade secret or any confidential information concerning the business or finances of the Jockey Club or any of its dealings, transactions or affairs or any such confidential information concerning any investigations carried out by the security department during his employment with the Jockey Club..."

3. The order included a paragraph saying:

"For the avoidance of doubt, any person other than the defendant who is served with or given notice of this judgment may apply to the court to vary or discharge the injunction set out at 1. above."

4. A copy of the order was served on the BBC, which was in the process of preparing a program which would be an exposé of corruption in the racing industry and the failure of the Jockey Club to respond adequately to it. Mr Buffham had been supplying the BBC with documents of the Jockey Club, and talking to one of their reporters about his activities at the Jockey Club. The reported case concerns an application by the BBC to vary the final injunction, so that it would not be in contempt in using and publishing the confidential material.

5. The BBC succeeded in its application, and on two separate bases. The first basis concerned whether the injunction impacted on the BBC at all. Gray J. decided that it did not, because the BBC was not a party to the litigation, and the injunction was a final injunction rather than an interlocutory injunction. In other words, the BBC would commit no contempt in taking and using Mr Buffham's information, even though the BBC knew that Mr Buffham had been ordered not to divulge that information.

6. The judge recognised that there would be little point in disposing of the BBC's application on that basis if the Jockey Club could start fresh proceedings against the BBC for an injunction to restrain it from using confidential material in its hands, and succeed. Hence he decided whether any such proceedings against the BBC would succeed. He came to the conclusion -- and this is the second basis for his decision -- that the Jockey Club would fail against the BBC in any such litigation.

Jockey Club v Buffham-- the reasons

7. The reasoning concerning the second basis is influenced by the English doctrine that there is a "public interest defence" to action for breach of confidence, and the fact that the trial judge thought it would be a good idea if the documents in question belonging to the Jockey Club were exposed to public scrutiny. The present status in Australia of this so-called "public interest defence" is not completely settled, but the tide is running strongly in favour of the view that there is no such defence. I set out the current state of play in the debate in **AG Australia Holdings Ltd v Burton** [2002] NSW SC 170 at [173]-[191]. Meagher Gummow and Lehane, **Equity Doctrines & Remedies** 4th edition para [41-115] say that Lord Denning's view that there is a defence of "public interest" has been "decisively rejected". At the level of whether persuasive argument has been presented, I agree. At the level of precedent, I would say rather that there are still a few Australian judicial statements in favour of the existence of the defence which need to be rejected by an appellate court, and at present it seems highly likely that they will be rejected. However, the notion that there is such a defence is sufficiently on the retreat for it not to be appropriate to deal with it any further in this paper. The reasoning concerning the second basis of the decision in **Jockey Club v Buffham** is also influenced by the provisions of the English **Human Rights Act 1998**. For both these reasons, the second basis of the decision is not likely to be applied in Australia.

8. I mention in passing that no reliance was placed by the parties on the tort of inducing breach of contract. This is a bit surprising, as presumably the BBC knew of the contract between the Jockey Club and Mr Buffham, and as well the BBC knew about the consent orders, which were also the product of contract.

9. In this paper I propose to look at the first basis of the decision, and to make a few miscellaneous observations about how contempt through frustrating the operation of injunctions operates.

10. When Gray J. decided that there could not be a contempt when a third party interferes with the performance of a final injunction, he was following and extending the reasoning of Lord Phillips of Worth Matravers MR in **Attorney General v Punch Ltd** [2001] QB 1028.

11. **Attorney General v Punch Ltd** [2001] QB 1028 was a case where the Attorney General had begun proceedings against a former MI5 officer called Shayler and the publishers of the Mail on Sunday, connected with Shayler disclosing material he had learned in the course of his employment. An interlocutory injunction was obtained against both defendants, the injunction against Shayler being a very wide one - it restrained him until trial or further order from disclosing to any newspaper or other organ of the media or any other person otherwise howsoever any information obtained by him in the course of or by virtue of his employment in the Security Service[3]. Punch, with knowledge of the injunctions, set about publishing material derived from Shayler, concerning the Security Service. It took the precaution of obtaining its material from Shayler in Paris, rather than England. A first instance judge convicted both Punch and its editor of contempt, and fined them. The editor appealed, and his appeal succeeded.

12. Lord Phillips held that the finding of contempt of court which was established in the House of Lords in **Attorney General v Times Newspapers Ltd** [1992] 1 AC 191 was one where the only relevant interference with the administration of justice was that the conduct of the trial, which the interlocutory injunction had been intended to protect, was interfered with. Lord Phillips said, in a passage quoted in its entirety by Gray J in **Jockey Club v Buffham** .:

"87. I have some difficulty with the reliance placed by the House of Lords on cases where contempt was established in relation to final orders. Notwithstanding these problems, I have reached the following conclusion in relation to the basis of the House of Lords' finding that contempt of court was established in **Attorney General v Times Newspapers Ltd** [1992] 1 AC 191: (a) intentional interference with the manner in which a judge is conducting a trial can amount to a contempt of court; (b) when in the course of a trial a judge makes an order with the purpose of furthering some aspect of the conduct of the trial, a third party who, with knowledge of that purpose, intentionally acts in such a way as to defeat that purpose can be in contempt of court; and (c) when a claimant brings an action to preserve an alleged right of confidentiality in information and the court makes an order that the information is not to be published pending trial, the purpose of the order is to protect the confidentiality of the information pending trial. A third party who, with knowledge of the order, publishes the information and thereby destroys its confidentiality will commit a contempt of court. The contempt is committed not because the third party is in breach of the order -- the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted.

88. The speeches of the House of Lords make it plain that the offence lies not simply in the commission of the act prohibited by the order, but in the effect that the act has of interfering with the conduct of the trial."

13. Gray J. went on to say, at [26]:

"Although the passages which I have cited from the Punch case are strictly obiter, I respectfully accept that the Spycatcher principle is limited to interlocutory injunctions. There is nothing in principle or in any decided case which requires me to extend the principle to final injunctions."

And at [27]:

"It follows that the BBC is not in my judgment bound or affected by the order of 31 May 2002; nor would the BBC be at risk of committing contempt if it were to proceed with the publication of the proposed "Panorama" program."

14. It is those passages which are, in my view, in error. There is both authority, and sound principle, to justify a conclusion that there can be a contempt of court when a third party knowingly interferes with performance of a final injunction.

Authority

15. There are three 19th-century cases which make clear that interference with the carrying out of a final injunction directed to someone else can be a contempt.

16. **Lord Wellesley v The Earl of Mornington** (1848) 11 Beav 180 (50 ER 785); 83 RR 136 was a case where a final injunction restrained the Earl from cutting down certain trees. The injunction did not extend to "his servants and agents". The Earl's land agent, a Mr Batley, cut the trees down, with knowledge of the order. First the plaintiff moved to commit Mr Batley for contempt for breach of the order. That failed, as Mr Batley was not bound by the order. Lord Langdale MR said (at 180, 786 of ER):

"You do not ask to commit him for the contempt, but for the breach of an injunction by which he is not enjoined. I think the objection fatal to this form of notice of motion; but I by no means think that because Batley is not enjoined in his

character of servant and agent, he cannot be punished for knowingly aiding and assisting Lord Mornington in doing that which the court has expressly prohibited."

17. With this hint, the plaintiff then tried again, and sought to commit Mr Batley for contempt in knowingly assisting in the breach of the order. The plaintiffs would have succeeded in this second application, but for the fact that Batley "... threw himself on the favourable consideration of the Court, and regretted if he had, through error and misapprehension, done anything that might be deemed a violation of the order of the Court",

and the plaintiff did not press for a committal. Lord Langdale MR said, at 183 (787 of ER), that Mr Batley was in contempt for

"intermeddling with these matters... Batley, in the position in which he was, and knowing the duty of the Earl of Mornington, ought to have taken care not to do any acts, in violation of the order of the court.",

and ordered Batley to pay the costs.

18. **Avery v Andrews** (1882) 51 LJ Ch 419; 46 LT 279 was a case where trustees of a friendly society were prohibited by final injunction from disposing of £2,000 of the Society in a certain way. They resigned, and new trustees were appointed. Within three months of the order being made, the new trustees disposed of the funds in the way that the first set of trustees had been ordered not to. The new trustees were held guilty of contempt of court. Kay J said, at 416 - 7 of LJ Ch:

"It is very necessary that the orders of this Court shall be observed implicitly; and if people are so foolish as to imagine that they can in this way, by a ruse, avoid and get rid of an order made by this Court, it is time that this delusion should be put an end to. I do not think that as to Andrews & Lely I should be justified in imprisoning them; but as to all the other gentlemen, I commit them at once to prison; and I order all the costs of this motion to be paid by them all, including Andrews & Lely. If they want to make their submission to the Court, and to escape from the punishment which this act has brought upon them, I advise them to arrange that the £2000 shall be replaced. "

19. The leading case is **Seaward v. Paterson** [1897] 1 Ch 545. There, a final injunction had been granted to prevent a tenant called Paterson from breaching a covenant of the lease requiring him not to annoy the lessor or the lessor's under tenants. The form of order made was one "that the defendant, his under tenants, agents and servants be perpetually restrained from...". The defendant disobeyed the order by permitting boxing matches on the premises. In so doing, he was assisted by a Mr Sheppard, who acted as master of ceremonies at the boxing match. A Mr Murray was found to be the promoter of the boxing matches. An application to commit the defendant, Mr Shepherd, and Mr Murray for contempt succeeded before North J. Murray appealed, and lost. Lindley LJ said, at 554

"now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him -- he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this -- not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning."

It was held that it was only necessary to prove he had knowledge of the existence of the injunction, not that he had been served with it.

20. As well as these cases, the principle is recognised in standard texts: **Kerr on Injunctions** 6th ed (1927) page 671-2, 674-5, **Seton on Judgments and Orders** 7th ed (1912) 522-3.

The principle justifying there being contempt by a third party interfering with performance of an injunction

21. **Attorney-General v Times Newspapers** [1992] 1 AC 191 was referred to by both Gray J. in **Jockey Club v Buffham** and by Lord Phillips in **Attorney General v Punch**. It is part of the "Spycatcher" saga. There had been an interlocutory injunction against the Observer and the Guardian, restraining them from publishing extracts of the book pending the trial of a suit by the Attorney General seeking permanent injunctions against publication, on the grounds of breach of confidentiality. The Sunday Times, with knowledge of that injunction, published extracts from the book. It was held guilty of contempt of court, and an appeal against that decision went to the House of Lords. There, the conviction for contempt was upheld. It did not matter that the Sunday Times was a competitor of the Observer and the Guardian, nor that, in publishing the extracts, the Sunday Times was in no way trying to assist the Observer and the Guardian, but rather was following its own commercial agenda - and so there was no way in which could be said that the Sunday Times was aiding and abetting the Observer or the Guardian to breach the interlocutory injunction against them. It was held that there was a contempt because the publication by the Sunday Times interfered with the administration of justice by the Court in the action against the Observer and the Guardian.

22. It is true that the particular injunction which was interfered with in that case was an interlocutory injunction, and that various of the examples which were given by their Lordships of actions which would be a contempt of court by

interfering with the administration of justice were ones where the injunction involved in the example was an interlocutory injunction. For instance, if there was an action between A and B about whether B was entitled to demolish A's house, and an interlocutory injunction restrained B from demolishing the house pending the hearing, it could be a contempt for C, with knowledge of that injunction, to demolish the house. However **Seaward v. Paterson** was referred to extensively by their Lordships -- by Lord Brandon of Oakbrook at 204, by Lord Ackner at 212-213, by Lord Oliver of Aylmerton at 222, and by Lord Jauncey of Tullichettle at 228-229. So was **Lord Wellesley v The Earl of Mornington** 11 Beav 180; 83 RR 136 - by Lord Brandon of Oakbrook at 203, by Lord Ackner at 212, and by Lord Jauncey of Tullichettle at 228. And these are both cases, as we have seen, where there was a contempt involved in a third party frustrating a final injunction.

23. Lord Oliver of Aylmerton, at 222-223 adopted, as stating the gravamen of the offence, a statement from the speeches in the House of Lords in **Attorney-General v Leveller Magazine Ltd** [1979] AC 440: "the publication ... frustrates, thwarts, or subverts the purpose of the court order and thereby interferes with the due administration of justice in the particular action." [4]

24. A unifying theme in the law of contempt of court is that it is concerned with conduct which interferes with the administration of justice. There are many types of such conduct -- assaulting an officer of the Court in discharge of his or her duty (**Elliott v Halmarack** 1 Merivale 302), displacing a receiver (**Broad v Wickham** 4 Sim 511), or interference with the execution of process (**Ex parte Clarke** 1 Russ & Myl 563)[5]. Lord Oliver's statement of the rationale for the existence of contempt in the particular circumstances where an injunction is frustrated is just an example of that unifying theme. His statement of the rationale can be applied in a variety of different circumstances where an injunction is frustrated, as a guide to whether there is contempt in frustrating that injunction. In the context of an interlocutory injunction, the Court's purpose is quite clear, namely that matters should remain as ordered by that injunction until the conclusion of the trial.

25. When there is a final injunction, the purpose of the Court in making the injunction is different -- it is to vindicate the legal rights of the person who has obtained the injunction. Deliberate interference by a third party not bound by the injunction can very effectively frustrate, thwart or subvert the court's purpose in vindicating those rights. And for that reason, there can be a contempt in interfering with a final injunction.

26. That there should be the power to punish third parties who interfere with final orders is consistent with the basis on which equity grants remedies. Equitable remedies like injunctions or orders for specific performance are made because the Court intends that a particular state of affairs will be brought about in the real world, so that the rights of a successful plaintiff can be properly vindicated. When Equity acts in aid of legal rights, it grants an injunction precisely because damages are not an adequate remedy, and it aims to see that some particular situation which will vindicate the plaintiff's rights is actually brought about. Likewise, when Equity grants an injunction in the exclusive jurisdiction the grant is always discretionary, and the rationale which underlies all the granting of all equitable remedies, namely that when there has been a wrong done, it should be set right (no more and no less), is applied.

27. There are various ways, besides the granting of injunctions, in which the equity court shows its determination that a result it has decided is appropriate should actually be achieved. Thus, if a mandatory order has been made, and the defendant does not carry it out, the court can order that the acts in question be performed by the plaintiff, or by a person appointed by the court, at the expense of the defendant (Supreme Court Rules Part 42 Rule 9). As part of that power, the court has power to nominate persons to execute documents the defendant refuses to execute himself. The court has power to make vesting orders, which can circumvent all conveyancing formalities so as to ensure that property ends up being owned by the person who should own it. That there are these powers to ensure that court orders are carried out is completely consistent with there being a power to punish for contempt for interference with performance of a final injunction.

28. And there is an aspect of the power to punish for contempt which makes it particularly well adapted to being a sanction for interference with performance of an injunction, namely that the punishment continues only for so long as the objective which the court is seeking to achieve in making the order is being frustrated. This is well illustrated in the remarks of Kay LJ in **Avery v Andrews**[6], to the effect that as soon as the new trustees replaced the money which they had distributed in defiance of the order, they were likely to be freed.

29. The effect of this principle, that an injunction can have the practical effect of stopping someone who is not a party to it from engaging in conduct which would interfere with the injunction, is recognised by Lord Oliver and 224-225 as meaning that, in one sense, an injunction does indeed have an effect against all the world, not just against those who are party to it. His Lordship accepts this with equanimity, saying "Indeed, were it not so, the administration of justice which is the purpose of the law of contempt to uphold would be largely deprived of any effective protection."

I respectfully agree.

Other cases that illustrate the principle

30. **Hubbard v Woodfield** (1913) 57 Solicitors Journal & Weekly Reporter 729 was a case where a landlord had

obtained against his tenant an injunction against the tenant selling certain property. The tenant gave instructions to auctioneers to sell the property, then disappeared. An injunction was granted against the auctioneers "aiding and abetting the defendant in committing a breach of the order of [Date] by selling or attempting to sell [the property]". Neville J. held there was jurisdiction to continue that injunction, even though the auctioneers were not made party to the proceedings.

31. **Acrow (Automation) Ltd v Rex Chainbelt Inc** [1971] 1 WLR 1676. Acrow manufactured products in England under licence agreement from an American corporation. The American corporation wrongly purported to terminate the licence agreement. Acrow obtained an interim injunction preventing the American corporation from so doing. There was an essential part of the licensed product, which was supplied by Rex, another American corporation. But the supply of that part was pursuant to ad hoc orders which Acrow placed from time to time, not pursuant to any long-term supply contract. The American licensor instructed Rex not to supply that part to Acrow. Rex had notice of the first injunction which was issued. Acrow sought an injunction against Rex refusing to supply that part. It was granted, on the principle that Rex had knowledge of the first injunction, and was acting unlawfully by assisting the American licensor to disobey it. That unlawfulness of conduct meant that Rex was deliberately interfering with the trade or business of another by unlawful means, which was a tort against the commission of which an injunction could be granted. That reasoning would run in exactly the same way if the injunction which Acrow had obtained was a final injunction rather than an interim injunction.

32. **Z Ltd v A-Z and AA-LL** [1982] QB 558 is the case about the effect of Mareva injunctions on banks who are given notice of the Mareva injunction. And of course a Mareva injunction is an interlocutory injunction, so the case is not directly relevant to my thesis. However, there were some important statements of principle by Eveleigh LJ, at 578, which explains the basis on which is the court finds contempt in these circumstances:

"I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction..... I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted."

These principles likewise would apply to a final injunction as well as to an interlocutory injunction.

A digression on the fate of the decision of the Court of Appeal in Attorney General v Punch

33. The decision of the Court of Appeal in **Attorney General v Punch Ltd** [2001] QB 1028 has now been reversed by the House of Lords. **Attorney General v Punch Ltd and Another** [2003] 1 AC 1046 was decided by the House of Lords on 12 December 2002. The ratio of the case is summarised thus in the headnote:

"that contempt of court consisted of interference with the administration of justice and would arise if there was intentional impedance or prejudice of the purpose of a court order; that, in the context of contempt of court proceedings, the purpose of the court in issuing an interlocutory injunction was the preservation of the rights of the parties pending a final determination of the issues between them rather than the litigant's purpose in seeking to obtain the order; that it followed that, in relation to a injunction restraining publication of information pending a decision as to whether it was entitled to protection on the ground of confidentiality, the actus reus of contempt lay in the destruction of the confidentiality of the material which it was the purpose of the injunction to preserve; and that, accordingly, the editor having wilfully published material which he knew the court had intended by its order to remain confidential, the actus reus and the mens rea of contempt of court had been established..."

34. Though this decision removes the precise basis of the decision in **Jockey Club v Buffham**, it does not expressly repudiate the notion that a third party cannot be guilty of contempt of court when he or she interferes with the operation of a final injunction directed to someone else.

Application to undertakings

35. If someone breaches an undertaking which he or she has given to the court, that is a contempt, just as breach of an injunction is a contempt: **Australian Consolidated Press Ltd v Morgan** (1965) 112 CLR 483. Knowing interference by a third party in an undertaking given to the court can equally result in that third party being guilty of contempt: **Ellendale**

Pty Ltd v Graham Matthews Pty Ltd (1986) 11 FCR 347; (1986) 65 ALR 275; **Attorney-General v Times Newspapers** [1992] 1 AC 191 at 219 per Lord Oliver of Aylmerton; **C C O M Pty Ltd v Jiejing Pty Ltd** (1992) 36 FCR 524. In **CCOM** at 530 - 531 Drummond J. said:

"Mr McCullagh however is not a party to the action and is not bound by the undertaking. Such a person is not subject to the strict liability in contempt which rests upon a person bound by an undertaking that is breached. However, a person who is not in terms bound by an undertaking but who knows of it and who then does something which disrupts the situation created by the undertaking may, but not necessarily must, be guilty of contempt of court.

Such a person will be guilty of contempt where his conduct, coupled with his knowledge of the undertaking, shows that he is flouting the authority of the court by doing something which he knows will prevent the undertaking given to the court is for us achieving its intended object. Such a person will be in contempt, because he has "knowingly impeded or interfered with the administration of justice by the court in the action between A and B": see **Attorney-General v Times Newspapers Ltd** (supra) (at 1003; 405) per Lord Brandon. See also **Seaward v Paterson** [1897] 1 Ch 545 at 555 and **Z Ltd v A-Z and AA-LL** [1982] QB 558 at 578."

(This statement of principle is influenced by the fact that the case in which it was made concerns an interlocutory undertaking, not a final undertaking.)

Australian authority

36. There is ample Australian authority that third parties can be guilty of contempt if, knowing of an order or undertaking, they either aid or abet the person bound by the order in breaking it, or otherwise do an act that obstructs or frustrates the object of the order or undertaking.

* **Re Intex Consultants Pty Ltd** [1986] 2 Qd R 99 (company director who causes company to breach an interlocutory undertaking to the court is guilty of contempt);

* **Windsurfing International Inc v Sailboards Australia Pty Ltd** (1986) 69 ALR 534; (1986) 19 FCR 110 (action settled on basis of undertaking is being given to the court by company; director of company who has knowledge of the undertaking and causes company to breach them is guilty of contempt);

* **Ellendale Pty Ltd v Graham Matthews Pty Ltd** (1986) 11 FCR 347; (1986) 65 ALR 275 (litigation settled on the basis of undertaking is being given to the court by a company and its governing director. A new company incorporated by the governing director can be guilty of contempt if it aids and abets the governing director in breaching the undertakings.)

* **Madeira Roggette Pty Ltd** (No 2) [1992] 1 Qd R 394 (interlocutory order prohibits lessor of premises from interfering with tenants use occupation and quiet enjoyment of the premises; director of lessor who has knowledge of the order, and orders midnight demolition of the premises, is guilty of contempt);

* **Sun Newspapers Pty Ltd v Brisbane TV (Ltd)** (1989) 92 ALR 535 (Derryn Hinch and his producer held guilty of contempt of court for televising material when they knew that an interlocutory injunction had been granted against the licensee of one of the television stations on which his show was broadcast prohibited the broadcasting of that material) ;

* **Stewart v Gymboree Pty Ltd** [2001] QCA 307; BC200104395 (company director who instigated acts of company which are breach of an interlocutory injunction against the company is guilty of contempt).

Of these cases, two, **Windsurfing International** and **Ellendale**, relate to undertakings which finally settled proceedings.

37. Though not part of the ratio of the case, it is also recognised in **Australian Securities Commission v Macleod** (1993) 40 FCR 155; (1993) 113 ALR 525 where Drummond J said, at 532-533 of ALR

"The principle upon which a person not bound by an order may nevertheless be held in contempt by engaging in conduct that defeats the operation of the order is quite different from that which governs the liability of persons bound by an order later said to be breached. I dealt with those differences in an unreported decision, **CCOM Pty Ltd v Jiejing Pty Ltd**, QG 124 of 1991, which I gave on 8 July 1992. There is no requirement to serve a stranger to an order as a precondition to his liability to contempt proceedings. The reason for this is clear. It may often be quite impossible beforehand for the beneficiary of an order to know of the existence of, let alone to serve with a copy of the order in accordance with O 37, r 2, a person not bound by the order but who later is said to be in contempt of court in respect of that order"

(**CCOM Pty Ltd v Jiejing Pty Ltd** is now reported, at (1992) 36 FCR 524.)

38. As well, and importantly, the principle is recognised in some dicta of Brennan, Deane, Toohey and Gaudron JJ in **Witham v Holloway** (1995) 183 CLR 525. Their Honours said, at 533

"... orders, whether they be Mareva injunctions, injunctions relating to the subject matter of the suit, or, simply, procedural orders, are made in the interests of justice. Non-compliance necessarily constitutes an interference with the administration of justice even if the position can be remedied as between the parties."

Extent of knowledge of the order or undertaking which is needed

39. Given that contempt is in substance a crime, it is actual knowledge of the undertaking or order which is required, not constructive notice : **Grant-Taylor v Jamieson** [2002] NSWSC 634 per Barratt J.

40. And because it is necessary for there to be a knowing interference with the administration of justice, before there is a contempt, if the person who has assisted in breach of an order or undertaking honestly believes that the meaning of the order or undertaking is such that what he or she did it not interfere with its operation, then the mens rea for contempt is not present: **CCOM** at 531 - 532.

41. As the extent of the knowledge of the order which is necessary, Pincus J said, in **Sun Newspapers Pty Ltd v Brisbane TV (Ltd)** (1989) 92 ALR 535 at 538:

"It does not appear to be necessary to show, in circumstances of this sort, that the person charged was aware of the full terms of the order; the cases speak of "knowledge of the order" or being "aware" of the order: see **Attorney-General (NSW) v Mayas Pty Ltd** (1988) 14 NSWLR 342 at 355- 6 per McHugh JA (as he then was); **Z Ltd v A-Z** [1982] 1 QB 558 at 572H, 586C. Apart from authority, the point may be illustrated as follows. If a person sitting in court heard most, but not all, of the terms of an injunction pronounced by a judge and then promptly left to arrange matters so that what he knew to be the court's intention would not take effect, it does not seem likely that his not having heard the full terms of the order would be a defence to a charge of contempt, whether or not he was a party to the proceedings."

Procedure for this type of contempt

42. The procedure for committing someone for contempt for breach of an undertaking which that person has given to the court is simpler than the procedure for committing someone for contempt for breach of a court order (**Alexander v Crawford** [2003] NSWSC 426 at [34]-[40] per Bryson J.). Likewise the procedure for committing someone for contempt for knowing involvement in the frustration of an undertaking given by someone else to the court is simpler than the procedure for contempt arising from someone breaching an order directed to that person -- see para 37 above.

21 August 2003

1 By J C Campbell. I am grateful to Ms Alex Munday for assistance with research.

2 This paper was delivered at the NSW Supreme Court Judges Conference on 24 August 2003, as part of a session on recent mistaken cases.

3 Part of the problem which Lord Phillips felt in granting relief to the Attorney General in **Attorney General v Punch Ltd** [2001] QB 1028 arose from the extraordinary width of the injunction which had been granted against Shayler -- in retrospect, it would have been better for the interlocutory injunction to have been confined to the risk which was actually apparent at the time it was granted. It would also have been better for the interlocutory injunction to have been confined to information which was truly confidential.

4 The italics appear in the original

5 These examples on drawn from the argument in **Lord Wellesley v The Earl of Mornington** (1848) 11 Beav 180 at 181; 50 ER 785 at 786

6 set out in para 18 above

Swearing in Ceremony of The Honourable Joseph Charles Campbell QC

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT

Friday 26 October 2001

SWEARING IN CEREMONY OF THE HONOURABLE JOSEPH CHARLES CAMPBELL QC AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

1 CAMPBELL J: Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. I present to you my Commission.

2 SPIGELMAN CJ: Thank you, Justice Campbell. Please remain seated while the Commission is being read. Principal Registrar, would you please read the Commission.

(Commission read)

3 Justice Campbell, I invite you to rise and take the oaths. First the oath of allegiance and then the judicial oath.

(Oaths of Office taken)

4 Principal Registrar, I hand you the oaths so they may be placed amongst the Court's archives. Sheriff, I hand to you the Bible so that you may have the customary inscription placed in it in order that it may then be presented to Justice Campbell as a memento of the occasion.

5 Justice Campbell, on behalf of the Court and on my own behalf I welcome you as a Judge of the Court and congratulate you on your appointment. We will hear presently of some of your achievements, leading qualities, competence in your service as barrister of this Court. I look forward to many years of service with you as a Judge of this Court.

6 THE HONOURABLE R J DEBUS MP, ATTORNEY GENERAL OF NEW SOUTH WALES: As Attorney General and on behalf of the New South Wales Bar it is my great pleasure to extend my congratulations to you on your appointment as a Judge of the Supreme Court of New South Wales.

7 You have come a long way since your days at Tamworth High School, and your years of study at the University of Sydney, where you excelled in the humanities and the law, obtaining an honours degree in both disciplines.

8 Upon leaving university you began your legal career in 1974 at the firm of Allen, Allen & Hemsley. Your time as a solicitor was short but distinguished and a year later you were admitted to the Bar, reading with Richard Conti, now a Judge of the Federal Court. You took Silk in 1988.

9 Your Honour quickly established a reputation as a talented and versatile advocate. Your skills were recognised not only by your peers, but also by a distinguished Court of Appeal bench comprising their Honours Hutley, Glass and Samuels.

10 Your skills as a barrister came to the attention of the Court of Appeal in one of your earliest cases, which concerned an appeal from a decision awarding the princely sum of two thousand dollars to a hairdresser whose shop had been flooded after some less than perfect renovations. Your Honour was forced to contend with an appeal court bench that found the decision in the Court below was based on an incorrect construction of the contract.

11 In concluding his judgment, his Honour Justice Hutley, wrote:

"I would like to say how much the court appreciated the argument presented by Mr Campbell, a very junior member of the Bar, who was faced with what is a most difficult situation for an advocate, suddenly having to deal with the case on an entirely different basis from that which he was originally presented with and came prepared to handle. We hope to see him again in the court."

12 His Honour Mr Justice Hutley was, I might say, my own lecturer in Succession at the University of Sydney, and I, along with several generations of law students can testify that his Honour was the least forgiving, the most stringent examiner in the Faculty.

13 His Honour Mr Justice Glass echoed the sentiments of Mr Justice Hutley saying that he agreed in the reasons for judgment, the order for costs and the accolade to Mr Campbell.

14 I am assured, your Honour, that such comments were not restricted to this one performance and have continued throughout your career, though most, I understand, have been uttered privately rather than in authorised law reports. 15 While spending your early years honing those skills which brought enviable praise from the Bench, you also found time to lecture part-time in equity at Sydney University for several years.

16 This teaching experience was clearly to your liking, as you later returned to your alma mater in the role of Challis lecturer in bankruptcy. Fortunately, it has not only been students who have benefited from your considerable knowledge and experience. You have been a member of the Council of Law Reporting from 1994 to the present and, since the beginning of this year, have occupied the role of chairperson of the Council.

17 Your interest in the development of the law has also seen you contribute to the Commercial Law Association and the Company Law Discussion group.

18 During your career at the Bar, you have maintained a varied practice which has seen you appear before the Supreme Court, the Federal Court and the High Court on matters concerning administrative law; banking, finance and securities; commercial law; corporations law; insolvency, bankruptcy and liquidation law; intellectual property law; trade practices and competition law; and, of course, trusts, equity, wills, probate and family provision law.

19 Such a broad range of experience and skills will no doubt ensure your Honour's career on the bench is as successful and fulfilling as your career at the Bar has been, and I offer you my best wishes and that of the profession on your well deserved elevation to the bench.

20 MR N K MEAGHER, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: May it please the court. On behalf of the solicitors of New South Wales it is my great pleasure to congratulate your Honour on your appointment as a judge of the Supreme Court of New South Wales.

21 The Attorney-General and I have obviously been reading very much the same script, particularly of your life and achievements. Your Honour was born in Sydney and moved to Tamworth where your mother's family lived. After completing your Leaving Certificate at Tamworth High School in 1965, at the early age of 16 years, your Honour commenced an Arts degree at Sydney University where you attended St Andrews College.

22 You graduated with an honours degree in philosophy but, I am told, you found that lacking in fulfilment and chose to pursue studies in law at Sydney University, completing, as we have heard, a degree with first class honours.

23 Your outstanding academic achievements were to be subsequently, as we have heard, applied as a part-time lecturer in equity between 1974 and 1978 and between 1983 and 1986 when you were the Challis lecturer in bankruptcy.

24 Your Honour worked on the solicitors' side of the law, as we have heard, for a very, very short time at Allen Allen & Hemsley where you were articled and were privileged to have the late Justice John Lehane as your master solicitor.

25 As we have heard, your Honour was called to the bar in June 1975, having been so persuaded by your wife's cousin, now Justice Conti, with whom you read.

26 In November 1988 you became Queen's Counsel. Your former colleagues at the bar have noted and said you had unbelievable thoroughness in terms of your preparation in relation to cases.

27 Those who have been your juniors have reported that they have stood in awe of your extraordinary attention to detail and your being a vast repository of knowledge and advice, especially in equity and contract. Others have remarked upon your impeccable integrity, both professionally and personally.

28 Your appointment to the Equity Division of the Supreme Court will be much welcomed for your personal qualities, broad experience and expertise.

29 I am told that your Honour is a great fan of opera and concerts and a lover of all music, but in particular delights in the performances of your three talented sons, for whom you have had occasion to commission a piece to celebrate your wife's birthday.

30 You have also been known to be a very ardent traveller and were reportedly fascinated by recent trips to China, Ireland and, just after the announcement of your appointment, an extensive tour of eastern Europe.

31 Your Honour, on behalf of the solicitors of New South Wales I congratulate you on your appointment and wish you many satisfying years on the bench.

32 CAMPBELL J: Chief Justice, other judges, Mr Attorney, other members of the legal profession, ladies and gentlemen. Any occasion like this which marks a major turning point in one's life, provides an occasion for looking back. And working out, on doing so, that there are many people who have played a part in my taking up of this appointment today. On an occasion like this it is neither possible, nor appropriate, to deal anything like adequately with my relationship with any of them, but there are some debts which I should acknowledge in an incomplete way.

33 The first of those are members of my family. The first of those are my parents. My father died when I was five, and all I can remember of him is disconnected fragments. But I am confident that from him I got not only some useful genetic material but also the benefit that a close relationship between parents can provide, even to someone who is too young

to really understand what is going on.

34 My mother was the most important single influence on my growing up, and she did literally everything that she could for me. I owe her a lot. She encouraged me, no doubt unrealistically, to believe that I could achieve anything I wanted to, and when it was time for me to leave home at the age of sixteen to go to university she encouraged that, too. She is now aged 89 and living in a nursing home. I know she would be very proud to be here today, but unfortunately it would be just too much for her to come.

35 I also owe a lot to my brothers. Particularly during the time that I was growing up, my brother Richard was a constant source of encouragement and someone who I tried to emulate. It was largely from him that I acquired the prejudice that intellectual activities are worth taking seriously. From the time I came to Sydney my elder brother David in effect provided an alternative home for me and also provided ongoing friendship. I wish I could emulate the generosity and enthusiasm which he has always displayed.

36 Over the years I have also had the benefit of a wide extended family in the form of my mother's five sisters and brother and their various offspring.

37 Then there are my parents-in-law, Pat and Mary Conti. They have provided continual support from the time more than thirty years ago, when they agreed to the fairly foolhardy proposition that a law student with no money, no contacts and fairly speculative prospects marry their daughter. They and Jenny's sisters, Liz and Janet, have really provided me with a second family to belong to.

38 Then there is my wife, Jenny. For over thirty years she has been, and still is, my constant companion and closest friend. Over the time that I have been a barrister she has continually provided me with qualified support. That she had an income from her work that we could live on was part of the reason why I went to the bar. There have been many times when I have been absent in body or mind, and she has kept the household running regardless. She has put up with the restless nights that are involved when cases prove troublesome. Without her support I simply could not have had the legal career that I have had. But she was also always ready to say enough is enough and there is more to life than this. I am grateful for the support and I am grateful for the qualifications.

39 Finally, there are our sons James, Robert and David. It has been a continual interest and pleasure over the last twenty-four years to live with them as they have grown up and matured. It continues to be a great interest and pleasure now they are adult to have them home from time to time, enjoy their company and hear about their lives, so different to ours. The whole process of parenting has been a tremendous benefit to me.

40 Any lawyer draws continually on his or her education. For me, Tamworth High School provided a good education and a very broad range of extracurricular activities. I had many skilled and dedicated teachers there. In particular I would mention Ford Spry, who is now deceased, who over a period of four years provided regular classes in maths for a group of people that he was training to do the maths honours course, and Brian Neil who introduced me to English literature over a period of five years.

41 And it was in Tamworth that I had the first experience of coming across lawyers, not in their work but in what they did, where there were local solicitors who judged the interschool debating competitions there.

42 St Andrews College is a place which has a very special place in my affections. I lived there for five and a bit very happy years. Most of that time was taken up trying on different ideas for size, reading widely, learning more about theatre, music, the college wine cellar, and also just taking part in the long discussions that students have. I still have good friends from that time, some of whom who are here today.

43 I should also mention here a special debt I have to Sir Adrian Solomons. He was a Tamworth solicitor who was also a member of the New South Wales Legislative Council. A Commonwealth scholarship had financed me through an Arts honours degree, and at the end of the Arts degree I had a very borderline case for an extension of that scholarship to be able to cover a law degree. Sir Adrian helped me, without any fee, to get through the bureaucratic maze and get an extension of the scholarship. Without that help I would not be here today.

44 At Sydney University I cannot recall a single bad lecturer, and there were many who were very stimulating lecturers. The stimulating ones included, as they then were, Colin Phegan, Bill Gummow, John Lehane, Bob Austin, Roger Giles (now of this court), and Eugene Kamenka.

45 You heard that I was articulated to John Lehane. For the first six months of my practice at the law I sat at a desk in a corner of his room. I cannot think of a better way of starting the practice of law. It gave me the chance to watch someone, who had complete mastery of the principles of the law and vast knowledge of how business actually operates, going quietly and efficiently about providing practical answers to the real problems that people came with to him. I am very sorry that he is not here today.

46 Richard Conti is another man to whom I owe a very special debt of gratitude. As you heard, he encouraged me to come to the bar. He eased my way onto the 11th floor. He took me as his pupil and provided the help that comes with that relationship, and over the whole of my time as a barrister he has always been there as both a source of inspiration and help.

47 I spent twenty-six years at the bar and have been very fortunate that I have been able to do so. Work at the bar provides continual opportunities to meet people from all walks of life and to have a window into their lives. It lets you know about how all sorts of social institutions work. You can get tutorials from experts in the widest varieties of fields of expertise. I found it fascinating the way work at the bar covers such a broad range of inquiry - and by that I mean not just that any part of human activity is potentially the subject of a law suit, but as well the topics that you need to deal with, including the history that explains how a particular principle came to be, and the theory or justification as to why a particular principle is either a sensible idea or perhaps not such a sensible idea.

48 Now, the way in which the litigation system operates is one which is in one sense at one remove from the daily life of the community. In one sense it is *about* the daily life of the community rather than being itself part of that life. And, furthermore, it is usually about part of the daily life of the community in the past rather than now. But it still is of importance. It is concerned with those activities of the daily life of the community which have led to a dispute - and the task of litigation is to put an end to the dispute so the litigants can get on with their lives and get on with their business.

As it does that, the legal system is in many ways a very cooperative enterprise. It is a system in which each individual involved has a role to play in achieving the vital end of resolving disputes in the community and resolving them in a way which is principled, uses fair processes and is in accordance with the laws that the representatives of the community have themselves chosen.

49 The way it operates over time is like a river that is made up of lots of different parts. The system is always there, even though the individual parts that make it up - the individual people - move on and themselves change.

50 As an individual in the law I have gone through that same process of changing roles. As a junior I was often led. I had the privilege of being led by a very large number of excellent barristers. I cannot name them all. It would be unfair to name just some. Many of them later became judges of this court or other courts. Some of them did not. From them I picked up much about what the law is about, the practical skills of litigation, and what the boundaries are that you practically ought not go beyond.

51 And when later in my time at the bar I worked with juniors there were many really smart, really hard-working men and women who not only helped with the work of the case at hand but who taught me a lot. Throughout the whole time there have been instructing solicitors with their indispensable role in the process. And of course barristers are in a never ending dialogue with the judges. Over twenty-six years of carrying on that dialogue with the judges, I know I have benefited greatly from the discussions, the probing, the questioning, as the judges try in the course of a case to get the right answer.

52 Another part of the system, and a very important part of the legal system for keeping it working, is the barristers who are not involved in a particular case. I have had tremendous friendship and support from other barristers on the floors that I have belonged to. Even though you might not often do it, it is comforting to know that there are barristers with whom you can toss a problem around if you need to. It is comforting to have colleagues to have a conversation with about things other than the case which is consuming you at the time.

53 There are people who are outside the legal profession who also make their contribution. I must acknowledge the enormous assistance I have received over the years from the clerks and secretaries and other support staff a barrister could not function without. And I must mention particularly here Paul Daley, who was my clerk for most of the time I was a barrister. I could always rely on him to make sure that the daily arrangements of practising ran smoothly, and his motto that "nothing's a problem" was one that he always carried out.

54 Today, with this ceremony, I move into a different stretch of this same river that I have been part of for over a quarter of a century. Since my appointment was announced some people have said to me, "But how can it happen that you are a barrister one day and judge the next?" Part of the answer is in one sense, I have had a quarter of a century's training for this. Another part is that I confidently expect that I will be helped by counsel and solicitors in cases that are before me.

55 Even so, I have no illusions that it will be easy. It is a great privilege to be offered the opportunity of joining in the work that the judges collectively do in their part of the legal process. It will be a great challenge to try to do that job properly.
