HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

YOUYANG PTY LIMITED as Trustee of the
Bill Hayward Discretionary Trust APPELLANT

AND

The persons listed in Schedule 1 trading as
MINTER ELLISON MORRIS FLETCHER
and later as Minter Ellison RESPONDENT

Youyang Pty Limited v Minter Ellison Morris Fletcher
[2003] HCA 15
3 April 2003
S237/2002

ORDER

1. *Appeal allowed with costs.*

2. *Orders 1, 2, 3, 4, 5, 7 and 8 made by the New South Wales Court of Appeal on 8 October 2001 are set aside and, in their place, order that:*

   a) *the appeal to that Court is allowed with costs and the cross-appeal is dismissed with costs,*

   b) *Orders 3, 4, 5 and 6 made by Brownie AJ on 16 August 2000 are set aside,*

   c) *the respondent pay the costs of the appellant at first instance, and*

   d) *Order 1 made by Brownie AJ on 16 August 2000 is varied so as to replace the amount of $414,009 with $500,000, together with interest thereon pursuant to s 94,* Supreme Court Act *1970 (NSW) from 24 September 1993 to the date of these orders.*

3. *The parties have 28 days within which to file a proposed consent order to supplement order 2(d), by fixing the actual sum for interest under s 94,* Supreme Court Act *1970 (NSW). In the absence of such a proposed consent*

order, each party is at liberty to restore the matter to a single Justice of this Court for further directions.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with A S Martin SC for the appellant (instructed by Carneys Lawyers)

T F Bathurst QC with I M Jackman SC for the respondent (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Youyang Pty Limited v Minter Ellison Morris Fletcher

Trusts – Express trust – Money received by firm of solicitors to be held for a specific purpose and in accordance with specific conditions – Misapplication of funds by firm – Breach of express trust – Liability of firm as trustee – When breaches of trust occurred – Remedies – Restoration of trust fund – Causation – Whether appellant suffered a recoverable loss in consequence of firm's breaches of trust – Whether appellant would not have suffered loss but for breach of trust – When loss is to be assessed.

Supreme Court Act 1970 (NSW), s 94.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The appellant company ("Youyang") was trustee of a discretionary trust formed in 1974 and styled "the Bill Hayward Discretionary Trust". Mr William Hayward and his wife, Mrs Alison Hayward, were the directors of Youyang. The secretary of Youyang was Mr Peter Fowler, the Hayward family accountant and investment adviser. Mr Hayward acted on behalf of Youyang in the events giving rise to this litigation.

The ECCCL proposal

2 Mr Hayward was born in 1930. He held a degree from the University of Cambridge. In 1986 he had retired after serving as a school master for approximately 30 years. From 1974 until his retirement, Mr Hayward was head master of the Anglican Church Grammar School in Brisbane. Mr Hayward was a person of means. With his wife, he controlled, through various companies and trusts, funds of about $25 million. Before making investment decisions, it was Mr Hayward's practice to consult Mr Fowler.

3 In about July 1993, Mr Hayward received from Mr Fowler two documents issued by EC Consolidated Capital Limited ("ECCCL"). The first, dated 31 March 1993, was styled "Investment Summary" and the second, dated 14 May 1993, was headed "Information Memorandum". The documents related to a proposed preference share issue by ECCCL. The Information Memorandum contained the statement:

> "This opportunity to subscribe for shares to be issued by [ECCCL] is subject to the express condition that each person wishing to invest is to subscribe at least $500,000.00 and that [ECCCL] will under no circumstances accept any subscription from any person for any amount that is less than $500,000.00."

4 At that time, the Corporations Law, which was adopted and applied in the States and Territories, contained in Div 2 (ss 1017-1034) of Pt 7.12 detailed prospectus provisions. However, s 1017 stated that the Division did not apply, among other things, in relation to excluded offers or invitations in relation to securities. Section 66(3) provided that an offer or invitation in relation to securities was an excluded offer or excluded invitation if, together with other criteria, it was an offer for subscription of or invitation to subscribe at least $500,000 by each person to whom the offer was made or the invitation issued. Hence the significance of the stipulation in the ECCCL documents of the $500,000 minimum subscription.

5 In the Information Memorandum, under the heading "HOW TO INVEST", there appeared the statement:

> "The Investor, upon signing the Subscription Agreement is to provide an unendorsed bank cheque made payable to Minter Ellison Morris Fletcher's Trust Account for an amount equal to the Subscription Moneys to be held in trust by Minter Ellison Morris Fletcher pending satisfaction of the Completion provisions detailed in the Subscription Agreement.
>
> The Investor will be entitled to be refunded in full without deduction an amount (in cash or bearer securities) equal to the Subscription Moneys if at the date agreed for Completion of the share purchase the Investor does not among other things receive the benefit of the Deposit Certificate.
>
> The deposit Certificate issued by the Prime Bank will be held by National Registries Pty Ltd as Paying Agent for the benefit of the Investor."

In the same document, under the heading "DISCLAIMER", was the statement that the preference shares were to be subscribed for "on the basis of the information and representations contained in this Memorandum" and certain other documents defined as "the Approved Documentation" and that investors "must only rely on statements made in the Approved Documentation".

The role of Minters

6 Minter Ellison Morris Fletcher ("Minters") was a firm of solicitors with offices in Sydney, Melbourne, Brisbane and elsewhere. Mr Hayward regarded Minters as a leading national law firm. Since at least July 1991 Minters had been acting for the promoters of ECCCL, who included Mr Tony Senese. ECCCL was incorporated on 23 March 1992. Mr Ian Lewis was the responsible partner of Minters under whose supervision and control there was performed all work in connection with the drafting of the documents relating to the subscription for preference shares in ECCCL. The preparation of those documents took place over many months and they included the Information Memorandum and the Subscription Agreement to which reference will be made hereunder. Mr Lewis also was the responsible partner under whose supervision and control the funds held by Minters were disbursed. He had been a partner of Minters since 1985.

Youyang invests $500,000

7 Mr Hayward decided to proceed with an investment of $500,000 by Youyang in ECCCL after a meeting with Mr Senese, the Managing Director of

ECCCL. The general scheme of the investment was that Youyang subscribe for 5,000 shares in ECCCL, each with a par value of 1 cent but with a premium of $99.99. ECCCL was to use a proportion of the subscription moneys to purchase a bearer deposit certificate issued by a prime bank which undertook to pay to the bearer $500,000 10 years after its issue. In that way, the investor would obtain security for the $500,000 subscription moneys. The deposit certificate was to be held by National Registries Pty Ltd ("Registries") as "paying agent" on behalf of Youyang and presented for payment by the prime bank on its maturity.

8 The other principal component of the subscription moneys was to be used by ECCCL in dealing on international money markets. This was a speculative venture, but Youyang was assured, if all went to plan, of the return 10 years later of the face value of its investment.

9 The prime bank which was selected was Dresdner International Financial Markets (Australia) Limited ("DAL"), a wholly owned subsidiary of Dresdner Bank AG. The evidence was that a bearer certificate of deposit is far more than a letter to a depositor evidencing a term deposit transaction. The bearer deposit certificate bears the word "negotiable", which allows it to be traded on the money market.

10 Youyang completed a document headed "Subscription Agreement" and the four schedules to it. The Subscription Agreement, without the schedules, comprised some 17 pages. Minters' name and Melbourne address appeared at the bottom of the title page of the Subscription Agreement. Schedule 4 was a document addressed to Minters by Youyang and headed "AUTHORISATION FOR PAYMENT". It stated:

> "In accordance with the Subscription Agreement ('Subscription Agreement') dated 24th Sept 1993 I irrevocably and unconditionally authorise you to disburse the moneys held to my account in accordance with clause 2 of the Subscription Agreement."

11 Mr Hayward, on behalf of Youyang, also completed a document dated 17 September 1993 headed "PURCHASE OF PREFERENCE SHARES IN [ECCCL]". It stated that Youyang "hereby confirms that [Minters], Solicitors of 40 Market Street Melbourne Victoria are to act as its agents at Completion for Subscription Moneys of $500,000.00". Youyang contended at trial that this agency was part of a contractual arrangement between Minters and Youyang which contained an implied term that Minters would exercise due care and skill in attending to the completion. However, that case failed at trial and in this Court

the relationship between Youyang and Minters was approached by both sides as purely one of beneficiary and trustee on the terms to which we now turn.

12 Clause 2 of the Subscription Agreement was headed "SUBSCRIPTION FOR SHARES". Clause 2.1 is of critical importance. It stated:

> "The Investor on signing this Agreement will provide an unendorsed non negotiable bank cheque made payable to [ECCCL's] Solicitors trust account for the aggregate of the Subscription Moneys (subject to the 'Important Notice' on page 27 of this Agreement) to be held in trust by [ECCCL's] Solicitors in accordance with the provisions of this Agreement."

The "IMPORTANT NOTICE" stated that the signing and delivery by the investor of the Subscription Agreement, with a bank cheque for the subscription moneys, constituted an offer by the investor to enter into that agreement.

13 Clause 2.3 obliged ECCCL to use the subscription moneys in a particular fashion. It stated:

> "[ECCCL] subject to the terms of this Agreement will use the Subscription Moneys in the following manner:
>
> (a) procuring the provision of the Deposit Certificate as detailed in clause 3;
>
> (b) paying expenses and commissions incurred by [ECCCL] relating to the subscription by the Investor under this Agreement details of which are set out in Schedule 2; and
>
> (c) the balance to be applied to the working capital requirements of [ECCCL] to be used among other matters, for example, providing margin funds to lenders concerning [ECCCL's] proposed borrowing of foreign currencies (physical or synthetic), funding purchases and investments in securities (such as bonds, bills of exchange etc) in International Money Markets (physical or synthetic), for the paying of option fees concerning [ECCCL's] proposed dealing in paper and non paper currencies such as precious metals and for working capital reserves, overhead costs and operating needs generally."

14 Clause 3 provided for ECCCL, before completion, to procure the delivery of the deposit certificate from the funds provided by Youyang to Minters, and

authorised Minters to release the funds for that purpose up to the "Deposit Certificate Purchase Limit". Clause 4 dealt with the steps to be taken on completion. The investor was obliged (cl 4.2) to provide a written authority to Minters to pay to ECCCL "the aggregate of the Subscription Moneys after the purchase of the Deposit Certificate under clause 3". Clause 4.3 stated that at completion Minters "from the funds held pursuant to clause 2.1 will pay to [ECCCL] the aggregate of the Subscription Moneys remaining after the provision of the Deposit Certificate". Clause 4.4 obliged ECCCL at completion, among other matters, to procure that the deposit certificate be delivered to Registries. Finally, cl 4.5 stated:

> "The Investor will not be obliged to complete the subscription for the shares under this Agreement and will be entitled to be refunded in full without deduction the moneys paid by the Investor under this Agreement if at Completion the matters set out in clauses 4.3 and 4.4 do not occur provided that the Investor has first complied with its obligations under clause 4.2."

15 Clause 6 of the Subscription Agreement provided for the redemption of the preference shares from the funds held by Registries and yielded at the maturity of the bearer deposit certificate. In the meantime, after the expiry of 12 months from the date of issue of the preference shares, ECCCL was obliged (cl 7.3) to redeem them within 30 days of receipt of a written request by the holder.

16 On 22 September 1993, Mr Fowler, on behalf of Youyang, arranged for the issue of a bank cheque made payable to Minters in the sum of $500,000. This was in performance of the obligation imposed by cl 2.1 of the Subscription Agreement. Minters received the funds on 24 September. It was admitted on the pleadings that there was thus constituted a trust of which Minters was the trustee.

17 No consideration was given in submissions to the Court respecting any Victorian legislation which dealt with the administration of the trust accounts of solicitors[1]. However, any additional statutory controls apart, the nature of the trust was clear and in most respects was of a not unusual type. Minters was obliged to hold the $500,000 proceeds of the bank cheque upon trust for, or, as the documentation also put it, to the account of, Youyang, with the power (and duty) to disburse it in accordance with the Subscription Agreement but not

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1 cf *Maguire v Makaronis* (1997) 188 CLR 449 at 465-466.

otherwise[2]. Any disbursement by Minters otherwise than as authorised by Youyang would be a dealing with Youyang's property which was in breach of trust.

18 However, as explained above, Minters' client in the ordinary sense of the term was ECCCL, not Youyang. That state of affairs placed Minters in the position of owing (at least) contractual and fiduciary duties to ECCCL and its trust obligations to Youyang. The case has not been presented as one arising from the clash of conflicting fiduciary duties; certainly Minters was not in a position whereby it could not fulfil its obligations to the one party without failing in its obligations to the other[3]. Rather, Youyang relies upon alleged breach of trust in the most direct sense. But in what follows the broader circumstances are to be kept in mind.

The breaches of trust by Minters

19 The terms of the trust which bound Minters were admitted on the pleadings to include the following terms:

(a) the Subscription Moneys would be disbursed only in accordance with the provisions of the Subscription Agreement (cl 2.1);

(b) if requested by ECCCL, Minters would release to ECCCL prior to the completion of the Subscription Agreement an amount up to but not exceeding the amount defined in the Subscription Agreement as the Deposit Certificate Purchase Limit (cl 3.3);

(c) Minters would only release the Deposit Certificate Purchase Limit amount for the purpose of ECCCL purchasing a Deposit Certificate (cl 3.3);

(d) if on completion a Deposit Certificate purchased by ECCCL with the moneys released by Minters pursuant to the terms alleged in pars (b) and (c) was delivered to Registries in accordance with cl 4.4 of the Subscription Agreement, then Minters would pay from the funds held in trust the balance of the Subscription Moneys

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2 cf *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 188 per Lord Millett.

3 cf *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19.

remaining after the provision of the Deposit Certificate to ECCCL (cl 4.3).

Further, cl 4.5 indicated that if on completion the deposit certificate as required by the Subscription Agreement was not delivered to Registries, then Minters was obliged to hold for Youyang or as it directed the whole of the balance of the subscription moneys.

20 The Subscription Agreement dated 24 September 1993 and supporting documents were executed and payments made on that day. The disbursement authority signed on that day by ECCCL and addressed to Minters stated:

> "In accordance with the Subscription Agreement dated 24 September 1993 between [ECCCL] and [Youyang] we authorise you to disburse the moneys ($500,000.00) held by you under the Subscription Agreement as follows:-
>
> 1. $256,800.00 to [DAL] (by way of bank cheque);
>
> 2. $21,641.44 to [Minters] (made up of $21,041.44 being outstanding legal fees and $600.00 being settlement fee);
>
> 3. $221,558.56 to [ECCCL]."

21 With the payment of $256,800 from Minters' trust account there was procured from DAL a letter dated 24 September and addressed to ECCCL. This read:

> "We confirm your deposit with us value 24 September 1993.
>
> | | | |
> |---|---|---|
> | Our Ref | : | 600 |
> | Dealt date | : | 24 September 1993 |
> | Principal | : | AUD 256,800 (banked into our account with BNZ Melbourne number 00035102) |
> | Term | : | 10 years |
> | Maturity | : | 24 September 2003 |
>
> At maturity we confirm repayment of AUD 500,000 representing principal of AUD 256,800 and interest of AUD 243,200."

22 This, as Minters admitted on the pleadings, was not a bearer certificate of deposit. It was an acknowledgment of indebtedness by DAL to ECCCL and provided Youyang with no security whatever against any insolvency of ECCCL. In a statement dated 14 October 1998 and prepared for other litigation, but in evidence in this case, Mr Lewis said that he had had no previous dealings with such certificates and thought that all that was required by the Subscription Agreement was "a document from the bank certifying that it held the monies on deposit and stating the terms on which the monies were held".

23 However, in the cross-examination of Mr Lewis upon that statement, a different picture emerged. First, Mr Lewis agreed that by September 1992, well before Youyang had become involved, the proposal included the use of bearer certificates of deposit, which Mr Lewis understood to be a certificate of deposit negotiable by delivery.

24 Secondly, on 31 May 1993, again before the involvement of Youyang, Minters had written to Mr Senese with respect to the form of certificates of deposit to be provided with respect to investments with ECCCL by Perpetual Trustees WA Limited ("Perpetual WA"):

> "Earlier we expressed our concern in relation to the form of the certificate of deposit. In particular the provisions relating to the terms of issue of the preference shares have been ignored ... for the last two completions."

Minters continued:

> "Therefore the certificate of deposit must be in bearer form and be delivered to [Registries] at completion. We again query why the current form of the certificate of deposit is in favour of [ECCCL]. In our opinion, unless the certificate of deposit is issued in bearer form this will constitute a breach of the Subscription Agreement",

and concluded:

> "Finally new certificates of deposit concerning the first two completions should be obtained in bearer form and all further certificates of deposit should be issued in bearer form."

25 The result is that well before the wrongful disbursement of Youyang's funds at the completion on 24 September 1993 Minters understood both the importance of the obtaining of a deposit certificate in the requisite form to

provide security for the investors and that ECCCL had a history of procuring certificates which were not in proper form.

26 A provisional liquidator was appointed to ECCCL on 28 May 1997 and its winding up was ordered on 15 July 1997. This was after certain events to which further reference will be made later in these reasons. There was no money to pay anything to unsecured creditors such as Youyang. The upshot was that Youyang recouped none of the $500,000 investment.

The Supreme Court proceedings

27 Youyang instituted proceedings in the Equity Division of the Supreme Court of New South Wales seeking restoration of the trust fund. Minters defended the claim on the footing that Youyang had suffered no recoverable loss in consequence of the breach of trust.

28 With respect to the $256,800 applied by ECCCL to the deposit with DAL, Brownie AJ entered judgment on 23 August 2000 for Youyang in the sum of $414,009 on the basis that this amount would yield $500,000 on 24 September 2003. This was the tenth anniversary of the completion on 24 September 1993, and the stipulated "Redemption Date" in respect of the preference shares. His Honour held that, even if there had been no breaches of trust by Minters, the balance of the investment ($221,558.56) would have been lost as "speculative".

29 Each party appealed. The Court of Appeal, by majority (Handley JA, Young CJ in Eq), reversed the orders of Brownie AJ. Youyang appeals to this Court against that result, whilst still seeking to vary the orders at trial. Their Honours held that the acceptance of the defective deposit certificate was a breach of trust which nevertheless did not cause any loss of Youyang's funds. The third member of the Court of Appeal (Hodgson JA) would have limited the recovery by Youyang to $221,558 being the moneys disbursed at settlement by Minters to ECCCL itself. The reasons for these conclusions are discussed hereafter.

30 In this Court, Youyang seeks the restoration and variation of the relief given at trial, so as to replace the sum of $414,009 stipulated by Brownie AJ with $500,000, together with interest pursuant to s 94 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") from 24 September 1993 to the date of the order of this Court.

31 Section 94 empowers an award of interest in proceedings in the Supreme Court for the recovery of any money, including any debt or damages or the value of any goods, but does not authorise the giving of interest upon interest. In some

circumstances, a court of equity may require a delinquent trustee or other fiduciary to bear compound interest[4]. However, Youyang relies upon the statute alone and it will not be necessary to consider whether this could have been a case for compound interest.

The liability of the trustee

32 Perhaps the most important duty of a trustee is to obey the terms of the trust. On 24 September 1993 there were several breaches by Minters of the trust obligations it had undertaken to Youyang. First, Minters released the trust moneys as to $256,800 for the purchase from DAL of what was not the requisite certificate of deposit. Secondly, the balance of $221,558.56 remaining after an appropriation by Minters of $21,641.44 was paid out of Minters' trust account to ECCCL in breach of the obligation of Minters not do to so unless the payment to DAL had procured the requisite certificate of deposit. The payment to Minters appears to have been in discharge of indebtedness to the firm by ECCCL. It stands in no better light than the larger sum which ECCCL received. The result is that the whole of the $500,000 was dealt with by Minters in breach of its duties as trustee.

33 The rigour of the rule, as Augustine Birrell QC[5] put it, that it is the duty of a trustee "to adhere to the terms of his trust in all things great and small, important, and seemingly unimportant" was alleviated in England by s 3 of the *Judicial Trustees Act* 1896 (UK), shortly after Birrell gave his lectures[6]. In Victoria, s 67 of the *Trustee Act* 1958 (Vic) empowered the Supreme Court to relieve from personal liability trustees who had acted in breach of trust but who had done so "honestly and reasonably" and who "ought fairly to be excused for the breach"[7]. Minters did not attempt to place any reliance upon s 67 or comparable provisions in legislation of any other State. The facts discouraged any such attempt.

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4 *Hungerfords v Walker* (1989) 171 CLR 125 at 148; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 316 [74].

5 *The Duties and Liabilities of Trustees*, (1896) at 22. Birrell was Quain Professor of Law at University College, London, 1896-1899.

6 *Maguire v Makaronis* (1997) 188 CLR 449 at 473-474; cf at 495-496.

7 *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149 at 164-165.

34 The submissions for Minters which were accepted in the Court of Appeal appear to have proceeded on the footing that the relevant breaches of trust occurred at some later time when Youyang's investment with ECCCL was lost. But the critical date (both for the operation of s 94 of the Supreme Court Act and more generally) was 24 September 1993. At that date, the trust was to be performed by the discharge by Minters of its duties with respect to payment from its trust account. Thereafter, there would be no active obligations for Minters to perform.

35 Whilst the rights of Youyang against Minters crystallised on 24 September 1993, decisions such as that by Street J in *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd*[8] indicate that the appropriate remedy, and, in particular, the quantum of pecuniary remedy, falls for determination at a later stage. In *Target Holdings Ltd v Redferns*[9], Lord Browne-Wilkinson, with reference to *Re Dawson* and the judgment of McLachlin J in *Canson Enterprises Ltd v Boughton & Co*[10], said:

> "A trustee who wrongly pays away trust money, like a trustee who makes an unauthorised investment, commits a breach of trust and comes under an immediate duty to remedy such breach. If immediate proceedings are brought, the court will make an immediate order requiring restoration to the trust fund of the assets wrongly distributed or, in the case of an unauthorised investment, will order the sale of the unauthorised investment and the payment of compensation for any loss suffered. But the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred."

In *Canson*, McLachlin J, after putting to one side considerations that arise in tort and contract law, said that in equity "the losses are to be assessed as at the time of trial, using the full benefit of hindsight"[11].

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8 [1966] 2 NSWR 211. See also the judgment of Kearney J in *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 345-346.

9 [1996] AC 421 at 437.

10 [1991] 3 SCR 534.

11 [1991] 3 SCR 534 at 555.

36 Equity provides a range of remedies for breach of express, resulting, implied and constructive trust and apprehended and repeated breach. This appeal concerns the provision of a money remedy for breach of an express trust. The nature of that remedy may vary to reflect the terms of the trust, and the breach of which complaint is made. Generalisations may mislead.

37 This is not a case of providing a remedy to restore or replenish funds thereafter to be held on trusts yet to be fully performed[12]. Here, Minters did not hold the moneys for indeterminate or contingent beneficial interests. The result is that the right of Youyang after 24 September 1993 was not to have duly administered a restored trust fund by an order of the nature exemplified in *Partridge v Equity Trustees Executors and Agency Co Ltd*[13]. There, in a suit brought by the residuary beneficiaries of a testamentary trust, an order was made that the trustee pay a specified sum to the estate of the testator "to be invested and held on the trusts of the will".

38 As already indicated, this was a case of breach of duty by a trustee; the complaint was not one merely of the imprudent exercise of a power, for example of a power of investment, by failure to employ the care and diligence which equity requires[14]. Where the complaint is of maladministration of this kind, then it has been said in the English Court of Appeal in *Bristol and West Building Society v Mothew*[15]:

> "Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution."

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12 *Maguire v Makaronis* (1997) 188 CLR 449 at 473.

13 (1947) 75 CLR 149 at 167-168.

14 *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609 at 641.

15 [1998] Ch 1 at 17. See, further, Elliott, "Remoteness Criteria in Equity", (2002) 65 *Modern Law Review* 588 at 591-593.

This view of the matter has been approved by the New Zealand Court of Appeal in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*[16], on the footing that the stricter view of liability for breaches of trust causing loss to the trust estate and for breaches of the fiduciary duties of loyalty and fidelity is not required where the complaint concerns failure to exercise the necessary degree of care and diligence.

39 Given the nature of the present case, those questions do not arise on this appeal. However, there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited way with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.

40 The point appears from the statement by McLachlin J in *Canson*[17]:

> "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 person wronged."

Whatever the qualification to these principles which might flow in some cases from acceptance in Australia of the reasoning in *Bristol* and *Bank of New Zealand*, they applied to the present case with undiminished cogency.

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16 [1999] 1 NZLR 664 at 681.

17 [1991] 3 SCR 534 at 543. See also McLachlin J's further remarks in *Norberg v Wynrib* [1992] 2 SCR 226 at 272, quoted by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 196-197 [71].

41 However, a little more should be said of the case put by Youyang. It does not put a case of breach by the trustee of the proscriptive fiduciary obligations not to obtain an unauthorised benefit from the relationship and not to be in a position of conflict. These are identified and explained in *Breen v Williams*[18] and *Pilmer v Duke Group Ltd (In liq)*[19].

42 In particular, the present is not an instance, of which the decisions of the House of Lords and Privy Council respectively in *Nocton v Lord Ashburton*[20] and *Brickenden v London Loan and Savings Co*[21] are the most celebrated examples, of a solicitor who has had financial transactions with a client, getting the client to prefer the personal interests of the solicitor. Thus, in *Nocton*, one transaction involved the solicitor getting the client to release from his mortgage a property over which, by that release, the solicitor obtained further security for a mortgage of his own. In these cases, as Viscount Haldane put it[22], a court of equity may order the solicitor to replace the property improperly acquired from a client or to make compensation if that property has been lost.

43 The essence of Youyang's complaint is shortly identified. It is the misapplication of the moneys held on trust on terms that, in the events that happened, obliged Minters to hold the moneys absolutely for Youyang and at its direction. To adapt what was said by Fry LJ in *Webb v Stenton*[23], Minters has made itself "personally liable to pay money to [Youyang] *by reason of* some breach of trust or default in the performance of [its] duties as trustee". (emphasis added)

44 This appeal turns upon the significance for the facts of the causal requirement expressed by Fry LJ in the phrase "by reason of". That serves to

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18 (1996) 186 CLR 71 at 113, 137.

19 (2001) 207 CLR 165 at 197-199 [74]-[78]; cf at 216-220 [134]-[136].

20 [1914] AC 932.

21 [1934] 3 DLR 465.

22 [1914] AC 932 at 956-957.

23 (1883) 11 QBD 518 at 530. See also the further authorities referred to by Handley and Cripps JJA in *Wickstead v Browne* (1992) 30 NSWLR 1 at 14-15.

remind, as Mummery LJ recently put it, that "[t]here is no equitable by-pass of the need to establish causation" and that "[i]n questions of causation it is important to focus on the relevant equitable duty"[24]. This raises considerations having an affinity to those which determined the outcome in *Target Holdings*.

Target Holdings

45 *Target Holdings* concerned the misapplication by the solicitors for a finance company of moneys held by the solicitors on a bare trust for their client. The solicitors had received moneys from their client to be held on trust, subject to any contrary instructions of the client, to pay to or to the order of the proposed mortgagor and borrower from the client; payment out was to occur only when the property in question had been conveyed to the mortgagor and the mortgagor had executed charges in favour of the client. The solicitors acted in breach of trust in paying out the moneys prematurely and before the conditions had been satisfied, and were liable to account. However, ultimately, the property was conveyed to the mortgagor and the charges were duly executed. That was an important circumstance and one that differs from the present case. The House of Lords held in *Target Holdings* that the client had suffered no loss for which the solicitors were accountable in an action for breach of trust for the premature payment out of the funds. Writing extrajudicially of *Target Holdings*, Lord Millett has said[25]:

> "The plaintiff could not object to the acquisition of the mortgage or the disbursement by which it was obtained; it was an authorised application of what must be treated as trust money notionally restored to the trust estate on the taking of the account."

46 The litigation in *Target Holdings* arose when it transpired the mortgaged property, on subsequent exercise by the client of its power of sale, was worth far less than the moneys disbursed by the solicitors. The client brought an action claiming restitution of the entire moneys held by the solicitors (£1.525 million). In the Court of Appeal, the client recovered final judgment for that amount less

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24 *Swindle v Harrison* [1997] 4 All ER 705 at 733, 734.

25 Millett, "Equity's Place in the Law of Commerce", (1998) 114 *Law Quarterly Review* 214 at 227. See also Underhill and Hayton, *Law Relating to Trusts and Trustees*, 16th ed (2003) at 857.

the sum realised on the subsequent sale of the property[26]. The House of Lords rejected the reasoning of the Court of Appeal, which had accepted that in cases of "immediate loss" by wrongful payment out of trust moneys, the loss was treated as established at that moment and subsequent events were to be disregarded. Their Lordships emphasised that the depositing of the moneys with the solicitor had been but one aspect of the arrangements for the financing transactions and until "the underlying commercial transaction" had been completed, the solicitors could be required to restore to their client account the moneys wrongly paid away[27]. Lord Browne-Wilkinson said that he did not doubt that moneys held by solicitors on client account were trust moneys or that the basic equitable principles applied to any breach of trust. However, his Lordship continued[28]:

> "[T]he basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach."

He added:

> "I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid away. But to import into such trust an obligation to restore the trust fund once the transaction has been completed would be entirely artificial. ... To impose such an obligation in order to enable the beneficiary solely entitled (ie the client) to recover from the solicitor more than the client has in fact lost flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation. In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor's client account reconstituted as a 'trust fund.'"

47 The breach of trust committed by the solicitors in *Target Holdings* left the client in exactly the same position as if there had been no breach; if the instructions had been obeyed, the transaction still would have gone ahead and the client suffered a loss represented by the difference between the amount advanced

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26 [1994] 1 WLR 1089; [1994] 2 All ER 337.

27 [1996] AC 421 at 436.

28 [1996] AC 421 at 436.

on security and the amount realised from the security. That loss would have been caused by the fraud of third parties.

48 The present case is distinguishable from *Target Holdings* in at least two respects. First, Youyang was not the client of Minters, although Minters was trustee of the moneys for it. Secondly, the proposed commercial transaction, involving the provision of security to Youyang, was not after delay, as in *Target Holdings*, completed; the security was never provided and Minters should not have disbursed Youyang's moneys.

49 Nevertheless, the creation of the trust in favour of Youyang was not an end in itself; the terms of the trust which bound Minters were concerned with the application of the trust moneys in completion of a larger commercial transaction with Youyang and Minters' client, ECCCL, as the principal actors. To acknowledge that situation is not necessarily to embrace any theory of reductionism whereby, notwithstanding the rigour of the rule requiring observance of the terms of the trust, in certain events "commercial" trusts do not provide for their beneficiaries the full panoply of personal and proprietary rights and remedies designed by equity[29]. Rather, it emphasises that, in the administration of the pecuniary remedy Youyang seeks for misapplication of its funds by Minters, regard should be had to the scope and purpose of the trust which bound Minters.

50 These considerations in turn lend force to the application here of the proposition expressed as follows by Lord Browne-Wilkinson in *Target Holdings*[30]:

> "[T]he fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. I can see no justification for 'stopping the clock' immediately in

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29 cf Austin, "Moulding the Content of Fiduciary Duties", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 153 at 167-168.

30 [1996] AC 421 at 437.

> some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered."

Subsequent events

51 Minters relies upon events subsequent to the completion date of 24 September 1993 as showing that Youyang seeks to render it accountable for a loss which is attributable to other circumstances. Youyang submits that it would not have suffered the loss of $500,000 but for the breaches of trust by Minters. Youyang's submissions should be accepted. In reaching that conclusion it is necessary to consider certain events subsequent to the disbursement of moneys on 24 September 1993.

52 ECCCL wished to withdraw the deposits with DAL before the expiry of their terms, a step requiring the co-operation of DAL. The position taken by DAL was that it wanted to make sure that the investors were informed of the changes to the documentation and that DAL would no longer be holding any deposits.

53 On 23 August 1994, Mr Senese on behalf of ECCCL wrote to Mr Lewis at Minters advising that ECCCL was:

> "in the process of completing and obtaining the necessary approvals from the preference shareholders for the purpose of withdrawing the deposit funds from [DAL] and depositing those funds with an overseas prime rated bank. Under this basis no interest withholding tax liability would accrue.
>
> The notifications and approvals process with respect to the preference shareholders is being conducted formally by way of a Deed Poll."

54 Mr Lewis responded to Mr Senese by letter dated 1 September 1994 stating that Minters expressed no opinions on the tax implications of the proposed change and presumed that ECCCL had sought advice from its tax advisers. The letter added:

> "[W]e presume that the Deed Poll referred to in your letter is to be signed by the individual investors who have subscribed for the preference shares. We feel you will obviously require their consent to the proposal."

55 Youyang executed the Deed Poll on 2 September 1994. Earlier, by letter dated 26 August 1994, ECCCL had asked for the prompt attention of Youyang to

the execution of the Deed Poll and indicated that any questions should be directed to Mr Senese. This communication was accompanied by a notice to preference shareholders bearing the date 26 August 1994. This stated:

> "On advice from our taxation advisors, all the DAL deposits should be transferred directly to an overseas Investment Grade Bank to ensure that the deposits could not attract withholding tax liability."

56 The notice commenced with the statements, both incorrect, that in accordance with the terms and conditions of the Subscription Agreement, ECCCL had procured the provision of deposit certificates for the benefit of the preference shareholders and that the deposit certificates issued by DAL were held by Registries to be applied for the benefit of the preference shareholders in accordance with the agreement with Registries. There was no statement that Youyang had not been provided with the requisite security afforded by the issue of a bearer certificate of deposit.

57 Clause 6 of the Deed Poll provided that Youyang agreed with ECCCL that ECCCL:

> "may substitute a Deposit Certificate issued by a Prime Bank, which as to maturity date and maturity sum is identical to the DAL certificate of deposit for which it is substituted, and that such substitution shall constitute a variation of the Subscription Agreement and *that it otherwise confirms the Subscription Agreement*". (emphasis added)

58 On 20 September 1994, ECCCL withdrew the moneys on deposit with DAL and thereafter lent them to a related company, Consolidated Capital Acceptances Ltd. On 30 January 1995, ECCCL entered into an agreement with Westpac Banking Corporation ("Westpac") for Westpac to sell to ECCCL a certificate of deposit with a face value of $502,213.61 at the maturity date of 24 September 2003. Again, this document was not a bearer certificate of deposit and was issued in favour of ECCCL. On 23 February 1995, ECCCL lodged with Registries the Westpac instrument which was substituted for the DAL certificate. In all, eleven instruments were substituted in this way: five of them in respect of investments by Perpetual WA, four by Perpetual Trustee Co Ltd, one by Youyang and the other by Letcher & Jeffery Nominees Pty Ltd.

Mr Hayward

59 Brownie AJ was not satisfied that if Mr Hayward had learned that the deposit certificate procured from DAL had not corresponded with the

requirements of the Subscription Agreement, Youyang would have sought to redeem its preference shares. In any evaluation of the significance of that finding it must be remembered that, when the Deed Poll was executed, there was nothing to suggest to Mr Hayward that Registries was not holding a bearer certificate of deposit as required by the Subscription Agreement. Right up to the time when he heard of the liquidation of ECCCL, Mr Hayward had thought that his investment was performing satisfactorily.

60 In any event, Brownie AJ did not find, as Handley JA later assumed he had found, that if Mr Hayward had been told about the form of the certificate he would not have been concerned and would have proceeded with the investment. The matter was accurately put in the following passage from the judgment of Hodgson JA:

> "There is in my opinion a world of difference between, on the one hand, an investor seeking to reverse an investment that has already been made because of a matter of the form of a certificate considered in isolation and, on the other hand, a proposed investor instructing a trustee to go ahead and make an investment notwithstanding that the party to whom the money is to be entrusted is deliberately breaching its contract by not proffering the security for the investment which it undertook to provide. In my opinion, the primary judge's finding concerning the former matter says nothing about the latter."

His Honour added:

> "In my opinion, if a trustee wishes to assert that a breach of trust caused no damage for the reason that the beneficiary would, if asked, have authorised the very action which constituted the breach of trust, then there is at least an evidentiary onus on the trustee to make good that proposition."

61 The significance attached in the Court of Appeal to the supervening event, being the execution of the Deed Poll, appears to have proceeded upon a misunderstanding. For example, Handley JA reasoned:

> "The funds remained intact and safe until [Youyang's] [D]eed [P]oll of 2 September 1994 was delivered to [DAL]."

The fate of the investment in ECCCL appears to have been treated as synonymous with the trustee relationship between Youyang and Minters.

62 However, the moneys which ECCCL had held on deposit with DAL never provided the security for the investment made by Youyang. The security was to be provided by a bearer certificate of deposit in the proper form lodged with Registries. The subsequent release of the moneys held by ECCCL on investment with DAL had no effect upon the deficiency in Youyang's position. The "non-bearer" instrument had been lodged with Registries, leaving Youyang's investment unsecured. After the events of 1994 and the execution of the Deed Poll, that position did not change. Youyang's investment was still unsecured. Clause 6 of the Deed Poll had authorised ECCCL to substitute a deposit certificate but only on the same terms as those required by the Subscription Agreement.

63 The execution of the Deed Poll and the implementation of these steps thereunder could be of significance on questions of causation if what had been brought about was the release of an existing bearer certificate of deposit and its replacement by a "non-bearer" instrument. But that was not the order of events that transpired. Youyang was not provided at any stage with the security for which it had bargained. It is not to the point that, in addition to the breaches of trust by Minters, there may also have been dishonest and discreditable subsequent acts by third parties which led to the loss of the funds[31]. To present the case by fixing upon those subsequent acts, to adopt the remarks of Bowen LJ in *Magnus v Queensland National Bank*[32], would be "an ocular illusion", because the loss of the trust funds occurred as soon as the trustee wrongly disbursed them, at the completion on 24 September 1993.

The reasoning of the Court of Appeal

64 Handley JA reasoned that the breach of trust in making the payment to ECCCL "was consequential on the earlier breach and was not an independent breach in its own right" and did "not enlarge [Youyang's] rights against [Minters]". Young CJ in Eq held that the second breach was "consequential" in the sense that "[t]he act of paying over the balance of the fund to ECCCL caused no further loss" to the loss of $500,000 which "occurred when the bearer certificate was not obtained".

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31 *McCann v Switzerland Insurance* (2000) 203 CLR 579 at 588 [18], 621-622 [135]; *Magnus v Queensland National Bank* (1888) 37 Ch D 466 at 471-472, 477, 479-480.

32 (1888) 37 Ch D 466 at 480.

65 These statements were made on the footing that there was to be no recovery in respect of the first breach, by reason of the subsequent events concerning the Deed Poll. But, as indicated above, that reasoning is to be rejected. That being so, there is no ground to dismiss from consideration the breach respecting the balance of the $500,000. Each component of the $500,000 was paid away in breach of trust and not one cent of the moneys was recouped by Youyang from the "investment" with ECCCL.

66 Young CJ in Eq also spoke of Youyang as having, apparently by the Deed Poll, "release[d]" its right to compensation in respect of the first breach. It should be noted that in this Court Minters correctly did not seek to maintain a proposition that Youyang at any stage had released any claims it might have against Minters.

67 Hodgson JA also held that Brownie AJ had erred in finding that a loss had resulted from the first breach of trust. But in respect of the payment to ECCCL his Honour held that, as between Youyang and Minters and as a matter of common sense and experience, the subsequent failure of the investment made with the payment was caused by that breach of trust by Minters.

68 Something more should be said respecting Hodgson JA's holding as to the first breach. This was that (i) DAL had refused to pay over the money evidenced by the ECCCL certificate without the consent of Youyang, so that, until the Deed Poll was executed and DAL left the scene, Youyang had suffered "no compensable loss from the first breach of trust"; (ii) "the loss of money due to the [D]eed [P]oll" could not be seen as caused by Minters' breach, "unless the entry into the [D]eed [P]oll can itself be regarded as a consequence" of that breach; (iii) it was for Youyang to plead and demonstrate (ii), but it had not done so.

69 There are several difficulties with step (i) in this reasoning and thus with (ii) and (iii), even if the burden placed upon Youyang by (iii) could otherwise be supported. First, the reference to "no compensable loss" was misleading in this context. The trust moneys were lost when paid out in breach of trust. That is the *injuria* with which equity is concerned, not the failure of the investment transaction[33]. By analogy with common law terms, the damage was then suffered; subsequent events went to quantification. Secondly, at no time did

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33 cf *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 442; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 526 [93].

Youyang have the benefit of the security against the possible insolvency of ECCCL which was to have been provided by the bearer certificate. Thirdly, the stance taken by DAL may have reflected caution lest it be embroiled as a third party accountable to Youyang for breach of trust or duty by, it would appear, ECCCL; but the fact remained that the deposit held by DAL had been made by ECCCL to whom DAL was indebted.

70 The reasoning of the Court of Appeal cannot stand as an answer to the case put by Youyang.

Orders

71 The appeal to this Court should be allowed with costs. Orders 1, 2, 3, 4, 5, 7 and 8 made by the Court of Appeal on 8 October 2001 should be set aside, and in place thereof two orders should be made. They are that (i) the appeal to that Court by Youyang be allowed and the cross-appeal by Minters be dismissed, in each case with costs to be paid by Minters, and (ii) Orders 3, 4, 5 and 6 made by Brownie AJ on 16 August 2000 be set aside, Minters be ordered to pay the costs of Youyang of the proceedings at first instance, and Order 1 be varied so as to replace the amount of $414,009 with $500,000, together with interest thereon pursuant to s 94 of the Supreme Court Act from 24 September 1993 to the date of these orders by the High Court.

72 The orders of this Court will leave standing the order of Brownie AJ (Order 2) entering judgment for Youyang on the Amended Cross-Claim by Minters for contribution and Order 6 made by the Court of Appeal dismissing Minters' cross-appeal.

73 The reference in proposed order (ii) above does not fix a sum for the interest under s 94. The parties should have 28 days within which to file a proposed consent order to vary order (ii) by adding therein a reference to that sum. In the absence of such a proposed consent order, each party should have liberty to restore the matter to a single Justice of this Court for further directions.