

A COMPARATIVE EVALUATION OF DEVELOPMENTS IN EQUITABLE RELIEF FOR BREACH OF FIDUCIARY DUTY AND BREACH OF TRUST

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I INTRODUCTION

It is a very great pleasure to be able to deliver the 2005 WA Lee lecture. There are many reasons in my own mind which led me to accept the invitation to deliver the lecture. Together with Professor Myles McGregor-Lowndes, I was involved in the establishment of this lecture in recognition of the contribution made by Tony Lee to Equity and Trusts as a teacher scholar and law reformer. I have to say that the idea to establish the lecture came from Myles although I was happy to be involved in the establishment and administration of the lecture having worked with Tony for many years as a colleague in the law school at the University of Queensland. I was in fact taught Equity and Trusts by Tony in 1973 or perhaps it was 1974.

During the time that I worked in the Law School at the University of Queensland, Tony and Professor Harold Ford of the University of Melbourne, published the first edition of what has become the leading Australian work on the *Principles of the Law of Trusts*, new editions of which continue to appear regularly. It is generally acknowledged that Tony has also made a very significant and enlightened contribution to the reform of Trusts and Succession Laws in Australia. I hope therefore that this lecture will serve as a fitting tribute to these and other contributions which Tony has made as teacher scholar and law reformer.

This lecture is intended to provide a brief glimpse of some of the themes which I have been examining in the course of writing a new book on *Equitable Obligations: Duties, Remedies and Defences* which is scheduled to be published by Thomson Legal and Regulatory in 2006. The focus of the new work is on liabilities and remedies for breach of trust and breach of fiduciary duty and hence, I have decided to talk about some aspects of the developments which have occurred in relation to those aspects of

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Lecture delivered on 27 October 2005 as part of the WA Lee Equity Lecture Series, Faculty of Law, Queensland University of Technology.

equitable relief. The focus will be on Australian developments in the context of comparative perspectives drawn from developments in the United Kingdom, New Zealand and Canada. I would also like to add that the focus of the lecture is concerned with how the courts deal with the question of how a fiduciary (including a trustee) ought to act and what the courts will do in the event that the fiduciary has not acted as he ought to have acted. This requires an examination of the moral qualities of the fiduciary's actions which is manifested in terms of the fiduciary's obligation of loyalty requiring the adherence to a selfless standard of behaviour rather than self-interested behaviour. Other standards of conduct are also considered when assessing the moral quality of the fiduciary's behaviour. So I will begin by reflecting on developments which have occurred in relation to the fiduciary's obligation of loyalty.

II DEVELOPMENTS IN RELATION TO LIABILITIES FOR BREACH OF FIDUCIARY DUTY AND BREACH OF TRUST

[201] **Developments in relation to a fiduciary's obligation of loyalty**

It has traditionally been accepted by Australian and English authorities that when the characteristics which give rise to a fiduciary relationship are present, that the feature which marks the fiduciary out for special scrutiny is the obligation of loyalty which is reflected in various facets, the most important of which is the duty to avoid a conflict of duty and interest and the duty not to misuse the fiduciary position without the fully informed consent of the beneficiary. These are simply facets or different aspects of the core duties of loyalty and fidelity which entitles the beneficiary to the single minded loyalty of the fiduciary. What lies at the heart of the fiduciary obligation is a standard of conduct and that standard is one which requires the fiduciary to act selflessly and with undivided loyalty in the interests of the other party. It is a very high standard, the effect of which is to limit the way in which the fiduciary may use a discretion or power over another party. The fiduciary must only have regard to the interests of the other party so that the self interest of the fiduciary has to give way to the interests of the beneficiary.¹

The operation and the determination of liabilities of a fiduciary based on conflict of duty and interest or a misuse of a fiduciary position in a wide variety of fiduciary contexts is well established and documented in terms of the requirements which have to be satisfied. However, in more recent cases the courts have been called upon to consider whether there are other duties embraced within the framework of the fiduciary's obligations of loyalty and fidelity and in particular whether there is scope for subjecting the fiduciary to other more positive duties. The courts have been called upon to consider the extent to which it might be justifiable to invoke the fiduciary standard to regulate new situations in the interests of justice. Here, it is useful to compare the approach that currently prevails in Australia with that which has found support in some Canadian cases.

In Australia, the fiduciary standard can only be invoked to protect particular economic interests and the High Court of Australia has not been prepared to countenance intervention on the basis of a fiduciary relationship to provide an independent source of positive duties to create new forms of civil wrongs outside of the law of contract and tort. The court has only been prepared to recognise proscriptive obligations not to

¹ For an explanation of the obligation of loyalty as the distinguishing obligation of a fiduciary see *Bristol and West Building Society v Mothew* [1997] 2 WLR 436, 448 (Millett LJ).

obtain an unauthorised benefit from the relationship and not to be in a position of conflict, and it has resisted the imposition of positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed. Thus, for example, in the context of the relationship of doctor and patient, the court has only been prepared to recognise proscriptive obligations and has declined to allow the fiduciary standard to provide the basis for an obligation on a doctor to provide a patient with access to medical records. The proscriptive obligations prohibit the fiduciary from engaging in certain kinds of activities without imposing any positive duties to act and the obligations which affect the fiduciary do not prescribe either the content of what is legal conduct or the means by which the beneficiary's interests are to be protected. In Australia, the conflict and profit rules are considered to represent the hallmark of the fiduciary's duty of loyalty. The fiduciary can be made to account for benefits and make good losses on the basis of these rules but cannot otherwise incur liabilities which stem from the imposition of positive legal duties to act in the interest of the person to whom the duty is owed.² It is therefore still necessary in Australia to plead cases in which relief is claimed on the basis of a breach of fiduciary duty by pleading facts which demonstrate a breach of the conflict or profit rules.

In other jurisdictions, particularly in North America the courts have imposed positive duties to disclose information to beneficiaries about matters which affect the interests of the beneficiary, and in Canada some judges have sought to invoke fiduciary obligations as a basis for enabling patients to have access to medical records held by doctors. Such an approach involves an expansion of the types of interests that fiduciary law is invoked to protect so as to include not only economic interests but also individual and social interests particularly in relation to vulnerable and disadvantaged classes of people, including indigenous peoples. In *McInery v Macdonald*³ it was decided that the relationship of physician and patient gave rise to a duty to make proper disclosure to the patient on the basis of an assumption that the information conveyed to the doctor remained the information of the patient and is held in a fashion akin to a trust. The onus was placed on the physician to justify denial of access to the information.

The judgment of McLachlin J in the case of *Norberg v Wynrib*⁴ is also of interest in this context. There it was accepted that fiduciary duties are not confined to the exercise of power which can affect the legal interests of the beneficiary but also encompasses 'the beneficiary's non-legal interests or practical interests'.⁵ Under this approach, fiduciary obligations are not confined to matters such as confidentiality, conflict of duty and interest and under influence. The obligations may extend to protecting societal and practical interests, and justified a finding in that instance that a breach of duty occurred when a doctor took advantage of a patient, dependent on drugs for sexual favours. Particular importance was attached to the power of the physician and the vulnerability of the patient, as giving rise to a fiduciary relationship. Under this analysis, the fiduciary standard is capable of assuming a new dimension of protecting 'fundamental human and

² This paragraph is based on the reasoning of the High Court in *Breen v Williams* (1996) 186 CLR 71. See also *Fico v O'Leary* [2004] WASC 215, [156]; *Bell Group Ltd (In Liq) v Westpac Banking Corporation* [2001] WASC 315, [191-2] (Owen J). It may be that a similar approach prevails in New Zealand see *S v Attorney-General* [2003] NZCA 149.

³ (1992) 93 DLR (4th) 415.

⁴ (1992) 92 DLR (4th) 449.

⁵ *Norberg v Wynrib* (1992) 92 DLR (4th) 449 at 490-1.

personal interests'.⁶ This provided the passport to relief in the form of damages 'to protect the plaintiff's interest in receiving medical care free from exploitation at the hands of the fiduciary'.⁷

[202] Developments in relation to the identification of a fiduciary relationship

The application of the fiduciary standard is dependent upon the existence of a fiduciary relationship. In many instances the existence of such a relationship will not pose any great difficulties particularly if the relationship is one of the well established fiduciary relationships. In this lecture, attention will focus on the developments which have occurred in relation to the issue of what scope exists for fiduciary duties to arise in the context of a more extensive range of relationship and it will be suggested that on the basis of recent developments in relation to the criteria which have to be satisfied to establish the existence of a fiduciary relationship, that there is considerable scope for fiduciary duties to arise in the context of a more extensive range of relationships, including a broad range of professional advisory relationships. Perhaps the most significant development in relation to the criteria for establishing the existence of such a relationship, is the emergence of what may conveniently be referred to as the reasonable expectation test.

The courts have declined to adopt any comprehensive definition of who is a fiduciary and have left open the possibility that such a relationship might arise in an infinite variety of circumstances. Key factors singled out in the leading Australian High Court authorities have been a position of disadvantage or vulnerability on the part of one of the parties, which causes him or her to place reliance on the other, and an undertaking to act for or on behalf of, or in the interests of the another in the exercise of a power that will affect the interests of that other in a legal and practical sense.⁸ For many years, the focus in the Australian cases has therefore been on finding on the basis of the particular facts of the case, an undertaking to act on behalf of another in some particular matter or matters. It may be that there is greater scope for such an undertaking to be found on the basis of a reasonable expectation. Finn J in his more recent judicial and extra judicial writings on fiduciary obligations has brought this test to the forefront of the requirements, which have to be satisfied to establish a fiduciary relationship. The approach is one, which requires the establishment of a reasonable expectation on the part of one party, to the relationship that the other will act in the interests of that party and not in the interests of himself or herself or the interests of some third party. The expectation must be such that the fiduciary must act not merely having regard to the other party's interests, but must act solely and selflessly in the interests of the beneficiary.⁹ Under this approach, it would seem that there is greater scope for a fiduciary obligation to arise because it encompasses situations in which someone has either undertaken to act in the interests of another, as well as situations in which there is a legitimate expectation that such an undertaking has arisen.¹⁰

⁶ Ibid.

⁷ Ibid.

⁸ *Hospital Products Limited v United Surgical Corp* (1984) 156 CLR 41.

⁹ *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 521; P Finn, 'Fiduciary Reflections' Paper presented at 13 Commonwealth Law Conference, Melbourne, Australia, Sunday 13 April – Thursday 17 April, 2003.

¹⁰ *Woodson Sales Pty Ltd v Woodson (Australia) Pty Ltd* [1996] NSW Lexis 3758, [73].

In both New Zealand¹¹ and Canada, some judges have opted to determine the issue as to the existence of a fiduciary relationship, by application of a reasonable expectation test that a party would act in the best interests of the other party. Those who adopt this approach usually have regard to a non-exhaustive list of evidential factors including influence, vulnerability and trust without regarding vulnerability as a necessary ingredient for the existence of such a relationship.¹² Other judges have dissented from this view, and adopted a more restrictive approach. Instead, vulnerability has been singled out as the distinguishing characteristic so that the existence of a fiduciary relationship requires a determination as to whether one party is dependent upon the power of another. One party has to have unilateral power over another's affairs, placing the latter at the mercy of the former's discretion.¹³

Under the reasonable expectation approach there is scope for fiduciary obligations to arise in a commercial setting and for them to arise as the consequence of the contract and the terms of the contract in a particular business setting. Under this approach, the obligations will arise when it is necessary to give effect to the expectations which the parties properly entertain of each other, in consequence of the contract and its terms within the particular business setting. Findings may be made that self interest is required to be subordinated to acting in the best interests of the other, in some or all matters which are the subject matter of the agreement. On the other hand, such findings will not be open if that will distort the arrangement which has been entered into by the parties. The contract may be the source of the fiduciary duty, as for example, it is in the case of agency and partnership, as well as providing the foundation for the modification of the extent and nature of the duties owed in the particular case.¹⁴

It is possible to make a few brief observations about some of the contexts which are occurring in which fiduciary duties are from time to time found to have arisen outside of the well established presumptive relationships, on the basis of the particular circumstances surrounding the relationship between the parties. The most commonly recurring situations which have arisen in recent years are those which have involved various kinds of professional advisers (including financial advisers) and their clients, other than lawyers and their clients, although as will be made apparent in a moment, lawyers and their clients also figure very prominently in the cases. In such instances whether or not the obligation of loyalty has arisen will depend upon whether the requirements of proof discussed earlier have been satisfied for proof that the relationship is in fact fiduciary. Accountants¹⁵ have been found to incur fiduciary obligations, as have stockbrokers when undertaking an advisory role in relation to investments,¹⁶ or where there is an expectation that the adviser will act in the interests of the customer in providing advice as to the wisdom of proposed investments. Potentially many kinds of financial service relationships are open to scrutiny, including banks when they come to occupy the position of an investment adviser.¹⁷ Under the

¹¹ *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 23 (Richardson J).

¹² *Lac Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 40 (La Forest J); *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 178-9 (La Forest J).

¹³ *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 219 (Sopinka and MacLachlin JJ).

¹⁴ *Hospital Products International Pty Ltd v United Surgical Corporation* (1984) 156 CLR 41, where differing views were expressed as to the desirability of extending fiduciary duties to a commercial context.

¹⁵ *Henderson v Amadio No 1* (1995) 62 FCR 1.

¹⁶ *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 37.

¹⁷ *Commonwealth Bank v Smith* (1991) 42 FCR 390.

approach based on the reasonable expectation of the client, such findings are open irrespective of the level of sophistication of the customer or the ability of the customer to accept or reject the advice. It does not require a total assumption of power by the adviser or total reliance of the client on the adviser.¹⁸

[203] Developments in relation to claims for breach of fiduciary duty against professional advisers

There has been a lot of litigation in recent years against lawyers, accountants and various financial advisers by claimants seeking to establish entitlement to relief on the basis of a breach of fiduciary duty. For the purpose of this lecture, the main focus will be on the operation of fiduciary duties in relation to lawyers, although some brief comments will also be made in relation to application of fiduciary duties in claims brought against financial advisers.

It is generally assumed that a solicitor is subject to the usual obligations of fidelity and loyalty owed by fiduciaries generally. Manifestations of this include; the duty to preserve the confidentiality of information received as a consequence of the solicitor client relationship and not to disclose such information without the client's fully informed consent; to avoid conflicts of duty and interest; to account for unauthorised profits; and to avoid any actual conflict between the duty to serve the interests of one client and the duty to serve the interests of another client.¹⁹ It is the latter duty which has been gaining increasing prominence in two situations, one of which is commonly described as the simultaneous representation of clients in the same matter, sometimes referred to as same matter conflicts, and the other which is commonly referred to as successive representation in separate matters. In the first, the fiduciary acts for separate clients in the same matter and in the second, the fiduciary has on an earlier occasion acquired information which is relevant to another matter in respect of which the fiduciary is now acting for a different client. It is now necessary to offer some explanation as to the current state of the authorities in Australia and in other jurisdictions in relation to both aspects of this duty.

At the moment there is no leading High Court authority in relation to simultaneous representation of clients in the same matter, although there have been a number of cases in which both State and Federal judges have enunciated some relevant principles in relation to this matter. Those authorities do not go so far as to prohibit a solicitor from acting for more than one party, even in instances where the solicitor is also one of the parties to the transaction so as to raise issues not only of conflict of duty but also conflict of duty and interest. However, it is repeatedly asserted that the solicitor must avoid any conflict between the duty to serve the interests of one client and the duty to serve the interests of another client. In part, the intervention of the court will depend upon whether the solicitor has obtained the 'unfettered consent of all the relevant clients after fully disclosing all the material facts, or the duty is attenuated by contract, with relevant client's fully informed consent'.²⁰ However, the obligation of the solicitor does

¹⁸ For a Canadian example of a fiduciary relationship found to have arisen in a financial advisory context see *Hodgkinson v Simms* (1994) 117 DLR (4th) 161; see also *Aequitas v AEFC* [2001] NSWSC 14, where Austin J found that a fiduciary relationship had arisen as a result of a joint venture holding itself out as having expertise in advising and undertaking through their agent to provide corporate advice.

¹⁹ *Maguire v Makaronis* (1996) 188 CLR 449, 495 (Kirby J).

²⁰ *Marron v J. Chatham Daunt Pty Ltd* BC970123 (Byrne J).

not cease at that stage, as the solicitor must be constantly vigilant and alert to perceive the possible emergence of a conflict of interest not only between the clients but also between the client and the solicitor. It is generally acknowledged that situations can arise in which it is impossible for the solicitor to act fairly and adequately for both parties, even if there has been informed consent. The courts will readily intervene if there have been failures by the solicitor to properly inform a particular client when in possession of information material to the client's interests. Significant material non-disclosures and conflict of interests on the part of the solicitor such as close family and commercial ties with one of the clients will also establish a claim for relief.²¹

There are perhaps more instructive authorities to be found in other jurisdictions. The relevant principles were explored by the Privy Council in an appeal from New Zealand in *Clarke Boyce v Mouat*.²² There it was accepted that a solicitor can act with informed consent which is required not only in order to be able to act for both parties, but it is also required whenever a conflict of interest or a real possibility of a conflict arises in the course of so acting. The establishment of an informed consent is dependent upon the solicitor demonstrating not only that each party has consented to the solicitor acting for both parties, but also demonstrating when a conflict has arisen, that there has been such disclosure that the client appreciates that the solicitor is acting under a disability and the consequences of not receiving proper advice. Consequently, a solicitor will be in breach of duty if he or she acts for both parties in the transaction without disclosing this to one of them, and even if this is disclosed, the solicitor will also be in breach if the solicitor fails unbeknown to one party, to disclose to that party material facts relative to the other of which he or she is aware.

In the United Kingdom, the obligations of a fiduciary who acts for more than one party have been formulated with even more stringency by Millett LJ in *Bristol and West Building Society v Mothew*.²³ There it is accepted that a solicitor may not act for two principals without the informed consent of both principals, and that a solicitor must also 'take care not to find himself in an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligation to another'.²⁴ The solicitor may be left with no alternative other than to cease to act for one and preferably both. In addition, Millett LJ also stated that: 'even if a solicitor is properly acting for two principals, the solicitor must act in good faith in the interests of each and must not act with the intention of furthering the interest of one principal to the prejudice of the other'.²⁵ Liability here depends on intentional conduct, although it need not be dishonest. It should also be noted that in the United Kingdom, the obligation to avoid conflicts of duty may not be limited to conflicts in relation to the same transaction, but may also extend to instances in which there is some reasonable relationship between the two matters.²⁶

²¹ *Stewart v Layton* (1992) 111 ALR 687; *Wan v McDonald* [1992] 105 ALR 687.

²² [1994] 1 AC 428.

²³ [1997] 2 WLR 436. See also *Moody v Cox* [1917] 2 Ch 71, 81.

²⁴ *Bristol and West Building Society v Mothew* [1007] 2 WLR 436, 450.

²⁵ *Ibid.*

²⁶ *Marks & Spencer Plc v Freshfields Bruckhaus Deringer* [2004] 1 WLR 2331, 2335 (Lawrence Collins J). See also *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, in which the House of Lords affirmed the strictness of the fiduciary standards in a case of conflicting duties by a solicitor. However, the House of Lords dealt with the case on the basis that the fiduciary prohibition of a conflict of duty and duty was incorporated into the retainer.

There is also now, a considerable body of authority in relation to the circumstances under which a solicitor may act against a former client and under what circumstances injunctive relief may be available to restrain a solicitor from acting against a former client. In Australia, as yet, there is no authoritative statement of the applicable principles by the High Court. A diversity of approaches have been adopted by State and Federal judges when called upon to deal with this issue, and intervention has been based on three possible grounds, namely, a duty of loyalty owed to the former client expressed in terms of conflict of duty and interest, the protection of confidential information and the court's control over the conduct of solicitors as officers of the court.²⁷ It is necessary to make some comments about each of these grounds. Although, in a number of the cases, both conflict of interest and preventing the disclosure of confidential information are identified as closely related grounds, the principles and findings are usually stated in terms of a there being a real and sensible possibility of confidential information being used.²⁸ However, there are also statements to the effect that a conflict can arise simply because the advancement of the case of a new client will prejudice the interest of a former client, and some judges have gone so far as to suggest that only in rare and very special cases could a solicitor properly be permitted to act against the former client whether or not there is any real question that the use of confidential information could arise.²⁹ In addition, some cases have been decided on the basis that the solicitor's duty to the court is such as to prevent the solicitor from acting, and even although there may be no breach of fiduciary duty or likelihood of the misuse of confidential information.³⁰ The need for the objective appearance of independence on the part of the solicitor has been stressed.

In some of the cases which have been dealt with on the basis of preventing a disclosure of confidential information, a strict approach has been adopted so as to not too readily allow a solicitor to act in a matter adverse to the interests of the old client. The courts have endeavoured to guard against disclosures of confidential information that will be of disadvantage to the former client and to guard against subconsciously drawing on the information. The courts will consider whether there is a real risk of the disclosure of confidential information, both conscious and unconscious, although, the possibility of real mischief must be proved. It is necessary to prove that the information was confidential to the plaintiff when it was communicated and that it should be kept confidential and secret.³¹ The courts have not accepted the approach adopted in an early Queensland case, that the interest of the previous client should prevail if there is any evidence of communication of confidential information,³² and nor have the courts been prepared to introduce an irrebuttable presumption that a prior retainer has resulted in the acquisition of confidential information.³³ In general, the courts in Australia have not been prepared to place much reliance on arrangements such as the utilisation of

²⁷ *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; [2001] VSCA 0248, [52]; *Newman as Trustee for the estates of Littlejohn v Phillips Fox (a firm)* [1999] WASC 171.

²⁸ *Malleson Stephen Jaques v KPMG Peat Marwick* (1991) 4 WAR 357, 360 (Ipp J); *Oceanic v HIH* [1999] NSWSC 292.

²⁹ *Wan v McDonald* [1992] 105 ALR 473, 494.

³⁰ *T and I* [2001] Fam CA 351.

³¹ For a very full analysis of these issues see the judgment of Drummond J in *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307; see also *D & J Constructions Pty Ltd v Head and others trading as Clayton Utz* (1987) 9 NSWLR 118, 122 (Bryson J).

³² *Mills v Day Dawn Block Gold Mining Company Limited* (1882) QLJ 62.

³³ Such an approach found favour with Gummow J in *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209, 230.

undertakings and Chinese walls, and the onus has in some cases been placed on the recipient to prove the absence of any defined risk, as the only workable approach having regard to the large size of modern law firms.³⁴

A brief comparison of the above approach with that endorsed in the United Kingdom and Canada provides some useful comparative perspectives. In *Prince Jefri Bolikah v KPMG*,³⁵ a case which was concerned with a firm of accountants, the House of Lords rejected the approach adopted in *Rakussen Ellis v Munday Clarke*,³⁶ which required it to be demonstrated that there is real mischief and prejudice if the solicitor is allowed to act. There the court was content to accept the undertakings and seems to have been in favour of allowing the solicitor to act. The remarks of the House of Lords in *Bolikah* were made in the context of the emergence of huge international firms with enormous resources operating on a global scale offering a comprehensive range of services. This case was dealt with on the basis that the only duty which survives the termination of the client relationships is a continuing duty to preserve the confidential information imparted during its subsistence.³⁷ The case for a strict approach was found to be unanswerable and so it was accepted that the court should intervene unless there is no risk of disclosure, although the risk has to be a real one and not fanciful or theoretical, but it need not be substantial. Under this approach, the evidential burden shifts once the former client has established that the defendant firm is in possession of confidential information, which was imparted in confidence and that firm is proposing to act for another party with an interest adverse to the former client in a matter to which the information is or may be relevant. It is up to the defendant to show that there is no risk that information will come into the possession of those acting for the other party. The court also has to be satisfied that effective means have been taken, that no reasonable disclosure will occur, and the establishment of ad hoc Chinese walls was not considered to be an effective measure.³⁸

In Canada the *Rakussen* approach was also rejected in *MacDonald Estate v Martin*.³⁹ Under the approach adopted in that case, the court would infer that confidential information was imparted once it is shown that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, unless the solicitor satisfies the court that no information was imparted which could be relevant. A heavy burden is placed on the lawyer, and assurances and undertakings not to use the information are of no avail. Essentially a lawyer who has confidential information cannot act against a former client and there is a strong inference that lawyers who work together share confidences. The lawyer has to satisfy the court that all reasonable means have been taken to ensure that no disclosure will occur. In the United States, the courts have adopted an even more stringent approach of an irrebuttable presumption that the knowledge of one member of a law firm constitutes knowledge of all the lawyers in that firm.

³⁴ *Colonial Portfolio v Nissen* [2000] NSWSC 1047; *Newman as Trustee for the Estates of Littlejohn v Phillips Fox (a firm)* [1999] WASC 171.

³⁵ [1999] 2 WLR 215.

³⁶ [1912] 1 Ch 831.

³⁷ *Rakussen Ellis v Munday Clark* [1912] 2 Ch 831, 235.

³⁸ *Ibid*, 235-7.

³⁹ (1991) 77 DLR (4th) 249.

Aside from lawyers and their clients, the other professional relationship in which breach of fiduciary duty claims are being raised, is in the context of the relationship of a financial adviser and client. All of the usual fiduciary duties may be brought into play, although as yet the body of case law is sparse, but is steadily increasing as a result of the growth of financial advisory work undertaken by banks, financial institutions, firms of accountants and others operating as independent professional advisers. There have been instances of successful claims based on conflict of duty and interest established against financial advisers,⁴⁰ and of additional obligations having to be discharged because of the advisory role undertaken which will result in the court examining the quality of the advice and the fairness of the transaction.⁴¹ There have also been instances in which the courts have intervened where there has been a conflict of duty and duty on the part of a bank manager.⁴²

[204] Developments in relation to non-fiduciary obligations of trustees

Apart from fiduciary obligations, there are a range of other obligations owed by trustees many of which relate to the conduct of trustees in the administration and management of trust affairs. The most important of these is the duty of care which the trustee has to discharge in the management of trust affairs. The standard of conduct which the trustee is required to adhere to in this context may be less exacting than the fiduciary standard and it is sometimes suggested that the duty of care is more akin to that of negligence at common law. A few brief observations need to be made about the standard of care which will affect the separate responsibilities of each trustee, where there is more than one trustee.

It is well established that the duty of a trustee in the conduct of the business of a trust 'is to conduct the business of the trust with the same care as an ordinary man of business would extend to his own affairs'.⁴³ This statement of the duty is, however on its own a little misleading, for it is also well accepted that a trustee is not in exactly the same situation as an ordinary business person. A trustee is expected to exercise caution so as to preserve the trust property and a trustee unlike an ordinary business person does have to take into account the interests of the beneficiaries to whom the obligations are owed. The expectations and responsibilities of the trustees are therefore significantly different to those of an ordinary business person and this may as Finn J pointed out in *ASC v AS Nominees Ltd*,⁴⁴ be reflected in the 'different risks that persons who invest their assets in companies on the one hand and in trust on the other are considered likely to have assumed'.⁴⁵

As well distinguishing the trustee's standard of care from that of the ordinary prudent business person, there is also scope for a higher standard of care to be expected of some trustees in contemporary circumstances. The standard of care was adopted in the late nineteenth century at a time when trust corporations were not used for trading and investment and at a time when professional trustees were not common. The standard of care adopted did not differentiate between different types of trustees. Today, trust

⁴⁰ *Aequitas v AEFC* [2001] NSWSC 14.

⁴¹ *Daly v Sydney Stock Exchange* (1986) 160 CLR 37.

⁴² *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *The Commonwealth Bank v Smith* (1991) 102 ALR 453.

⁴³ *Bartlett v Barclays Trust Co (No 1)* [1980] 1 ALL ER 139, 150 (Brightman J).

⁴⁴ (1995) 62 FCR 504.

⁴⁵ *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516.

corporations and professional trustees are common and as such they invite reliance upon themselves by members of the public by virtue of the specialist knowledge which they appear to have in the business of trust management. It has therefore been proposed by some English and Australian judges, although not yet fully endorsed and regularly applied, that a higher duty of care is applicable to someone like ‘a trust corporation which carries on a specialised business of trust management’.⁴⁶ The rationale for the higher standard is based on trust corporations holding themselves out in their advertising as being above ordinary mortals, who in the conduct of their business employ specialist trained trust officers and managers as well as having access to financial information and professional advice for dealing with trust problems on a daily basis. Under this approach, such trustees would be rendered liable for losses if the loss arises from the trustees’ neglect to exercise the special skill and care which it professes to have. The scope for liabilities to be established on this basis remains to be fully explored. In Queensland the higher duty of care has been introduced as an amendment to the *Trusts Act 1973*. Section 22(1) of that Act now provides that a trustee in exercising a power of investment must ‘(a) if the trustee’s profession, business or employment is or includes, acting as a trustee or investing money for other persons - exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons’. The section also provides ‘(b) if the trustee’s profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons – exercise the care diligence and skill a prudent person would exercise in managing the affairs of other persons’.

[205] Developments in relation to claims for breach of trust by trustees holding funds on a resulting trust

There have been some recent attempts to render trustees of a resulting trust liable for breach of trust. This is an aspect of breach of trust which has so far received little attention. On the basis of what little authority that exists, it may be necessary to establish some level of knowledge on the part of the resulting trustee in order to succeed in such a claim. The matter was considered by McPherson JA in *Port of Brisbane Corporation v ANZ Securities Ltd*,⁴⁷ without resolving whether there was a resulting trust on the facts, with the judge indicating that it would be offensive to notions of equity and common sense to hold ANZ Securities liable for a supposed breach of trust “it had never undertaken and was not aware that any such obligation existed”.⁴⁸ In this instance, before any claim was made in relation to the money, it had been fully disbursed. It also had been received in good faith without any notice that another laid claim to the money. ANZ had considered itself a trustee for another, apart from the resulting trust alleged by the plaintiff. It had never held the funds as part of its general assets.

A similar approach was adopted in the United Kingdom by Robert Walker LJ in *Allan v Rea Brothers Ltd*⁴⁹ in rejecting a claim, because the trustee company did not at any time

⁴⁶ *Bartlett v Barclays Trust Co (No 1)* [1980] 1 ALL ER 139, 152. In *ASC Nominees v AS Nominees Ltd* (1995) 62 FCR 504, 518 where Finn J accepted that a higher standard of care applied to trustee companies although it was not applied in that case. See also *Wilkinson v Feldworth Financial Services Pty Ltd* (1998) 29 ASCR 642, 693 where Rolfe J expressed agreement with Finn J.

⁴⁷ [2002] QCA 158.

⁴⁸ *Port of Brisbane Corporation v ANZ Securities Ltd* [2002] QCA 158, [32].

⁴⁹ [2002] EWCA 85.

have both actual knowledge that the transfer payment was invalid and should be returned, and nor did it have the means of either ascertaining what was due to be returned to trustees of a scheme or of raising that sum. The trustee company did not know the true position and it was found that the company had made repeated inquiries and had been deceived as to the true position.

[206] Developments in relation to recipient liability of third parties for breach of trust and breach of fiduciary duty

There has not been any recent authoritative statement by the High Court as to the requirements which have to be satisfied in order to render a third party personally liable for a breach of trust. As is the case in some other jurisdictions, there is a diversity of approaches which have been adopted, although most of the approaches centre around a knowledge based approach. There has been no consistency as to the levels of knowledge which have to be satisfied in order establish liability against the third party. Without going into the possible five levels of knowledge which have bedevilled this area of liability, the more recent authorities have settled on level one to four but not five.⁵⁰ This, at least was the approach which found favour with De Jersey J in *Doneley v Doneley*,⁵¹ where the judge also acknowledged that a recipient claim is essentially proprietary, although it does not require actual possession of trust property or an absolute interest in it, in order to establish the recipient element. What it requires is that the recipient has been a direct beneficiary of the breach of trust as a result of having received the property which is 'identifiable with the trust property the subject of the breach'.⁵² In this case it was found that the bank knew of all the material facts necessary to establish the breach of trust in relation to the securities affecting the trust property. It has also been acknowledged in another case that in a recipient claim it is not necessary to establish that the defendant acted dishonestly or with a want of probity,⁵³ and in the same case the Judge expressed a preference for a strict liability approach, but did not apply that approach. This approach will be considered in more detail in a moment, in the context of the English developments in relation to recipient liability.

In the United Kingdom there has for many years been an almost endless stream of litigation involving claims based on the receipt of trust property in breach of trust by third parties, and the courts have found it very difficult to settle on an agreed approach for the determination of such claims, other than requiring a requisite level of knowledge to render the recipient liable. It also seems to be agreed that dishonesty is not a prerequisite for liability. What level of knowledge will suffice has been a matter of considerable disagreement, and as will be explained in a moment, the English courts are being called upon to abandon the requirement of knowledge altogether. In the period following the case of *Re Montagu's Settlement*,⁵⁴ the general trend of authorities was to settle on level one to three as the basis for liability to arise, but not levels four and five. However, more recently some judges have opted to shift the emphasis away from knowledge to commercially unacceptable conduct and to impute knowledge to a person guilty of commercially unacceptable conduct. Such an approach does not eliminate

⁵⁰ *Gertsch v Atsas* [1999] NSWSC 898, [28] (Foster J); *Hancock Memorial Foundation Ltd v Porteous* [1999] WASC 55, [79] (Anderson J); *K & S Corporation Ltd v S* [2003] SASC 96, [23] (Besanko J).

⁵¹ (1998) 1 Qd R 602.

⁵² *Doneley v Doneley* (1998) 1 Qd R 602, 612.

⁵³ *Koorootang Nominees Pty Ltd v Australian and New Zealand Banking Group Ltd* [1988] VR 16.

⁵⁴ [1975] 1 WLR 1240.

knowledge entirely as a factor. In *BCCI Ltd v Akindele*⁵⁵ it was stated that: ‘All that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt’.⁵⁶ It was asserted somewhat hopefully, that this approach would avoid the difficulties of definition which arise under a solely knowledge based approach enabling the ‘courts to give common sense decisions in a commercial context’.⁵⁷ Even so, the findings in that case were still expressed in terms of knowledge, and a preference was expressed for liability to be fault based.

In contrast to all of the above, stands the approach favoured by Lord Millett as enunciated in *Twinsectra v Yardley*⁵⁸ to the effect that liability for knowing receipt is receipt based and does not depend on fault. The cause of action was identified by Lord Millett as restitutionary and is available only where the defendant has received or applied money to his own use or benefit. Lord Millett could see no basis for requiring actual knowledge of the breach of trust let alone dishonesty, as a condition of liability. Constructive notice would be sufficient, although Lord Millett would prefer liability to be strict subject to a defence of change of position.⁵⁹

It should also be noted that there is also some scope for recipient liability to arise where property is held in a fiduciary capacity, although not trust property in a strict sense. The invocation of this category of liability where profits and gains have been received as a result of a breach of a fiduciary duty is more problematical because of the absence of any pre-existing trust or fiduciary relationship in respect of the property even although potentially, the property may be subject to a constructive trust because of the breach of fiduciary duty. Such cases would normally fall to be determined under the accessory category of liability, the key developments in relation to which will now be explained.

[207] Developments in relation to accessory liability of third parties for breach of trust and breach of fiduciary duty

Once again in Australia there have been no recent pronouncements from the High Court in relation to the requirements which have to be satisfied in order to render a third party personally liable as an accessory to a breach of trust. One of the key elements that has been insisted upon is knowledge, and it would seem that probably levels one to four but not five will suffice for the purpose of rendering a third party liable. The courts have been unwilling to countenance liability on the basis that the circumstances would have put an honest and reasonable person on inquiry. There are signs that the courts in Australia will follow the lead provided by their English counterparts and allow dishonesty to be accepted as the test of liability in breach of trust claims and that an objective test of dishonesty will be adopted.⁶⁰

It is therefore appropriate and relevant to say something about what has emerged in recent English authorities in relation to this issue. There it is accepted that accessory liability is not dependent upon the receipt of trust property and that liability does not

⁵⁵ [2000] 4 ALL ER 221.

⁵⁶ *BCCI Ltd v Akindele* [2000] 4 ALL ER 221, 235.

⁵⁷ *Ibid*, 236.

⁵⁸ [2002] UK HL 12

⁵⁹ *Twinsectra v Yardley* [2002] UH HL 12, [105]

⁶⁰ *Beach Petroleum v Kennedy* (1997) 26 ACSR 114, 297 (Rolfe J); *Voss v Davidson* [2002] QSC 313, [28] where the judge found that the defendant was not acting dishonestly.

spring from any proprietary dominion. An accessory claim has been clearly differentiated from a receipt claim in so far as an accessory claim is concerned with a third party who has interfered with the trust relationship by assisting a trustee so as to deprive the beneficiary of the trust property. In *Royal Brunei Airlines v Tan*⁶¹ it was emphasised that accessory liability is not property based, and therefore not concerned with the liability of a person who has received any property. It focuses on the interference with the due performance of the personal fiduciary obligations owed by the trustee and as such is fault based. Subsequently, Lord Millett pointed out in *Twinsectra v Yardley*⁶² that the action is not restitutionary, but one in which the claimant seeks compensation for wrongdoing and that liability is not strict.⁶³ It would also seem that this category, at least in the United Kingdom, is no longer confined to dishonest and fraudulent conduct by the trustee and that it is sufficient if the assistance occurs in relation to the use of trust funds not permitted by the trust.⁶⁴ It is not proposed to examine in any detail all of the various requirements which have to be satisfied, but instead to focus on developments which have taken place in relation to the requirement of knowledge, which was insisted on as one of the key ingredients until the decision in *Royal Brunei*. Once again, it proved difficult for the courts to settle on the levels of knowledge required to establish liability, although by about 1995 it seemed to be settled that an accessory should know of the relevant facts. In addition, some judges had begun to lay particular stress on dishonesty and want of probity as a basis for accessory liability. In *Royal Brunei* it was accepted that dishonesty was a necessary foundation of accessory liability, whereas negligence was rejected as the basis of liability, since a third party does not normally incur the burden of having to discharge a duty of care owed to the beneficiaries. According to Lord Nichols:

A liability in equity to make good the loss attaches to a person who dishonestly procures or assist in a breach of trust or breach of fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly although this will usually be so where the third party is acting dishonestly.⁶⁵

What does dishonesty or acting with want of probity mean in this context? Under the approach adopted by Lord Nichols in *Royal Brunei* it means: ‘simply not acting as an honest person would in the circumstances’.⁶⁶ Lord Nichols also suggested that it has a strong objective element and that it is more concerned with advertent conduct, conscious impropriety rather than with inadvertent conduct and that carelessness does not constitute dishonesty. It was stressed that the standard of what constitutes objective conduct was not left to be determined on the basis of the subjective moral standards of the individual and that it would not be enough to escape liability ‘because he believes he sees nothing wrong in such behaviour’.⁶⁷ Honesty was identified as an objective standard and that it was a matter of looking at all of the circumstances known to the third party at the time, as well as having regard to the personal attributes of the third party including ‘experience and intelligence and the reason why he acted as he did.’⁶⁸

⁶¹ [1995] 3 WLR 604.

⁶² [2002] UKHL 12.

⁶³ *Twinsectra v Yardley* [2002] UH HL 12, [296]

⁶⁴ *Royal Brunei Airlines v Tan* [1995] 3 WLR 64, 71.

⁶⁵ *Ibid*, 76.

⁶⁶ *Ibid*, 73-4.

⁶⁷ *Ibid*, 64.

⁶⁸ *Ibid*.

Lord Nichols, bravely proclaimed that the approach would avoid the “tortious convolutions about the sort of knowledge required”⁶⁹

Notwithstanding the hopes of Lord Nichols for the new approach, what seems to have occurred is a new avenue for dispute about the required standard of dishonesty and the relevance of subjective factors associated with the specific characteristics of the defendant. Moreover the approach does not seem to have eliminated knowledge altogether on the part of the accessory, as a relevant consideration in determining liability. In the subsequent case of *Twinsectra v Yardley*,⁷⁰ the House of Lords interpreted Lord Nichols statements as requiring a subjective test of dishonesty. Lord Hoffmann stating that it requires a ‘dishonest state of mind that is consciousness that one is transgressing ordinary standards of honest behaviour’⁷¹ and Lord Hutton stating that an accessory can ‘not be dishonest even if he does not know that what he is doing would be dishonest to honest people’.⁷² Lord Millett delivered a very vigorous dissent on the basis that the standard is objective, and that an accessory is required to attain the standards which would be observed by a person placed in similar circumstances, although account must be taken of subjective considerations such as the defendant’s experience, intelligence and his actual state of knowledge, although it is not necessary that he actually appreciate what he was doing was dishonest.⁷³ This approach would seem to accord with what Lord Nichols said in *Royal Brunei*, although knowledge seems to return through the back door as a factor indicative of dishonesty.

Further clarification has been provided by the Judicial Committee of the Privy Council in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Limited*.⁷⁴ The judgment was delivered by Lord Hoffman and it should be noted that Lord Nichols was present at the hearing. Their Lordships accepted that the standard for determining whether the defendant’s mental state can be characterised as dishonest is an objective standard and it is irrelevant that the defendant judges honesty by a different standard. It was also accepted that a dishonest state of mind is a subjective mental state on the part of the person who assists in the breach of trust and that: ‘Such a state of mind may consist of knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people’s money), or it may consist in suspicion combined with a conscious decision not to make inquiries’.⁷⁵

It was accepted that there is an element of ambiguity in the remarks of Lord Hutton and Lord Hoffman in *Twinsectra*. According to their Lordships the reference in Lord Hutton’s judgment to:

what he knows would offend normally accepted standards of conduct’ meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.⁷⁶

⁶⁹ Ibid, 75.

⁷⁰ [2002] 2 WLR 802.

⁷¹ *Twinsectra v Yardley* [2002] 2 WLR 802, 807.

⁷² Ibid, 811.

⁷³ Ibid, 836.

⁷⁴ Judgment delivered on the 10 October 2005.

⁷⁵ *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Limited* judgment delivered on 10 October 2005, [10].

⁷⁶ Ibid, [15].

Similarly the reference by Lord Hoffman to ‘consciousness that one is transgressing ordinary standards of honest behaviour’ was interpreted as ‘intended to require consciousness of those elements of the transaction which make participation transgress the ordinary standards of behaviour. It did not also require him to have thought about what those standards were’.⁷⁷ In addition their Lordships also confirmed that ‘Someone can know and certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means’.⁷⁸ It was also not necessary to know the precise involvement of the other party in another’s affairs in order to suspect that there was no right to use the money as one’s own.

The approach just outlined is expressed in terms which are applicable to both accessory liability for breach of trust and breach of fiduciary duty. In Australia it is well established that a third party may incur liability as an accessory as a result of involvement in the misconduct of a fiduciary, so as to provide an avenue for rendering third parties liable to account for profits, benefits and gains received by a third party who has participated in the breach of fiduciary duty committed by the fiduciary, as well as for losses suffered as a result of the third party’s participation. This was accepted as long ago as 1975 by the High Court in *Consul Development Pty Ltd v DPC Estates Ltd*.⁷⁹ The requirements to establish liability in *Consul* were stated in terms of knowledge with levels one to four but not level five being required to establish liability. The High Court has not yet had an opportunity to re-examine *Consul* in the light of more recent English developments outlined above, so it is not entirely clear if the dishonesty approach will prevail in Australia. In cases decided by both Federal and State judges, the approach has been accepted as a statement of modern Australian law.⁸⁰

In Canada an assistance claim in the context claims for the disgorgement of profits received by a third party must, under the current authorities, be based on receipt of a benefit with actual knowledge, recklessness or wilful blindness to the breach. The Supreme Court of Canada has not yet pronounced on whether “‘knowingly” should give way to “dishonesty” as the “defining ingredient” of accessory liability’.⁸¹

III DEVELOPMENTS IN RELATION TO REMEDIES AND DEFENCES FOR BREACH OF FIDUCIARY DUTY AND BREACH OF TRUST

[301] Developments in relation to proprietary remedies for breach of fiduciary duty

It is up to the court to determine the appropriate remedy for a breach of fiduciary duty. The remedy will depend largely upon the nature of the case. Since the breach of obligation is exclusively equitable, the range of remedies are exclusively equitable in

⁷⁷ Ibid, [16].

⁷⁸ Ibid, [28].

⁷⁹ (1975) 132 CLR 373.

⁸⁰ *Aequitas v AEFC* [2001] NSWSC 14, [383-384] (Austin J); *Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd* [2003] QSC 205, [1582], where Chesterman J accepted the formulation of Lord Nichols in Royal Brunei indicating that *Consul* did not ‘contain a definitive exposition of the necessary ingredients to establish liability of one who assists in a breach of fiduciary duty’. There are also some reported instances in which accessories have been found to have acted dishonestly, see *Capital Investments Corporation Pty Ltd v Classic Trading Pty Ltd* [2001] FCA 1385. There are also signs that the dishonesty approach will be adopted in New Zealand, see *Asian-Pacific Finance Limited v Wadell* [1999] NZCA 92.

⁸¹ *Canada Inc v Strother* [2005] BCCA 385, [25].

nature.⁸² The remedial response in equity is in the main different from the common law and there is a wider range of remedial considerations which come into play in equity. Restoration rather than punishment is the purpose that is sought to be achieved. Relief is usually devoid of common law limitations. In addition, presumptions may be available to facilitate proof of a claim. Counter-entitlements may be awarded in favour of the fiduciary. It is a cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts. The courts will award whatever remedy may be appropriate to achieve an account of the gain derived by the fiduciary. The full range of both personal and proprietary remedies is available and many of these remedies go beyond offering compensation to the plaintiff. The plaintiff can elect to claim multiple or alternate remedies.

In Australia the courts have been called upon to determine the extent to which there is scope in a breach of fiduciary duty claim to award proprietary relief, and there have been some significant developments in relation to the willingness of the courts to grant such relief in such cases. Before discussing these developments it is necessary to place this development in the context of other developments which have taken place in relation to the requirements which have to be satisfied in order to obtain proprietary relief in Australia. These developments have occurred in the context of delineating the circumstances in which a proprietary remedy in the form of a constructive trust may be awarded as an appropriate form of relief. It should be noted that there may be other proprietary remedies such as an equitable lien or charge which may also be part of the framework of proprietary remedies available in equity. In a series of cases, the High Court of Australia has accepted the constructive trust as an appropriate form of equitable relief, beginning in *Hospital Products Limited v United Surgical Corporation*⁸³ where Deane J stated that: ‘a constructive trust may be imposed as the appropriate form of relief in circumstances where a person could not in good conscience retain a benefit or the proceeds of a benefit in breach of his contractual or other legal or equitable obligations’.⁸⁴ Subsequently in *Muschinski v Dodds*⁸⁵ the same judge described the constructive trust as a ‘remedial institution which equity imposes regardless of actual or presumed intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle’.⁸⁶ Particular emphasis was placed on the doctrines of equity which are designed “to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct”.⁸⁷ It is generally accepted in Australia that in order for a remedial constructive trust to be imposed there has to be identifiable trust property to which a trust could attach and a legal or equitable basis for treating the retention of the property as unconscionable.

That the constructive trust is available as a remedial response to a claim for equitable intervention was confirmed by the High Court in *Giumelli v Giumelli*⁸⁸ and as a remedial response: ‘It obliges the holder of the legal title to surrender the property in

⁸² *Maguire v Makaronis* (1996) 188 CLR 449, 467 (Brennan CJ, McHugh and Gummow JJ).

⁸³ (1984) 156 CLR 41.

⁸⁴ *Hospital Products International Pty Ltd v United Surgical Corporation* (1984) 156 CLR 41, 125.
⁸⁵ (1985) 160 CLR 583.

⁸⁶ *Muschinski v Dodds* (1985) 160 CLR 583, 614.

⁸⁷ *Ibid*, 619-20. See also *Baumgartner v Baumgartner* (1987) 164 CLR 137.

⁸⁸ (1998) 196 CLR 101.

question thereby bringing a determination of the rights and titles of the parties'.⁸⁹ The order made by the court is 'akin to an order for conveyance'.⁹⁰ In addition 'it does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests'.⁹¹ The remedial constructive trust has the added dimension of flexibility as to its date of operation. It can be so framed that the commencement of its operation may be from the date of judgment or formal order or from some other date. This enables the court to protect the legitimate claims of third parties particularly creditors who may be prejudiced by the imposition of a constructive trust at an earlier date than the judgment or order.⁹² In other contexts the constructive trust is thought to arise as soon as the circumstances necessary for its establishment are present.

In New Zealand there has been some support for the acceptance of a remedial constructive trust based on unjust enrichment⁹³ rather than unconscionable denial of a beneficial interest, whilst in Canada the availability of a constructive trust based on unjust enrichment is well established.⁹⁴ In the United Kingdom, the House of Lords has left open the question of whether English law should adopt the remedial constructive trust 'to be decided in some future case when the point is directly in issue'.⁹⁵

The approach of the High Court to the award of a constructive trust in respect of gains acquired in breach of fiduciary duty has changed significantly in recent years. In earlier authorities, it was asserted that a constructive trust arises in respect of the gains and that the advantage must be held for the beneficiary.⁹⁶ In *Henry (Keith) & Co v Walker (Stewart)*⁹⁷ Dixon CJ, McTiernan and Fullagar JJ indicated that any property acquired by use of the fiduciary position is held by the fiduciary in trust for the beneficiaries,⁹⁸ whilst in *Hospital Products* Mason J also indicated that the fiduciary must account in equity, and the appropriate remedy is by means of a constructive trust.⁹⁹

In more recent cases, the Australian courts have adopted a more flexible approach in relation to the award of proprietary relief for breach of fiduciary duty. There is no doubt that a breach of fiduciary duty may be redressed by relief in the form of a constructive trust, and that the claimant may be able to follow and trace the gain into identifiable property for the purpose of establishing an entitlement to proprietary relief. This is no longer automatic or as of right. In *Bathurst City Council v PWC Pty Properties Ltd*¹⁰⁰ the court indicated that it was necessary to first decide whether having regard to the

⁸⁹ *Giumelli v Giumelli* (1998) 196 CLR 101, 112.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*, 112-13; See also *Muschinski v Dodds* (1985) 160 CLR 583, 615.

⁹³ *Hayward v Giordani* [1983] NZLR 140, 150 (Cook P); *MacIntosh v Fortex Group Ltd* [1997] 1 NZLR 711, 721 (Gallen J).

⁹⁴ *Pettkus v Becker* (1980) 117 DLR (3d) 257.

⁹⁵ *Wesdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] 2 WLR 802, 839.

⁹⁶ *Wicks v Bennett* (1921) 30 CLR 80, 98 (Higgins J).

⁹⁷ (1958) 100 CLR 342.

⁹⁸ *Henry (Keith) & Co v Walker (Stewart)* (1958) 100 CLR 342, 350.

⁹⁹ *Hospital Products International Pty Ltd v United Surgical Corporation* (1984) 156 CLR 41, 108; see also *Chan v Zacharia* (1983) 154 CLR 178, 199 where Deane J indicated that the constructive trust which arises because a fiduciary has made an unauthorised gain arises at the time of the breach of duty rather than at the time of the court's order.

¹⁰⁰ [1998] HCA 59.

issues in the litigation, there are other remedies available to quell the controversy. An equitable remedy which falls short of a trust may assist in avoiding a result in which the plaintiff gains a beneficial proprietary interest over equally deserving creditors of the defendant.¹⁰¹ In the Queensland decision of the Court of Appeal in *Wickham Developments Ltd v Parker*¹⁰² McPherson JA and Pincus JA highlighted the fact that liability for breach of fiduciary duty is personal and that it is for the court to decide whether a proprietary remedy should be imposed in addition to a personal remedy to account. It did not follow that a proprietary remedy would be imposed and that it was necessary to consider the impact on general creditors if the fiduciary becomes insolvent. This approach severs the issue of liability based on the existence of a fiduciary relationship from the issue of what is the appropriate remedy, and whether it is appropriate to award the constructive trust as a proprietary remedy.¹⁰³

In more recent cases, the High Court has also expressed a preference for personal remedies rather than proprietary remedies in breach of fiduciary cases, as well as in the context of other claims such as those based on estoppel. In *Warman v Dwyer*¹⁰⁴ the court rejected the constructive trust as the appropriate remedy and indicated that an account of profits was the preferred remedy for that case. The liability of the fiduciary was considered to be essentially personal.¹⁰⁵ In *Giumelli v Giumelli*¹⁰⁶ the court considered that an estoppel claim was such that a monetary sum should be fixed to represent the value of the equitable claim, with the court indicating that the court should first of all decide if there 'is an appropriate remedy which falls short of the imposition of a constructive trust'.¹⁰⁷ In addition the High court has also stressed in *Warman* that liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff when assessing the quantum of the profits. The court is required to ascertain precisely what the fiduciary should account for as a consequence of the fiduciary's breach of duty or in the case of a loss, the quantum of the loss.¹⁰⁸ In *Warman*, the assessment was to be made on the basis of the loss of the agency agreement which would only have lasted for a further year.

It is also now well established that equitable compensation may be granted as an alternative to a constructive trust. In *Distronics Ltd v Edmonds*¹⁰⁹ it was decided to award compensation, and in doing so the judge took into account the fact that it was necessary to protect the interests of third parties including those of a mortgagee.¹¹⁰ In

¹⁰¹ *Bathurst City Council v PWC Pty Properties Ltd* [1998] HCA 59, [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁰² [1995] QCA 281.

¹⁰³ *Wickham Developments Ltd v Parker* [1995] QCA 28, [8].
¹⁰⁴ (1995) 182 CLR 544.

¹⁰⁵ *Warman v Dwyer* (1995) 182 CLR 544, 555-6 (Mason CJ, Brennan, Deane, Dawson, Gaudron JJ).
¹⁰⁶ (1998) 196 CLR 101.

¹⁰⁷ *Giumelli v Giumelli* (1998) 196 CLR 101, 113 (Glesson CJ, McHugh Gummow and Callinan JJ).

¹⁰⁸ (1995) 182 CLR 544, 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

¹⁰⁹ [2002] VSC 454.

¹¹⁰ *Distronics Ltd v Edmonds* [2002] VSC 454, [213]; See also *Victoria University of Technology v Wilson* (2004) 60 IPR 393, [221-3], where Nettle J decided that it was inequitable to declare a constructive trust because of the effect of subsequent developments, particularly the adverse effects on third parties. Relief was framed in terms requiring the defendants to pay the claimant the value of the shares subject to appropriate expenses and allowances. In addition, the claimant was also to be given credit for its time and resources used in the development of software. The judge also recommended that a generous view be taken of the contributions made by the defendants in the development of software.

other cases, judges have been prepared to take account of unjust consequences to the fiduciary and the creditor's of the fiduciary.¹¹¹

It would seem that as a consequence of these developments in relation to relief for breach of fiduciary duty, it is misleading to continue to express the liability of the fiduciary in terms of constructive trusteeship as though it will automatically entitle a claimant to a proprietary remedy. It also leads one to assume that a constructive trust automatically arises prior to the declaration of such a trust. This is no longer the case, as liability and remedial issues have been severed so that there are no longer any automatic proprietary consequences based on a breach of fiduciary duty. The determination of what is the most appropriate form of relief is matter within the discretion of the court. The constructive trust has emerged as one of the possible remedies within the armoury of the court and when it is invoked the court is free to determine how it will operate in any give case having regard particularly to the consequences to third parties arising as a result of such relief. It may be that in the vast majority of cases that a constructive trust will not be the most appropriate remedy. In both New Zealand¹¹² and Canada a flexible approach has been adopted in relation to relief for breach of fiduciary duty and in other contexts including breach of confidence claims.¹¹³ In these jurisdictions, the constructive trust is not considered to be the most appropriate remedy in the vast majority of cases. In the United Kingdom there is very little recent authority in relation to this matter, and as yet little scope for use of a remedial constructive trust. English judges have usually expressed the liability of the fiduciary as being a personal one,¹¹⁴ and instances of proprietary relief being utilised for the recovery of gains from a breach of fiduciary duty are hard to find except in relation to the renewal of leases and the purchase of freehold reversions. Proprietary relief has also been usually restricted to claims which are based on an established equitable interest in property, as for example, where trust or company property is misappropriated or utilised for the purpose of making a gain in breach of fiduciary duty.

There is a further consequence of the above developments, which is in need of re-consideration in the light of these developments and that is the assumption in *Attorney General for Hong Kong v Reid*¹¹⁵ that as soon as a bribe is received by a fiduciary it is held on a constructive trust for the person injured.¹¹⁶ This means that the injured party is entitled to seek a proprietary remedy as of right, rather than depending upon the exercise of the court's discretion. As such, the constructive trust under this approach is institutional rather than remedial. Such an approach is incompatible with the approach which now prevails in the context of other situations in which relief is sought for breach of fiduciary duty in which the award of proprietary relief is at the discretion of the court. There is no compelling reason why the approach adopted in relation to relief available in respect of bribes received by a fiduciary or a third party should fall outside of this general framework, although there is and ought to remain scope for proprietary relief in

¹¹¹ *Katingal Pty Ltd v Amor* (1998) 162 ALR 287, 290 (Burchett J).

¹¹² *Estates Realties v Wignall* [1991] 3 NZLR 482 (Tipping J); *Official Assignee of Collier v Creighton* [1996] UKPC 7.

¹¹³ *LAC Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th)14, 64 (La Forest J).

¹¹⁴ *Regal Hastings v Gulliver* [1942] 1 ALL ER 378 where relief was restricted to a personal liability to account.

¹¹⁵ [1993] 3 WLR 1143.

¹¹⁶ *Attorney General for HGong Kong v Reid* [1993] 3 WLR 1143, 1146 (Lord Templeman).

the case of a bribe. Equally there ought also to be scope to take into account the adverse consequences to third parties of awarding such relief

[302] Developments in relation to equitable compensation as a remedy for breach of trust and breach of fiduciary duty

One of the key remedies which is utilised for the purpose of providing relief in respect of both breach of trust and breach of fiduciary duty claims is that of an award of equitable compensation. In both contexts, the courts have had to address a number of issues in relation to the assessment of the quantum of the compensation. Here attention will be focused on issues of causation, contributory responsibility and the apportionment of losses as well as exemplary damages.

In breach of trust claims, the courts have had to decide whether a trustee who is liable to compensate the beneficiary for losses should be confined to making good losses that are caused by the breach of trust. This issue has been addressed in the context of the almost universal acceptance of the proposition derived from an extensive statement by Street CJ in *Re Dawson*¹¹⁷ that the obligation of a defaulting trustee is essentially that of effecting restitution to the trust estate. In *Youyang Pty Ltd v Minter Ellison*¹¹⁸ the High Court of Australia accepted that the quantum of the compensation is to be determined at the trial using the full benefit of hindsight, and in that instance was satisfied that the loss would not have been suffered but for the breach.¹¹⁹ In adopting this approach, the court approved of some statements by Lord Browne-Wilkinson in the decision of the House of Lords in *Target Holdings v Redferns*.¹²⁰

In *Target*, one of the issues addressed was whether a trustee was liable to compensate the beneficiary for not only losses caused by the breach of trust but also for losses which the beneficiary would have suffered in any event if there had not been a breach of trust. It was accepted that compensation should be confined to making good losses caused by the breach of trust and that the quantum should be fixed at the date of judgment.¹²¹ It was also accepted, that in this instance, the transaction would have gone ahead even if there had been no breach of trust. This does not mean that the common law rules as to the assessment of damages apply in the context of a traditional trust, although there does have to be some causal connection between the breach of trust and the loss to the trust estate, for which compensation is recoverable. It should be noted that the remarks of Lord Browne-Wilkinson were made in the context of a bare trust and in which the transaction was completed. In this instance it was considered to be artificial to talk in terms of the obligation to re-constitute the trust so as to enable the beneficiary, in this case the client of a solicitor, to recover from the solicitor more than the client had in fact lost. Relief was restricted to requiring the solicitor to restore moneys wrongly paid away from the solicitor's trust account before completion of the transaction. In the end, the court was unwilling to give compensation for losses not caused by the breach and the loss was measured at the time of the judgment with the full benefit of hindsight. It is also worthwhile to consider the approach which has been adopted in relation to the issue of causation when assessing compensation for breach of fiduciary duty given that

¹¹⁷ [1966] 2 NSWLR 211, 214-16.

¹¹⁸ (2003) 212 CLR 484.

¹¹⁹ *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484, 504 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

¹²⁰ [1995] 3 WLR 352.

¹²¹ *Target Holdings v Redferns* [1995] 3 WLR 352, 363.

it is now widely accepted that equitable compensation can now be ‘awarded for a wide variety of infractions of fiduciary and other duties’¹²² across a number of common law jurisdictions.¹²³ In Australia, the High court is yet to formally confirm what principles will be adopted in claims for compensation for breach of fiduciary duty although there are some indications provided in *Pilmer v Duke Group Ltd (in liq)*¹²⁴ even although it was accepted that no relevant fiduciary duty was owed in this instance. The court therefore did not consider it necessary to provide an ‘exhaustive consideration of the topic’.¹²⁵ What does emerge from statements in this case is that the measure of compensation for breach of fiduciary duty is to be determined by equitable principles, and that these do not necessarily reflect the rules for the assessment of damages at common law in tort or contract.¹²⁶ Although, Kirby J dissented in this case and found that a fiduciary obligation had arisen, Kirby J also accepted that the measure of equitable compensation would differ from the measure of common law damages and that often the measure would be greater in equity.¹²⁷

The matter was also touched upon again by the High Court in *Maguire v Makaronis*¹²⁸ where Brennan CJ, McHugh, and Gummow JJ did accept that there was ‘need to specify criteria for a sufficient connection or causation between the breach of duty and the profit derived or the loss sustained or the asset’.¹²⁹ Particular importance was attached to the obligation of a defaulting trustee to effect restitution to the trust estate, and a presumption that the default continues until restitution has been made. Particular importance was also attached to holding trustees to their duties and the need to protect the interests of the beneficiaries. In addition, a similar stringent response was considered to be appropriate in relation to other delinquent fiduciaries, particularly solicitors and other professional advisers. In this context, the same judges, as well as Kirby J, accepted the continuing applicability of the reasoning in an early decision by the Privy Council in *London Loan Savings Co v Brickenden*,¹³⁰ that it is not open to the court to speculate what course would have been adopted if the fiduciary in breach of duty had have discharged the obligation to make disclosure of material facts.¹³¹ This would seem to preclude the court from speculating about what the beneficiary would have done in the event that the fiduciary has fulfilled his or her obligations.

Notwithstanding the High Court’s re-assertion of the importance attached to the obligation of the defaulting fiduciary to make restitution, there have been a series of judgments by both State and Federal judges in which the issue of causation has been addressed in breach of fiduciary duty claims, on the basis that the assessment of compensation can be made having regard to the full benefit of hindsight and that it is necessary to establish that the breach of fiduciary duty caused the loss. Under this approach there has to be an adequate or sufficient connection between the breach and

¹²² *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, [124] (Mason P).

¹²³ *Nocton v Lord Ashburton* [1914] AC 832, 951 (Viscount Haldane); *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ).

¹²⁴ (2001) 207 CLR 165.

¹²⁵ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 195-6.

¹²⁶ *Ibid*, 224-5.

¹²⁷ *Ibid*, 201.

¹²⁸ (1996) 188 CLR 449.

¹²⁹ *Maguire v Makaronis* (1996) 188 CLR 449, 468 (Brennan CJ, Gaudron, McHugh, and Gummow JJ).

¹³⁰ [1934] DLR 465.

¹³¹ (1996) 188 CLR 449, 474 (Brennan CJ, Gaudron, McHugh, Gummow JJ), 492 (Kirby J).

the loss.¹³² Similar developments have occurred in Canada, as exemplified in *Canson Enterprises Ltd v Boughton & Co*¹³³ where a solicitor was held responsible only for the losses directly flowing from the breach of duty, but not for losses caused by an intervening act unrelated to the breach of duty. There, one judge was prepared to follow the common law in assessing damages,¹³⁴ whilst another was prepared to assess the loss at the time of the trial using the full benefit of hindsight and insisted that there needed to be a link between the equitable breach and the loss for which compensation is claimed. However, in other cases the courts have not been so keen to follow the approach in *Canson* in the context of different types of breach of fiduciary duty and have insisted on the full restitutionary approach.¹³⁵ In the United Kingdom, the matter is yet to be considered by the House of Lords. There are instances in which *Brickenden* has been accepted and applied,¹³⁶ and in other instances it has been accepted that it is necessary to address the issue of causation, so that it is necessary to show that the loss suffered has been caused by the relevant breach of fiduciary duty.¹³⁷ In the case of *Swindle v Harrison*,¹³⁸ a majority of the Court of Appeal were satisfied that the loss did not flow from the failure to make full disclosure because the disclosure would not have affected the claimant's decision to proceed with the transaction.

In the context of awarding equitable compensation as relief for breach of trust or breach of fiduciary duty, the courts have also been called upon to determine whether there is any scope for the apportionment of losses. In breach of trust claims, it has generally been assumed that the courts are not able to apportion losses on the basis of some form of equitable distribution or on the basis of a consideration of contributory negligence on the part of the claimant. Judgment for the full amount of the loss will be awarded so as to replenish the trust. In Australia, the High Court has re-affirmed the opinion expressed in *Astley v Australia Ltd*¹³⁹ that there are: 'severe conceptual difficulties in the path of acceptance of notions of contributory negligence to diminish awards of equitable compensation for breach of fiduciary duty'.¹⁴⁰ This was rationalised on the basis that contributory responsibility focuses on the conduct of the claimant, whereas fiduciary law focuses on the obligations of the fiduciary to act in the best interests of the beneficiaries. In contrast, there has been some judicial acceptance in New Zealand of contributory responsibility as a complete or partial defence to a claim for breach of fiduciary duty based in part on the fusion of law and equity, and by analogy with the

¹³² *Greater Pacific Investments Pty Ltd v Australian National Industries Ltd* (1969) 39 NSWLR 143; *Beach Petroleum v Kennedy* (1997) 26 ACSR 114; *Biala Pty Ltd v Mallina Holdings Ltd* (1994) 13 WAR 11; *Coomera Resort Pty Ltd v Kolback* [1998] QSC 20; *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709; *O'Halloram v RT Thomas & Family Pty Ltd* 39 ACSR 148; *Aequitas v AEFC* [2001] NSWSC 14.

¹³³ (1991) 85 DLR (4th) 129.

¹³⁴ *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, 147 (La Forest J).

¹³⁵ *Norberg v Wynrib* [1992] 2 SCR 226, 294-5 (McLachlin J); *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 201-3 and 207-9 (La Forest J).

¹³⁶ *Bristol & West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801, 826 (Chadwick J).

¹³⁷ *Swindle v Harrison* [1997] 4 All ER 705, 733 (Mummery LJ); see also *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652.

¹³⁸ [1974] 4 All ER 705.

¹³⁹ (1997) 197 CLR 1.

¹⁴⁰ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201-2 (McHugh, Gummow, Hayne and Callinan JJ).

Contributory Negligence Act.¹⁴¹ Such an approach has not been universally supported,¹⁴² and even if such a defence can be raised it is still necessary to make out a very strong case given the very high standards expected of fiduciaries.

In some jurisdictions, the courts have also had to consider whether in exercise of the equitable jurisdiction over fiduciaries, it is possible for an award of exemplary damages to be made to punish the fiduciary for reprehensible conduct, as well as to deter others of like mind from similar conduct. Different responses have arisen in different jurisdictions. In Australia, the courts have responded in the negative, although in one instance there has been an outstanding dissent from this view. In Queensland, Moynihan J in *Taylor & Co v Peffer*¹⁴³ accepted the defendant's submission: 'that it is difficult to reconcile a notion of exemplary damages and an account'.¹⁴⁴ In New South Wales, the matter was comprehensively examined by the Court of Appeal in *Digital Pulse Pty Ltd v Harris*,¹⁴⁵ following a decision by the trial judge that Australian law permits such an award. By a majority, the Court of Appeal decided that there is no power to award exemplary damages for breach of fiduciary duty, although Mason P in a well considered dissent, declined to regard the proposition that equitable compensation was indicative of the limits of monetary relief available in equity suggesting that the remedies go far beyond offering compensation.

In Canada, there have been some isolated judicial statements that exemplary damages are available for breach of fiduciary duty.¹⁴⁶ In New Zealand, it has been accepted that exemplary damages are available for breach of fiduciary duty in: 'serious and exceptional cases',¹⁴⁷ and it was also accepted by Cook P in *Acquaculture Corporation v NZ Green Mussell Co*¹⁴⁸ that exemplary damages could be awarded for actionable breach of confidence, although in this case Somers J regarded equity and penalties as strangers.

[303] Developments in relation to equitable compensation as a remedy for breach of an equitable duty of care by a fiduciary

In *Mothew v Bristol West Building Society*¹⁴⁹ Millett LJ suggested that: 'Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages this is merely the product of history and in this context is a distinction without a difference'.¹⁵⁰ On that basis Millett LJ therefore concluded that:

There is no reason in principle why the common law rules should not be applied by analogy to such a case. It should not be confused with equitable compensation for

¹⁴¹ *Day v Mead* [1987] 2 NZLR 443 at 451-452 Cook P; *Mouat v Clark Boyce* [1991] 1 NZLR 481, 498-9 (Cook P).

¹⁴² See the judgment of Somers J in *Day v Mead* [1987] 2 NZLR 443, 461-2; See also *Lankshear v ANZ* [1993] 1 NZLR 481, where Wallace J decided that the actions of the plaintiff did not justify apportionment in a claim against a third party.

¹⁴³ [1996] QSC 248.

¹⁴⁴ *Taylor & Co v Peffer* [1996] QSC 248.

¹⁴⁵ [2002] NSWSC 14.

¹⁴⁶ *Norberg v Wynrib* [1992] 2 SCR 226, 298.

¹⁴⁷ *Cook v Evatt (No 2)* [1992] 1 NZLR 676, 706 (Fisher J).

¹⁴⁸ [1990] 2 NZLR 29.

¹⁴⁹ [1997] 2 WLR 436.

¹⁵⁰ *Mothew v Bristol West Building Society* [1997] 2 WLR 436, 449.

breach of fiduciary duty which may be awarded in lieu of rescission or specific restitution. This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory".¹⁵¹

This approach has been followed by New Zealand judges¹⁵² and by some Australian judges. In *Permanent Building Society v Wheeler*¹⁵³ Malcolm CJ, Seaman and Ipp JJ in a joint judgment of the Full Court of the Supreme Court of Western Australia said:

there is a fundamental distinction between breaches of fiduciary obligations which involve dishonesty and abuse of the trustee's advantages and the vulnerable position of the beneficiaries on the one hand and honest but careless dealings which breach mere equitable obligations on the other. There is ample justification on policy grounds for more stringent rules in the case of breaches of fiduciary obligations but not where there has been honest but careless dealings. A court of equity applying principles of fairness should not require an honest but careless trustee to compensate a beneficiary for losses without proof that but for the breach of duty those losses would not have occurred. It is significant as regards matter of policy, that tortious duty not to be negligent and the equitable obligation on the part of trustees to exercise reasonable care and skill are in content the same. There is every reason in such circumstances to apply the equitable maxim that equity follows the law.¹⁵⁴

Notwithstanding the above approach, it should not necessarily be assumed that the High Court of Australia will open the door for the assimilation of the calculation of compensation in equity with the calculation of compensatory damages in tort or contract. Such an approach did not find favour with Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ in *Youyang*¹⁵⁵ although in that instance: 'the complaint was not merely of the imprudent exercise of a power of an investment, by failure to employ care and diligence which equity requires'.¹⁵⁶ It was acknowledged that it had been accepted in some cases where the maladministration involves a failure to exercise care and diligence that equity requires, that an award of equitable compensation resembles common law damages. Even although this question did not arise in the appeal, Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ went on to suggest that:

there must be a real question whether the unique foundations and goals of equity which has the institution of the trust at its heart, warrant any assimilation even in this limited way of the measure of measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.¹⁵⁷

¹⁵¹ Ibid. See also *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, where Lord Walker relied on these remarks in the context of suggesting that the quantum of equitable compensation payable for a breach of fiduciary obligation would be the same as the quantum for the breach of the contract of retainer.

¹⁵² *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664, 682 (Gault J); 686-8 (Tipping J).

¹⁵³ (1994) 14 ACSR 109.

¹⁵⁴ *Permanent Building Society v Wheeler* (1994) 14 ACSR 109, 166. The same sort of reasoning was also adopted in *Australian Breeders Co-operative Ltd v Griffith Morgan Jones* [1997] FCA 1405.

¹⁵⁵ *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484.

¹⁵⁶ Ibid, 500.

¹⁵⁷ Ibid.

This statement seems to be directed particularly at trustees in relation to their dealings with trust funds but one might reasonably anticipate that a similar approach might be adopted in relation to a claim based on a lack of care and diligence by a fiduciary other than a trustee. It seems unlikely the High Court would favour the intermingling of law and equity for the purpose of assessing equitable compensation for breach of an equitable duty of care on the part of trustees and other fiduciaries. This stands in marked contrast to the approach which has found favour in the United Kingdom, New Zealand and Canada.

[304] Developments in relation to following and tracing property in equity

In the next section, comments are provided about some of the developments which have occurred in relation to the operation of the rules for following and tracing trust property in equity in breach of trust claims for the purpose of maintaining a proprietary claim to the trust property resulting in the award of a proprietary remedy usually in the form of a constructive trust or equitable charge or lien. Before considering proprietary relief in the context of claims for breach of trust, it is necessary to provide some background information about developments which have occurred in relation to the general requirements, which have to be satisfied in order to follow and trace property in equity. Proprietary relief in the context of breach of fiduciary claims has already been considered in an earlier section, although the developments there, referred to in relation to the basis upon which proprietary relief is available in Australia, are also relevant to the background which is presented here about developments in relation to the requirements which have to be satisfied in order to follow and trace property in equity.

It is now widely acknowledged that following and tracing is a process which can be invoked for the purpose of ascertaining what has happened to the claimant's property. Following is the process of following the same asset as it moves from hand to hand and tracing is the process of identifying a new asset as the substitute for the old asset. The boundaries or the limits of this process are set by the doctrine of the bona fide purchaser. In the decision of the House of Lords in *Foskett v McKeown*,¹⁵⁸ Lord Millett described tracing as a process whereby assets are identified and as belonging in the realm of evidence, and as such tells us nothing about the legal or equitable right to the asset traced. It is not a claim or remedy but: 'Merely the process whereby a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, justifies his claim that the proceeds can properly be regarded as representing his property'.¹⁵⁹ Tracing involves the identification of: 'the traceable proceeds of the claimant's property'¹⁶⁰ and 'enables the claimant to substitute the traceable proceeds of the original asset as the subject matter of his claim'.¹⁶¹ However, it does not effect or establish the claim, which under orthodox principles, to be considered in a moment, depend upon the nature of the claimant's interest in the original asset. The claimant will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset subject to: 'potential defences as a result of intervening transactions'¹⁶² including the defence of bona fide purchaser and the defence of change of position. Under this analysis, which has found

¹⁵⁸ [2000] 2 WLR 1299.

¹⁵⁹ *Foskett v McKeown* [2000] 2 WLR 1299, 1323.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

acceptance in some judicial statements in Australia,¹⁶³ the process of identification is not be confused with a proprietary right, although the conduct of the process may also be a required as a preliminary step when making a proprietary as well as a personal claim against a recipient or accessory, because in respect of some of these claims it is still necessary to demonstrate what has happened to the claimant's property. Moreover, a claimant does not have to seek a proprietary remedy, and may elect instead to seek a personal remedy, in which case it does not mean that the claimant has ratified the actions of the defendant.¹⁶⁴

Under well established principles, the right to follow and trace the property into the hands of third parties and into other substituted property is said to depend upon the existence of an existing equitable proprietary interest. Proprietary claims in equity are said to depend upon the establishment of an existing equitable proprietary right. Under this approach, the proprietary claim is based on the vindication of 'a proprietary right and is not based on unjust enrichment or unjust factor. It is not dependent upon the discretion of the judge.¹⁶⁵ It is necessary to identify that interest and to establish the priority of that interest against other claimants, as well as establishing that the property in question represents the whole or part of that interest. The claimant will succeed by virtue of title to the property and not on the basis of what is determined to be fair just and reasonable.¹⁶⁶

In accordance with the need to base a proprietary claim on the existence of an equitable interest in the property, a fiduciary relationship in respect of the property which is the subject matter of a proprietary claim, has been regarded as a pre-condition which must be satisfied in order to follow and trace property as the identifiable subject matter of the proprietary relief. In *Re Diplock*,¹⁶⁷ the Court of appeal insisted that a fiduciary relationship was an essential pre-requisite, although it was sufficient that there was a fiduciary relationship between the claimant and a third party, through whose hands the property passed. It did not have to exist between the claimant and the defendant, thus enabling the next of kin in that case to claim against the defendant charities, who did not stand in a fiduciary relationship to the claimant in circumstances where the executors had paid away money under a mistake to the charities. The English judges have continued to insist ever since *Diplock* that there must be some fiduciary relationship which permits the assistance of equity to be raised. There must be some initial fiduciary relationship to start the tracing process in equity.¹⁶⁸

The matter was once again considered by Lord Millett in the decision of the House of Lords in *Foskett v McKeown*.¹⁶⁹ Although reservations were expressed about the requirement, it was not abandoned. Moreover, it was not necessary to explore the matter in any detail as it was a straightforward case in which a trustee had misappropriated trust money and mixed it with the trustee's own money in order to pay for an asset for the benefit of the trustee's children.¹⁷⁰ As one judge has pointed out in a subsequent

¹⁶³ *Evans Associates v European Bank Limited* [2004] NSWCA 82, [134] (Spiegelman CJ).

¹⁶⁴ *Foskett v McKeown* [2002] 2 WLR 1299 at 1323-1325.

¹⁶⁵ *Ibid*, 1322 - 3.

¹⁶⁶ *Ibid*.

¹⁶⁷ [1948] 1 Ch 465.

¹⁶⁸ *Agip (Africa) Ltd v Jackson* [1989] 3 WLR 1367, 1386 (Millett J); *Boscawen v Baja* [1996] 1 WLR 329, 335 (Millett LJ).

¹⁶⁹ [2000] 2 WLR 1299.

¹⁷⁰ *Foskett v McKeown* [2000] 2 WLR 1299, 1324.

case, Lord Millett: ‘stopped short of deciding that the traditional pre-condition of tracing in equity should be overruled’.¹⁷¹ Hence, it is still necessary in the United Kingdom to raise an equity to follow and trace property on the basis of a fiduciary relationship.

It is necessary to briefly reflect on whether there is any such requirement under Australian law. It is not entirely certain that such a requirement will be insisted upon in Australia, although the existence of such a requirement has been acknowledged in New Zealand.¹⁷² This matter must also be considered in the context of the acceptance in Australia of the remedial constructive trust, which enables a proprietary claim to be sustained even although there is not any subsisting equitable interest as the basis for sustaining a proprietary claim to identifiable property. There is no decision binding on lower courts in Australia which requires a fiduciary relationship for the purpose of maintaining a proprietary claim and for the purpose of enabling the claimant to follow and trace property in equity. It may therefore be the case that it is not a requirement which has to be satisfied under Australian law, given that a remedial constructive trust is available on the basis of an unconscionable denial of a beneficial interest, and that proprietary relief does not have to be confined within a framework of established categories, largely dependent upon the existence of a fiduciary relationship. This avoids the temptation to distort the notion of a fiduciary relationship, as sometimes occurs, in order to invoke the armoury of proprietary remedies, and it enables flexibility and discretionary considerations to play their part when the proprietary claim is sought without any established proprietary right as the foundation of the claim. It also takes into account the existence of a variety of rationales for equitable relief, apart from instances which involve a breach of trust or a breach of fiduciary duty.

[305] Developments in relation to the rules for following and tracing trust property in equity

It is now necessary to turn our attention to some developments in relation to aspects of the rules which evolved in equity for the purpose of following and tracing property in equity, when the pre-condition of a fiduciary relationship is satisfied. It is necessary to observe that both the common law and equity developed rules and presumptions in relation to following value through a series of transactions. Not only were the rules in equity differentiated from the common law rules on the basis of the requirement of a fiduciary relationship, but the rules themselves were better able than the common law rules, to deal with intermingling of funds in bank accounts and in other substitutions. Equity, unlike the common law, was able to resolve an amalgam into its separate parts by notionally charging a fund for the purpose of recovering the intermingled amount. Notwithstanding these differences, the process is the same at common law and equity, although there are different pre-conditions which have to be satisfied in order to invoke the process. Lord Millett drew attention to this in *Foskett v McKeown*,¹⁷³ indicating that the requirement in equity of a fiduciary relationship relates not to the process but to the nature of the claim or right, rather than the exercise of identification. In his opinion, there is nothing inherently legal or equitable about the exercise of identification, and hence no logical justification for different rules for tracing at law or in equity and for the distinction to produce capricious results in cases of mixed funds. On the other hand, whether a proprietary claim could be maintained was a different matter, and it is in that

¹⁷¹ *Shalson v Russo* [2003] EWCH 1637 (Rimer J).

¹⁷² *Re Arariamu Holdings Ltd* [1898] 3 NZLR 487, 492 (Wylie J.)

¹⁷³ [2000] 2 WLR 1299, 1324.

context, at least in the United Kingdom, that the existence of a fiduciary relationship may still be relevant, but not in relation to the process of tracing whether it be at law or in equity.

It may be that the time has come for the maintenance of separate rules for the location of value to be abandoned irrespective of whether the claim is a legal or an equitable claim. The process is inherently the same whether one is seeking to enforce a legal or an equitable right. This seems to have been contemplated by Lord Millett in *Foskett* in indicating that: ‘There was certainly no justification for allowing any distinction between them to produce a capricious result in cases of mixed substitutions by insisting upon the existence of a fiduciary relationship as a pre-condition for applying equity’s tracing rules’.¹⁷⁴ However, it would seem that ‘it cannot be said that *Foskett* has swept away the long recognised difference between common law and equitable tracing’,¹⁷⁵ in so far as he: ‘stopped short of deciding that the traditional pre-conditions of tracing in equity should be overruled’¹⁷⁶ in English law.

There are some aspects of developments which have occurred in relation to the operation of the equitable rules for following and tracing trust property in breach of trust claims which are worth mentioning. It seems to be now well established that a beneficiary does have the option to claim a proportionate interest when tracing misappropriated trust property into mixed substitutions. This seems to be well established in Australia on the basis of the decision of the High court in *Scott v Scott*¹⁷⁷ that the beneficiaries may elect to: ‘take such part as bears the same proportion to the whole of the misapplied trust moneys bore to the purchase price’¹⁷⁸ including the profit irrespective of whether the property is specifically severable or not.¹⁷⁹ Various mechanisms, including a charge and a constructive trust, are available to give effect to each party’s proportionate entitlements.¹⁸⁰

In the United Kingdom, it is also now accepted as: ‘established law that the mixed fund belongs proportionately to those whose money was mixed’.¹⁸¹ According to Lord Millett in *Foskett*, the beneficiary has the option to take a proportionate part of the property or a lien on it, depending on which is the most advantageous when a trustee had bought property partly with his or her own moneys and partly with misapplied trust moneys. The lien will be available for the amount of the misappropriated trust moneys. It does not matter whether the mixing precedes the investment or occurs at the time of the investment by making simultaneous or sequential payments out of different funds. It is only necessary to show that the claimant’s property contributed to the acquisition of the new asset. It is not necessary to establish that it has contributed to any increase in the value of the new asset.¹⁸²

¹⁷⁴ *Foskett v McKeown* [2000] 2 WLR 1299, 1324.

¹⁷⁵ *Shalson v Russo* [2003] EWCH 1637 (Rimer J).

¹⁷⁶ *Ibid.*

¹⁷⁷ (1962) 109 CLR 649.

¹⁷⁸ *Scott v Scott* (1962) 109 CLR 649, 661.

¹⁷⁹ *Ibid.*, 663; see also *Hagan v Waterhouse* (1993) 34 NSWLR 308, 255.

¹⁸⁰ *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 384. In this case an apportionment of the profits was not considered to be just.

¹⁸¹ *Foskett v McKeown* [2000] 2 WLR 1299, 1305 *Lord Browne-Wilkinson).

¹⁸² *Ibid.*, 1326-7.

In circumstances where the asset has been disposed of in favour of a gratuitous donee, the donee is unable to acquire any better title than the trustee wrongdoer, and the lien is enforceable against the trustee and those who claim under him other than a bona fide purchaser for value without notice. The beneficiary is able to enforce the lien against any part of the property, and those who take through the wrongdoer must subordinate their claim until the beneficiary's contribution is satisfied. In this context, innocent recipients will be in no better position than the wrongdoer trustee donor of the innocent recipients.

Apart from a lien for the amount of the misappropriated trust moneys, it was also accepted in *Foskett* that the beneficiaries may also seek to claim any increase in value based on their contribution, as against those who claim as substitutes through the wrongdoer, on the basis of a pro-rata division of the property. There is also scope for such a division to be excluded, and sometimes the beneficiary may be able to claim all of the property against the wrongdoer and those other than a bona fide purchaser for value without notice, including volunteers.¹⁸³ In *Foskett*, the children of the trustee who were volunteers of the asset acquired with funds, consisting of the trustee's own funds and misappropriated trust funds, were considered to be in no better position than the wrongdoer from whom they acquired the asset gratuitously. They were not able to raise the defence of a bona fide purchaser.

In *Diplock*, it was decided that where an innocent volunteer has mixed his or her own funds with those of the beneficiary's funds, both parties are required to recognise each other's claims to the fund and the claim of the equitable owner is not entitled to take priority against the claim of the volunteer.¹⁸⁴ The result is that each share *pari passu*. This approach was endorsed in *Foskett*, by Lord Millett as applicable where a mixed fund consists of misapplied trust property and contributions of innocent parties rather than the trustee's own contribution to the mixed fund. In such instances the claims would be treated *inter se*, as there is no basis upon which such claims are able to be subordinated to any others. The beneficiaries and the innocent contributors are required to share the property rateably and the gains and losses will also be borne rateably.

The rules for following and tracing property in equity have also evolved for the purpose of dealing with the allocation of losses between two or more claimants to a mixed fund, including mixed funds which consist of more than one set of beneficiaries. One of the problems which arises, is how are losses to be borne between claimants when moneys are withdrawn from the fund and dissipated. Sometimes the rule in *Clayton's* case is applied, that is losses are allocated on a first in first out basis. On other occasions, the losses are attributed *pari passu* as between the beneficiaries constituting the fund. It is now generally accepted in Australia, New Zealand, Canada and the United Kingdom that the first in first out principle is not necessarily appropriate for application to large funds between the victims of large scale fraud.¹⁸⁵ Sometimes the courts will regard the moneys as consisting of a common pool enabling the contributors share rateably on the basis that the equities are equal.¹⁸⁶ There are no hard and fast rules and the courts will endeavour to adopt the most equitable formulae having regard to a range of factors. There are a number of reported instances in which Australian judges have demonstrated

¹⁸³ Ibid, 1326-7.

¹⁸⁴ *Re Diplock* [1948] Ch 465, 539 (Lord Greene).

¹⁸⁵ *El Ajou v Dollar Land Holdings plc* (No 2) [1995] 2 ALL ER 213, 222 (Robert Walker J).

¹⁸⁶ This approach was adopted in *Barlow Clowes International Ltd v Vaughan* [1992] 4 ALL ER 22.

a marked reluctance to apply the rule in *Clayton's case*, in the context of mixed funds from more than one trust particularly where the claimants have participated in a common pooled fund.¹⁸⁷ Funds are very often distributed proportionately on the basis of contributions to the funds particularly if no other rational basis is available to distinguish the contributions of different claimants. Sometimes the court is able to use records to differentiate between different claimants. In New Zealand, it has also been accepted that the rule in *Clayton's case* can be displaced if it is impossible to determine the order of payments in or out,¹⁸⁸ and in Canada pro rata sharing has been considered to be a more workable rule.¹⁸⁹ In addition, the courts in Canada have also declined to apply the lowest intermediate balance rule which leads to a conclusion that a particularly beneficiary's share has been misappropriated and dissipated. Pro rata sharing of funds which remain has been permitted amongst multiple contributors to a common pool.¹⁹⁰ It also should be noted that *Clayton's case* has been accepted as applicable in the case of mixed funds of an innocent volunteer and trust funds but only in instances of an active unbroken bank account. A rateable division is regarded as applicable to other property acquired by a volunteer utilising such a mixed fund,¹⁹¹ although it has been asserted in more recent English cases that the claimant should be able to recover in full, the traceable proceeds out of mixed fund, without having to acknowledge the entitlement of the innocent volunteer to a share of the funds, subject to a defence of change of position.¹⁹²

It has already been demonstrated that a degree of flexibility has been adopted for the purpose of identifying the claimant's property when the process of following and tracing trust property is invoked. In the United States it is also possible under what is referred to as the 'swollen asset' theory to obtain proprietary relief even although the claimant is unable to identify specific property by application of the traditional rules and presumptions for following and tracing property. So far, that approach has not won acceptance in Australia or the United Kingdom. In *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co*,¹⁹³ Lord Templeman speculated about what would happen if it was impossible for the beneficiaries to trace misappropriated trust moneys into any particular asset in the context of a trustee who was a bank and had used all of the deposit moneys for the general purposes of the bank. Lord Templeman indicated that the beneficiaries would be able to trace into all of the assets of the bank and would be entitled to an equitable charge over all of the assets of the bank. As well they would be entitled to priority over the unsecured creditors who were considered to have voluntarily assumed the risk. It was even suggested that a lien could be imposed over the assets even where it could be demonstrated that the bank had dissipated the

¹⁸⁷ See for example *Hagan v Waterhouse* (1993) 34 NSWLR 308, 357 (Kearney J); *Re Global Finance Group Ltd* [2002] WASC 63, [243] and [251]; *Re French Caledonian Travel* [2003] NSWSC 1008.

¹⁸⁸ *Re Arariamu Holding's Limited* [1989] 3 NZLR 487, 498 (Wylie J); *Re Registered Securities* [1991] 1 NZLR 545, 553 (Somers J).

¹⁸⁹ *Re Ontario Securities Commission and Graymac Credit Corp* (1986) 55 OR (2d) 673, 668-70 (Marden J).

¹⁹⁰ *The Law Society of Upper Canada v Toronto - Dominion Bank* (1999) 169 DLR (4th) 353.

¹⁹¹ *Re Diplock* [1948] Ch 465, 537 (Lord Greene).

¹⁹² *Boscawen v Bajwa* [1996] 1 WLR 328, 338, where Millett LJ refused to apply the more favourable approach. See also *Clark v Cutland* [2004] 1 WLR 783.

¹⁹³ [1986] 1 WLR 1072.

funds belonging to the beneficiaries.¹⁹⁴ However, it was not necessary to apply this approach in *Space Investments*, as there was an express term in the trust instrument which permitted the trustee to treat the money notionally deposited, as if the trustee was beneficially entitled to the money. The claim of the new trustee was treated as that of an unsecured creditor, which ranked *pari passu* with that of the other unsecured creditors and this was rationalised on the basis that the seller had accepted the risk of insolvency by allowing the trustee to treat the funds as if the funds were the trustee's own money.

The approach outlined by Lord Templeman in *Space Investments* has not been endorsed in subsequent judicial statements in the United Kingdom and it is yet to find any support in Australian cases.¹⁹⁵ In *El Ajou v Dollar Land Holdings plc*¹⁹⁶ Millett J indicated his approval for such an approach, and in principle was prepared to impose a lien even although it was not possible to identify the claimant's money in bank accounts mixed with other moneys by application of the traditional rules and presumptions. On the other hand, the Privy Council in *Re Goldcorp Exchange*¹⁹⁷ rejected the broad approach of Lord Templeman in *Space Investments*, deciding that it would not overcome: 'the difficulty that the moneys said to be impressed with the trust were paid into an overdrawn account and thereupon ceased to exist'.¹⁹⁸ It has also been confirmed by the English Court of Appeal in *Bishopsgate Investments Ltd v Hoaman*¹⁹⁹ that moneys misapplied cannot be pursued through an overdrawn and therefore non-existent fund. In that case Leggatt LJ regarded *Space Investments* as 'authority for no wider proposition than that where a bank trustee wrongly deposits money with itself, the trustee is able to trace into all the bank's credit balances'.²⁰⁰

[306] Developments in relation to defences to claims for breach of fiduciary duty and breach of trust

There is an extensive range of defences which are frequently raised in an effort to defeat claims for breach of fiduciary duty and breach of trust. There are some specific developments and possible future developments that will be highlighted here, although like other parts of this lecture, it is not intended to be a comprehensive review of those defences and the requirements which have to be satisfied in order to establish the particular defences.

Acquiescence and laches are frequently raised as defences to such claims, and much confusion arises from the different senses in which these words are used, in what one Judge has described as a: 'vague area of equity doctrine'.²⁰¹ The various senses in which these words can be used were spelt out by Deane J in *Orr v Ford*.²⁰² This judgment has, perhaps, been overlooked in subsequent cases, and it is worth drawing

¹⁹⁴ *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co* [1986] 1 WLR 1072, 1074-6. The 'swollen assets theory' was also rejected by the UK Court of Appeal in *Barlow Clowes Int Ltd v Vaughan* [1992] 4 ALL ER 22.

¹⁹⁵ See *Sutherland (In the Matter of Scutts)* [1999] FCA 147 at [61-63] Sackville J; *Cashflow Finance v Westpac COD Factors* [1999] NSWSC 671 at [479] Einstein J.

¹⁹⁶ [1993] BCLC735

¹⁹⁷ [1994] 3 WLR 199.

¹⁹⁸ *Re Goldcorp Exchange* [1994] 3 WLR 199, 222.

¹⁹⁹ [1994] 3 WLR 1270.

²⁰⁰ *Bishopsgate Investments Ltd v Hoaman* [1994] 3 WLR 1270, 1279.

²⁰¹ *Orr v Ford* (1989) 84 ALR 146, 157 (Deane J). See also the comments of McPherson JA in *Baburin v Baburin (No 2)* [1991] 2 Qd R 240, 243 .

²⁰² (1989) 84 ALR 146, 157.

attention to it, because it contains a useful analysis and clarification of the scope of these defences. In addition, Deane J also drew attention to the fact that scope exists for doctrine to be unified in the context of these defences, instead of having to raise particular species of these defences, and having to satisfy the particular requirement for that particular species. Such unification may be possible within the framework of estoppel by conduct, whereby relief in equity would be precluded: ‘where the enforcement of rights would be unconscionable’.²⁰³ To date the High Court has not endorsed such an approach, although as will be made apparent in a moment, such an approach may be implicit in the adoption of the defence of change of position, which is based upon inequitable circumstances, particularly detrimental outcomes not dissimilar to detrimental reliance which underpins the doctrine of estoppel.²⁰⁴

There is now scope for the defence of change of position to be applied in both personal and proprietary claims for breach of fiduciary duty and breach of trust in Australia and the United Kingdom. In considering this defence, it needs to be placed in the context of the acceptance of the defence of change position as a defence in claims in restitution based on unjust enrichment, and in which the defence is being developed on a case by case basis. The High Court, in accepting that such a defence could be raised in a restitution claim in *David Securities Pty Ltd v Commonwealth Bank of Australia*²⁰⁵ identified the central element as that of: ‘the defendant having acted to his or her detriment on the faith of the receipt’.²⁰⁶ In the United Kingdom, the House of Lords approved of the introduction of the defence in *Lipkin v Karpanale Ltd*²⁰⁷ and indicated that the defence was available: ‘to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to require him to make restitution, or alternatively to make full restitution’.²⁰⁸ Since then, the courts in England and Australia have been developing the defence on a case by case basis in restitution claims. An analysis of those developments is outside the scope of this lecture and the comments which follow are confined to a consideration of the extent to which there is scope for the defence to be relied upon as a defence to a proprietary claim in equity arising out of a breach of trust or breach of fiduciary duty, particularly where it is sought to sustain such a claim against a third party. Some reference will also be made to the scope for this defence to be raised in personal liability claims against recipients and accessories.

In Queensland, the defence of change of position was introduced by statute in relation to breach of trust claims, long before the defence was judicially accepted as a defence in restitution claims. The defence is provided for by s 109(3) of the *Trusts Act 1973* and this section was probably introduced in response to the efforts of the court in *Diplock*, in seeking a way to respond to the inequitable circumstances faced by the innocent volunteers against whom it was sought to maintain a proprietary claim in respect of the wrongful distribution of property in the administration of a deceased estate. The section

²⁰³ *Orr v Ford* (1989) 84 ALR 146, 159.

²⁰⁴ See for example *Websdale v S & JD Investments Pty Ltd* (1991) 24 NSWLR 573, 583, Clarke JA decided in the context of the defence of laches that it would be inequitable to uphold the appellant’s claim because the ‘appellants had acted in a manner which encouraged a reasonable belief in the respondents that the notice would not be challenged’.

²⁰⁵ (1992) 175 CLR 353.

²⁰⁶ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

²⁰⁷ [1991] 2 AC 548.

²⁰⁸ *Lipkin v Karpanale Ltd* [1991] 2 AC 548, 580.

applies generally to the wrongful distribution of trust property and not only to the distribution of the estate of a deceased person and the use of the phrase ‘any remedy’ is wide enough to encompass both personal and proprietary remedies, so that the defence may be raised by a third party in response to both personal and proprietary claims. In other states where such legislation does not exist, it may be still possible for an innocent volunteer to raise the defence in proprietary claims based on breach of trust, as for example occurred in *Gertsch v Atsas*,²⁰⁹ where Foster AJ allowed the defence to be raised and made a determination on the basis of weighing up the advantages and disadvantages accruing to the recipient of the money.

In *Lipkin*, the House of Lords appears to have also cleared the way for the defence to emerge in relation to proprietary claims whether advanced at law or in equity, without however supplanting the defence of the bona fide purchaser. According to Lord Goff, the adoption of the defence of change of position: ‘will enable a more generous approach to be taken to the recognition of the right of restitution; in the knowledge that the defence in appropriate cases is available’.²¹⁰ It was subsequently acknowledged by Millett LJ in *Boscawen v Bajwa*²¹¹ that the introduction of the defence will also enable: ‘a re-examination of many decision of the past in which the absence of the defence may have led judges to distort basic principles to avoid injustice to the defendant’.²¹² This is an obvious reference to *Diplock*. There seems no doubt that the difficulties which arose in that case will now, in the absence any statutory provision like that which exists in Queensland, be able to be determined in the United Kingdom by application of the defence of change of position. This may mean some other aspects of *Diplock* may need to be reconsidered, particularly the refusal to allow funds to be traced in some of the instances that were considered in *Diplock* and in which the denial of tracing was said to depend upon the inequitable impact of tracing upon the innocent volunteer. It would now be a matter of deciding whether those circumstances were sufficiently inequitable so as to enable the volunteer to rely on the defence of change of position and if not, tracing might now be possible in some situations rejected in *Diplock*.

There is a further issue that arises as a consequence of the acceptance of the defence of change of position, and that is the extent to which it may be possible for a third party to raise the defence in response to a receipt or accessory personal liability claim. Such a defence does not fit well in relation to these claims, as the requirements are currently framed in terms of knowledge, whereas the defence of change of position is based on an innocent change of position based on the receipt of the monies.²¹³ However, as previously mentioned, there are those who advocate the adoption of a strict liability approach in receipt based claims subject to a defence of change of position. Accessory liability would remain outside of this framework and would depend upon the establishment of dishonest assistance in the breach of duty.

One further matter which is worth mentioning in the context of defences, is that of the response of the judiciary to clauses in trust instruments, seeking to exonerate trustees from liability for breach of trust. In Australia, the courts have generally adopted a

²⁰⁹ [1999] NSWSC 898.

²¹⁰ [1991] 2 AC 548, 581.

²¹¹ [1996] 1 WLR 328.

²¹² *Boscawen v Bajwa* [1996] 1 WLR 328, 334.

²¹³ See comments to this effect in *K&S Corporation Ltd v Sportingbet Australia Pty Ltd* [2003] SASC 96, [59] (Besanko J).

narrow construction in relation to such clauses. Exemptions have been denied when trustees have acted dishonestly and preferred their own interests.²¹⁴ In *Minter Ellison v Perpetual Trustee WA Ltd*,²¹⁵ the conduct of the solicitors as trustee was not such that they had acted in good faith because they acted consciously and deliberately in preferring the interests of their client and had paid no heed to their trust duties. Moreover, the court may also prevent a trustee from relying on an exemption clause if it is satisfied that it would be unconscionable or unconscientious for a trustee to rely on the clause. Such a finding was made in one case, in circumstances where a firm of solicitors was aware of their obligations and was responsible for misleading correspondence so that other parties would not become aware of the breaches.²¹⁶

In the case of *Armitage v Nurse*,²¹⁷ decided in the United Kingdom, the court had to consider the effect of a clause which exonerated trustee from their ‘own actual fraud’. This was construed to mean dishonesty, as distinct from constructive or equitable or fraud, so as to connote: ‘an intention on the part of the trustee to pursue a particular course of action either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not’.²¹⁸ In another English case, the test of dishonesty as applied in the accessory liability cases was adopted for the purpose of construing an exemption clause which limited liability to dishonesty.²¹⁹ Again in the case of *Allan v Rea Brothers Trustee Ltd*,²²⁰ Robert Walker LJ in considering the effect of an exemption clause which excluded the trustees’ liability for ‘wilful and individual fraud or wrongdoing’, decided that any breaches of the trustee’s duty did not come within any ‘measurable distance as amounting to wilful and individual fraud or wrongdoing’.²²¹

It may be that the courts will also need to turn their minds to the permissible scope of such exemption clauses and place limits on the extent to which it is permissible to exclude liability. In *Armitage v Nurse*,²²² Millett LJ reflected on the permitted scope of such clauses, and indicated that an exemption clause could exclude liability for wilful default as well as for ordinary negligence and want of probity as well as gross negligence. However, Millett LJ went on to suggest that: ‘there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is the fundamental concept of a trust’²²³ and in the absence of which there are no trusts. The minimum necessary and sufficient to give substance to the trusts was, in the opinion of Millett LJ: ‘the duty of the trustee to perform the trusts honestly and in good faith for

²¹⁴ *Reader v Fried* [2002] VSC 495, [16-17]. See also *Pope v Pope* [2001] SASC 26, [33], where Duggan J refused to allow a trustee to rely on an exemption clause which referred to dishonesty and wilful commission or omission of an act known to be a breach of trust. The judge found that the trustee was not acting in the execution of the trust, as he was acting in his own self interest and was not acting reasonably and properly in defending the action for his removal.

²¹⁵ [2001] NSW CA 240.

²¹⁶ *Wilkinson v Feldworth Services Pty Ltd* (1998) 29 ACSR 642, 746; See also *Pope v DRP Nominees Pty Ltd (No 2)* BC 200001388 SC SA, where Olsson J described the conduct of the defendant as “not reasonably and honestly pursued” and as pursued for the purpose of giving effect to the agenda of another party.

²¹⁷ [1997] 2 ALL ER 705.

²¹⁸ *Armitage v Nurse* [1997] 2 ALL ER 705, 711 (Millett LJ).

²¹⁹ *Walker v Stones* [2000] 4 ALL ER 412, 446 (Sir Christopher Slade).

²²⁰ [2002] EWCA Civ 85.

²²¹ *Allan v Rea Brothers Trustee Ltd* [2002] EWCA 85, [69].

²²² [1997] 2 ALL ER 705.

²²³ *Armitage v Nurse* [1997] 2 ALL ER 705, 713.

the benefit of the beneficiaries'.²²⁴ He did not include the duties of skill, prudence and diligence on the grounds that it was 'Too late to suggest that the exclusion of liability for ordinary negligence or want of probity is contrary to public policy'.²²⁵ Milet LJ also drew our attention to the fact that it is now widely acknowledged that such clauses have gone too far, and that in particular, professional trustees who charge for their services should not be able to rely on exemption clauses to exclude liability for gross negligence. Perhaps there is a greater willingness on the part of the Australian judiciary to restrict the operation of such clauses or to deny them operation on the basis of unconscionability. In some jurisdictions, legislation has been introduced to deny the effect of exemption clauses, as for example, in Jersey, where a law was introduced in 1989 which prevents an exemption clause from operating, which purports to absolve a trustee from liability for his own fraud, wilful misconduct or gross negligence.

IV CONCLUSION

By way of conclusion to this lecture, I would like to offer some comments in the form of an evaluation of the developments which have occurred in equitable relief for breach of fiduciary duty and breach of trust which I have highlighted in this lecture. These comments are made against the background of the comparative perspective which I have adopted in outlining those developments.

1. The attempts which have been made in some jurisdictions to expand the role of fiduciary obligations for the purpose of protecting individual and social interests should continue to be resisted in this country, so that the subordination of self interest should continue to be reflected in liabilities arising on the basis of conflict of duty and interest, misuse of a fiduciary position, undue influence and confidentiality. Other avenues may be available, and other rationales may well provide a basis for intervention without the need to resort to expanding the function served by the obligation of loyalty as currently understood in the Australian context.
2. Notwithstanding what has been suggested in the previous paragraph, there is clearly scope for the currently accepted fiduciary duties to arise in the context of a more extensive array of relationships, outside of the well established categories of such relationships. This is particularly so in relation to professional advisory relationships. There is now greater scope for this to occur on the basis of the court finding that there is a legitimate expectation of an undertaking to act in the best interests of another party to the relationship or some third party.
3. The obligation to avoid conflicts of duty and duty, has gained more prominence in claims for breach of fiduciary duty in litigation against lawyers and it has also become apparent that this duty may also arise in the context of other advisory relationships. This obligation embraces situations involving the simultaneous representation of clients in the same matter and successive representation in separate matters. In same matter conflicts, the courts should be willing to intervene whenever it is demonstrated that it is impossible for a lawyer to act fairly for both parties. When acting against a former client, the case for a very strict approach is clearly required so as to place the onus on the lawyer to demonstrate that there is no risk of disclosure of confidential information. In the

²²⁴ Ibid.

²²⁵ Ibid.

last instance, the courts should continue to insist that it is up to the lawyer to demonstrate that effective means are in place to prevent disclosure from occurring, although it is probably not necessary to go so far as to adopt an irrebuttable presumption in such instances as has occurred in some jurisdictions. In addition, one should also not lose sight of the additional obligations which attach to a lawyer and others such as financial advisers when undertaking an advisory role.

4. A trustee in exercise of a duty of care, owed in relation to the management and administration of a trust, is not required to simply act as an ordinary business person. It is sometimes overlooked in formulations of this duty, that the trustee is unlike an ordinary business person, in that the trustee does have to take account of the interests of the beneficiaries to whom the obligation is owed. The duty of care is therefore coloured by the fiduciary standard which may prevent the duty from being completely assimilated with a common law duty of care. The expectations of trustees and the responsibilities of trustees are manifestly different to those of an ordinary business person. Moreover, there should also be general acceptance that a higher duty of care applies to professional trustees and trust corporations by reason of special skill and care which such trustees profess to have and that liabilities should arise when the trustees conduct falls below such a standard of care.
5. It is suggested that in recipient liability personal claims against third parties for breach of trust and breach of fiduciary duty, the liability has a proprietary rationale and is therefore receipt based and not fault based. There is therefore no place for dishonesty or want of probity as a basis for liability in respect of such claims. There is a clear need for the courts to settle on an agreed approach in relation to such claims, and if knowledge is to be an essential ingredient, then all levels of knowledge should suffice. However, a good case can be made out for the abandonment of knowledge altogether as a requirement, and instead for liability to be strict, but subject to a defence of change of position.
6. There is also a clear need for the courts to settle upon an agreed approach in relation to accessory liability personal claims against third parties for breach of trust and breach of fiduciary duty. Unlike a recipient claim, the liability does not depend upon the receipt of property and it seems to be now accepted that liability is fault based. It is a matter of settling on what will constitute fault in this context. Should it be knowledge based or should it depend upon some form of dishonesty? It would seem that it is likely for the time being at least, to be based on dishonesty, although not confined to being an accessory to dishonest and fraudulent conduct on the part of the party primarily liable. If this is to be the approach, then it should have a strong objective element and not left to be determined on the basis of the subjective moral standards of the individual. The time is long overdue for the High Court to re-examine both recipient and accessory liability, should an appropriate opportunity arise.
7. In the case of both breach of trust and breach of fiduciary duty claims, the remedies available for the purpose of redressing the breach are to a large extent discretionary, except perhaps in instances where the plaintiff succeeds on the basis of an existing proprietary right, although even in such instances discretionary factors are brought into play when deciding if the defendant is able to rely upon a defence to defeat the claim. It is for the court to determine the appropriate remedies which will depend largely on the circumstances of the particular case. In these cases, the court has available to it the full armoury of

both personal and proprietary remedies. The remedial responses and the range of considerations which come into play are often very different to those which determine relief at common law. Restoration is a key feature of relief in these claims and punishment has generally not been part of the equation.

8. The adoption in Australia of a more flexible approach in relation the award of proprietary relief for the recovery of profits, gains and benefits derived in breach of fiduciary duty, is a sensible development. The award of proprietary relief is no longer automatic and in many instances it will be unnecessary or inappropriate. Personal remedies will in many instances provide adequate relief, although the remedial constructive trust may, if necessary, be declared enabling the court to shape the relief to avoid injustice to third parties. The courts are also mindful of the need to avoid unjust enrichments to the plaintiff when calculating profits, benefits or gains or when assessing losses for the purpose of equitable compensation. Fiduciary liability should be regarded as based on its own well established principles, and it is therefore suggested that it is somewhat misleading to describe that liability in terms of constructive trusteeship, as there are no longer any automatic proprietary consequences, in the absence of any existing equitable interest in the property in question. The developments which have taken place in relation to proprietary relief for breach of fiduciary duty should serve as a signal that a constructive trust should also no longer automatically arise the moment a bribe is received by a fiduciary. There should remain scope for proprietary relief in such instances, but on the basis of the flexible considerations, which prevail when a remedial constructive trust is applied.
9. The emergence in Australia of equitable compensation as a remedy not only for losses arising from breach of trust but also for relief arising from a breach of fiduciary duty and for breach of other equitable duties including equitable duties of care, is a significant and important development in relation to the relief that is available in response to such claims. As a result of this development, issues have arisen about causation and contributory responsibility for the purpose of apportioning losses in such instances. The courts have and should continue to attach particular importance to the obligation of defaulting trustees and other fiduciaries to make restitution as an aspect of the very high standards of conduct expected of such people. For that reason, the courts should tread carefully when called upon to adopt common law notions for the assessment of equitable compensation, and it may be that judges should not too readily speculate about what might have happened if the duty had been fulfilled. Even in relation to equitable duties of care owed by trustees and other fiduciaries, the standard of care is readily coloured by the fiduciary standard to protect the interests of another and it may be that common law notions derived from contract and tort are not necessarily appropriate for the purpose of the assessing quantum of equitable compensation for breach for an equitable duty of care. On the other hand, it may be permissible for the courts to insist on an adequate or sufficient connection between the breach and the loss in respect of which compensation is sought. There are also still severe conceptual difficulties preventing the acceptance of notions of contributory negligence, for the purpose of apportioning awards of compensation, although it may still be possible to reach similar results by means of awards of counter restitution in favour of the defendant and by application of established equitable defences. There is also a very strong inclination in Australia to resist the introduction of exemplary

damages in breach of fiduciary duty claims, although convincing reasons have been advanced for not regarding equitable compensation as indicative of the limits of monetary relief available in equity in a breach of fiduciary duty claim. Even so, the award of such relief would be restricted to very exceptional kinds of cases.

10. It is suggested that the Australian courts, unlike their British counterparts, should avoid the temptation to restrict proprietary claims in equity within the straight jacket of an existing equitable proprietary interest, with the result that in England it is still necessary to find a fiduciary relationship in order to invoke the rules and presumptions developed in equity for the purpose of following and tracing property. There should remain scope for proprietary relief even although the claim is not advanced on the basis of an existing equitable proprietary right, and it should still be possible in such instances to enable the claimant to invoke the rules and presumptions developed by equity for the purpose of following and tracing property as part of the process of identifying the subject matter of the proprietary claim. In addition, it is also suggested that there is no logical justification for any longer, maintaining different rules for the purpose of tracing property at law or in equity. This produces capricious results in the case of mixed funds, and hence the result should be the same irrespective of whether the proprietary claim is characterised as a legal or an equitable claim.
11. There is need for flexibility in the utilisation of the process of tracing, and it has been demonstrated how the courts in different jurisdictions have responded to this need in the context of mixed funds made up of many contributors. On the other hand, there has been a very marked reluctance on the part of the judiciary, particularly in the United Kingdom, to adopt other tracing approaches to enable a claimant to recover property when the claimant is unable to identify specific property by application of the established rules for following and tracing trust property. The established principles and presumptions are clearly in need of re-examination in the context of much more sophisticated business, fiscal and investment transactions, which now very often take place internationally and by means of the electronic transfer of funds. The rules and presumptions were developed in the latter part of the nineteenth century and in the early part of the twentieth century in the context of family trusts, and, as such, are not adequate for dealing with fraud in the context of the rapid expansion and internationalisation of business, and the very substantial amounts of funds that may be involved.
12. There is scope for a more unified approach to be adopted in relation to the defences based on equitable doctrines, such as laches and acquiescence rather than continuing to deal with such defences on the basis of their own specific requirements. This has gained added momentum by reason of the introduction of the defence of change of position, based on inequitable circumstances, particularly detrimental reliance. There is therefore, a role for unconscionability doctrine in this context.
13. The defence of change of position is now clearly available in relation to both proprietary and personal claims, although it has not, and nor should it supplant the defence of the bona fide purchaser, or the registration provisions of legislative enactments such as the *Land Transfer Act*. The bona fide purchaser, marks the limits of proprietary relief and the limits of personal recipient liability, and it has already been suggested above, that personal recipient liability ought to be strict, but subject to a defence of change of position. In respect of personal

accessory liability claims, it may be that there is no scope for a defence of change of position, given that liability is likely to depend on proof of dishonesty. In the past, the absence of any defence of change of position may have led the courts to deny the availability of the process of tracing in some situations, in order to produce just outcomes for innocent volunteers. It is no longer necessary to do this, now that a volunteer is able to raise such a defence. It may be that a claimant will be able to identify the property claimed to greater extent that might otherwise have been thought possible when seeking to trace funds wrongly distributed to an innocent volunteer. In order to resist the claim, the volunteer must now not only be able to demonstrate inequitable circumstances, but must also be able to demonstrate that those inequitable circumstances satisfy the requirements which have to be satisfied in order to make out a defence of change of position.

14. The courts should continue to scrutinise exemption clauses very closely and more attention should be given to determining the permissible scope of such clauses. There is much to be said for the view that there is an irreducible core of obligation, which is fundamental to trust and other fiduciary relationships without which, there would be no trust. The fiduciary standard which requires the fiduciary not to act out of self interest lies at the heart of such relationships. In particular, professional trustees who charge for their services should not be able too readily to avoid their obligations. Unconscionability doctrine may have a role to play here, as may legislative intervention.
15. Finally, the use of the terminology of constructive trust and constructive trusteeship has been deliberately avoided in this lecture, except in the context of the constructive trust as a proprietary remedy. These terms are often used when referring to various aspects of liabilities for breach of fiduciary duty, including the personal liability of recipients and accessories. There may be no proprietary connotations when used in such contexts. This only causes confusion and it is suggested that as a result of the developments discussed in this lecture, that the use of this terminology should be abandoned, as one is able to isolate the principles which determine liability for breach of fiduciary duty, including the principles which determine the personal liabilities of third parties from the principles which govern relief for breach of fiduciary duty and the related third party liabilities. It is no longer necessary to pretend that this topic is about constructive trusts or constructive trusteeship. It is, to a large extent, about personal obligations as they affect the party with primary responsibility, as well as the impact of those obligations on third parties for the purpose of determining the personal liabilities of third parties. It is then possible to regard the remedial framework when it is brought into operation for redressing such breaches, as a separate issue, without any automatic assumption that the relief will need to be proprietary in its consequences. Nevertheless, within that remedial framework, there is scope for both personal and proprietary remedies to be invoked, although the courts will more often than not prefer to award a personal remedy rather than a proprietary remedy. The proprietary remedy will always be dependent upon the existence of identifiable subject matter against which the remedy is able to operate with proprietary consequences. In addition, it may also be possible to sustain a proprietary claim on the basis of an equitable proprietary right, or perhaps even on the basis of an unconscionable denial of a beneficial interest, which then enables the process of following and tracing to be

invoked for the purpose of identifying the continued existence of the property as the subject matter of a proprietary claim.