HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ANGUS CLAYMORE PILMER & ORS APPELLANTS

AND

THE DUKE GROUP LIMITED
(IN LIQUIDATION) & ORS RESPONDENTS

Pilmer v The Duke Group Limited (in liq) [2001] HCA 31
31 May 2001
A46/1999

ORDER

1. *Appeal allowed with costs.*

2. *Set aside pars 2, 7, 9 and 10 of the orders made by the Full Court of the Supreme Court of South Australia on 13 August 1999 but only to the extent that those orders affect the parties to the appeal to this Court.*

3. *Remit the matter to the Full Court of the Supreme Court of South Australia for the making of orders consistent with this Court's reasons for decision.*

On appeal from the Supreme Court of South Australia

Representation:

A J Myers QC with P Zappia for the appellants (instructed by Phillips Fox) at the hearing on 7 April 2000

T A Gray QC with R J Whitington QC, S J Lipman and S J Doyle for the first respondent (instructed by Fisher Jeffries) at the hearing on 7 April 2000

A J Myers QC with G T Pagone QC and P Zappia for the appellants (instructed by Phillips Fox) at the hearing on 23 November 2000

R J Whitington QC with S J Lipman and S J Doyle for the first respondent (instructed by Fisher Jeffries) at the hearing on 23 November 2000

No appearance for the second to seventh respondents.

CATCHWORDS

Pilmer v The Duke Group Limited (in liquidation)

Contract – Breach – Damages – Calculation of loss – Contract of retainer for valuation of subject of takeover bid – Plaintiff company effected takeover in reliance on valuation made in breach of duty of care – Had valuation been accurate plaintiff would not have proceeded – Consideration included cash and issue and allotment of shares – Whether plaintiff suffered loss by issue of shares – Whether damages include sum representing market value of shares issued under agreement.

Companies – Company finance – Share capital – Maintenance of capital – Company limited by shares – Company issuing new shares – Issue and allotment otherwise than for cash – Whether company suffers loss by reason of issuing new shares.

Equity – Fiduciary duties – Duty of loyalty – Conflict of duties and interests – Conflict of duty and duty – Accountant retained by company to give independent expert valuation report to be placed before shareholders – Whether accountant owed fiduciary duties to company – Principles of causation in equity.

Equity – Equitable remedies – Equitable compensation – Assessment – Reduction for contributing fault.

ASX (Australian Stock Exchange Ltd) Listing Rules, Listing Rule 3J(3).

1 McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The first respondent, The Duke Group Limited, was formerly called Kia Ora Gold Corp NL and it is convenient to refer to it as "Kia Ora". Kia Ora was incorporated in South Australia in 1954 and, at the times which are now relevant, its shares were listed on the Australian Stock Exchange. It became insolvent and, in July 1989, the Supreme Court of South Australia ordered that it be wound up by the Court. The appellants are (or are the personal representatives of) those whom Kia Ora alleged and the trial judge found[1] were, at material times, the members of a partnership which carried on practice as accountants in Perth under the name "Nelson Wheeler".

2 The appeal to this Court concerns limited aspects of complex litigation brought by Kia Ora in the Supreme Court of South Australia against the appellants and (among others) persons who were alleged to have been directors of Kia Ora at the relevant times (the second, third and fourth respondents to this appeal). It is convenient to refer to these respondents as "the Kia Ora directors". The litigation arose out of a successful takeover bid by Kia Ora for a company called Western United Ltd. By its takeover offers, Kia Ora offered alternative forms of consideration to the shareholders of Western United for their shares in that company. Kia Ora offered either $1.20 for each share in Western United plus five shares in Kia Ora for each two shares in Western United *or* four shares in Kia Ora for each share in Western United. As a result of the acceptances of its offers, Kia Ora paid $25.696 million and issued and allotted 67.9 million $1 shares in Kia Ora, credited as fully paid up.

3 Kia Ora alleged that it retained the appellants' firm, Nelson Wheeler, to prepare a report which would be placed before a meeting of shareholders of Kia Ora. That report said, among other things, that[2]:

> "we are of the opinion that, from the point of view of Kia Ora, the price proposed to be offered [by Kia Ora for the shares in Western United] is fair and reasonable in all of the circumstances".

By its claim, Kia Ora alleged against the appellants that for them to have provided any report was in breach of a fiduciary duty. Kia Ora alleged further that the report was prepared incompetently and in breach of their contract of retainer and of a common law duty of care. It alleged against the Kia Ora

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1 *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1 at 195.

2 (1998) 27 ACSR 1 at 73.

directors that they had breached their fiduciary and statutory duties as directors. There was no allegation that the appellants were accountable in equity to Kia Ora on the footing that they had dishonestly assisted the directors to breach their fiduciary duties thereby attracting the application of the principles discussed in such decisions as *Royal Brunei Airlines v Tan*[3]. Liability in equity was alleged to be direct rather than accessorial. The appellants themselves were said to owe a fiduciary duty to Kia Ora and its shareholders.

4 The central issue in this appeal is whether Kia Ora suffered any loss by the issue and allotment of its shares to those who accepted its takeover offer for Western United. To understand how that issue arises, it is necessary to say something about the way in which, at trial, Kia Ora put its claims against the appellants and against the Kia Ora directors, and about the decisions of the primary judge (Mullighan J)[4] and, on appeal, the Full Court of the Supreme Court of South Australia[5]. But before turning to those subjects, it is convenient to say something more about the facts.

The Nelson Wheeler report

5 The report which the appellants prepared ("the Nelson Wheeler report") was placed before Kia Ora's shareholders to comply with listing rule 3J(3) of the Main Board Listing Rules of the Australian Stock Exchange. That rule forbade a listed company from acquiring (without the prior approval of its shareholders in general meeting) securities the value of which, or the consideration for the acquisition of which, exceeded 5% of shareholders' funds of the acquiring company. It applied if the vendor would be regarded as an associate of the listed company for the purposes of s 9 of the *Companies Act* 1981 (Cth) or the equivalent provisions of a State Companies Code. Listing rule 3J(3) applied to Kia Ora's acquisition of Western United because the third and fourth respondents (and another person who had died before the action was commenced) were directors of and shareholders in both companies[6].

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3 [1995] 2 AC 378.

4 (1998) 27 ACSR 1.

5 *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64.

6 (1998) 27 ACSR 1 at 60.

6 The listing rules required that persons associated with the vendor could not vote at the meeting of shareholders[7]. They also required that notice of any meeting of shareholders to approve a transaction of the kind we have described "be accompanied by copies of reports, valuations or other material from independent qualified persons sufficient to establish that the purchase or sale price of such assets is a fair price"[8].

7 The Nelson Wheeler report stated the opinion, in the terms set out earlier, that the price to be offered by Kia Ora for shares in Western United was fair and reasonable. The report was, in effect, a valuation of Western United. The final version of the report, dated 22 September 1987, valued the issued capital of Western United at $82.6 million or $3.22 per share. The then current market price for Kia Ora shares was $1.10 and, accordingly, the proposed offer to Kia Ora valued Western United at $3.95 to $4.40 per share. The report expressed the opinion that it was reasonable for Kia Ora to pay a premium to acquire all of the shares in Western United.

8 Share prices on stock exchanges around the world dropped very sharply on 19 and 20 October 1987. Share prices in Kia Ora and Western United were affected considerably. The market price of Kia Ora shares was reduced from $1.08 to 75 cents almost immediately. The price of Western United shares dropped more slowly but it dropped from $2.90 on 19 October 1987 to $1.70 on 30 October 1987. Nevertheless, Kia Ora pressed on with the takeover.

9 Kia Ora alleged that the appellants owed a duty of care to it, and its shareholders, to exercise all reasonable care, skill and diligence that a reasonably competent accountant would exhibit in carrying out the retainer to prepare such a report. By their pleading, the appellants admitted that they owed a duty of care to Kia Ora (among other things) to carry out their instructions with all reasonable care, skill and diligence but denied owing any duty to the shareholders of Kia Ora. At trial, the appellants sought to withdraw the admission that they owed a duty to Kia Ora and to amend their pleading to deny any duty of care to Kia Ora in tort but acknowledge a common law duty only to those shareholders of Kia Ora who were not associates of the Kia Ora directors[9]. The trial judge held that the appellants did owe Kia Ora a common law duty of care and a like duty under

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7 Listing rule 3J(3)(c).

8 Listing rule 3J(3)(b).

9 (1998) 27 ACSR 1 at 266.

the contract of retainer[10]. Kia Ora's shareholders not being party to the action, it was not necessary to decide whether the appellants owed any duty to the shareholders, or any group of shareholders. The trial judge rejected Kia Ora's claim that the appellants breached a fiduciary duty, holding that it was not shown that there was a fiduciary relationship between Kia Ora and the appellants[11].

The decisions at trial and in the Full Court

10 In the course of final submissions at the trial, counsel for the appellants conceded that the report (and the valuation of Western United that it incorporated) had been prepared incompetently and in breach of the duty of care owed to Kia Ora[12]. The trial judge found that the extent of the incompetence was "a very substantial departure from the standards which [the appellants] were required to observe"[13]. Among other things, the report made unjustifiably favourable projections of future maintainable earnings of Western United[14] and used price earnings multiples which were inappropriate[15]. Obvious checks which were readily available and which, if used, would have revealed what the trial judge described as the "absurd over valuation of Western United"[16] were not made.

11 The trial judge found that the Kia Ora directors were in breach of fiduciary and statutory duties[17]. He gave judgment for Kia Ora against the

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10 (1998) 27 ACSR 1 at 355.

11 (1998) 27 ACSR 1 at 378.

12 (1998) 27 ACSR 1 at 269.

13 (1998) 27 ACSR 1 at 294. See also *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 426-427; *Maguire v Makaronis* (1997) 188 CLR 449; cf *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.

14 (1998) 27 ACSR 1 at 275-280.

15 (1998) 27 ACSR 1 at 280-285.

16 (1998) 27 ACSR 1 at 285.

17 (1998) 27 ACSR 1 at 329.

appellants and the Kia Ora directors for $93,863,796.81 (including interest)[18]. That sum was calculated by allowing an amount equal to the cash which Kia Ora had paid shareholders of Western United (more than $26 million) and an amount of $30.55 million for the value of the shares which Kia Ora had issued and allotted "measured by having regard to their value at the time they were allocated" (found to be 45 cents per share)[19]. This figure of 45 cents per share was found to be the share market price of Kia Ora shares *after* the new issue had been made under the takeover scheme[20]. To the sum of these amounts was added an amount of $600,000 for damages for loss of use of money[21] and an amount of $6,439,339 was deducted as the true value of the shares in Western United obtained by the takeover. Pre-judgment interest was allowed pursuant to s 30C of the *Supreme Court Act* 1935 (SA) to give the judgment sum of more than $93.8 million.

12 From this judgment the appellants and the Kia Ora directors appealed to the Full Court of the Supreme Court of South Australia. Kia Ora cross-appealed. For present purposes, it is sufficient to note that the Full Court upheld the trial judge's findings that the appellants owed a common law and a contractual duty of care which they had breached and that, in assessing damages for that breach, it was right to allow an amount for the value of the shares which Kia Ora had issued and allotted[22]. The Full Court held, however, that the trial judge had erred in calculating the value of those shares as he had. It held that the amount which should be allowed on this account was to be calculated by reference to the value of Kia Ora shares *before* the issue of new shares under the takeover scheme[23]. This increased the amount allowed on this account from about $30.55 million to about $56 million. Kia Ora's cross-appeal was, therefore, allowed and the judgment for Kia Ora against the appellants varied. Certain other orders were made varying the judgment ordered by the trial judge against other parties to the action but they need not be noticed. The Full Court's orders did not deal with the contribution orders made at trial. No party to the appeal in this Court suggested that those orders should be revisited.

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18 (1998) 27 ACSR 1 at 495.

19 (1998) 27 ACSR 1 at 412.

20 (1998) 27 ACSR 1 at 399, 412.

21 (1998) 27 ACSR 1 at 416.

22 (1999) 73 SASR 64 at 162 [447].

23 (1999) 73 SASR 64 at 166-167 [469]-[477].

13 It is also important to note that in dealing with Kia Ora's cross-appeal, the Full Court concluded that, by providing any report to Kia Ora, the appellants had acted in conflict with their duty to act only in the best interests of Kia Ora[24] and had, accordingly, acted in breach of a fiduciary obligation owed to Kia Ora[25]. But for its conclusion that there was contributing fault by Kia Ora that could be taken to account in reduction of the equitable compensation to be allowed[26] the Full Court would have awarded the same amount as equitable compensation for the breach of fiduciary duty as it awarded for breach of the appellants' contract of retainer[27]. Contributory negligence affording no basis for the apportionment of damages awarded for breach of contract[28] Kia Ora was held entitled to succeed to the full extent of the damages for breach of contract[29].

14 The initial grant of special leave to this Court confined the appellants to a single ground. This was whether the Full Court erred in holding that Kia Ora suffered any loss by the issue and allotment of its shares. The Court heard argument respecting this ground and thereafter directed that the appeal be relisted. The Court then heard argument as to whether the grant of leave should be expanded to include one or more issues concerning equitable liability and relief. The issues were whether the Full Court erred in holding that the appellants owed a fiduciary duty to Kia Ora which they breached; whether, if such a duty existed and was breached, the Full Court erred in its assessment of the amount of equitable compensation; and whether that equitable compensation was properly to be reduced by reason of "contributing fault" by Kia Ora.

15 It is convenient first to deal with the contentions concerning the ground which attracted the initial grant of leave and then to consider whether there should be an expansion in the grant of leave to deal with the equitable issues.

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24 (1999) 73 SASR 64 at 224 [746], 229 [770].

25 (1999) 73 SASR 64 at 232 [788].

26 (1999) 73 SASR 64 at 255-257 [880]-[888].

27 (1999) 73 SASR 64 at 257 [890].

28 *Astley v Austrust Ltd* (1999) 197 CLR 1.

29 (1999) 73 SASR 64 at 258 [894].

The parties' general contentions

16 The appellants contended that the error in calculating damages to be awarded to Kia Ora by allowing any sum for the value of the shares which it had issued and allotted could be demonstrated simply. Kia Ora had paid out $26 million cash in return for shares worth about $6 million. In addition it had issued shares. Although its net assets had been reduced by only about $20 million (the $26 million cash paid out less the $6 million of assets acquired) it had been awarded damages which gave it that sum plus about $56 million for the shares it issued. This result was said to be so startling as to suggest error in principle. Kia Ora's riposte was to say that the shares which it had issued had been issued fully paid with a value of $1.10 per share attributed to them on the basis of the appellants' incompetent valuation. That value had been lost because of the appellants' breach of duty.

17 Arguments at this level of generality are apt to obscure some difficult questions that lie beneath the assertions that are made. In particular, they may distract attention from consideration of the nature of shares in a company having a share capital and focus unduly upon the way in which accountants prepare financial statements for the information of shareholders and others.

Some basic propositions

18 It is of the first importance to keep at the forefront of consideration that the claim which was made is a claim by the company, not a claim by or on behalf of its shareholders. It may be readily accepted that directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders. It may also be readily accepted that shareholders, as a group, can be said to own the company. But the company is a separate legal entity and the question raised in this matter is what damage (if any) did *it* suffer by issuing new shares. The question is *not* whether shareholders in Kia Ora were adversely affected[30].

19 Next, it is important to understand the nature of a share in the capital of a company. Once issued, a share comprises "a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but

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30 cf *Johnson v Gore Wood & Co* [2001] 2 WLR 72; [2001] 1 All ER 481.

not constituting a debt"[31]. It is, according to the classic description of Farwell J in *Borland's Trustee v Steel Brothers & Co Limited*[32]:

> "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with [the relevant corporations legislation[33]]."

The reference to measuring the interest of a shareholder in a company by a sum of money is no longer apt under present corporations law in Australia. The *Company Law Review Act* 1998 (Cth) abolished the concept of par value[34] and did away with the concept of authorised capital[35]. It seems that this was done in the belief that par value was merely an "arbitrary monetary denomination" which was potentially "misleading to an unsophisticated investor"[36]. The consequences of these and related changes to the law will, no doubt, depend upon the particular statutory provisions that have been made. They can be put to one side for the purposes of this case.

20 Before the shares in question were issued, they did not exist as an item of property whether of the company or anyone else[37]. It was the act of issuing the

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31 Pennington, "Can shares in companies be defined?", (1989) 10 *The Company Lawyer* 140 at 144.

32 [1901] 1 Ch 279 at 288. See also *Goldsmith v Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd* (1909) 8 CLR 241 at 256 per Isaacs J; *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 156 per Williams J.

33 Now s 140 of the Corporations Law but at the times relevant to this appeal *Companies (South Australia) Code*, s 78(1).

34 See now Corporations Law, s 254C and s 1427.

35 Corporations Law, s 1427.

36 Company Law Review Bill 1997, Explanatory Memorandum pars 11.22-11.23.

37 *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 427 per Aickin J.

shares and agreeing to allot them which created the relevant item of property – property which was never owned by the company[38].

21 At the time of the events which gave rise to these proceedings (late 1987 and early 1988) Kia Ora was a no liability company, that is, "a company that does not have under its memorandum and articles a contractual right to recover calls made upon its shares from a shareholder who defaults in payment of those calls"[39]. Kia Ora's status changed to a company limited by shares only in June 1988, after what was described as "the reverse takeover which was the acquisition of the assets of the Duke Group of companies (the Duke Group) by Kia Ora and the Duke Group acquiring the issued capital of Kia Ora and thereby control of the assets of Kia Ora"[40]. As a no liability company, Kia Ora was entitled to issue its shares at a discount[41]. In this respect it differed from companies limited by shares. They could lawfully issue shares at a discount only if certain conditions were satisfied (including authorisation by resolution of a general meeting and confirmation by order of the Court)[42]. Nonetheless it is convenient to approach the present matter by first considering the position of all companies having a share capital, without distinguishing between no liability and other forms of such companies.

Maintenance of capital

22 Central to the regulation of companies having a share capital (before the recent changes we mentioned above) was the importance of a company maintaining its capital. This was seen as of particular importance for the creditors of the company rather than the company itself or its corporators. In *In re Exchange Banking Company; Flitcroft's Case*, Jessel MR explained why that was so. He said[43]:

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38 We leave aside the distinctions sometimes drawn between issue and allotment. See *Central Piggery Co Ltd v McNicoll and Hurst* (1949) 78 CLR 594 at 599-600 per Dixon J; *St Helens Farm* (1981) 146 CLR 336 at 424-426 per Aickin J.

39 *Companies (South Australia) Code*, s 5(1); cf Corporations Law, s 112(2).

40 (1998) 27 ACSR 1 at 115; see also at 118.

41 *Companies (South Australia) Code*, s 118(1).

42 *Companies (South Australia) Code*, s 118(2).

43 (1882) 21 Ch D 519 at 533-534.

> "A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute … [T]here is a statement that the capital shall be applied for the purposes of the business, and on the faith of that statement, which is sometimes said to be an implied contract with creditors, people dealing with the company give it credit. The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than by a winding-up order."

The need to maintain capital led to the conclusion that a limited company could not lawfully acquire its own shares – again because creditors are "entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business"[44]. It led to the statutory prohibition upon companies purchasing, dealing in, taking security over, or giving financial assistance in connection with the acquisition[45] of, their own shares.

23 Most importantly for present purposes, the imperative to preserve capital (in the sense of ensuring that the company had actually received the amount which its issued shares represented and had not returned it to shareholders) was one of the key features lying behind the way in which the courts approached the issue and allotment of shares otherwise than for cash. The other of those key features was that "the dominant and cardinal principle of [the legislation governing limited liability is] that the investor shall purchase immunity from liability beyond a certain limit upon the terms that there shall be and remain a liability up to that limit"[46]. Creditors, therefore, were entitled on a winding up to have unpaid capital paid.

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44 *Trevor v Whitworth* (1887) 12 App Cas 409 at 423-424 per Lord Watson.

45 *Companies (South Australia) Code*, s 129; but now see Corporations Law, Pts 2J.2 and 2J.3.

46 Buckley, *The Law and Practice under the Companies Acts 1862 to 1886*, 5th ed (1887) at iii-iv.

24 These considerations do not apply to no liability companies in the same way in which they apply to other companies having a share capital. A no liability company does not have the right to recover calls from its shareholders and thus the second key feature we have mentioned has no application to no liability companies. Further, because the general statutory prohibition against issuing shares at a discount did not, under the Companies Codes, apply to no liability companies[47] the first key feature (the imperative to maintain capital) could have only a qualified operation in the case of a no liability company. Nevertheless, the capital of no liability companies may not be treated by directors or corporators of such companies in any way they choose. This Court held in *Tongkah Compound NL v Meagher*[48] that, without specific statutory power to reduce capital, a no liability company could not validly return capital to shareholders or extinguish the right to call up uncalled capital. That being so, and subject, of course, to any particular statutory qualification of the relevant principles, we do not consider that the issue of shares in a no liability company for non-cash consideration is to be governed by principles different from those which apply to other companies having a share capital.

25 To understand the principles that have developed in relation to the issue of shares for non-cash consideration, it is necessary to trace something of the history of that development.

Issue and allotment otherwise than for cash

26 The development of the law relating to issue and allotment of shares otherwise than for cash begins in 1867 with *Droitwich Salt Company v Curzon*[49] where it was held that a power to reduce capital conferred on a company by its constituting document (a deed of settlement) could not be relied on once the company was registered as a company limited by shares. Reduction of capital was held to be inconsistent with shareholders having limited liability. Thereafter, in the United Kingdom, the *Companies Acts* of 1867 and 1877 gave express statutory power to companies limited by shares to reduce their capital (but subject to confirmation by the court).

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47 *Companies (South Australia) Code*, s 118(1).

48 (1951) 83 CLR 489.

49 (1867) LR 3 Ex 35.

27 In 1880, in *In re Dronfield Silkstone Coal Company*[50], Jessel MR held that a power given by articles of association for directors to purchase for the company its own shares was illegal because it was contrary to the general intention of the legislation that capital which shareholders had contributed, or were liable to contribute, should not be diminished by returning it to shareholders. Accordingly, the Master of the Rolls held that a shareholder whose shares had purportedly been bought pursuant to this power was, on the winding up of the company, properly to be included in the list of contributories. An appeal to the Court of Appeal succeeded[51] but the opinion of Jessel MR was later approved by the House of Lords in *Trevor v Whitworth*[52].

28 With this background, then, it can be seen that the decision of the Court of Appeal in *In re Almada and Tirito Company*[53], that a company limited by shares had no power to issue shares at a discount, was no more than a particular application of by then well-accepted principle. As Lopes LJ said in *Almada and Tirito*[54]:

> "I can see no practical distinction between issuing shares at a discount and returning to the member a portion of the capital to which the creditors have a right to look as that out of which they are to be paid."

In *Almada and Tirito* the Court of Appeal overruled a line of decisions which held that companies could issue shares at a discount[55]. It seems, however, that the point remained controversial until the House of Lords dealt with it in 1892 in *Ooregum Gold Mining Company of India v Roper*[56]. The House decided in *Ooregum* that a company limited by shares had no power to issue shares as fully

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50 (1880) 17 Ch D 76.

51 (1880) 17 Ch D 76 at 96-97.

52 (1887) 12 App Cas 409 at 420 per Lord Herschell, 429 per Lord Watson, 439 per Lord Macnaghten.

53 (1888) 38 Ch D 415.

54 (1888) 38 Ch D 415 at 426.

55 *In re Ince Hall Rolling Mills Company* (1882) 23 Ch D 545 n; *In re Plaskynaston Tube Company* (1883) 23 Ch D 542.

56 [1892] AC 125. See also *Welton v Saffery* [1897] AC 299.

paid up for a money consideration less than their nominal value. Lord Halsbury LC said[57]:

> "I think, with Fry LJ in the *Almada and Tirito Company's Case*[58], that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: What is the nature of an agreement to take a share in a limited company ? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that, treating the question as unaffected by the Act of 1867, the company were prohibited by law, upon the principle laid down in *Ashbury Company v Riche*[59], from doing that which is compendiously described as issuing shares at a discount."

29 The decisions about issuing shares at a discount must also be understood against the background of s 25 of the *Companies Act* 1867 (UK) (30 & 31 Vict c 131) which provided that:

> "Every Share in any Company shall be deemed and taken to have been issued and to be held subject to the Payment of the whole Amount thereof in Cash, unless the same shall have been otherwise determined by a Contract duly made in Writing, and filed with the Registrar of Joint Stock Companies at or before the Issue of such Shares."

30 In 1868 and 1870 the English courts dealt with a number of cases in which companies had issued shares (often to promoters) in return for the transfer of property in specie to the company rather than cash[60]. The immediate question was whether the shareholder was to be treated as a contributory. But the decisions exposed the obvious tension between an insistence upon maintenance of capital and the possibility that the power to issue shares in return for property

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57 [1892] AC 125 at 134.

58 *In re Almada and Tirito Company* (1888) 38 Ch D 415.

59 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.

60 *In re Heyford Company; Pell's Case* (1869) LR 5 Ch App 11; *In re Heyford Ironworks Company; Forbes and Judd's Case* (1870) LR 5 Ch App 270; *In re Baglan Hall Colliery Co* (1870) LR 5 Ch App 346; *In re Empire Assurance Corporation; Leeke's Case* (1870) LR 11 Eq 100.

rather than cash might be abused. Indeed, in *Ooregum*, Lord Halsbury regretted that the statutory prescription that shares are held "subject to the Payment of the whole Amount thereof in Cash"[61] had "received a judicial exposition which allows payment otherwise than in cash"[62]. But as Lord Watson pointed out in *Ooregum*[63]:

> "A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice."

31 The issue came to a head in *In re Wragg Limited*[64]. In the previous year, 1896, the House of Lords had decided *Salomon v Salomon & Co*[65]. As is now well known, the House held that a trader could lawfully sell his then solvent

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61 *Companies Act* 1867 (UK) (30 & 31 Vict c 131), s 25.

62 *Ooregum Gold Mining Company of India v Roper* [1892] AC 125 at 134-135.

63 [1892] AC 125 at 136-137.

64 [1897] 1 Ch 796.

65 [1897] AC 22.

business to a limited liability company which he formed and that the company thus formed was not the mere alias or agent of or trustee for the vendor.

32 The question in *In re Wragg* was whether shares, credited as fully paid up and issued to the vendors of the business which the company bought, were improperly issued. The agreement pursuant to which the shares had been issued had been registered in the manner contemplated by s 25 of the *Companies Act* 1867. The question arose in misfeasance proceedings brought by the liquidator of the company against its directors alleging (among other things) that they were liable to contribute to the assets of the company for their misfeasance – in the case of one, by accepting the shares, and, in the case of the others, by issuing them or permitting their issue[66]. That application was joined with an application against the respondents as shareholders for declarations that their shares were unpaid[67].

33 The Court of Appeal affirmed the decision of Vaughan Williams J dismissing the applications. It was accepted in the Court of Appeal[68] that it was well established that an acquirer of shares from a company (whether as subscriber to the memorandum or by issue and allotment) could satisfy the liability in respect of those shares by paying money or money's worth, or as it had been put in *In re China Steamship and Labuan Coal Company; Drummond's Case*[69] in "meal or in malt". But could a court look behind the agreement which the company had made with the shareholder and decide whether the consideration in kind for which the agreement provided was adequate?

34 Lindley LJ began his consideration of this question in *In re Wragg* by examining the nature of the liability of a shareholder[70]:

> "The liability of a shareholder to pay the company the amount of his shares is a statutory liability, and is declared to be a specialty debt (Companies Act, 1862, s 16), and a short form of action is given for its recovery (s 70). But specialty debts, like other debts, can be discharged in

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66 [1897] 1 Ch 796 at 799.

67 [1897] 1 Ch 796 at 800.

68 [1897] 1 Ch 796 at 826 per Lindley LJ, 833 per A L Smith LJ.

69 (1869) LR 4 Ch App 772 at 779.

70 [1897] 1 Ch 796 at 829.

> more ways than one – eg, by payment, set-off, accord and satisfaction, and release – and, subject to the qualifications introduced by the doctrine of ultra vires, or, in other words, the limited capacity of statutory corporations, any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor."

To this general proposition there were some qualifications[71]:

> "It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *In re Eddystone Marine Insurance Co*[72]; nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for a statutory action for non-payment of calls: see *Pellatt's Case*[73]."

Of greatest immediate importance is the conclusion that the court could not go behind the agreement made by the company and shareholders except in very limited circumstances. Lindley LJ said[74]:

> "It has … never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. *Provided a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain*, it appears to be settled by *Pell's Case*[75] and the others to which I have referred, of which *Anderson's Case*[76] is the most striking, that agreements by limited companies to pay for

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71 [1897] 1 Ch 796 at 829.

72 [1893] 3 Ch 9.

73 *In re Richmond Hill Hotel Company; Pellatt's Case* (1867) LR 2 Ch App 527.

74 [1897] 1 Ch 796 at 830.

75 *In re Heyford Company; Pell's Case* (1869) LR 8 Eq 222; on appeal (1869) LR 5 Ch App 11.

76 *In re Wedgwood Coal and Iron Company; Anderson's Case* (1877) 7 Ch D 75.

> property or services in paid-up shares are valid and binding on the companies and their creditors." (Emphasis added)

In general, so long as the agreement was not ultra vires the company and remained in force, the courts would not go behind it to inquire about the adequacy of the consideration for which it provided. Thus, the tension between the imperative to maintain capital (for the protection of creditors) and the possible abuse of the power to issue shares in return for money's worth rather than money was resolved by permitting shareholders to rely on the contract made for the issue of shares in all but very limited cases. Indeed, it may be thought that resolution in this way was inevitable once *Salomon* was decided and full effect was given to the separate legal personality of the corporation and the limited liability of its corporators.

35 Attempts to demonstrate that an agreement to issue shares in return for payment in kind rather than cash should be set aside as colourable or illusory have not often succeeded[77]. One case in which the attempt did succeed is *In re White Star Line Ltd*[78]. There, more than 1.5 million shares had been issued by White Star Line Ltd to Royal Mail Steam Packet Co. The shares were partly paid, a total of £750,990 having been called but not paid. The issuing company (White Star) then agreed to accept from the Royal Mail Co deferred creditors' certificates for the nominal amount of the debt due on the shares.

36 It was acknowledged in evidence that at all material times the certificates were, to the knowledge of both parties, worth a great deal less than their nominal value. It was not found, however, that the certificates were entirely worthless. There was, therefore, consideration sufficient to support an accord and satisfaction. Nevertheless, the Court of Appeal held that the shareholder was to be treated as the holder of shares on which £750,990 remained unpaid[79]. It held[80] "that money's worth was not in fact given, or, to use alternative language, that the consideration was colourable or illusory in so far as it was represented as being

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77 See, eg, *In re Theatrical Trust Limited; Chapman's Case* [1895] 1 Ch 771; *In re Innes & Co Limited* [1903] 2 Ch 254; *Hong Kong and China Gas Company Limited v Glen* [1914] 1 Ch 527.

78 [1938] Ch 458.

79 [1938] Ch 458 at 479.

80 [1938] Ch 458 at 478.

of the value of 750,990*l*". That being so, the court concluded that the transaction did not amount to "payment" of the amount that had been called on the shares[81].

37 The actual decision in *In re White Star Line* may be understood as turning on the fact that *both* parties to the transaction knew that the consideration offered and received was not worth the sum attributed to it. Such a case has obvious parallels with the fourth kind of equitable fraud identified by Lord Hardwicke in *Chesterfield v Janssen*[82] where the nature and circumstances of the transaction reveal it to be "an imposition and deceit on the other persons not parties to the fraudulent agreement"[83]. More difficult questions would seem to arise, however, if only one party were shown to have known, at the time of the transaction, that the consideration provided was worth less than the value attributed to it.

38 In such a case, the relevant questions would be (or at least would include) whether the contract was ultra vires and whether it was liable to be set aside. If on its face, the contract revealed that the consideration was inadequate and shares had been issued at a discount, the contract would be made beyond power. If, however, the face of the contract did not reveal inadequacy of consideration, would the contract be set aside at the suit of a party to it? If the contract was liable to be set aside at the suit of a party to it, whether for fraud or otherwise, difficult questions may arise about the consequences of setting the contract for allotment aside and restoring the parties to their previous position. Would the shareholder nevertheless remain a member, bound to pay cash for the shares? Could the shareholder repudiate the allotment at least before winding up commenced[84]? If, however, the contract could not be set aside there would be no basis for the company (or a liquidator of the company) proceeding against the shareholder for the amount of inadequate consideration for the share without the shareholder being able to meet the claim with a plea that the agreement for allotment had been fully performed. (For completeness, it should also be noted in this connection that other considerations arise where a shareholder, who has agreed to take shares to be paid for in cash, seeks to discharge that liability by later agreeing to provide some other form of consideration. In such a case the

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81 [1938] Ch 458 at 479.

82 [1750] 2 Ves Sen 125 [28 ER 82].

83 [1750] 2 Ves Sen 125 at 156 [28 ER 82 at 100].

84 *Anderson's Case* (1877) 7 Ch D 75 at 104; *In re Hull and County Bank; Burgess's Case* (1880) 15 Ch D 507.

obligation to pay for the shares may be satisfied only to the extent of the consideration received[85].)

39 No doubt it was to avoid some of the difficulties associated with the issue of shares in return for non-cash consideration that the *Companies Act* 1985 (UK) introduced new provisions making an allottee of shares for non-cash consideration liable, in certain circumstances, for the aggregate nominal value of the shares (and any premium) if there were default in compliance with the provisions regulating the issue of shares for non-cash consideration[86]. There were, however, no equivalent provisions in the Companies Codes.

40 It is clear that, statute apart, if the contract for allotment and issue in return for a non-cash consideration could not be set aside, the courts would not inquire into the adequacy of that consideration with a view to holding the shareholder liable for the difference[87]. Further, although a director who joined in unlawfully allotting shares at a discount may be liable, in misfeasance proceedings, to pay the amount of the discount as compensation, if that amount cannot be recovered from the allottee or holder[88], it must be remembered that the misfeasance proceedings in *In re Wragg* failed because the court could not go behind the agreement pursuant to which the shares had been allotted to see whether there had been an issue at a discount.

41 In the present case, then, it is said that the shares which Kia Ora allotted to shareholders of Western United, in return for their shares in that company, were issued on terms that can now be seen to have overvalued the worth of the consideration for the allotment. It is said that the appellants' breach of duty caused that overvaluation. But nothing on the face of the transaction suggested that there was an issue of Kia Ora shares at any discount. Nor, at least in the case of shareholders of Western United who were unrelated to Kia Ora and its directors, is there anything to suggest that the shareholders knew or suspected that the price was other than a fair and reasonable price. Indeed, the whole thrust

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85 *Pellatt's Case* (1867) LR 2 Ch App 527 at 535; *In re Mercantile Trading Company; Schroder's Case* (1870) LR 11 Eq 131; *In re Wragg Limited* [1897] 1 Ch 796 at 839; *Gardner v Iredale* [1912] 1 Ch 700 at 716.

86 *Companies Act* 1985 (UK), s 103.

87 *Ooregum* [1892] AC 125; *Chapman's Case* [1895] 1 Ch 771; *In re Wragg* [1897] 1 Ch 796; *Mosely v Koffyfontein Mines Limited* [1904] 2 Ch 108.

88 *Hirsche v Sims* [1894] AC 654.

of Kia Ora's case was that the message conveyed (and intended to be conveyed) to Western United shareholders by the Nelson Wheeler report was that the consideration being given for the issue of shares in Kia Ora was fair and reasonable.

42 Perhaps other considerations might have intruded in the case of shareholders of Western United who were associated with Kia Ora and its directors, but no attempt has been made to set aside the contracts of allotment of Kia Ora shares to those persons. Indeed, it is not possible to say, from the material to which reference has been made in this Court, how many such shareholders there were or whether they retained their Kia Ora shares at the time of the proceedings which give rise to the present appeal.

43 What, then, did Kia Ora lose by issuing and allotting the shares which it did?

Kia Ora's loss

44 The consideration of this question must begin from one critical proposition. Had the appellants' contract of retainer been performed according to its terms, it was accepted both by the trial judge[89] and by the Full Court[90] that the takeover would not have proceeded. Of course the takeover did proceed, and none of the allotments made by Kia Ora were or could be undone. Once the takeover was completed it was no longer possible to rescind the contracts for allotment of shares and restore the parties to their previous positions[91]. It follows that the question of Kia Ora's loss must be considered on the assumption that the issue and allotments of shares were effective to create new shares which were vested in the shareholders to whom they were issued. It cannot be considered by making any assumption that the shares could be handed back to the issuing company.

45 It is necessary to distinguish between the claims which Kia Ora made against the appellants and, as we have already said, it is also necessary to distinguish the position of Kia Ora from that of the individual shareholders in the company.

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89 (1998) 27 ACSR 1 at 387.

90 (1999) 73 SASR 64 at 149 [368].

91 cf *Anderson's Case* (1877) 7 Ch 75 at 94-95 per Jessel MR.

Kia Ora's common law claims

46 We deal first with Kia Ora's common law claims against the appellants. Neither the trial judge nor the Full Court considered that any different amount should be assessed as damages according to whether the claim was for breach of contract or breach of a common law duty of care, although, as pointed out earlier, different consequences followed in relation to apportionment of damages for contributory negligence. Both the trial judge and the Full Court considered that the damages to be allowed in tort and in contract should represent the difference between the price paid for the shares acquired by Kia Ora and the value of the shares acquired by it. And both the trial judge and the Full Court held that the shares which Kia Ora issued were part of the price which it paid for the shares it obtained.

47 The word "price" may obscure more than it reveals. The part of the "price" to which attention is now directed consisted in the company's creating bundles of new rights and obligations. Those rights, once created, were of value to the holder and could be freely traded. But Kia Ora, the issuing company, once it had issued the shares, could not turn them to any commercial account for its own benefit.

48 It may be accepted that the issue of the new shares affected the existing shareholders. The nature and extent of that effect on the value of shares held by those existing shareholders would largely depend upon the perception of participants in the market for Kia Ora's shares of the relationship between the terms of the new issue and the value of Kia Ora's shares before the issue. If, as now has been found to be the case, the terms of the new issue were seen to be very disadvantageous (in the sense that the consideration given in return for the shares issued was worth far less than had been assumed) the effect on existing shareholders would have been very large. But the inquiry is, as we have pointed out earlier, an inquiry about what Kia Ora lost, not about what effect the transaction may have had on those who held shares in the company immediately before the takeover.

49 It would be wrong to treat the effect on these shareholders and on the company itself as indistinguishable. First, to do so would be to deny that the company is a separate legal entity. Secondly, there are very practical reasons not to do so. Those who were members of Kia Ora at the time of the present proceeding were not persons all of whom may have suffered some adverse consequences because the takeover went ahead. It must be remembered that one result of the takeover was that a group of new shareholders came on to Kia Ora's register of members. Those shareholders never had an opportunity of

considering, let alone relying on, the Nelson Wheeler report. The value of their shareholding in Kia Ora was not diluted by the takeover. On the other side of the coin, we were not taken to any evidence which would show whether any of those who held Kia Ora shares before the takeover, later sold their shares. What is clear, however, is that not all of those who were shareholders of Kia Ora when this proceeding was commenced (by the company's liquidator) had been on the register of members in 1987 when the notice of meeting was given under listing rule 3J(3) accompanied by the Nelson Wheeler report.

50 One other feature of the matter should be noted, but can then be put aside. After the issue of the shares which are now in question, there was no immediate legal impediment to Kia Ora issuing still further shares if it chose to do so and it could issue those shares on whatever terms it could lawfully, and commercially, exact. The fact that it had made the issue which gives rise to the present matter may (indeed, probably would) have affected the commercial terms it could obtain on any subsequent issue. It may (and probably would) have affected its standing with lenders and thus the terms on which it was able to raise further debt finance. But the case for Kia Ora was not put on this basis and it was not suggested in argument before this Court that the damages to be allowed for breach of contract or negligence should take losses of these kinds into account.

Kia Ora's principal contention

51 The chief weight of Kia Ora's submissions was thrown on two propositions: first, that it is entitled to recover the difference between the consideration paid and the value received in the takeover transaction and, secondly, that the consideration paid must include the value which the shares had, once issued.

52 The second of these propositions invites attention to the "value" of the shares issued by Kia Ora. It asserts that the time at which that value is to be assessed is after (presumably immediately after) their issue to the shareholders of Western United as part or full consideration for the transfer of the shares in Western United to Kia Ora. This contention seems to be at odds with the Full Court's conclusion that the value of the shares should be based on the market price for the shares *before* the takeover[92]. In any event, the contention asserts that the "value" of the shares is to be determined by the price at which holders of the shares were willing to trade them on the stock market. This was said to represent the market or fair value of the rights and corresponding obligations given and undertaken by Kia Ora.

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92 (1999) 73 SASR 64 at 166-167 [469]-[477].

53 It is essential to recall, however, that Kia Ora could not lawfully trade in its own shares. The value which Kia Ora sought to attribute to the shares it issued was, therefore, a value determined by transactions of a kind which Kia Ora was forbidden to make and from which it could not benefit. In no sense, then, did Kia Ora lose a sum which could have been paid to it by a willing but not anxious buyer of its issued shares in trading on the exchange.

54 Evidence was adduced at trial about how accountants preparing financial statements for the information of shareholders (and others) would record the transactions by which Kia Ora acquired the issued capital of Western United. Particular attention was given to whether (and how) those financial statements would recognise the difference between the sum of the market value of the shares which Kia Ora had issued in the takeover and the cash it paid out, and the true value of Western United.

55 Although it may be important to inform shareholders of that comparison so that they have a true and fair picture of the company's transactions in the relevant period, it does not inevitably follow that the accounts accurately reflect the sum to be allowed to the company as damages for breach of contract or negligence. The preparation of accounts in this form simply invites attention to the assumptions which lie behind them. In particular, it invites attention to the assumption that the sum which a shareholder in Kia Ora could obtain by selling the company's shares is a sum which reflects something that *the company* has lost. Because the company could not lawfully engage in a transaction of the kind which founds the valuation asserted, it follows that it did not lose anything by not making such a transaction. It is then necessary to consider whether that kind of transaction may, nevertheless, offer a useful and accurate basis for identifying a loss that was suffered by the company.

56 Some attention was given, in the Full Court, and in the argument on appeal to this Court, to whether the damages which Kia Ora sought (and the Full Court held should be awarded) were "expectation damages" or "reliance damages". The Full Court held that "[i]n the present case the damages to be awarded are reliance damages"[93]. In this Court, Kia Ora, in its written submissions, said that it "was not awarded and does not seek expectation damages (insofar as they exceed reliance damages)" and that it "has never sought expectation damages in the sense of damages designed to place it in the position it would have been in had the takeover transaction proceeded as represented".

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93 (1999) 73 SASR 64 at 156 [417]-[418].

Nevertheless, by basing the award of damages upon the market value of the shares after issue, the Full Court must necessarily be understood to have referred to that as a sum which, as the Full Court put it, "can be realised by the issuing company"[94]. And the only way in which Kia Ora could have realised that sum would have been by making some transaction other than the one in which it in fact participated. If attention is confined to the transaction in which Kia Ora *did* engage, it gave up, or lost, only the money which it outlaid and the *opportunity* of turning the shares which it did issue to some other more advantageous use in a different transaction. Otherwise it gave nothing up by issuing and allotting the shares. What is the significance of Kia Ora having missed an opportunity to turn the shares which it did issue to some more advantageous use than it did?

57 First, there is an evidentiary difficulty which should be identified. It is by no means obvious that the market price for Kia Ora shares represents what the company could have obtained had it made some different transaction. It is even less obvious that the market price prevailing *before* the new issue was made would represent what the company could have raised by issuing further shares. The market price before the new issue takes no account of the dilution of the interests of existing shareholders by the issue and allotment of new shares. The extent of that dilution would very likely be affected greatly by the terms of the new issue and the relationship which those terms bore (or were seen by the market to bear) to the pre-issue market price. These are matters about which it would be expected there would be evidence if the assessment of damages depended upon them. Yet the Full Court treated the pre-issue market price of Kia Ora shares as the amount which could have been realised by the issuing company and referred to no evidentiary basis for that conclusion.

58 The difficulty in looking to some alternative use of the capital which Kia Ora issued is, however, more deep seated than any deficiency in the evidence showing what the company could have done. The evidentiary difficulty might be addressed in a number of ways. If damages are to be assessed by considering what the company *could* have done, it would, perhaps, seem easy enough to assume that the company could have issued the shares which it did for cash rather than kind and applied the cash it received to the purchase of the assets it acquired. In default of other evidence, it may seem easy to assume that the issue could have been at par.

59 Such hypotheses would be relevant, however, *only* if the damages that were to be allowed should be assessed as the sum that would place Kia Ora in the

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94 (1999) 73 SASR 64 at 158 [425].

position in which it would have been had the appellants' negligent advice been *true*. And that has never been Kia Ora's case. It did not contend that the appellants warranted the valuation they made. It accepted that had the contract of retainer been performed according to its terms (and if there had been no breach of a duty of care) Kia Ora could not and would not have entered the transaction which it did. The damages which Kia Ora is to be awarded are damages that will, as far as possible, put it in *this* position, not in the position it would have been had the advice about Western United's value been true.

60 It is for this reason that it is irrelevant to inquire what would have been the position if Kia Ora had entered some other, more or less similar kind of transaction rather than the one it did make. Yet it is an assumption of that kind which necessarily underpins the identification of Kia Ora's loss by issuing the shares by reference to some market or other value of the shares which it issued. Reference to market or other value necessarily assumes that the shares could have been (and would have been if the contract of retainer had been performed) issued and allotted. That assumption is not open in a case of this kind.

61 Reference was made to a number of decided cases which Kia Ora submitted supported its contention that it had lost the market value of its shares. Particular reference was made to a series of English revenue cases which, so it was submitted, demonstrated that a company issuing shares incurred a cost at least equal to the par value of the shares[95]. But such cases necessarily focus upon the computation of "profits" under the relevant taxation legislation.

62 In the leading case in this stream of authority, *Osborne v Steel Barrel Co Ltd*[96], that required consideration of whether any amount should be set against receipts from the sale of stock acquired by the company in return for the issue of shares credited as fully paid. Such an inquiry has some parallels with the accounting evidence to which reference is made earlier because "[i]ncome, profits and gains are conceptions of the world of affairs and particularly of

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95 *Osborne v Steel Barrel Co Ltd* [1942] 1 All ER 634 at 637-638 per Lord Greene MR; *Craddock v Zevo Finance Co Ltd* [1944] 1 All ER 566; *Shearer (Inspector of Taxes) v Bercain Ltd* [1980] 3 All ER 295; *Stanton v Drayton Commercial Investment Co Ltd* [1983] 1 AC 501.

96 [1942] 1 All ER 634.

business"[97]. It and the cases following it offer little sure guidance to the resolution of the present issues.

63 In argument in this Court, Kia Ora placed heaviest emphasis on *Banco de Portugal v Waterlow & Sons Ltd*[98], a case which the Full Court considered was "of some assistance to Kia Ora"[99]. Particular reference was made to the frequently quoted passage from Lord Atkin's speech[100]:

> "If a person is wrongfully induced to part with a valuable thing, whether it be goods or choses in action, his measure of damages is the value of the thing at the time he parted with it. The cost of replacement does not enter into the measure of damages at all. If a man is fraudulently induced to part with 500 standards of timber he recovers the value at the time; it is quite immaterial that he could have replaced the timber – say, from the Russian market – at a small portion of the value. If he manufactures for 1*d* articles which can sell for 6*d*, the measure of damages against the wrongdoer is 6*d*, not 1*d*. So if he was by fraud induced to promise to deliver 500 of the 6*d* articles so that the contract could be enforced by an innocent holder of the contract, it appears to me that on well established authority the damages would be 12*l* 10*s*, not 2*l* 1*s* 8*d*. This means that, whether he parts with goods or parts with an obligation, the measure of damages is the market value of what he parts with, which means what it will exchange for; and this necessarily means in the case of an obligation expressed in currency of the country the face value of the obligation."

The principles stated in this passage can all be accepted. Their acceptance must not, however, be allowed to obscure the significance of the reference to "value", or the assumption implicit in it, that the person parting with the valuable thing could obtain that value by an exchange transaction. In the present case the company could obtain value for shares which it issued only according to the terms of the transaction under which they were issued, a transaction which could not lawfully fix a value less than par. But the relevant hypothesis for consideration is *not* that the company would have made this takeover on some

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97 *Commissioner of Taxes (SA) v Executor Trustee and Agency Co of South Australia Ltd* ("*Carden's Case*") (1938) 63 CLR 108 at 152 per Dixon J.

98 [1932] AC 452.

99 (1999) 73 SASR 64 at 160 [438].

100 [1932] AC 452 at 489-490.

other terms as to payment of the same (or any) price for the shares in Western United. The relevant hypothesis is that the company could and would have made *no* takeover and the inquiry is about what it gave up or lost because it did.

64 The answer to that inquiry must be that Kia Ora outlaid cash and whatever may have been the administrative costs of issuing the shares. If a claim had been made, it may well be that some allowance would be made for the consequential effect on its capacity to raise other equity or debt finance. Otherwise, however, it gave up, or lost nothing by the issue of its shares.

65 It follows that in our opinion the Full Court was wrong to allow the sum which it did for the issue and allotment of Kia Ora shares in assessing the damages to be allowed for breach of contract or negligence.

Fiduciary duty and equitable compensation

66 It becomes necessary to consider whether the issues on the appeal to this Court should be expanded to include the matters indicated earlier in these reasons. As we pointed out earlier, the Full Court held that, by providing any report, the appellants had acted in conflict with their duty to act only in the best interests of Kia Ora and had acted in breach of their fiduciary obligation to Kia Ora[101]. But for its conclusions that there was contributing fault by Kia Ora and that the compensation to be allowed might be reduced on this account, the Full Court would have awarded the same amount as equitable compensation for the breach of fiduciary duty as it awarded for breach of contract.

67 Three questions arise. They were formulated as follows:

(a) Did the Full Court err in finding that the appellants breached a fiduciary duty which they owed Kia Ora?

(b) If no to question (a), did the Full Court err in assessing the amount of equitable compensation to be allowed (before any reduction for "contributing fault") as it did?

(c) If no to question (a), did the Full Court err in holding that the equitable compensation allowed to Kia Ora is to be reduced on account of Kia Ora's "contributing fault"?

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101 (1999) 73 SASR 64 at 232 [788].

68 The appellants submitted that special leave should be granted in respect of question (a) and that, if the issue were decided against them, special leave should be granted with respect to question (b) but not question (c). Kia Ora submitted that special leave should not be granted with respect to question (a), but that it should be granted (by way of cross-appeal) with respect to questions (b) and (c).

69 Question (a) involves several elements. In our view, question (a) should be answered favourably to the appellants because there was no relevant fiduciary duty which they owed to Kia Ora. The decision of the trial judge on this issue was correct and the Full Court erred in differing from his Honour. That makes it unnecessary to determine whether the Full Court also erred in assessing equitable compensation as it did and in allowing a reduction for "contributing fault". Accordingly, the grant of special leave should be expanded to allow for question (a) but not questions (b) and (c).

70 The trial judge considered a number of authorities, in particular the decisions of this Court in *Hospital Products Ltd v United States Surgical Corporation*[102], *Daly v Sydney Stock Exchange Ltd*[103] and *Breen v Williams*[104]. In particular, the trial judge referred to the passage in the judgment of Mason J in *Hospital Products* in which, after referring to the well recognised fiduciary relationships of trustee and beneficiary, agent and principal, solicitor and client, director and company, and partners, Mason J observed[105] that the critical feature of those relationships was the undertaking or agreement by the fiduciary to act for or on behalf of or in the interests of another person in the exercise of power or discretion which will affect in a legal or practical sense the interests of that other person. Mason J added[106]:

> "The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. …

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102 (1984) 156 CLR 41.

103 (1986) 160 CLR 371.

104 (1996) 186 CLR 71.

105 (1984) 156 CLR 41 at 96-97.

106 (1984) 156 CLR 41 at 97.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed".

71 It is important also to recognise the distinct character of the fiduciary obligation, which sets it apart from contract and tort. In *Norberg v Wynrib* McLachlin J said[107]:

> "The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other."

In the same case, Sopinka J observed[108]:

> "Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."

72 The trial judge correctly recognised that in some instances contractual and fiduciary relationships co-exist and he referred to *Daly* as indicating that, in certain circumstances, a financial adviser may owe fiduciary obligations to a client. The trial judge concluded from the evidence that at times the appellants did undertake work as financial and corporate advisers including work on

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107 [1992] 2 SCR 226 at 272. See also the earlier statement of principle to similar effect by McLachlin J in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 542-545.

108 [1992] 2 SCR 226 at 312; see also *Maguire v Makaronis* (1997) 188 CLR 449 at 474; *Breen v Williams* (1996) 186 CLR 71 at 110.

company appraisals and evaluations[109]. However, he found that the appellants had not acted in any such capacity for Kia Ora. His Honour said[110]:

> "There is no evidence to suggest that the [appellants] gave any advice, or made any representation to, Kia Ora about the efficacy or wisdom of the takeover. Indeed, there is no evidence to suggest that the [appellants] advised, or even suggested to Kia Ora, that the takeover of Western United be undertaken. … [T]hose controlling Kia Ora were determined that Kia Ora takeover Western United and the [appellants] were required to undertake the valuation and having done so were to give a report under the listing rule."

73 In submissions at trial reliance had been placed upon the passage from the report, set out earlier in these reasons, stating the opinion of the appellants that the price proposed to be offered was fair and reasonable in all the circumstances. The trial judge rejected the submission that this represented advice given to Kia Ora to enter into the takeover transaction. Rather, that part of the report was an expression of an opinion given pursuant to the contract of retainer which obliged the appellants to value the issued capital of Western United and to express an opinion, with reference to listing rule 3J(3)(b), as to whether the purchase price was a fair price. His Honour concluded that the circumstance that the appellants acted incompetently and in breach of their contractual and tortious duties did not mean that they gave advice in the relevant sense for the purpose of liabilities as a fiduciary.

74 The trial judge was correct in principle in taking this approach. In *Breen v Williams*, the point was made, by way of contrast to what is said in some of the Canadian judgments, that fiduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals. In *Breen v Williams*, Gaudron and McHugh JJ said[111]:

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of

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109 (1998) 27 ACSR 1 at 376-377.

110 (1998) 27 ACSR 1 at 377.

111 (1996) 186 CLR 71 at 113. See also at 137-138 per Gummow J.

> conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."

75 The trial judge added that there was no other reason to suggest the existence of a fiduciary relationship[112]. In particular, the appellants were not agents of Kia Ora, there was no relationship of ascendancy or influence by the appellants over Kia Ora, nor one of dependence or trust on the part of Kia Ora in the relevant sense. It was to be expected that Kia Ora relied upon the appellants to do their work competently and independently but they were not guiding or influencing Kia Ora in the sense discussed in the cases dealing with fiduciary relationships.

76 The Full Court differed from the trial judge. It held that, by providing the report under listing rule 3J(3), the appellants were in breach of their fiduciary obligations to Kia Ora. These required an undivided loyalty; the only way in which that duty of loyalty could have been discharged was by the appellants refraining from acting in the matter[113]. In its submissions in this Court, Kia Ora put the matter by saying that there was "a conflicting obligation" to be "loyal", that there was a proscription on the appellants acting at all, and that the relevant fiduciary obligation was one not to accept the retainer.

77 These submissions reflect the difficulty of Kia Ora in defining the content of the alleged fiduciary relationship including the alleged conflict or significant risk of conflict between duty and interest or between concurrent duties. The words of Frankfurter J in *Securities Commission v Chenery Corporation*[114] bear repetition. His Honour said[115]:

> "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

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112 (1998) 27 ACSR 1 at 377.

113 (1999) 73 SASR 64 at 232 [787].

114 318 US 80 (1943).

115 318 US 80 at 85-86 (1943).

78 In particular, the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is "a conflict or a real or substantial possibility of a conflict" between personal interests of the fiduciary and those to whom the duty is owed. That is how the matter was put by Mason J in *Hospital Products*[116]. Similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction.

79 The division in the House of Lords in *Phipps v Boardman*[117] respecting the application of principle to the facts in that case indicates that different minds may reach different conclusions as to the presence or absence of a real or substantial possibility of conflict between duty and interest or between duty and duty. However, in *Hospital Products*, Mason J quoted[118] with approval a statement by Judge Learned Hand in *Phelan v Middle States Oil Corporation*[119]. That statement included the following:

> "[I]f the doctrine be inexorably applied and without regard to the particular circumstances of the situation, every transaction will be condemned once it be shown that the fiduciary had such a hope or expectation, however unlikely to be realized it may be, and however trifling an inducement it will be, if it is realized. … We have found no decisions that have applied this rule inflexibly to every occasion in which the fiduciary has been shown to have had a personal interest that might in fact have conflicted with his loyalty. On the contrary in a number of situations courts have held that the rule does not apply, not only when the putative interest, though in itself strong enough to be an inducement, was too remote, but also when, though not too remote, it was too feeble an inducement to be a determining motive."

80 Listing rule 3J(3) required that the report be supplied by an independent, qualified person. Kia Ora's case with respect to fiduciary duty began with the proposition that the appellants were not independent within the meaning of the

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116 (1984) 156 CLR 41 at 103. See also *Clay v Clay* (2001) 75 ALJR 528 at 538 [46]-[47]; 178 ALR 193 at 207-208.

117 [1967] 2 AC 46.

118 (1984) 156 CLR 41 at 104.

119 220 F (2d) 593 at 602-603 (1955).

listing rule. This was said to be so by reason of associations between the partners of the firm and Kia Ora, Western United and, in particular, one of the defendants, Mr Harold Abbott[120]. His Honour found that the takeover by Kia Ora had been "orchestrated" by Mr Abbott[121]. It was admitted by the appellants on the pleadings that an implied term of their contract of retainer was that they act independently[122]. After a detailed review of the evidence, the trial judge concluded that in this sense the appellants were not independent of Kia Ora or Western United[123]. However, as indicated, his Honour also found that no fiduciary relationship had arisen between the appellants and Kia Ora[124].

81 Nevertheless, the Full Court fixed upon the existence of these associations as demonstrating not only a failure to comply with the contractual requirement of independence, but also as indicative of a conflict of interest in the preparation by the appellants of their report[125]. In this Court, Kia Ora supported the finding by the Full Court in its favour by contending that the findings by the trial judge on the independence issue demonstrated that the appellants had had a past and continuing "alignment" with the Kia Ora directors. The directors were said to have had an interest in maximising the value of Western United so that they received the maximum amount of consideration, whilst the appellants had been engaged to prepare an independent report; this was said to show that there were "interests" in conflict.

82 Whatever may be meant by the term "alignment", on the pleadings it could not, as explained earlier in these reasons, be used to suggest knowing assistance by the appellants in any dishonest or fraudulent conduct of the Kia Ora directors. The Full Court made it clear that there had been no finding to that effect[126]. Moreover, in its submissions, Kia Ora did not indicate with any specificity the existence of any prior or concurrent engagement or undertaking by

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120 (1998) 27 ACSR 1 at 196.

121 (1998) 27 ACSR 1 at 120.

122 (1998) 27 ACSR 1 at 196.

123 (1998) 27 ACSR 1 at 264, 268, 269.

124 (1998) 27 ACSR 1 at 376.

125 (1999) 73 SASR 64 at 227-230 [761]-[775].

126 (1999) 73 SASR 64 at 196 [639], 198 [651].

the appellants or any one or more of them which, within the meaning of the authorities, presented an actual conflict or a real or substantial possibility of conflict in the acceptance and performance of the retainer for the provision of the report. Rather, in a general way, it was suggested that there was an expectation by the appellants that "mutual dealings" might not continue if the appellants did not do the bidding of persons such as Mr Harold Abbott in relation to the provision of the report. All of this fell short of demonstrating the real or substantial possibility of conflict spoken of in the authorities.

83 The conflicting duty or interests must be identified. Conflict is not shown by simply pointing to the fact that there had been past dealings between the appellants and interests associated with the Kia Ora directors. The fact that dealings are completed will ordinarily demonstrate that any interest or duty associated with those dealings is at an end and no continuing duty or interest was identified here. Nor is it sufficient to say generally that there was a hope or expectation of future dealings. That will often be so. Most professional advisers would hope that the proper performance of the task at hand will lead the client to retain them again. No real or substantial possibility of conflict was demonstrated.

84 The conclusion which follows, that the Full Court erred in finding that the appellants breached a fiduciary duty which they owed to Kia Ora, makes it unnecessary to determine questions (b) and (c). However, the following observations are appropriate.

85 Various judgments in this Court[127] establish that, in Australia, the measure of compensation in respect of losses sustained by reason of breach of duty by a trustee or other fiduciary is determined by equitable principles and that these do not necessarily reflect the rules for assessment of damages in tort or contract. In the present case, the Full Court, but for a reduction by reason of "contributing fault" on the part of Kia Ora, would have awarded the same amount as equitable compensation for breach of fiduciary duty by the appellants as it awarded for their breach of contract. In this appeal the occasion does not arise to consider whether, matters of "contributing fault" aside, the measure of equitable compensation may not have been greater than the damages awarded in contract,

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127 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 426-427 per McHugh J; *Maguire v Makaronis* (1997) 188 CLR 449 at 467-475 per Brennan CJ, Gaudron, McHugh and Gummow JJ, 488-495 per Kirby J; *McCann v Switzerland Insurance* (2000) 75 ALJR 325 at 328 [15]-[19] per Gleeson CJ, 348-349 [135]-[141] per Hayne J; 176 ALR 711 at 714-715, 742-744.

or whether the fate which in this Court has befallen the award in contract would necessarily have precluded an award of equitable compensation if there had been a relevant breach of fiduciary duty.

86 With respect to question (c), concerning "contributing fault", it is sufficient to say that the decision in *Astley v Austrust Ltd*[128] indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty. *Astley* affirms[129]:

> "At common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property. Proof of contributory negligence defeated the plaintiff's cause of action in negligence."

Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common law. *Astley* indicates that the particular apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in *Astley* would suggest, *a fortiori*, that such legislation did not touch the fiduciary relationship.

87 It follows that the allowance by the Full Court of the sum for the issue and allotment of Kia Ora shares, in assessing the damages for breach of contract or negligence, is not to be sustained on the footing that there was a fiduciary duty owed by the appellants, breach of which brought with it a measure of equitable compensation in the same sum.

88 The appeal should be allowed and the orders of the Full Court set aside. Given the conclusions we have reached, the first respondent is entitled to judgment in an amount calculated as the amount of cash it outlaid ($26,178,135.81) less the value of the shares it received in Western United (allowed in the sum determined by the trial judge[130] and adopted by the Full

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128 (1999) 197 CLR 1.

129 (1999) 197 CLR 1 at 11 [21].

130 (1998) 27 ASCR 1 at 399.

Court – $6,439,339)[131] to which should be added what was referred to as loss of use damages and interest.

89 There is no dispute that the loss of use damages should be calculated at the rates used by the Full Court[132]. There is, however, a dispute about whether, as the Full Court held[133], the damages should be calculated by reference to the cash outlaid by Kia Ora less only part of the value of the shares Kia Ora received in Western United. The Full Court attributed the balance of the value of the shares received to the shares that were issued by Kia Ora. The appellants submitted that, in assessing Kia Ora's damages on this account, the whole of the value of the Western United shares should be subtracted from the cash paid by Kia Ora because that would represent the actual loss suffered. The respondents contended that this question should be remitted to the Full Court for its consideration. Consistent with our conclusion that Kia Ora gave up or lost nothing by the issue of its shares, we consider that the loss of use damages should be calculated on the difference between the sum outlaid by Kia Ora ($26,178,135.81) and the whole of the value of what it obtained ($6,439,339.00).

90 As for interest pursuant to s 30C(1) of the *Supreme Court Act* 1935 (SA) it is enough to say that, although the principal on which that interest should be allowed must now be reduced, there was no submission that interest should be allowed at some rate or for some period different from the rate and period fixed by the Full Court[134].

91 The appellants should have their costs of the appeal to this Court. Because the proceedings both at trial and in the Full Court dealt with many issues other than the issues which have been the subject of the present appeal, we consider that the disposition of the costs of the appeal to that Court and any consequential variation to the orders for costs made at trial should be in the discretion of the Full Court having regard, no doubt, to the fact that this appeal has succeeded.

92 We would therefore order as follows:

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131 (1999) 73 SASR 64 at 173-174 [520]-[526].

132 (1999) 73 SASR 64 at 174 [527]-[528].

133 (1999) 73 SASR 64 at 174 [526].

134 (1999) 73 SASR 64 at 179 [551]-[552].

1. Appeal allowed with costs.

2. Set aside pars 2, 7, 9 and 10 of the orders made by the Full Court of the Supreme Court of South Australia on 13 August 1999 but only to the extent that those orders affect the parties to the appeal to this Court.

3. Remit the matter to the Full Court of the Supreme Court of South Australia for the making of orders consistent with this Court's reasons for decision.

93 KIRBY J. This appeal[135], in my opinion, is mainly concerned with fiduciary obligations. It involves the ambit of a propounded fiduciary duty, the remedies available where such a duty is found to have been breached, and, specifically, whether such remedies may be modified by a conclusion that there has been "contributory fault" on the part of a beneficiary. Only if these issues are answered unfavourably to the claimant beneficiary do questions necessarily arise as to the scope of that party's recovery at common law[136].

The unusual course of the proceedings

94 The primary judge in the Supreme Court of South Australia (Mullighan J) acknowledged that, by the end of the trial, the plaintiff (to whom I shall refer as "Kia Ora") had principally put its case on the basis of fiduciary duties[137]. However, he concluded that Kia Ora had not established that there was a fiduciary relationship with the appellants, who were their Perth accountants[138]. He therefore dismissed Kia Ora's claim against the appellants, as so propounded. He did so by the application of what he took to be the requirements of this Court's decision in *Breen v Williams*[139]. At the time that was the most recent statement by this Court about the nature of fiduciary duties and the consequences of their breach[140].

95 In the Full Court, the primary judge's holding in respect of fiduciary obligations was reversed. The Full Court held that, by providing their report to Kia Ora, to be placed before its shareholders in compliance with listing rule 3J(3)

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135 From a judgment of the Full Court of the Supreme Court of South Australia ("the Full Court"): *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64.

136 In this regard I would follow the approach expressed in Tilbury, *Civil Remedies*, vol 1 (1990) at 12-15 [1021]-[1025]; Fiss, *The Civil Rights Injunction* (1978) at 91; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301.

137 *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1 at 367.

138 (1998) 27 ACSR 1 at 378.

139 (1996) 186 CLR 71 ("*Breen*").

140 Since *Breen* the Court has delivered judgment in *Maguire v Makaronis* (1997) 188 CLR 449 ("*Maguire*"). Earlier decisions included *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 ("*Hospital Products*"); *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 ("*Daly*"); and *Warman International Ltd v Dwyer* (1995) 182 CLR 544 ("*Warman*").

of the Australian Stock Exchange Ltd ("ASX") rules[141], the appellants were in breach of a fiduciary duty which they owed to Kia Ora[142]. They were therefore liable to account to Kia Ora in respect of the loss which Kia Ora had suffered as a consequence of their report[143].

96 Whilst holding that the appellants were liable, under this head, to pay Kia Ora equitable compensation (including a component for interest[144]) the Full Court went on to determine that the equitable compensation should be reduced. It did this primarily by reference to what it said was "an allowance for unreasonable action on the part of [Kia Ora] which might be described as contributing fault but having the same effect as contributory negligence under apportionment legislation"[145]. The Full Court assessed the extent of the reduction for such "contributing fault" to be the same percentage as it would have allowed for contributory negligence if that were available under this head of claim, namely 35%[146].

97 Because the claim by Kia Ora, framed in common law negligence, was subject to reduction for contributory negligence but the claim in contract was not, Kia Ora, unsurprisingly, elected before the Full Court to take its judgment in contract. However, that election was obviously made on the footing of the then determination of Kia Ora's legal and equitable entitlements. Naturally enough, it was made with the view to maximising Kia Ora's recovery. But in this Court, events took an unusual turn.

98 Initially, the only ground upon which special leave was granted to the appellants to appeal to this Court concerned their assertion that Kia Ora had suffered no loss by the issue and allotment of its own shares to the shareholders of Western United Limited ("Western United") as part of the consideration for a takeover of Western United. That ground addressed technical arguments, responsive to Kia Ora's claim in contract, in respect of which judgment had been entered against the appellants by the Full Court. Argument was heard on that limited question. That question is now the subject of the joint reasons.

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141 ASX Main Board Listing Rules; see the reasons of McHugh, Gummow, Hayne and Callinan JJ at [5]-[6] ("the joint reasons").

142 (1999) 73 SASR 64 at 232 [788].

143 (1999) 73 SASR 64 at 232-258 [788]-[894].

144 (1999) 73 SASR 64 at 239-240 [816]-[820].

145 (1999) 73 SASR 64 at 255 [875].

146 (1999) 73 SASR 64 at 257 [888].

99 After the judgment of this Court was reserved, the Court, by order, enlarged the issues for consideration[147]. It directed the parties to provide further submissions on three questions concerning the Full Court's finding that the appellants had breached a fiduciary duty which they owed to Kia Ora[148]. Inherent in that direction, in the application and counter-application which the appellants and Kia Ora respectively then made (and in the oral argument which was reopened as a result), is the consequence that, if this Court were to reach conclusions on the subject of fiduciary duty different from those of the Full Court, it would give effect to them. Any other course would be impermissible and unjust. It would be impermissible for the issue of fiduciary obligations to be considered as a purely hypothetical exercise[149]. It would be unjust if the only possible outcome of the added issue were one favourable to one side, in this case the appellants. Once the issues of the contested fiduciary duty and its consequences were revived it necessarily followed that this Court was empowered (and, given certain decisions, obliged) to give effect to any conclusions it reached about those issues.

100 In my view, the special leave previously granted by this Court should be expanded. The appellants should be permitted to appeal on added question (a), namely whether the Full Court erred in finding that the appellant breached a fiduciary duty owed to Kia Ora[150]. In respect of this enlargement of the appeal, I therefore agree with the other members of this Court. However, unlike my colleagues, I do not believe that this decision, and its outcome, render it unnecessary to determine the consequential questions upon which Kia Ora urged that special leave should then be granted.

101 The consequential questions concern whether the Full Court erred in assessing the amount of equitable compensation to be awarded to Kia Ora (added question (b)) and whether it erred in holding that such equitable compensation was liable to be reduced on account of Kia Ora's "contributing fault" (added question (c))[151]. Once special leave is granted to the appellants on added question (a), this Court should, in my view, grant special leave to the respondents on added questions (b) and (c). At least, it should do so if the answer to added

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147 Order made by Hayne J on 8 August 2000.

148 The three questions are set out in the joint reasons at [67].

149 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355 [45], 370-371 [87].

150 Joint reasons at [69], [84].

151 The questions are set out in the joint reasons at [67].

question (a) is favourable to Kia Ora, if a strongly arguable case appears that the Full Court has erred on the matters raised by the other added questions, if resolution of these issues will return the matter to the way in which Kia Ora primarily presented its case at trial, and if the remedies then available to Kia Ora are as large as, or larger than, any remedies available at common law, whether in contract or negligence.

102 Given the unusual way in which this appeal unfolded, I will start at the end opposite to that taken in the joint reasons. I will address myself to the three questions posed by the Court when it became plain that it was necessary, one way or the other, to consider and decide Kia Ora's primary case, namely its claim that the appellants were in breach of a fiduciary duty to it.

The background and additional facts

103 The complexity of the facts is reflected by the length of the reasons both of the primary judge[152] and of the Full Court[153]. The background facts are described in the joint reasons[154]. However, in order to deal with the enlarged question of fiduciary obligations, it is necessary out of fairness to the conclusion of the Full Court on these issues, to add further reference to the evidence. This will help to explain the conclusion which the Full Court reached.

104 It was the directors of Kia Ora who proposed that that company should make a takeover bid for Western United. Apart from Messrs Quilty and Singleton, those directors were also shareholders in Western United. Hence, they had a personal interest in the outcome of the proposed takeover[155]. The identified directors and their associates were actually substantial shareholders in Western United. The primary judge found that they may well have received 85% of the takeover proceeds[156].

105 It was in such circumstances that ASX listing rule 3J(3) applied to the proposal. It required that the takeover be approved at a meeting of Kia Ora's shareholders convened for the purpose of approving the takeover. Shareholders

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152 The reasons of Mullighan J run to 496 pages: *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1.

153 The reasons of the Full Court run to 238 pages: *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64.

154 Joint reasons at [1]-[3], [16], [80]-[82].

155 (1999) 73 SASR 64 at 223 [742].

156 (1998) 27 ACSR 1 at 110.

associated with Western United were disqualified from voting on the proposal. The ASX rule also required that notice of the meeting be accompanied by a report (with valuations or other material) from "independent qualified persons sufficient to establish that the purchase or sale price of such assets is a fair price"[157]. It was this report which the appellants purported to provide.

106 The ASX rule obliged the appellants to report not only about their opinion on the value of Western United but also whether the price proposed was fair. Necessarily, this had to be looked at from Kia Ora's point of view[158]. Thus the appellants were not called upon merely to provide factual information of an objective kind. They were retained to provide what was, in effect, professional advice and a recommendation, prerequisite to the takeover proceeding.

107 A precondition for the provision of the report, obvious from the circumstances but also expressly stated, was the complete independence of the appellants from those proposing the takeover. On the face of things, as chartered accountants, the appellants would have appeared to uncommitted shareholders of Kia Ora as "independent" and "qualified". In terms of commercial reality, such shareholders were not, for the most part, in a position themselves to make an informed assessment of the takeover proposal or of the fairness of the share price.

108 All of the foregoing would have been plain to the directors who retained the appellants for this purpose. It would also have been obvious to the appellants. If they had stopped to consider it, they would have realised that the uncommitted shareholders were highly dependent upon them. The ASX was also dependent on their report. So, indeed, was the general public investing in shares for whom ASX rule 3J(3) affords both a standard, and an assurance, of integrity and propriety in takeover proposals in which directors of an acquiring company are personally interested. Unless that rule is carried out in accordance with its letter, and intent, the danger of self-interested actions on the part of directors is manifest.

109 As found by the Full Court, the appellants were not "independent" as required. Instead, there had been extensive, lengthy and close business and personal associations over a number of years between various members of the appellants' firm and Kia Ora, Western United and Mr Harold Abbott (the third respondent) in particular[159]. The detail of these associations is complex and is described by the courts below. It specially involved one of the members of the

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157 The full terms of ASX rule 3J(3) appear at (1999) 73 SASR 64 at 83-84 [35].

158 (1999) 73 SASR 64 at 222-223 [738]-[740].

159 (1999) 73 SASR 64 at 227 [761].

appellants, Mr Geoffrey Stokes (since deceased)[160], Mr Munachen[161], Mr Pilmer[162] and, to a lesser extent, Mr Martino[163].

110 The primary judge found that such associations gave rise to a breach of the contractual requirement of independence. He concluded that, effectively, the appellants allowed Mr Pilmer to do as he was told, rather than to exercise a truly independent professional judgment[164]. The primary judge also found that "in the context of commercial affairs which were mutually advantageous to all of them"[165], the appellants were so involved with the committed directors of Kia Ora and Western United as to make it inappropriate for the appellants, by reason of their association alone, to undertake the preparation of the report required by ASX rule 3J(3). Although this conclusion was stated in the context of the primary judge's consideration of the implied contractual obligations owed by the appellants to Kia Ora, the same considerations are clearly relevant to an evaluation of whether a fiduciary duty was enlivened by the relationship and/or the circumstances and, if such a duty existed, whether it was breached.

111 The reason that the primary judge withheld relief under the claim for breach of fiduciary duty was his understanding of the law established by this Court for the ascertainment of fiduciary obligations, most notably in *Breen*[166]. He did not dismiss the claim on the basis of a different assessment of the facts. He had expressed his conclusions about the facts in strong terms. Those conclusions depended upon his assessment of the credibility of key witnesses, concessions made for the appellants during the trial and the common relevance of the facts found for the three ways in which Kia Ora propounded its claim. In such circumstances, there can be no real doubt that, had the judge considered that it was open to him in law to find that a fiduciary duty was owed by the appellants to Kia Ora, he would have concluded that such duty had been proved.

112 In an appeal by way of rehearing it was therefore open to the Full Court (reaching a different conclusion on the applicable law) to give effect to its

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160 The executors of the estate of Mr Stokes are the sixth appellants.

161 Fifth appellant.

162 First appellant.

163 Third appellant.

164 (1999) 73 SASR 64 at 227 [761].

165 See (1999) 73 SASR 64 at 227 [762].

166 (1998) 27 ACSR 1 at 369-371.

contrary classification of the facts and to uphold Kia Ora's alternative claim. This the Full Court did[167]. It reached the conclusion that the circumstances found imposed a fiduciary duty on the appellants in respect of the provision of their report to Kia Ora under the ASX rule. That conclusion necessitated the consideration by the Full Court of the nature of the fiduciary duty in question and of its breach[168], the relief that should be given to Kia Ora by way of equitable remedy[169] and whether such relief could, or should, be reduced by a conclusion that there was "contributing fault" on the part of Kia Ora[170].

113 In my respectful view, the primary judge erred in rejecting Kia Ora's claim that the appellants owed Kia Ora a fiduciary duty which they had breached. The Full Court was right to correct that error. Whilst granting special leave to reagitate the point, because of its importance generally and for the present parties, this Court, in disposing of this appeal, should affirm the Full Court's decision in that regard.

114 This conclusion necessarily lifts into this Court the consequential questions regarding the relief to be afforded. As soon as this Court's appellate consideration of those questions is engaged, it is necessary for the consequences to be analysed and given effect. The appellants, having advanced their arguments about fiduciary duty and in my opinion having lost, the respondents should be permitted the special leave that they seek to reagitate the remedial consequences that follow. In particular, they should be permitted to dispute the deduction for "contributing fault" which the Full Court upheld. I would allow Kia Ora to do this on the basis that the course of the proceedings, the supervening order of this Court and Kia Ora's written submissions and argument on these points amount, in substance, to propounding a notice of contention (by which Kia Ora seeks to uphold the outcome in the Full Court on a basis different from that which the Full Court decided) or a cross-appeal to allow consequential correction of the judgment. No contrary submission was advanced for the appellants when the three added questions were fully debated, as they were.

115 To explain how I come to my conclusions, it is necessary first to analyse the *ratio decidendi* of this Court in *Breen*; to distinguish that decision from the issues presented by the relationship of the present parties and the circumstances of their transactions; and then to suggest the features of that relationship, and of

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167 (1999) 73 SASR 64 at 231 [781].

168 (1999) 73 SASR 64 at 231-232 [782]-[788].

169 (1999) 73 SASR 64 at 232-241 [789]-[827].

170 (1999) 73 SASR 64 at 241-258 [828]-[894].

those transactions, that make it clear that a fiduciary duty attached to the appellants with large consequences for the remedies available to Kia Ora.

The decision in *Breen*

116 In *Breen*, this Court upheld a judgment of a majority in the New South Wales Court of Appeal[171]. In that Court I dissented on a point that is here relevant. It was whether a fiduciary duty existed in law in the relationship between the parties or by reason of the other circumstances of that case[172]; whether it had been breached[173]; and, if it had, what equitable relief should be granted[174].

117 Whilst I respectfully adhere to the opinions which I expressed in *Breen v Williams*, I must be careful, in applying the law to the present appeal, to conform to the ratio of *Breen* in this Court, including as it appears in any reasoning which, by inference, is incompatible with what I said in the Court of Appeal. In that case, I followed the decision of the Supreme Court of Canada in *McInerney v MacDonald*[175]. That decision was to the effect that a medical practitioner and a patient are involved in a fiduciary relationship for the purpose of the law of fiduciary obligations[176]. On that basis, with certain limitations, a patient was entitled to oblige a medical practitioner to accede to a request to allow access to medical records held by the practitioner in respect of the patient. This Court unanimously disagreed.

118 In ascertaining the ratio of *Breen*, it is primarily necessary to examine the differing ways in which members of this Court explained their respective conclusions, for within this Court there were differences of opinion. One can perform this task, conscious of the wealth of commentary which the decision has evoked. The comments have ranged from the condemnatory[177], through the

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171 *Breen v Williams* (1994) 35 NSWLR 522.

172 *Breen v Williams* (1994) 35 NSWLR 522 at 542-549.

173 *Breen v Williams* (1994) 35 NSWLR 522 at 549.

174 *Breen v Williams* (1994) 35 NSWLR 522 at 549-550.

175 [1992] 2 SCR 138 ("*McInerney*"); see also *Norberg v Wynrib* [1992] 2 SCR 226.

176 *Breen v Williams* (1994) 35 NSWLR 522 at 531, 545.

177 Magnusson, "A Triumph for Medical Paternalism: *Breen v Williams*, Fiduciaries, and Patient Access to Medical Records", (1995) 3 *Torts Law Journal* 27 at 28.

disappointed[178], to the resigned and accepting[179], rising to praise[180] and ending just short of unalloyed pleasure[181]. Where a judicial decision produces such a wide range of responses, for the most part from knowledgeable writers, it is fair to assume that the law does not speak with total clarity or that its content is uncontested.

119 When one examines what *Breen* actually stands for, as a matter of legal authority, it clearly negates any entitlement by patients, under the common law, to inspect their medical records, save with the agreement of the medical practitioner concerned or where legislation so provides. In this respect, this Court confirmed the unanimous opinion of the Court of Appeal[182]. But the point upon which a difference of opinion had emerged in the Court of Appeal related to the alternative claim which the patient advanced, based on the suggested equitable category of fiduciary duty. This Court held, affirming the majority in the Court of Appeal (Mahoney JA and Meagher JA), that no such fiduciary duty existed in the circumstances.

120 There were differences of reasoning in this Court's decision in *Breen*. A majority were clearly of the opinion that the relationship of medical practitioner and patient did not, without more, create fiduciary obligations. Thus, that relationship bore no sufficient analogy to that between a solicitor and client, or trustee and cestui que trust, that traditionally gives rise, without more, to

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178 Hamblin, "Breen v Williams: Right of access to medical records denied", (1994) 1 *Privacy Law & Policy Reporter* 141 at 158; Hepburn, "Case Notes: Breen v Williams", (1996) 20 *Melbourne University Law Review* 1201 ("Hepburn"); Magnusson and Opie, "Patient Access to Medical Records: Fiduciary Duties and Other Issues – A Classroom Interactive", (1998) 17 *University of Tasmania Law Review* 99 at 100 ("Magnusson and Opie").

179 Brebner, "*Breen v Williams*: A lost opportunity or a welcome conservatism?", (1996) 3 *Deakin Law Review* 237 at 249 ("Brebner"); Erbacher, "Access to medical records: *Breen v Williams*", (1996) 3 *Deakin Law Review* 67 at 78.

180 Nolan, "Notes: A Fiduciary Duty to Disclose?", (1997) 113 *Law Quarterly Review* 220 ("Nolan"); see also Parkinson, "Before the High Court: Fiduciary Law and Access to Medical Records: *Breen v Williams*", (1995) 17 *Sydney Law Review* 433 at 445.

181 Olbourne, "Breen v Williams: A Doctor's Perspective", (1999) 6 *Journal of Law and Medicine* 284 at 301 ("Olbourne"); see also Pizer, "Case Notes: Breen v Williams", (1995) 20 *Melbourne University Law Review* 610 at 619 ("Pizer").

182 *Breen v Williams* (1994) 35 NSWLR 522 at 541, 549, 551, 569.

fiduciary obligations[183]. On the other hand, Gummow J[184] concluded that the relationship between a medical practitioner and a patient who seeks skilled and confidential advice and treatment was indeed a fiduciary one[185]. In his Honour's opinion, this conclusion followed, by analogy, from the earlier decision of this Court in *Daly*[186]. It also followed from an analysis of the formulations of the mainspring of fiduciary duty found in other decisions of this Court[187], other Australian authority[188] and authority of the Supreme Court of Canada apart from *McInerney*[189]. The point of Gummow J's analysis was that the answer to the claim advanced by Ms Breen was not to be found, alone, in a classification of her relationship with Dr Williams. The "nature of the relationship"[190] was only one aspect of the two-fold test to be applied for ascertaining the existence and scope of a fiduciary duty. The other aspect considers "the facts of the case"[191].

121 In some established relationships[192], the relationship itself will be enough to make it clear that a fiduciary obligation is owed by one party to the other in respect of related transactions between them during the relationship. Relationships giving rise to such obligations differ between jurisdictions. In Australia, Gaudron and McHugh JJ in *Breen*[193] mentioned "trustee and beneficiary, agent and principal, solicitor and client, employee and employer,

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183 *Breen* (1996) 186 CLR 71 at 98 per Dawson and Toohey JJ, 111 per Gaudron and McHugh JJ; see also *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] AC 871 at 884 per Lord Scarman.

184 See Hepburn, (1996) 20 *Melbourne University Law Review* 1201 at 1211.

185 *Breen* (1996) 186 CLR 71 at 134.

186 (1986) 160 CLR 371 at 377, 384-385.

187 *Hospital Products* (1984) 156 CLR 41 at 72-75, 96-97, 142; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 200-201.

188 *Glandon Pty Ltd v Strata Consolidated Pty Ltd* (1993) 11 ACSR 543 at 556-557; 11 ACLC 895 at 905-906.

189 *Hodgkinson v Simms* [1994] 3 SCR 377 at 431-432, 465-471.

190 *Hospital Products* (1984) 156 CLR 41 at 102 per Mason J.

191 *Hospital Products* (1984) 156 CLR 41 at 102 per Mason J.

192 *Breen* (1996) 186 CLR 71 at 107 per Gaudron and McHugh JJ.

193 *Breen* (1996) 186 CLR 71 at 106-107 referring to *Hospital Products* (1984) 156 CLR 41 at 96.

director and company and partners". However, in other countries, perhaps reflecting different social circumstances, courts have been willing to add new and different categories. Thus in Canada, the Supreme Court has added (but this Court has not) the category of medical practitioner and patient[194]. That Court has also added the relationships of parent and child[195] and the Crown and indigenous peoples[196]. In the United States of America still further relationships have been added. These include majority and minority shareholders[197], patients and physicians[198], or psychiatrists[199] and others[200].

122 The primary point for which *Breen* stands in relation to fiduciary duties is that, in Australia, attempts to elevate a relationship between medical practitioner and patient effectively to a special one which, without more, will import fiduciary obligations has, for the moment, failed. Proving that the relationship involves an imbalance of power, and even vulnerability on the part of the patient, was not sufficient.

123 Like that between doctors and their patients, the relationship of chartered accountant and client has not yet been classified as one of the categories which, without more, gives rise to fiduciary obligations. Because such obligations are more onerous (and the legal consequences more drastic) than those arising from common law duties of care or from contractual relationships, it is understandable that the *per se* categories of fiduciary relationship have been limited in the past and will not be extended except by clear analogy with those presently accepted[201]. I must comply with this approach.

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194 *Norberg v Wynrib* [1992] 2 SCR 226.

195 *M (K) v M (H)* [1992] 3 SCR 6.

196 *R v Sparrow* [1990] 1 SCR 1075.

197 eg *Pepper v Litton* 308 US 295 (1939); *Southern Pacific Co v Bogert* 250 US 483 (1919); *Zahn v Transamerica Corporation* 162 F 2d 36 (1947).

198 *Hammonds v Aetna Casualty & Surety Co* 237 F Supp 96 (1965); *Lockett v Goodill* 430 P 2d 589 (1967).

199 *MacDonald v Clinger* 446 NYS 2d 801 (1982).

200 Dorsett, "Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*", (1996) 8 *Bond Law Review* 158 at 159 ("Dorsett").

201 *Breen* (1996) 186 CLR 71 at 98 per Dawson and Toohey JJ, 111 per Gaudron and McHugh JJ.

124 A further point established by *Breen* is not unconnected. This is that a degree of caution must be observed in relying upon Canadian and United States authorities concerning the expansion of *per se* fiduciary relationships or factual circumstances in other relationships that are said to combine to impose fiduciary obligations. This difference between the approach of North American courts and those of other common law jurisdictions, particularly the United Kingdom, was also observed by Chief Justice Mason[202]. At least so far as the relationship of medical practitioner and patient was concerned, I suggested in the Court of Appeal that professional paternalism, evident in the decisions on the issue in the United Kingdom, was less in harmony with the social circumstances and law[203] of Australia than was the position prevailing in North America[204]. Similar considerations might inform the approach of Australian law to the obligations of chartered accountants to their clients. Although my approach in this regard in *Breen v Williams* has been taken to task[205], I remain of the opinion there stated. But it matters not in this appeal.

125 I do not read *Breen* as obliging Australian courts to ignore all Canadian and United States authority on fiduciary obligations[206]. There remains much in the law of those jurisdictions which is common to Australian law so far as equitable doctrine and remedies are concerned. The basis for fiduciary duties in all jurisdictions is explained in common terms by reference to obligations of loyalty to a person dependent on another who, to the knowledge of that other, is specially vulnerable[207]. Nevertheless, in matters of detail, following *Breen*, it must be accepted that a view has been taken that North American courts have, to some extent, become engaged in "reshaping the law of obligations in a way which blurs significant distinctions"[208] that are still maintained by the courts of

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202 See Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters (ed), *Equity, Fiduciaries and Trusts 1993* (1993), 3 at 11 (reprinted (1994) 110 *Law Quarterly Review* 238 at 246) ("Mason") noted *Breen v Williams* (1994) 35 NSWLR 522 at 536, 566.

203 *Breen v Williams* (1994) 35 NSWLR 522 at 536, 541, 544-555; cf *Rogers v Whitaker* (1992) 175 CLR 479.

204 *Breen v Williams* (1994) 35 NSWLR 522 at 548.

205 Olbourne, (1999) 6 *Journal of Law and Medicine* 284 at 298.

206 *Breen* (1996) 186 CLR 71 at 83 per Brennan CJ, 95 per Dawson and Toohey JJ, 112-113 per Gaudron and McHugh JJ, 129-131 per Gummow J.

207 See Dorsett, (1996) 8 *Bond Law Review* 158 at 158.

the United Kingdom[209] and Australia. To the extent that there are differences, Australian courts should therefore adhere to "accepted doctrine". They will not uncritically follow judicial authority from North America.

126 Thirdly, *Breen* illustrates a general disinclination of Australian law to expand fiduciary obligations beyond what might be called proprietary interests into the more nebulous field of personal rights, such as those agitated in *Breen* itself[210]. There the patient had no proprietary rights of any kind in the notes of the medical practitioner[211]. The kinds of disputes concerning alleged fiduciary obligations that typically find their way to the courts usually involve financial relationships. Fiduciary obligations were never limited to disputes about property interests[212]. Nevertheless, *Breen* stands as a warning that the imposition of fiduciary obligations "gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies"[213]. This represents a further reason for exercising restraint in expanding the categories of *per se* relationships or treating new fact situations as attracting fiduciary obligations beyond those accepted in the past.

127 Fourthly, and most importantly, *Breen* upholds the principle stated in the aphorism that fiduciary obligations are "proscriptive" and not "prescriptive"[214]. This, in my view, is the fundamental reason why all members of this Court in *Breen* rejected Ms Breen's claim of a fiduciary obligation. Whatever the differing views which the justices held concerning the character of the relationship in question there and whether it was, or was not, a fiduciary one for some or all purposes, there was agreement that Ms Breen's claim failed because it would have involved imposing on the suggested fiduciary positive obligations to

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208 Nolan, (1997) 113 *Law Quarterly Review* 220 at 226.

209 *R v Mid Glamorgan Family Health Services Authority; Ex parte Martin* [1995] 1 WLR 110; [1995] 1 All ER 356.

210 *Breen* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ.

211 cf Brebner, (1996) 3 *Deakin Law Review* 237 at 245.

212 cf DeMott, "Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal", (1992) 30 *Osgoode Hall Law Journal* 471 at 473-475 noted *Breen v Williams* (1994) 35 NSWLR 522 at 543-544.

213 *Breen* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ.

214 *Breen* (1996) 186 CLR 71 at 113; cf Dorsett, (1996) 8 *Bond Law Review* 158 at 159.

act[215]. It would have burdened him with an affirmative obligation to grant access to his notes to a patient ("prescriptive" duties). It would thus have gone further than the conventional ("proscriptive") duties of loyalty, of avoiding conflicts of interest or of misusing one's power, such as fiduciary duties have traditionally upheld[216].

128 Whilst, for my own part, I question the viability of this supposed dichotomy (because omissions quite frequently shade into commissions) I must accept that *Breen* embraces the distinction. Moreover, it is one that has been approved in commentaries[217]. Until further elucidated by this Court, it should therefore be followed by Australian courts and by me.

Breen does not exclude a fiduciary obligation

129 When the foregoing considerations are extracted from *Breen*, as the binding rule established by that decision, it will be seen immediately that none of them decides the present case. Kia Ora did not allege that the relationship of chartered accountant to client was *per se* of the variety that attracted fiduciary obligations. It did not set out to draw an analogy between that relationship and the closest analogy of a fiduciary kind, namely legal practitioner and client. While there are obvious overlaps between the professions of chartered accountant and legal practitioner, the history of each has been different and their respective functions are distinct. This is not, therefore, a case (nor was it ever suggested to be) where an established relationship, as such, gave rise to the imposition of fiduciary duties to Kia Ora on the part of the appellants. At all times, Kia Ora addressed itself to the peculiarities of the facts of its relationship with the appellants. This was also how the Full Court dealt with the claim.

130 Nor did Kia Ora advance its entitlements by reference to North American authority. I will likewise refrain from referring to otherwise pertinent developments in that part of the world. Instead, Kia Ora relied, and the Full Court decided the case, upon orthodox principles of the Anglo/Australian law of fiduciary obligations.

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215 *Breen* (1996) 186 CLR 71 at 137-138 per Gummow J; see also Faunce, "Doctors and Fiduciaries: Implications for Resource Allocation Among Intensive Care Patients", (1997) 4 *Journal of Law and Medicine* 214 at 216; Brebner, (1996) 3 *Deakin Law Review* 237.

216 See Qu, "The Fiduciary Role of the Manager and the Agent in a Loan Syndicate", (2000) 12 *Bond Law Review* 86 at 90 ("Qu") citing *Moss v Moss [No 2]* (1900) 21 LR (NSW) Eq 253 at 258.

217 Nolan, (1997) 113 *Law Quarterly Review* 220 at 222.

131 So far as the conventional attention which this branch of the law has given to proprietary rights, nothing in *Breen* speaks against the recognition of fiduciary obligations in the kind of relationship and activities proved by the evidence in this case. Indeed, this was a classic case in which the proprietary interests of Kia Ora and the shareholders, independent of the directors, were at stake. Although *Breen* was an invitation to enter new territory, this case is not. It is placed squarely in the middle of the kind of circumstance in which fiduciary obligations have been upheld on countless occasions: where the obligation of loyalty to the financial interests of identifiable persons who were specially vulnerable is abused by other persons entrusted with duties permitting them to make judgments, in effect, for others which called for the selfless pursuit of the interests of others, the independent performance of their duties and (if that be not possible) a refusal to be involved. As Professor Finn put it[218]:

> "The lawyer and the stockbroker illustrate the functionary regarded as clearly fiduciary at least when acting in an advisory, and not merely in a ministerial, capacity. Predictably it is these the courts have in mind when they describe the adviser as a fiduciary. And what these suggest is that fiduciary responsibilities will be exacted where the function the adviser represents himself as performing, and for which he is consulted, is that of counselling an advised party as to how his interests will or might best be served in a matter considered to be of importance to his personal or financial well-being, and in which the adviser would be expected both to be disinterested, save for his remuneration, and to be free of adverse responsibilities unless the contrary is disclosed at the outset."

132 This was not, ultimately, a case where "prescriptive" duties were imposed. As the Full Court found[219] in the circumstances of self-interest, conflict of interest and lack of independence in which they found themselves, the duty of the appellants was clear. It did not involve assuming affirmative initiatives. It simply involved compliance with the loyalty ordinarily required of fiduciaries, namely the scrupulous avoidance of any possibility of misuse of power. The appellants should have declined to provide the report under ASX rule 3J(3). The duty falling upon them was therefore proscriptive. Within this rubric, no prescription of affirmative conduct was imposed.

133 It follows that, so far as the ratio of *Breen* in this Court is concerned, it provided no impediment to a finding that the appellants owed Kia Ora fiduciary

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218 Professor (now Justice) Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 50 (footnote omitted).

219 (1999) 73 SASR 64 at 232 [787].

obligations. But is there any other reason why this Court should hold that such obligations were inapplicable to the circumstances of the case?

The principles governing fiduciary obligations

134 The Full Court explained its conclusion, favourable to Kia Ora's argument in respect of fiduciary obligations, in a passage which is, in my opinion, correct[220]:

> "[N]ot only did [the appellants], in the circumstances, lack independence, but they were in a position where their obligation to act solely in the interests of Kia Ora was compromised by and in substantial conflict with their personal and commercial loyalty to certain of the directors of Kia Ora. The fact that they apparently did prefer, whether consciously or sub-consciously, the interests of the directors to those of Kia Ora is borne out by their failure to mention in their report such fundamental matters of which they were or ought to have been aware and which, if disclosed, could only have had a substantial effect on the opinion they expressed. Amongst those matters were the knowledge of the Parry transaction some few weeks before at a substantially lower price per share than they were considering to be fair to Kia Ora, the identity of the major depositors with Western United and the back-to-back loan transactions being undertaken through Western United, failure to disclose all of which gave a misleading impression of the asset position and business activity of Western United."

135 The reasons of the Full Court go on to describe several other instances where the appellants showed preference for, and loyalty to, the directors with whom they were associated rather than to Kia Ora, the company which had retained them and whose uncommitted shareholders were reliant on their report and dependent on their independent judgment about the fairness of the price of the share offer. In the circumstances, Kia Ora and such shareholders were clearly vulnerable to the consequences of incomplete information and a biased opinion given by the appellants. Time and space restrain me from mentioning all of the considerations. They are referred to in the reasons of the Full Court[221]. They repay careful reading. The conduct portrayed is the very opposite of that which proper professional standards and compliance with ASX rule 3J(3) envisaged. Because that conduct was obligatory for the protection of a corporation and its shareholders reliant on the appellants (and of the larger community of potential shareholders in the investing public reliant on the arrangements put in place by the ASX rule) an apparent case of fiduciary duty is established in conformity with authority.

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220 (1999) 73 SASR 64 at 229 [770].

221 (1999) 73 SASR 64 at 222-231 [737]-[781].

136 A number of propositions concerning the existence, or otherwise, of fiduciary obligations may be stated. They include the following:

(1) Fiduciary obligations are not confined to established relationships or to exactly identical facts as those that have given rise to them in the past. Even those jurists most resistant to analogical extensions in this field accept that the list of persons owing fiduciary duties is not closed[222]. It could scarcely be so, given that equity is itself the embodiment of judicial invention[223]. Unless legislation requires a different approach[224], equity and equitable remedies respond to changing times, different social and economic relationships[225] and altered community expectations. However, where a suggestion is made that fiduciary obligations arise in a new relationship, or out of particular facts, it is essential that judges perform their functions by analogy from settled principles[226]. They are not entitled to distort those principles. Nor may they superimpose an equitable classification on facts, simply because to do so would afford better or larger remedies to a plaintiff who appears to have suffered some wrong[227].

(2) Specifically, it is not sufficient, to impose fiduciary obligations on an alleged wrong-doer, simply to point to the vulnerability of the person claiming to have been wronged. Many people who are in an arm's length relationship with each other (if they have any real relationship at all) experience a serious disproportion of power in their dealings. To turn every such case into one giving rise to fiduciary obligations would be to distort basic doctrine. Where the voice of equity is silent, the party harmed will have to rely upon entitlements, if any, that it enjoys under the

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222 *Breen v Williams* (1994) 35 NSWLR 522 at 570 per Meagher JA; cf *Breen* (1996) 186 CLR 71 at 107 per Gaudron and McHugh JJ.

223 *The Aldora* [1975] QB 748 at 753; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352 at 373; Magnusson and Opie, (1998) 17 *University of Tasmania Law Review* 99 at 129.

224 cf *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395-396 [31], 424 [111].

225 Hepburn, (1996) 20 *Melbourne University Law Review* 1201 at 1202; cf *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 336-337.

226 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 298 per Gummow J; see also Peters, "Assessing the New Judicial Minimalism", (2000) 100 *Columbia Law Review* 1454 at 1507-1513.

227 *Breen v Williams* (1994) 35 NSWLR 522 at 570 per Meagher JA.

common law, specifically on the basis of contract or tort. Several recent expositions of negligence law make reference to vulnerability as a consideration relevant to the imposition of legal duties of care[228]. For fiduciary obligations, vulnerability to wrong-doing will certainly be a relevant consideration. However, it is not sufficient. Vulnerability can call forth remedies in a case of some proved wrong-doing. But to call forth fiduciary obligations, more than vulnerability is required[229].

(3) The mere fact that a party may have remedies at law, whether in contract or tort, does not exclude the possibility that fiduciary obligations may also be imposed. There is no antipathy between such concurrent obligations[230]. Because equitable remedies will commonly be more significant and protective, it will often be the case that a party, with an arguable case that fiduciary obligations arise from the facts, will give primacy to that aspect of its case. This is what Kia Ora did in the present proceedings. If equitable relief were available, many of the technicalities of the common law remedies would fall away. Normally, the party establishing such an entitlement will be in at least as good a position, and often much better, than it would be if confined to remedies at common law. It is entitled to advance its case as it chooses. It is not necessary for it first to exhaust any remedies it may have at common law[231].

(4) The greatest difficulty facing those who assert the existence of fiduciary obligations, outside the classic *per se* relationships, arises from the fact that the law has not formulated any precise or comprehensive definition of the criteria adopted for imposing such obligations[232]. The inadequacies and incompleteness of past attempts do not, however, relieve a judge, faced with such a claim, of the necessity to have a notion of what is involved. Without this, there would be no proper, orderly development of fiduciary responsibilities or predictability and clarity in the law. Nor

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228 eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 225-226 [118]-[119], 285 [286]; cf *Breen* (1996) 186 CLR 71 at 125 per Gummow J.

229 Qu, (2000) 12 *Bond Law Review* 86 at 101.

230 *Breen* (1996) 186 CLR 71 at 132 per Gummow J; cf *Hospital Products* (1984) 156 CLR 41 at 97; *Breen* (1996) 186 CLR 71 at 93 per Dawson and Toohey JJ.

231 *Supreme Court Act* 1935 (SA) ss 20-28; Tilbury, *Civil Remedies*, vol 1 (1990) at 12-15 [1021]-[1025].

232 *Breen* (1996) 186 CLR 71 at 92 per Dawson and Toohey JJ.

would a foundation be provided upon which those affected might reasonably organise their affairs[233].

(5) Various theories have been propounded in an attempt to capture the essence of the "fiduciary principle". They include the opinion that it arises where a trust is created in relation to specific property or where a person is in a position that involves "confidence so as to impress him with a fiduciary character"[234]. This exposition is inadequate as it is no defence for a fiduciary to prove that the beneficiary did not really have confidence in it. Trust itself is not the essential attribute of fiduciary liability, although it will often exist in fact. Something additional is required[235]. Attempts to suggest that this additional element is the presence of a peculiar vulnerability to the fiduciary holding a discretion or power[236] must be rejected as being too broad, for the reasons already stated[237]. A third suggestion would have it that a fiduciary obligation arises where one person accepts a transfer of powers from another with a requirement that the deployment of such power be restricted to uses for the benefit of the beneficiary only[238]. However, obviously, this is more a statement of the problem than the provision of a useful criterion. It is in these circumstances that a fourth theory was advanced by Professor Finn[239]. He suggested that the unifying principle of fiduciary obligations arises from the existence of a duty of loyalty that, reflecting "higher community standards or values"[240], gives rise to a "legitimate expectation that the

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233 Michalik, "Doctors' Fiduciary Duties" (1998) 6 *Journal of Law and Medicine* 168 at 170 ("Michalik").

234 *Halsbury's Laws of England*, 4th ed Reissue, vol 16 at 807 [905]; see also Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 170.

235 Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 170-171; cf *Liggett v Kensington* [1993] 1 NZLR 257; [1994] 3 NZLR 385 (PC).

236 *Frame v Smith* [1987] 2 SCR 99 at 136; *Hodgkinson v Simms* [1994] 3 SCR 377 at 466-467; see also Dorsett, (1996) 8 *Bond Law Review* 158 at 160.

237 Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 172.

238 *Hospital Products* (1984) 156 CLR 41 at 96-97; see Shepherd, *The Law of Fiduciaries* (1981) 35.

239 Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 27-28; see generally Finn, *Fiduciary Obligations* (1977).

240 Mason, (1994) 110 *Law Quarterly Review* 238 at 246.

other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly"[241]. Essentially, this was the criterion that I favoured in *Breen v Williams*[242]. Whilst it can be criticised as tautologous and subjective, I still consider that it represents the best attempt to express what is involved[243]. Read with the qualifications accepted by this Court in *Breen*[244], it does offer a useful "description"[245] to assist in the practical application of basic doctrine to varying relationships and facts.

(6) As a matter of practicality, to reduce the uncertainties that arise from the elusive "essence" of the "fiduciary principle", it is reasonable for courts to have regard to features commonly found in cases where fiduciary obligations have been upheld. Necessarily, such features are not exhaustive. They may overlap. As Gaudron and McHugh JJ pointed out in *Breen*[246], they have included in the past: "the existence of a relation of confidence[247]; inequality of bargaining power[248]; an undertaking by one party to perform a task or fulfil a duty in the interests of another party[249]; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another[250]; and a dependency or

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241 Mason, (1994) 110 *Law Quarterly Review* 238 at 246; see Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 174.

242 *Breen v Williams* (1994) 35 NSWLR 522 at 544.

243 Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 174; Hood, "What is so special about being a fiduciary?", (2000) 4 *The Edinburgh Law Review* 308 at 310-313.

244 See above at [116]-[133].

245 Finn declared that he was providing a "description" not a "definition": Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 54.

246 (1996) 186 CLR 71 at 107.

247 *Hospital Products* (1984) 156 CLR 41 at 69 citing *Tate v Williamson* (1866) LR 2 Ch App 55 at 61; *Coleman v Myers* [1977] 2 NZLR 225 at 325.

248 *Hospital Products* (1984) 156 CLR 41 at 69-70.

249 *Reading v The King* [1949] 2 KB 232 at 236; *Hospital Products* (1984) 156 CLR 41 at 96-97.

250 *Frame v Smith* [1987] 2 SCR 99 cited in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 598-599.

> vulnerability on the part of one party that causes that party to rely on another[251]". Superimposed on all of these instances is the common requirement of "loyalty"[252]. Whilst that word itself is also somewhat tautologous, it signals, in the context, the central idea involved. In some relationships, or factual circumstances, an element of selflessness is implicit. It is not enough that the party charged with default may have conformed to contractual duties or even to the standards of a tortious duty of care. Whether it has or not, equity will require that party not to profit in any way from the relationship nor advance any interests other than those of the beneficiary, except with the beneficiary's informed consent. Equity will oblige the fiduciary not to have any interest unknown to the beneficiary that could conflict with the foregoing duties[253].

The appellants owed a fiduciary duty

137 When the foregoing principles are applied to the facts as found in the present case, it is my opinion that the Full Court was correct to hold that the appellants owed a fiduciary duty to Kia Ora. The company relied on the appellants for an independent, impartial and competent report which the appellants were incapable of providing, and did not provide.

138 First, there is no error in the analysis by the Full Court or the criteria which it applied. Correctly, the Full Court recognised, in contradistinction to the primary judge[254], that nothing in the ratio of this Court's decision in *Breen* obliged the opposite conclusion. Secondly, the Full Court prudently reminded itself of the need for care against unnecessarily importing equitable principles (and fiduciary obligations) into commercial relationships[255]. This is a view that I

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251 *Johnson v Buttress* (1936) 56 CLR 113 at 134-135.

252 *Bristol and West Building Society v Mothew* [1997] 2 WLR 436 at 449; [1996] 4 All ER 698 at 711-712; cf Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 130-131 [501].

253 *Breen* (1996) 186 CLR 71 at 93, 137; cf *Maguire* (1997) 188 CLR 449 at 496; Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1 at 27; Michalik, (1998) 6 *Journal of Law and Medicine* 168 at 175.

254 (1998) 27 ACSR 1 at 369-373.

255 The Full Court referred to *Hospital Products* (1984) 156 CLR 41 at 118-119; see *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64 at 224-225 [748]; see also *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 351.

have myself expressed[256]. It has a long judicial lineage[257]. Thirdly, the Full Court examined the rules of professional ethics applicable in 1987 to chartered accountants in Australia, such as the appellants. It did so, acknowledging that such rules were not binding on the Court but viewing them as "a reliable and important indicator of … accepted opinion"[258]. Such rules would obviously be pertinent to the consideration representing the "essence" of the fiduciary principle described by Professor Finn[259]. A similar use of professional rules in the context of fiduciary obligations has been adopted in Canada[260] and New Zealand[261] in judicial opinions that have otherwise been cited in this Court with apparent approval[262].

139 According to "ethical guidelines" of the Institute of Chartered Accountants in Australia issued at the applicable time, the principles binding on persons such as the appellants included those of "integrity, objectivity, independence, confidentiality and professional competence"[263]. The adoption of those rules reflected the fact that, in certain circumstances at least, clients and persons dependent upon clients of chartered accountants will be extremely vulnerable to the discharge of their duties.

140 The adoption of ASX rule 3J(3) is, in turn, a further indication that in respect of identified functions having implications for clients, their shareholders and the investing public, chartered accountants who undertake such duties are not

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256 *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 584-586; cf *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 538.

257 eg *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374 at 382 per Bramwell LJ.

258 *Chamberlain v The Law Society of the Australian Capital Territory* (1993) 43 FCR 148 at 154.

259 See above at [131].

260 *Hodgkinson v Simms* [1994] 3 SCR 377 at 423-425 per La Forest J.

261 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83.

262 As to *Hodgkinson*, see *Breen* (1996) 186 CLR 71 at 133-134, 136; as to *Farrington*, see *Maguire* (1997) 188 CLR 449 at 465-466 per Brennan CJ, Gaudron, McHugh and Gummow JJ, a point noted by the Full Court: (1999) 73 SASR 64 at 225-226 [752].

263 (1999) 73 SASR 64 at 226 [753].

simply business people performing contracted services for profit. Whatever might be the case in respect of other activities that they undertake, the very nature of the reporting function envisaged by ASX rule 3J(3) imposes on chartered accountants, who accept that duty, fiduciary obligations owed to those who reasonably expect that the function will be carried out with selfless loyalty to the client which commissions the report. In the present case, this meant loyalty and integrity with respect to Kia Ora, the company, as distinct from its committed directors who were able to send a lot of business, as they had in the past, in the direction of the appellants' firm.

141 This is the way the Full Court reasoned. By avoiding the pitfalls that this Court had identified in *Breen* and upholding a duty of loyalty and integrity which was imposed on the appellants by the very nature of the task entrusted to them, the Full Court came to the correct conclusion on this issue. The appellants owed Kia Ora fiduciary duties in performing the reporting function under ASX rule 3J(3)[264].

142 Having found the existence of the duty, it was unsurprising that, consonant with the factual findings of the primary judge, the Full Court should also find that it had been breached. The duty of "undivided loyalty to the persons whom they serve"[265] had been flagrantly negated[266]. In circumstances where, in effect, undivided loyalty to Kia Ora and its unsuspecting shareholders was impossible, had not been, and probably could not have been, repaired by disclosure, the only way in which the appellants could have discharged their fiduciary obligation was by declining to act[267]. Fiduciaries do this regularly. I am confident that chartered accountants throughout Australia do it all the time.

143 Why must persons in the position of the appellants act in the way suggested? It cannot only be because the rules of their professional body oblige it or the provisions of the ASX imply it. In my opinion, it is, ultimately, because the law imposes such duties by virtue of the loyalty that the law extracts from specified circumstances, of which this is one. The law that imposes such a duty is not confined to the contract between the chartered accountant and the client.

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264 (1999) 73 SASR 64 at 231 [781].

265 *Breen* (1996) 186 CLR 71 at 108 per Gaudron and McHugh JJ.

266 See eg *Fitzsimmons v The Queen* (1997) 23 ACSR 355; 15 ACLC 666 noted by Baxt, "Escaping the Dilemma of Conflict – Is Resignation the Only Course?", (1997) 15 *Companies and Securities Law Journal* 326; Farrar, "A Note on Dealing with Self Interested Transactions by Directors", (2000) 12 *Bond Law Review* 106 at 110-111.

267 (1999) 73 SASR 64 at 232 [787].

Nor is it limited to the duty of care imposed by the law of negligence. Such duties can easily be modified or bargained away. The law that imposes such a duty is one resting on the observance of conscientious conduct by persons, such as the appellants, towards clients, such as Kia Ora and through them to the unsuspecting shareholders and potential shareholders who depend on such loyalty and adherence to selfless conduct, at least in matters of this kind.

144 With all respect to those of a different view, this Court should not, by its decision in this case, send a signal that chartered accountants in the position of the appellants were merely the contracted agents of their client or simply a tortfeasor liable under the law of negligence. The duty they assumed, by providing their report under ASX rule 3J(3), was of a higher quality. It was a fiduciary duty.

145 The appellants suggested that they were relieved of any fiduciary duty because Kia Ora knew of their past associations with the company, its directors and Western United. I disagree. This was not a case of informed consent. Such consent requires full and frank disclosure to the party affected of all material facts[268]. It obliges the fiduciary to reveal to the beneficiary all relevant information necessary for the beneficiary to make a proper judgment as to whether to give consent to the activity that would otherwise be a breach of fiduciary obligations. No such disclosure was made here. No such consent was forthcoming, either on the part of the shareholders of Kia Ora (to whom the ASX rule 3J(3) report is ultimately addressed) or even the directors. Indeed, there was no disclosure to the shareholders at all.

146 Given the nature, duration and complexity of the relationships that disqualified the appellants from performing the rule 3J(3) reporting function, it would have been virtually impossible, as a matter of practicality, to fulfil the requirements of full disclosure[269]. As for the directors, the Full Court correctly found that disclosure to each other, of the very facts that gave rise to the circumstances that disqualified the appellants, would not have fulfilled the protective purpose for which the ASX rule was adopted. The appellants' fiduciary obligations to Kia Ora could not be cured, in effect, by the consent of the compromised directors condoning the involvement of the appellants which was the source of their disqualification[270].

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268 *Breen* (1996) 186 CLR 71 at 125-126 per Gummow J citing *Boardman v Phipps* [1967] 2 AC 46 at 104, 105, 112, 117, and *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 at 1131-1132; [1973] 2 All ER 1222 at 1227.

269 (1999) 73 SASR 64 at 231-232 [783]-[788].

270 cf *Gluckstein v Barnes* [1900] AC 240 at 247.

147 It follows that no error has been shown in the Full Court's conclusion that the circumstances were such as to impose on the appellants a fiduciary duty towards Kia Ora. Indeed, the Full Court's conclusion in that regard did not initially even attract a grant of special leave to this Court. First impressions were correct. The matter having been fully argued, I would grant special leave in relation to added question (a). I would dismiss the appeal so far as it challenged the Full Court's finding that the appellants owed Kia Ora a fiduciary duty and that they were in breach of such duty by accepting the retainer, ignoring their conflict of interest and providing the report under rule 3J(3) as they did.

The quantification of equitable compensation

148 Because this is a minority opinion, I will say no more in respect of added questions (b) and (c) than is necessary to reach the orders which I favour in this appeal. The appellants urged that it was unnecessary to address those added questions at all. This is the view substantially favoured by the majority of this Court[271]. Because I have reached a different conclusion on added question (a), it is essential, in the approach that I take, to consider the further added questions.

149 Where fiduciary obligations exist and have been breached, equitable remedies are available both to uphold the principle of undivided loyalty which equity demands of fiduciaries[272] and to discourage others, human nature being what it is, from falling into similar errors.

150 The fiduciary must make good any breaches arising from its default in discharging the fiduciary obligations[273]. It must account for any profits it has made as a consequence. The overall purpose of the law of fiduciary obligations is to restore the beneficiary to the position it would have been in if the fiduciary had complied with its duty[274]. To attain this end, the beneficiary is entitled to invoke a range of remedies much broader than those typically available at common law. They are also remedies devoid of many of the common law

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271 Joint reasons at [84].

272 *Bray v Ford* [1896] AC 44 at 51-52 per Lord Herschell cited in *Breen* (1996) 186 CLR 71 at 108 per Gaudron and McHugh JJ.

273 *Breen* (1996) 186 CLR 71 at 113.

274 *Breen* (1996) 186 CLR 71 at 93; see Wright, "Fiduciaries, Rescission and the Recent Change to the High Court's Equity Jurisprudence", (1998) 13 *Journal of Contract Law* 166 at 176 ("Wright").

limitations and technicalities[275]. As well, presumptions are available that facilitate proof of a claim. Amongst the applicable remedies is the broad power to award equitable compensation[276].

151 In affording remedies for a fiduciary's breach of its obligations, equity is seen, depending on one's point of view, at its "flexible pragmatic best (or worst)"[277]. There are, of course, limits. They are those appropriate to enforcing the obligations of conscience. In a proper case, they will require just counter-entitlements to be set off, or deducted, where this can be done with accuracy[278]. The purpose of equity's relief is not punishment but restoration[279]. The "cardinal principle of equity [is] that the remedy must be fashioned to fit the nature of the case and the particular facts"[280].

152 The rule governing the calculation of equitable compensation is that stated by McLachlin J in *Canson Enterprises Ltd v Boughton & Co*[281]:

> "The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the

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275 *Maguire* (1997) 188 CLR 449 at 493; see Wright, (1998) 13 *Journal of Contract Law* 166 at 172-173.

276 *Warman* (1995) 182 CLR 544 at 567 concerning an account of profits.

277 *Underhill's Law relating to Trusts and Trustees*, 13th ed (1979) at 11 cited *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 94.

278 *Warman* (1995) 182 CLR 544 at 567-569.

279 *Maguire* (1997) 188 CLR 449 at 496.

280 *Warman* (1995) 182 CLR 544 at 559 citing *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728-729.

281 [1991] 3 SCR 534 at 543; see also *Hodgkinson v Simms* [1994] 3 SCR 377 at 453-454.

> person wronged ... In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart."

McLachlin J's exposition has been cited in this Court[282], in the United Kingdom[283] and in other decisions[284] and texts[285].

153 It is because equitable relief has large objectives that the measure of equitable compensation will often differ from the measure of common law damages. Often, it will be greater. Thus, the mere fact that no property can be restored, or other order of restitution fashioned which is apt to the circumstances, will not relieve a fiduciary, in breach of its duties, from fulfilling both the compensatory and prophylactic objectives that equity upholds. Equitable relief will self-consciously favour the beneficiary by "holding trustees to their duties and thereby protecting the interests of beneficiaries"[286].

154 The foregoing rule is given effect by the differing approaches of equity and the common law to assessing the consequences of the wrong, and to whom that wrong is properly attributed. I explained some of those differences in *Maguire*[287]. I remain of the views stated.

155 In the light of these differences of approach, and of the fact that equitable remedies in a particular case fulfil "purposes other than the mere adjustment of the position as between the fiduciary and the beneficiary"[288], it is my opinion that the Full Court erred in its assessment of the equitable compensation payable to Kia Ora. It did so, first, by restricting the award of interest to Kia Ora to a six

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282 *Maguire* (1997) 188 CLR 449 at 492-493.

283 *Target Holdings Ltd v Redferns* [1996] AC 421 at 438-439.

284 *Permanent Building Society (In Liq) v Wheeler* (1994) 11 WAR 187 at 248; *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 109.

285 See generally Gummow, "Compensation for Breach of Fiduciary Duty" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 57; Tilbury, "Equitable Compensation" in Parkinson (ed), *The Principles of Equity* (1996) at 789-790 [2208]; Glover, *Commercial Equity: Fiduciary Relationships* (1995) at 271 [6.129]; Davies, "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Waters (ed), *Equity, Fiduciaries and Trusts 1993* (1993) 297 at 305-307.

286 *Maguire* (1997) 188 CLR 449 at 470.

287 (1997) 188 CLR 449 at 492-495.

288 *Maguire* (1997) 188 CLR 449 at 494-495.

month period from 1 January 1988 to 30 June 1988. Concededly, this imposed a semi-artificial limitation. Once it reached a conclusion (contrary to the primary judge) that fiduciary obligations had been established, and that their breach had been proved, the Full Court should have fashioned remedies that restored Kia Ora (as best the Court's orders could) to the position that it would have been in if the appellants had declined the retainer, as they should have done.

156 It is here that a crucial difference emerges between the question presented by the claims framed at common law (with which the joint reasons in this Court deal) and the relief which equity affords. Equity will not be concerned, as such, with the common law analysis. It will ask what would have happened if the appellants, as fiduciaries, had adhered to their obligations. The answer to that question will be either that some other firm of chartered accountants would have been retained who, performing their functions independently and objectively would have been bound on the accepted evidence to report that the price of the shares proposed was *not* a "fair" one within ASX rule 3J(3). Or, in the exigencies, it would have been impossible for the protagonist directors to have obtained a report as required by the rule at all. In either event the requirements for shareholder approval would not have been fulfilled.

157 Against the theoretical possibility that full disclosure of the otherwise disqualifying considerations might have been made by the appellants to Kia Ora and its shareholders, it is inconceivable (had this been done) that the shareholders would have given their "informed consent" to the takeover of Western United at the share price proposed. In any of the postulated events, therefore, the takeover would not have taken place. Kia Ora would not have been burdened by the issue against its limited capital of the shares which thereupon became a debt of Kia Ora. Kia Ora would not have paid the cash and issued its shares[289] to the fortunate shareholders of Western United who received those benefits on terms so favourable to them and Western United but so unfavourable to Kia Ora.

158 The common law may impose artificial consequences for the valuation of the shares issued by Kia Ora as part of this transaction. The majority, in this appeal, so hold. Whilst expressing my doubts that such an apparently unjust outcome reflects the requirements of the common law, I reserve my opinion about that question. Given my view that the correct analysis of Kia Ora's claim against the appellants is primarily to be made in terms of the appellants' fiduciary duties, it is unnecessary for me to express a concluded view. At least this is so provided Kia Ora's judgment, pursuant to the principles of equitable relief, is no

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289 As found by the primary judge, the cash payment was $26,178,135.81 and 67.9 million shares were issued with a market value each of 82 cents: (1999) 73 SASR 64 at 166-167 [475].

less than that which Kia Ora would recover under its claim in contract (as in my opinion it is).

159 Once it is acknowledged (as I believe to be the case) that the appellants' breach consisted of their acceptance of the retainer to provide a report under ASX rule 3J(3), it becomes plain that it was the appellants' breach of their fiduciary duties to Kia Ora that provided the occasion, and the possibility, for the directors' wrongdoings in pursuing the takeover to further their own private interests, as distinct from the interests of Kia Ora. But for the appellants' breach of their fiduciary obligations, the takeover would simply not have happened. Before this Court, as below, counsel for the appellants conceded that, as a practical matter, unless there had been a report and a meeting of shareholders, the takeover of Western United could not have proceeded. This was a proper concession. The calculation of equitable compensation must therefore proceed on that footing. On that basis, so far as equitable relief is concerned, a court is entitled to act on the accounting evidence that showed the true loss to Kia Ora, as being the difference between the valuable consideration given by Kia Ora[290] and the true value of Western United when acquired[291].

160 Accepting that equitable compensation has the dual functions earlier mentioned, the Full Court ought to have awarded equitable compensation against the appellants in the form of compound interest from 1 January 1988 to the judgment of the primary judge on 30 January 1998. During the whole of that time, Kia Ora was kept out of reimbursement of the cash component which it had paid in the takeover. Moreover, it was obliged, in issuing shares against its accumulated capital to forgo other uses to which that available capital might have been put. This could have included the issue of a similar number of its shares for their true value or the pursuit of investments at a proper value, then or later, which would have been to the financial advantage of Kia Ora, as the most improvident transaction into which it was led by the appellants' report was not.

161 The Full Court's termination of the entitlement to interest was justified by reference to common law principles[292]. It concluded that, within a short time, the directors would probably have dissipated Kia Ora's funds in some other way. However applicable such principles might be in considering claims at common law, they were not, in my view, appropriate to the provision of equitable relief.

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290 Represented by the cash payment made and the true value of the shares issued.

291 Represented by the value of Western United at the time of the takeover, viz $6,489,339: (1998) 27 ACSR 1 at 400.

292 As expressed in *Hungerfords v Walker* (1989) 171 CLR 125: see (1999) 73 SASR 64 at 171-172 [504]-[512].

162 Of course, the amount of interest involved is very large. It was natural to hesitate before ordering interest for the entire duration proposed. But the award of interest is only large because the outlays into which Kia Ora was inveigled are themselves very large. No equitable justification can be suggested for termination of interest, arbitrarily, after six months. If the governing principle is restoration, that principle can only be achieved by the award of interest during the whole time that Kia Ora was prevented from using the money lost by the cash payment and share issue.

163 Kia Ora has therefore made good its complaint against the approach of the Full Court concerning the calculation of equitable compensation. To that extent, I would disturb the Full Court's decision about such compensation. Doing so does not, as the appellants contended, constitute punishment. It amounts to no more than remedying the financial consequences which they occasioned to Kia Ora by providing their flawed and incompetent report. Once they did so, everything else followed[293]. The appellants did not rebut the presumption that, without the takeover, Kia Ora would have used the same dissipated capital in a profitable way. The contrary proposition is pure speculation. It is unsustained by the evidence or by a proper approach to such evidence as was called.

164 With respect to other matters concerned with the calculation of Kia Ora's equitable compensation, I would refuse special leave to either party to agitate the several grounds which they respectively argued. I am unconvinced that any other error of calculation on the part of the Full Court has been demonstrated. However, my conclusion about interest as part of Kia Ora's equitable compensation requires recalculation of that compensation by the Full Court. It is preferable for such recalculation to be performed in circumstances where the parties might speak to it so that it could be judicially determined accurately for the first time[294]. To that extent, special leave should be granted in respect of added question (b).

"Contributing fault" and equitable compensation

165 Added question (c) asked whether the Full Court erred in reducing the amount of equitable compensation awarded to Kia Ora on account of what the Full Court described as Kia Ora's "contributing fault".

166 The appellants sought to express this concept more favourably to their interests by suggesting that the deduction was "on account of [Kia Ora's] own

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293 As the Full Court itself recognised: (1999) 73 SASR 64 at 234 [798].

294 cf *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 263 [35].

conduct"[295]. However, the expression used by the Full Court cannot be wished away, or explained, by adopting different language. I was reminded by the appellants of my own opinion in *Maguire* as to the "elasticity of equitable remedies" and as to the capacity of a court of equity to fashion remedies "according to the exigencies of the particular case so as to do what is 'practically just' as between the parties"[296]. I adhere to those opinions. I accept that equitable compensation will sometimes exceed the measure of damages that can be recovered at common law for the same wrong[297]. But this is not what the Full Court said. Nor, more importantly, is it what it did.

167 The Full Court confronted, quite directly, a controversy which has engaged judges and academic writers for some time, both in Australia and elsewhere. The issue was whether there can be grafted onto the principles governing equitable remedies a new equitable principle of reduction for responsibility in the case of "contributing fault". Can such a principle be adapted, by analogy, from the advances that have occurred in respect of common law claims and statutory provisions that apply where a defendant can show contributory negligence?

168 There is no authority of this Court on the point. It was mentioned in passing in *Maguire*. However, it was reserved because the point was not argued in that case[298]. It was certainly argued in the present litigation. The Full Court was therefore correct to express its conclusion on the point. That conclusion was that the principles of equitable relief, as they have developed in Australia, recognise a deduction for "contributing fault"[299]. Having so concluded, the Full Court went on to determine that the same failures as "render[ed] Kia Ora guilty of contributory negligence"[300], in this case constituted "contributing fault for the purpose of considering any reduction in compensation otherwise payable for the breach of fiduciary duty"[301].

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295 Appellants' written submissions on supplementary questions of special leave.

296 *Maguire* (1997) 188 CLR 449 at 496.

297 cf Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 645.

298 *Maguire* (1997) 188 CLR 449 at 494.

299 (1999) 73 SASR 64 at 241-250 [828]-[861].

300 (1999) 73 SASR 64 at 256 [881].

301 (1999) 73 SASR 64 at 256 [881].

169 In a thorough review of authority, both for and against this conclusion (and a reference to a consideration by this Court of a somewhat analogous question[302] which seemed to tell against its ultimate result) the Full Court finally accepted the principle of "contributing fault". As I read its reasons, it did not (as perhaps it might have done) subsume the considerations pertinent to such a deduction within a more general analysis of the issue of causation, or a different analysis by reference to general equitable notions of apportionment[303]. Instead, boldly, the Full Court embraced the idea of "contributing fault". It did so knowing full well that this was a contentious conclusion.

170 I do not consider that equitable remedies (any more than those of the common law) are chained forever to the rules and approaches of the past. Nor do I find the notion of developing equitable rules (any more than those of the common law[304]) by reference to statutory developments as uncongenial as, on occasion, this Court has done[305]. The idea that the common law develops in "imitation" of statutes is not a recent one[306]. A similar notion was sometimes reflected in equitable remedies, particularly in relation to defences based on statutes of limitations[307]. Furthermore, all equitable and legal principles must today operate in a universe dominated by the star of statute. It would be surprising if the gravitational pull of statute, felt everywhere else in the law, did not penetrate into the expression and re-expression of non-statutory rules[308].

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302 *Astley v Austrust Ltd* (1999) 197 CLR 1 noted in (1999) 73 SASR 64 at 242 [829]-[831].

303 Referred to in *Maguire* (1997) 188 CLR 449 at 494.

304 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 465; Kelly, "The Osmond Case: Common Law and Statute Law", (1986) 60 *Australian Law Journal* 513; *Ralevski v Dimovski* (1986) 7 NSWLR 487 at 493; cf *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 519-526.

305 *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; cf *Cotogno v Lamb [No 3]* (1986) 5 NSWLR 559 at 570-572.

306 *Pearson v Pulley* (1668) 1 Chan Cas 102 at 102 [22 ER 714 at 715]; cf *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743.

307 *Knox v Gye* (1872) LR 5 HL 656 at 674; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 785-786 [3415].

308 See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 12-13 [33], 27 [83], 45-47 [128]-[130]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 [23], 89-90 [105].

171 Nevertheless, there are, as the joint reasons point out, severe "conceptual difficulties"[309] in the path of adopting a principle derived by analogy from contributory negligence to diminish awards of equitable compensation for the breach of fiduciary obligations. The foundation of the difficulty is explained by Justice Gummow, writing extracurially, in an essay to which I referred in *Maguire*[310]:

> "While negligence is concerned with the taking of reasonable care, a fiduciary traditionally has more expected of him. His duty is one of undivided and unremitting loyalty. The fiduciary acts in a 'representative' capacity in the exercise of his responsibility. One must fear that introduction of concepts of contributory negligence into that setting inevitably will work a subversion of fundamental principle."

172 To the same effect, Justice Handley has said[311]:

> "Equity has not hitherto considered that a beneficiary is bound to protect himself against his fiduciary. The relationship is not at arm's length and the beneficiary is entitled to place trust and confidence in the fiduciary. The basis for a finding of contributory negligence is therefore lacking."

173 Whatever might have been my inclination to explore the notion adopted by the Full Court prior to *Astley v Austrust Ltd*[312], I regard the holding in that case as a splash of cold water, discouraging any creative instinct in this connection. There, after all, the Court was considering the development of an apportionment principle within the four walls of the common law and the applicable statute. A majority of the Court concluded[313] that no such

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309 Joint reasons at [86].

310 Gummow, "Compensation for Breach of Fiduciary Duty" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 57 at 86 (footnotes omitted) referred to in *Maguire* (1997) 188 CLR 449 at 489.

311 Handley, "Reduction of Damages Awards" in Finn (ed), *Essays on Damages* (1992) 113 at 127; see also Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 637 [2304].

312 (1999) 197 CLR 1. It has taken legislative intervention to overcome that decision: see Young, "Current Issues: Contributory negligence", (2001) 75 *Australian Law Journal* 213 at 215.

313 Gleeson CJ, McHugh, Gummow and Hayne JJ; Callinan J dissenting.

development was available. Damages for breach of contract could therefore not be reduced under apportionment legislation expressed in terms of "contributory negligence" whether or not the plaintiff had, or could also have, sued in tort. In the face of that decision and the repeated recognition by this Court that, in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principles[314], the attempt to push common law notions of contributory negligence, as now modified by statute, into equitable remedies collapses in the face of insurmountable obstacles.

174 Having come to this conclusion, the foundation for the Full Court's deduction for the "contributing fault" of Kia Ora disappears. It is not, therefore, necessary to consider the factual complaints of Kia Ora about the conduct attributed to it by the Full Court, on the basis of which such "contributing fault" was found to exist. Kia Ora objected that, in so far as the Full Court had relied on the conduct of some or all of its directors to establish "contributing fault" on its part, this was misconceived. For Kia Ora, the issue was the appellants' separate breach of fiduciary duty. That breach could not be minimised by reason of breaches on the part of others. Such arguments simply lend force to the comments, stated above, concerning the danger of deflecting attention from the purposes of equitable relief, once breaches of fiduciary duties are found.

175 For these reasons, added question (c) should be answered in the affirmative. The special leave originally granted by the Court should be enlarged to permit the disposition of the proceedings conformably with the answers to the three added questions.

176 Before leaving added question (c), it is appropriate for me to record that, in the Supreme Court of South Australia, proceedings were commenced by the appellants for equitable contribution to their judgment from the directors of Kia Ora. The primary judge determined the proportions that should be contributed by the various defendants to the original proceedings, including the appellants. That determination was the subject of an appeal to the Full Court with which this Court has not been concerned. We were informed by counsel that the decision in that appeal is pending, perhaps awaiting the outcome of these proceedings. I mention this issue to illustrate the fact that, in a case of this kind, equitable remedies are not indifferent to the apportionment of responsibility between several wrongdoing fiduciaries. But that consideration is quite separate from that of "contributing fault" on the part of a beneficiary wronged by a fiduciary.

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314 See *Maguire* (1997) 188 CLR 449 at 489 and cases there cited.

Conclusions: an entitlement to recover for fiduciary breaches

177 It follows from the enlargement of special leave, upon which this Court is unanimously agreed, and from my answer in favour of Kia Ora of each of the three added questions[315], that Kia Ora was entitled to succeed in the Full Court on the basis of a breach of fiduciary duty upon which, at trial, it primarily presented its case against the appellants. To that extent, in my view, the appeal to this Court would properly be dismissed, for, standing alone, the Full Court had upheld Kia Ora's appeal against the approach of the primary judge in this respect.

178 However, the answer to added questions (b) and (c), and the enlargement of the appeal to permit the consequential determination of those questions, requires adjustment to the relief afforded by the Full Court. Such adjustment would involve the provision to Kia Ora of the interest which it claimed as part of its entitlement to equitable compensation beyond the semi-arbitrary six months which the Full Court allowed and up to the judgment at trial. It would also involve the restoration to Kia Ora of the amount incorrectly deducted from its equitable compensation on the basis of Kia Ora's suggested "contributing fault".

179 When such adjustments are made, it is abundantly clear that the recovery by Kia Ora against the appellants would be greater in equity than that provided by the Full Court in respect of Kia Ora's claim against the appellants framed in contract or negligence. Kia Ora should be relieved of the election to take its judgment on the claim framed in contract. That election was based upon considerations which, in my opinion, have been overtaken by events and shown to have been legally flawed.

180 Upon these premises, it is unnecessary for me to express any conclusion about the result reached by the majority that would substantially limit Kia Ora's recovery from the appellants under the common law. I remind myself of Lord Esher MR's famous *dictum* that "any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England[316]". The same, I believe, is true of the common law of Australia, as now declared by this Court. With all respect, I regard the result reached by the majority in this appeal as invoking this *dictum*. But because I do not need to reach a final view on the point, I will refrain from doing so.

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315 Orders made by Hayne J on 8 August 2000.

316 *Emmens v Pottle* (1885) 16 QBD 354 at 357-358, applied in *Donoghue v Stevenson* [1932] AC 562 at 608-609 by Lord Macmillan and cited by Evatt J (diss) in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 519.

Orders

181 The appeal must be allowed. However, the purpose of allowing it would not be, as the other members of the Court decide, substantially to reduce the recovery of Kia Ora. Instead, it would be to permit the Full Court to recalculate Kia Ora's recovery under the principles of equitable compensation, providing fully for interest and removing the impermissible deduction made for "contributing fault".

182 To give effect to these conclusions, the orders that I favour are:

1. Grant special leave to enlarge the previous grant so as to include each of the three issues raised by the questions stated in the order of the Court of 8 August 2000.

2. Answer those questions:

   (a) No;

   (b) Yes;

   (c) Yes.

3. Allow the appeal. Set aside the judgment of the Full Court of the Supreme Court of South Australia. Remit to that Court the recalculation of the judgment in favour of the first respondent against the appellants. The appellants should pay the costs of the proceedings in this Court. The costs order made by the Full Court in respect of the proceedings to date should not be disturbed. The costs of the proceedings remitted to the Full Court should be as that Court provides.