HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, GAGELER AND KEANE JJ

STEPHEN JAMES HOWARD APPELLANT

AND

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA RESPONDENT

Howard v Commissioner of Taxation
[2014] HCA 21
11 June 2014
M140/2013

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A H Slater QC with D J McInerney for the appellant (instructed by Oakley Thompson & Co)

J T Gleeson SC, Solicitor-General of the Commonwealth with P R Bender (instructed by Maddocks)

CATCHWORDS

Howard v Commissioner of Taxation

Taxation – Income tax – Taxpayer a member of joint venture – Taxpayer proposed involvement of company of which he was director in business opportunity arising from joint venture – Breach of fiduciary duty by joint venturers – Joint venture failed and opportunity lost – Taxpayer awarded equitable compensation for loss of joint venture opportunity – Commissioner included compensation in taxpayer's assessable income – Whether taxpayer held compensation on constructive trust for company – Whether compensation assessable income.

Assignment – Where litigation agreement between company and directors assigned to company any award to directors of damages arising out of relevant proceedings – Whether agreement assignment of proceeds of action or assignment of rights under judgment obtained in action – Whether agreement assignment of present property for value or assignment of future income.

Words and phrases – "assignment of future income", "conflict of duties", "conflict of duty and interest", "fiduciary duty", "unauthorised gain or profit".

FRENCH CJ AND KEANE J.

Introduction

1 In his income tax assessment for the 2005 income year the appellant did not include, as part of his assessable income, his share of an award of equitable compensation under a judgment in proceedings in the Supreme Court of Victoria between parties to a joint venture of which he had been a member. The joint venture involved the proposed purchase, lease to a substantial tenant, and on-sale of the Kingston Links Golf Course. The appellant claimed that the equitable compensation awarded to him was impressed with a constructive trust in favour of a company, Disctronics Ltd ("Disctronics"), by reason of his fiduciary office as one of its directors. Two other directors, co-plaintiffs with the appellant, were parties to the joint venture in their personal capacities. The directors had decided, during the development of the joint venture, that they should endeavour to have Disctronics purchase the golf course from the joint venture provided it could do so at an affordable price and, in that event, to rebate to the company any entitlement they might have as a result of their involvement in the joint venture. The appellant also argued that he had assigned the fruits of the cause of action to Disctronics pursuant to an agreement made between the directors and the company when the litigation in the Supreme Court was pending ("the litigation agreement").

2 The respondent, the Commissioner of Taxation of the Commonwealth of Australia, did not accept the appellant's contentions and issued an amended assessment on 5 August 2009 on the basis that the appellant's award of damages was received by him beneficially and not as a fiduciary. He also imposed a penalty. The appellant succeeded in an appeal under s 14ZZ of the *Taxation Administration Act* 1953 (Cth) to a judge of the Federal Court of Australia (Jessup J)[1], who held that the award of equitable compensation was not income in the appellant's hands. A Full Court (Middleton, Perram and Dodds-Streeton JJ) of the Federal Court, however, allowed the Commissioner's appeal from the decision of the primary judge, save as to penalty[2]. The appellant has appealed to this Court pursuant to a grant of special leave made on 8 November 2013[3].

3 The appellant's argument that his fiduciary obligation to Disctronics extended to his involvement in the joint venture had nothing to do with the

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1 *Howard v Federal Commissioner of Taxation (No 2)* (2011) 86 ATR 753.

2 *Howard v Federal Commissioner of Taxation* (2012) 206 FCR 329.

3 [2013] HCATrans 269 per Crennan, Kiefel and Bell JJ.

protective purposes for which such obligations exist in equity. That argument, advanced in his own interest, fell under the shadow of the cautionary observation of Deane J in *Chan v Zacharia*[4]:

> "There is 'no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them'".

4 The appellant's obligation to Disctronics, as one of its directors, did not extend beyond taking appropriate steps to give effect to a decision of the directors to try to bring the company in as the ultimate purchaser from the joint venture and, in that event, to rebate to it their entitlements flowing from the joint venture. The company was not and was never intended to be a member of the joint venture. There was no relevant fiduciary obligation preventing the appellant from taking a share of the profits of the joint venture on his own account. The litigation agreement did not alter the character of the award of equitable compensation as income in the hands of the appellant. The appeal should be dismissed with costs.

Factual history

5 The litigious trail which has led to this appeal has its origins in a joint venture arrangement made in July 1999. Three of the joint venturers — the appellant, Donovan (who was based in the United Kingdom) and Quinert — were directors of Disctronics, a company that they used as an investment vehicle. The fourth joint venturer, Bucknall, was a self-employed consultant engaged by Donovan's company, Solette Pty Ltd ("Solette"), who had put the acquisition, lease and on-sale concept to Donovan, early in 1999. The fifth joint venturer was Edmonds, who had been invited by Donovan to provide advice on the financing of the proposed transaction. The sixth joint venturer, Cahill, a real estate agent, was engaged through Edmonds to make approaches with a view to acquiring a suitable property. A prospective tenant, Spotless Services Australia Limited ("Spotless"), had been identified in February 1999 when Bucknall sounded out Stuart Rose of that company. In April 1999, Rose told Bucknall that Spotless might be prepared to pay a rent of $900,000 per annum for the tenancy of a public golf course.

6 The original principals of the proposed golf course project were the appellant, Donovan (utilising Solette as a vehicle for property development and investment) and Quinert. Bucknall, Edmonds and Cahill were involved as consultants and advisers. The arrangements with them, however, developed into

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4 (1984) 154 CLR 178 at 205; [1984] HCA 36 quoting *Barnes v Addy* (1874) LR 9 Ch App 244 at 251 per Lord Selborne LC.

a joint venture involving all six men on terms ultimately agreed at a teleconference held on 20 July 1999. While the appellant did not participate in that teleconference, he agreed with the minutes of the meeting and thereafter was treated as a participant.

7 The terms of the joint venture arrangement, to the extent that they were recorded in those minutes, involved the realisation of a "day-one" profit by the joint venture. The profit would arise out of the on-sale of the golf course to a third party purchaser who would be attracted by the income stream derived from the lease to Spotless, which could be used to service debt and provide a return on investment. The profit would be the difference between the purchase price paid by the joint venture and that paid by the ultimate purchaser. The profit share was to be split six ways.

8 Immediately following the teleconference of 20 July 1999, Cahill began negotiating on behalf of the joint venture with Kevin Wood of Kingston Property Constructions Pty Ltd, the owner of the Kingston Links Golf Course. On 3 August 1999 a verbal agreement was reached for the sale of the golf course to the joint venture for the sum of $8,680,000. In the meantime, Rose had advised Bucknall, by letter dated 29 July 1999, that an annual rental of $1,165,000 was achievable, subject to various matters set out in the letter. The letter suggested that a minimum ten year lease was required along with a ten year option.

9 The golf course project initially had not involved Disctronics at all. However, after April 1999, when Spotless' interest was confirmed, Donovan thought that Disctronics itself could acquire the Kingston Links Golf Course from the joint venture, rather than the joint venture selling the golf course to a third party purchaser. It was his view that, if the equity required of an investor in the golf course lay within the capacity of Disctronics to provide, acquisition by Disctronics might be a more productive investment for it than the insurance bonds which were then the company's only Australian investment other than cash. Quinert and the appellant thought that a sensible approach. However, Disctronics could only come in if the equity it had to put up, in addition to debt funding, did not exceed $1,500,000. Edmonds and Cahill reacted adversely to the idea, as Disctronics' involvement would limit the potential "day-one" profit in which they expected to share.

10 Before the joint venture crystallised on 20 July 1999, Edmonds had prepared a memorandum dated 10 July 1999 positing a total outlay by the ultimate purchaser of $10,100,000, of which $7,700,000 would be debt finance and $2,400,000 equity injection. That scenario involved an equity injection by the ultimate purchaser which was higher than the amount contemplated by Disctronics' directors. It therefore conflicted with Donovan's plans for

Disctronics' involvement and sowed the seeds of dissension. As Jessup J observed[5]:

> "If the transaction were to be considered as a speculation for 6 individuals, the higher the purchase price, the better. But, if the transaction were to be considered as an investment for Disctronics, the lower the purchase price, the better."

11 The appellant, Donovan and Quinert met in London on or about 12 July 1999. Donovan told Quinert and the appellant that he wanted to make the golf course project available as an investment opportunity for Disctronics, provided that Disctronics could handle the equity investment that was required. He thought it could afford up to $1,500,000, raised mostly by redemption of its insurance bonds. The appellant and Quinert agreed.

12 On 13, 14 and 15 July 1999 the appellant, Donovan and Quinert met as directors of Disctronics, together with a fourth director, David Mackie, who was the United Kingdom based Chief Executive Officer of the Disctronics group. Mackie had no objection to Disctronics' involvement in the golf course project. It is not in dispute, notwithstanding the absence of any note in the minutes of the meeting of directors, that they agreed that if the equity requirement to acquire the golf course was less than $1,500,000 they would seek to have Disctronics become the ultimate purchaser of the golf course. They also agreed that they would rebate their entitlements to Disctronics.

13 Further exchanges occurred between the Disctronics directors and Edmonds leading up to the teleconference of 20 July 1999, at which time (and it was not in dispute before Warren J or in the Federal Court proceedings) the joint venture was established[6]. As Jessup J noted, Disctronics was not a member of the joint venture[7]. Jessup J summarised the position as at August 1999[8]:

> "By early August … the members of the joint venture which had been formed on 20 July were in possession of the 2 key parameters by reference to which they could plot their future: the price at which

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5 (2011) 86 ATR 753 at 764 [21].

6 *Disctronics Ltd v Edmonds* [2002] VSC 454 at [131].

7 (2011) 86 ATR 753 at 776–777 [56] referring to [2002] VSC 454 at [132]–[134] per Warren J.

8 (2011) 86 ATR 753 at 769 [34].

> Kingston Links was available for purchase, $8.68 million, and the annual rental which was likely to be paid by Spotless, $1.165 million."

It was against this background that the inevitable disintegration of what was to be a short-lived joint venture arrangement began.

14 Following a new proposal by Edmonds on 3 August 1999, Donovan said that Disctronics was to be the equity investor. He asked Quinert to tell Edmonds that Disctronics intended to take up its "entitlement" in respect of the golf course project, as by that time it appeared that an equity injection of less than $800,000 would be sufficient. There was no such "entitlement", as the acquisition of the golf course by Disctronics was dependent upon the joint venturers' agreement. Further exchanges followed but yielded no resolution of the differences between the appellant, Donovan, Quinert and Bucknall on the one hand, and Edmonds and Cahill on the other.

15 On 19 August 1999, Quinert made a formal written offer to the owner of the Kingston Links Golf Course of $8,688,000 to purchase the golf course. In that offer he stated that the "equity investor" would be "an unlisted public company group which operates pre-dominantly in the United Kingdom and the United States of America." This was a reference to Disctronics and associated companies. A wholly owned Australian subsidiary of Disctronics, Corwen Grange Pty Ltd ("Corwen Grange"), had been incorporated. Quinert and the appellant were its directors. The offer was made in the name of Corwen Grange.

16 The offer was not accepted. Instead the owner accepted an offer for the purchase of the golf course made by Edmonds and Cahill and a business acquaintance of Cahill's, Michael Buxton. The offer was made without the knowledge of the appellant and his associates. Kingston Links Country Club Pty Ltd ("KLCC"), which Edmonds, Cahill and Buxton had incorporated on 12 October 1999 and of which they were directors, executed a contract of sale for the purchase of the golf course on 29 October 1999. On 8 December 1999, KLCC entered into a lease with Spotless. A transfer of the land to KLCC was registered on 14 December 1999. Disctronics lodged a caveat on 22 December 2000 over the title to the land on which the golf course stood, asserting the existence of a constructive trust in its favour. On 8 June 2001, KLCC commenced proceedings against Disctronics in the Supreme Court of Victoria for removal of the caveat ("the caveat proceeding").

17 On 15 June 2001 the appellant, Donovan and Quinert executed the litigation agreement with Disctronics, identifying themselves in the agreement as its directors. Disctronics agreed to pay their legal fees and disbursements associated with proceedings they proposed to institute against Edmonds and Cahill, and KLCC and others in the Supreme Court of Victoria and to indemnify

them against payment of any orders for costs. Paragraph 4 of the litigation agreement provided:

> "In consideration of [Disctronics'] promises set out in paras 1 and 3 hereof the directors, and each of them, assign absolutely unto and to the sole use of [Disctronics], any award of damages (whether on revenue or capital account), costs or interest made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings and the ultimate outcome thereof".

18 Recital B to the litigation agreement referred back to the meeting of the Disctronics directors in London in July 1999 and stated:

> "On or about 14.07.'99 in London meetings of [Disctronics], the directors agreed that if the equity requirement to acquire [Kingston Links Golf Course] was less than AUD$1.5m then the directors would seek to have [Disctronics] become the equity participant and purchaser of [Kingston Links Golf Course] (the 'Option'). The directors further agreed that if [Disctronics] exercised its Option then the directors would rebate to [Disctronics] any entitlement (whether on revenue or capital account) they may have as a consequence of their participation in the joint venture".

It was not in dispute on the appeal to this Court that the recital was an accurate statement of the way in which the appellant and his fellow directors sought to involve Disctronics in the golf course project.

Proceedings in the Supreme Court of Victoria

19 On 26 June 2001 the appellant, Donovan, Quinert, Bucknall, Disctronics and Solette[9] commenced proceedings in the Supreme Court of Victoria against Edmonds, Cahill, KLCC, Buxton, Emanbee Nominees Pty Ltd, MRB Life Pty Ltd and Domain Hill Property Services Pty Ltd[10]. The appellant, Donovan, Quinert and Bucknall claimed relief arising out of breaches of fiduciary duties by

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9 Originally, Solette was identified as a prospective purchaser of the golf course, although by July 1999 the company was no longer involved in the proposed acquisition. See [2002] VSC 454 at [181].

10 The offer to purchase the golf course was made in the name of Buxton's company Emanbee Nominees Pty Ltd. Ultimately, MRB Life Pty Ltd was assigned that company's interest in the joint venture agreement between KLCC, Emanbee Nominees Pty Ltd, Buxton, Cahill, Edmonds and others. Cahill negotiated with Wood through Domain Hill Property Services Pty Ltd, which was subsequently de-registered.

Edmonds and Cahill owed to them as joint venture participants and equitable compensation in amounts equal to their respective shares of the profit ("the main proceeding"). The land on which the golf course stood was ultimately sold by KLCC under a contract of sale dated 17 June 2002.

20 On 23 October 2002, Warren J gave judgment in both the main proceeding and the caveat proceeding[11]. In that judgment, as summarised by Jessup J, her Honour found, inter alia[12]:

- A joint venture was formed initially between Donovan, the appellant, Quinert and Solette by about early June 1999 and possibly as early as April 1999[13].

- The joint venture, as originally formed, was varied to remove Solette and to consist therefrom of Donovan, the appellant, Quinert, Bucknall, Edmonds and Cahill from 20 July 1999[14].

- The joint venture was dissolved on 10 August 1999 as a result of actions by Edmonds and Cahill[15].

- Edmonds and Cahill breached the fiduciary duty they owed to the appellant and other members of the joint venture to act honestly and in good faith by secretly and furtively approaching Wood, Rose and Buxton; by making an offer to Wood for the purchase of the golf course which they knew would exceed the plaintiffs' offer; and by not telling the

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11 [2002] VSC 454.

12 (2011) 86 ATR 753 at 778 [58] referring to [2002] VSC 454 at [183].

13 [2002] VSC 454 at [24]; (2011) 86 ATR 753 at 786 [74]–[75] where Jessup J stated that Solette was "possibly" included (referred to in (2012) 206 FCR 329 at 334–335 [11]). See also (2012) 206 FCR 329 at 332 [6(b)–(c)].

14 [2002] VSC 454 at [43], [46], [131], [141], [165]–[166], [181]; (2011) 86 ATR 753 at 776–777 [56], 778–779 [59], 786 [76] (referred to in (2012) 206 FCR 329 at 334–335 [11]); (2012) 206 FCR 329 at 332 [6(e)].

15 [2002] VSC 454 at [59]–[60], [64]–[65], especially [165]; *Edmonds v Donovan* (2005) 12 VR 513 at 532 [43], 538 [60], especially 532 [45] and 536 [55] per Phillips JA; (2011) 86 ATR 753 at 773 [48].

> plaintiffs of their intentions, especially when the opportunity presented itself[16].

The basis upon which Warren J ordered Edmonds, Cahill and KLCC to pay equitable compensation to the appellant and other members of the joint venture was set out in a passage from her judgment quoted by Jessup J[17]:

> "I am satisfied that it will be necessary for an assessment to be made for an amount of equitable compensation to be paid to the plaintiffs, except Disctronics, by Edmonds, Cahill and KLCC after the deduction of outstanding debts, including any adjustments to allow for ANZ [KLCC's lender], in an amount equivalent to four-sixths of the value of the golf course and, after the ascertainment of profits, an amount equivalent to four-sixths of the profit derived from the golf course. This component of the compensation is not the taking of an account in the strict sense, rather, an assessment of the opportunity that the plaintiffs lost. These amounts ought be calculated from the date of formal acceptance of the offer by the Kingston Group on 9 September 1999 to the date of final orders. They ought place the plaintiffs, excluding Disctronics, in the position they would have been save for the breaches of fiduciary duty by Edmonds and Cahill."

21 Jessup J, in the appeal against the Commissioner's amended assessment, held that the effect of the determinations made by Warren J was that there was no agreement, as between the individual joint venturers, that Disctronics would be accepted as the purchaser to whom the golf course was on-sold if it elected to be that party[18]. The appellant and his associates could not insist, as against Edmonds and Cahill, that the course be on-sold to Disctronics rather than to some third party who might have been prepared to pay more[19].

22 Warren J made final orders on 3 December 2002[20]. Her Honour found against Disctronics in the caveat proceeding, held that the caveat had been lodged

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16 [2002] VSC 454 at [68], [156], [159], [161]–[162], [166]; (2005) 12 VR 513 at 534–535 [50]–[52], 538 [61], especially 535–536 [54].

17 (2011) 86 ATR 753 at 779 [60] quoting [2002] VSC 454 at [216].

18 (2011) 86 ATR 753 at 778 [59].

19 (2011) 86 ATR 753 at 778 [59].

20 *Disctronics Ltd v Edmonds (No 2)* [2002] VSC 534.

without reasonable cause and granted compensation to KLCC in the amount of $100,000[21].

Proceedings in the Court of Appeal of Victoria

23 Edmonds, Cahill and KLCC appealed to the Court of Appeal of the Supreme Court of Victoria against the orders for equitable compensation made by Warren J in the main proceeding. The appellant, Donovan, Quinert and Bucknall cross-appealed against Warren J's refusal to order an account and against the award of equitable compensation in the main proceeding as being unduly generous to the unsuccessful defendants. Disctronics appealed against the orders for compensation made against it in the caveat proceeding. Judgment in the appeals was delivered on 22 February 2005[22]. The appeal by Edmonds, Cahill and KLCC was dismissed[23]. The cross-appeal was allowed but only for the purpose of adjusting Warren J's award of compensation[24]. Disctronics' appeal against the compensation order in the caveat proceeding was allowed[25]. Phillips JA, with whom Winneke P and Charles JA agreed, observed in the course of his judgment that Disctronics was not a member of the joint venture established on 20 July[26]. It was not the beneficiary of the fiduciary duties of which Edmonds and Cahill stood in breach. Those duties were owed only as between members of the joint venture. On that basis, Disctronics was not a proper plaintiff for equitable relief against Edmonds, Cahill and KLCC. Further, at the time when the caveat was lodged, Disctronics had no interest of its own, even in equity, in the property itself. It had no claim as a plaintiff to compensation for breach of fiduciary duties. Nevertheless, Phillips JA held that the caveat had not been lodged without reasonable cause[27].

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21 [2002] VSC 534 at [47]–[49].

22 (2005) 12 VR 513.

23 (2005) 12 VR 513 at 516 [1] per Winneke P, 516 [3] per Charles JA, 546 [85] per Phillips JA.

24 (2005) 12 VR 513 at 516 [1] per Winneke P, 516 [3] per Charles JA, 546 [85] per Phillips JA.

25 (2005) 12 VR 513 at 516 [2] per Winneke P, 516 [3] per Charles JA, 552 [103] per Phillips JA.

26 (2005) 12 VR 513 at 549–550 [95] per Phillips JA (Winneke P at 516 [1] and Charles JA at 516 [3] agreeing).

27 (2005) 12 VR 513 at 550 [96].

24 Under the judgment of Warren J, as varied by the Court of Appeal, the appellant's share of the award of equitable compensation, including interest, was $861,853.35. The money was paid to Disctronics by the solicitors for the appellant and the other successful plaintiffs in the Supreme Court proceedings. Disctronics declared the amounts received as assessable income for tax purposes.

Proceedings in the Federal Court

25 In proceedings brought by the appellant under s 14ZZ of the *Taxation Administration Act* 1953 (Cth), Jessup J held that the appellant had received the award of equitable compensation as a constructive trustee for Disctronics[28]. That judgment was reversed by the Full Court, which held that, on the evidence accepted by the primary judge, the appellant's responsibility was to have Disctronics accepted as an equity participant by the other joint venturers[29]. It was in that circumstance that the appellant agreed to rebate his share of the "day-one" profit to Disctronics[30]. The Full Court said[31]:

> "Mr Howard's obligation to Disctronics only involved Mr Howard using his reasonable endeavours to have it become purchaser, which obligation he discharged."

26 The Full Court held that Disctronics was simply a vehicle to be used in the event of certain contingencies occurring[32]. The company's only interest would have arisen if and when the equity required for the purchase of the golf course fell below $1,500,000. Their Honours said[33]:

> "In these circumstances, there could be no conflict of interest in the way contended for by Mr Howard, and no breach of Mr Howard's fiduciary duty to Disctronics. Accordingly, the award of damages in question had the character of assessable income in Mr Howard's hands, and was not received by him as trustee."

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28 (2011) 86 ATR 753.

29 (2012) 206 FCR 329 at 336 [18].

30 (2012) 206 FCR 329 at 336 [18].

31 (2012) 206 FCR 329 at 336 [18].

32 (2012) 206 FCR 329 at 337 [19].

33 (2012) 206 FCR 329 at 337 [20].

27 The Full Court correctly rejected an argument that the litigation agreement reflected a pre-existing constructive trust or effected an assignment of the rights to the fruits of the litigation. In that respect their Honours said[34]:

> "This was an argument not raised before the primary judge. In any event, it has no substance. The effect of the litigation agreement cannot be to prevent the award of equitable damages from being derived by Mr Howard in his hands beneficially: see *Booth v Commissioner of Taxation* (1987) 164 CLR 159 at 167 (per Mason CJ)."

The issues in the appeal

28 The issues in the appeal are:

- Whether the appellant received the sum of equitable compensation awarded by the Supreme Court as constructive trustee for Disctronics.
- If not, whether the appellant had assigned the right to receive that amount such that the income was not derived by him beneficially.
- Whether the appellant incurred liability in respect of the costs of the proceedings in the Supreme Court which should properly have been taken into account in ascertaining the amount of any gain made by the appellant and, alternatively, whether those costs were an outgoing of a revenue nature incurred in gaining the income comprised in the award made by the Supreme Court.

The appellant's fiduciary obligation to Disctronics

29 The appellant submitted that, from the time it was decided by the directors to try to involve Disctronics as the end purchaser, it was not open to him to appropriate any benefit arising from the investment or the opportunity to invest in the golf course project. He was, he argued, constructive trustee of any benefit which accrued from the opportunity. That submission rested upon a broadly stated fiduciary obligation. In making it, the appellant had to confront the difficulty that the golf course project was at all relevant times a joint venture between himself and five others, who owed fiduciary duties to each other in relation to the joint venture. It was neither conceived nor pursued by the appellant or the other Disctronics directors in their capacity as directors. Nor was there any apparent conflict between the interest of the appellant as a member of the joint venture, and his fiduciary duties as a director of Disctronics.

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34 (2012) 206 FCR 329 at 334 [9].

30 The respondent submitted that:

- The appellant acted solely in his own capacity in the joint venture from May 1999 until 13 or 14 July 1999, at which time the appellant, Donovan and Quinert decided to pursue the golf course project as a possible investment opportunity for Disctronics as the ultimate purchaser, subject to the proviso that the equity investment of the company not exceed $1,500,000.

- The appellant's fiduciary relationship with Disctronics operated in relation to the golf course project only because of and consistently with the terms of the agreement made between the directors in London in July 1999. He owed a fiduciary duty to try to make the opportunity to acquire the golf course available to Disctronics and to bring about that acquisition.

- In early August 1999 it became clear that the conditions for Disctronics' possible involvement as the purchaser from the joint venture could not be met. Edmonds and Cahill would not accept Disctronics as the ultimate purchaser. The acquisition by Disctronics not being possible, the appellant's duty to the company in relation to the project was at an end.

31 The relationship of director and company is one of a class of accepted relationships which attract proscriptive fiduciary duties, including a duty "not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict."[35] Those proscriptive duties attach to the powers and discretions exercised by company directors. As fiduciary agents, directors must exercise their powers "honestly in furtherance of the purposes for which they are given"[36] and not for their personal benefit or gain or for that of a third party[37].

32 The protective rationale for the proscriptive duties attaching to a fiduciary's powers was explained by Mason J in *Hospital Products Ltd v United*

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35 *Breen v Williams* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ, see also at 137 per Gummow J; [1996] HCA 57.

36 *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142 per Dixon J, see also at 135 per Latham CJ; [1937] HCA 42.

37 *R v Byrnes* (1995) 183 CLR 501 at 517 per Brennan, Deane, Toohey and Gaudron JJ; [1995] HCA 1.

States Surgical Corporation[38], and quoted with approval in *Pilmer v Duke Group Ltd (in liq)*[39]:

> "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".

33 Fiduciary duties apply beyond the exercise of powers and discretions flowing from the fiduciary relationship. A fiduciary cannot in his or her personal capacity be the subject of a conflict of interest. The general principle of equity, by reference to the liability to account, was stated by Deane J in *Chan v Zacharia*[40] and was echoed in the unanimous judgment of the Court in *Warman International Ltd v Dwyer*[41]:

> "A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position".

The objective of the rule is "to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage"[42]. The appellant's case was based upon the first limb of the principle stated in *Warman* and later restated in *Pilmer*[43]:

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38 (1984) 156 CLR 41 at 97; [1984] HCA 64.

39 (2001) 207 CLR 165 at 196 [70] per McHugh, Gummow, Hayne and Callinan JJ; [2001] HCA 31.

40 (1984) 154 CLR 178 at 199; see also *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350; [1958] HCA 33.

41 (1995) 182 CLR 544 at 557 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; [1995] HCA 18.

42 (1995) 182 CLR 544 at 557–558 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ.

43 (2001) 207 CLR 165 at 199 [78] per McHugh, Gummow, Hayne and Callinan JJ quoting in part *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103 per Mason J.

> "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."

34 Despite their broad judicial formulations fiduciary duties are not infinitely extensible. That point was made in *Chan v Zacharia*[44], which concerned the content of the fiduciary duties of members of a partnership inter se. The limits of those duties were to be determined by the character of the venture for which the partnership existed, the express agreement of the parties and the course of dealings actually pursued by the firm[45]. The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship. It is to be "moulded according to the nature of the relationship and the facts of the case"[46]. By way of example, company directors are frequently shareholders. The decisions they take as directors may therefore affect their personal interests. They do not breach their fiduciary obligations merely because in promoting the interests of the company they are also promoting their own[47]. On the other hand, a decision taken by directors to advantage themselves other than as members of the general body of shareholders would constitute an abuse of fiduciary powers[48].

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44 (1984) 154 CLR 178.

45 *Chan v Zacharia* (1984) 154 CLR 178 at 196 per Deane J.

46 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102 per Mason J referred to in *Clay v Clay* (2001) 202 CLR 410 at 432–433 [46] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ; [2001] HCA 9; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11 per Mason, Brennan and Deane JJ (Gibbs CJ generally agreeing at 5), see also at 15 per Dawson J; [1985] HCA 49; *Breen v Williams* (1996) 186 CLR 71 at 135 per Gummow J.

47 *Hirsche v Sims* [1894] AC 654 at 660–661 referred to in *Mills v Mills* (1938) 60 CLR 150 at 164–165 per Latham CJ, 170 per Rich J (Evatt J agreeing at 188), 179 per Starke J; [1938] HCA 4; *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 440 per Williams ACJ, Fullagar and Kitto JJ; [1953] HCA 39.

48 *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493–494 per Barwick CJ, McTiernan and Kitto JJ; [1968] HCA 37.

35 Overbroad assertions of fiduciary duties, uninformed by a close consideration of the facts and circumstances of the particular case, are sometimes made for reasons which have nothing to do with the protective rationale of those duties. The plurality in *Maguire v Makaronis* referred to[49]:

> "attempts to throw a fiduciary mantle over commercial and personal relationships and dealings which might not have been thought previously to contain a fiduciary element."

The forensic purposes of such attempts may include the availability of advantageous equitable remedies and the avoidance of stringent time limits. The appellant attempted to stretch the fiduciary mantle attaching to his position as director to his membership of the joint venture. He did so in order to defeat a claim that he was liable to pay income tax on the amount of equitable compensation awarded to him in the Supreme Court of Victoria. His purpose had nothing to do with the vindication or protection of Disctronics' interests.

36 Taking the appellant's submissions at face value and disregarding his forensic purpose, it is important to heed the caution given by Deane J in *Chan v Zacharia* against excluding "the adjustment of general principles to particular facts and changing circumstances" and thereby converting equity into "an instrument of hardship and injustice in individual cases"[50].

37 If there is no possible conflict between personal interest and fiduciary duty, and if the gain or benefit is not obtained by use or by reason of the fiduciary position, the fiduciary is not liable to account for the gain or benefit. The directors of Disctronics[51], acting in their personal capacities, conceived of a profit-making venture in which they would be involved in their personal capacities. Their entry into the joint venture did not involve the use of any knowledge or opportunity derived from their positions as directors. Acting as directors, they decided that the company could be benefited by being brought in as the ultimate purchaser of the golf course. The decision of the directors did not establish any basis, in principle, to impress their personal interests in the joint venture with fiduciary obligations to Disctronics in the event that it did not acquire the golf course. There is no suggestion that that decision involved an exercise of their powers as directors other than in the interests of the company. It

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49 (1997) 188 CLR 449 at 463–464 per Brennan CJ, Gaudron, McHugh and Gummow JJ; [1997] HCA 23.

50 (1984) 154 CLR 178 at 205.

51 The relevant directors being the appellant, Donovan and Quinert, not including Mackie.

was the investment potential of the acquisition from Disctronics' perspective that led them to propose that it purchase the golf course for a price which was not necessarily as good a price as would have been obtained from an arms-length purchaser. That this was so was evidenced by the adverse reaction of Edmonds and Cahill and their eventual departure from the joint venture. Their interest was, of course, in sharing in the "day-one" profit, which would not be realised if Disctronics were to acquire the golf course and hold it as lessor to Spotless. The other joint venturers could not insist upon this change to the foundation of the relationship between the joint venturers. The directors never regarded the opportunity to garner the "day-one" profit as an opportunity which Disctronics might exploit. The present case is thus radically distinguished from the line of authority of which *Keech v Sandford*[52] is the leading case.

38 Once it became clear that Edmonds and Cahill would not agree to Disctronics as the ultimate purchaser, the potential for Disctronics to derive any benefit from the joint venture was at an end. By that time, or at least by the time Edmonds and Cahill had diverted the project to their own use, the appellant's duty to pursue any benefit or advantage for Disctronics by procuring its participation in the joint venture project could not further be performed. And the appellant did not obtain any gain or profit before these events occurred. These matters are sufficient to defeat the appellant's primary contention. The appellant fails upon the first and principal issue in the appeal.

The litigation agreement

39 The appellant submitted that the litigation agreement confirmed the constructive trust for which he contended in his primary submissions. For the reasons already given, there was no constructive trust of the equitable compensation awarded to the appellant.

40 The appellant argued in the alternative that by the litigation agreement he assigned his right to the amount of the equitable compensation ultimately received in 2005 and not the sum itself. As a matter of construction of the agreement, that argument, which was made for the first time in the Full Court, should not be accepted. Under the terms of the agreement the appellant, Donovan and Quinert assigned "any award of damages (whether on revenue or capital account), costs or interest made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings and the ultimate outcome thereof". The agreement did not assign the appellant's interest in the joint venture nor in the cause of action arising out of the breach of

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52 (1726) Sel Cas T King 61 [25 ER 223].

fiduciary duties by Edmonds and Cahill and asserted in the main proceeding in the Supreme Court. It did not involve an assignment of a chose in action.

41 This Court in *Federal Commissioner of Taxation v Everett*[53] distinguished between an equitable assignment of present property for value, carrying with it a right to future income, and a like assignment of mere future income, dissociated from the proprietary interest with which it is ordinarily associated. The latter takes effect "when the entitlement to that income crystallizes or when it is received, and not before."[54] Mason CJ observed in *Booth v Federal Commissioner of Taxation*[55]:

> "[I]n some cases it may be impossible to identify a present right to future income divorced from the proprietary right which generates that future income. In such cases an attempted assignment deals with future property or an expectancy and operates to vest the future income in the assignee as and when that future income accrues due, but not before it accrues due. Accordingly, the assignment would not be effective to prevent the income being derived or being deemed to be derived by the assignor."

As the respondent submitted, that is this case. The appellant's submissions with respect to the litigation agreement should be rejected.

The off-set of costs

42 The appellant submitted shortly that if this Court were to otherwise dismiss his appeal, the amount of his assessable income from the judgment of the Supreme Court of Victoria should be reduced by what he contended was his share of the legal costs incurred in prosecuting the Supreme Court proceedings. The legal costs have been recouped from the amount paid to Disctronics in 2005.

43 While the respondent, in the Full Federal Court, accepted that the legal costs incurred by the appellant in recovering the award of equitable compensation would have been a deduction from his income, he submitted that there was no evidence that the appellant had in fact incurred any costs. The legal costs were paid by Disctronics, which had presumably claimed a deduction. The Full Court accepted the respondent's contention[56]. The only evidence of

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53 (1980) 143 CLR 440; [1980] HCA 6.

54 (1980) 143 CLR 440 at 450–451 per Barwick CJ, Stephen, Mason and Wilson JJ.

55 (1987) 164 CLR 159 at 167–168; [1987] HCA 61.

56 (2012) 206 FCR 329 at 337 [23].

expenditure on legal costs was of expenditure by Disctronics[57]. There was no evidence to demonstrate that the appellant had incurred any expense, by way of reimbursing Disctronics or otherwise, or that any such expenditure had occurred in the 2005 income year[58].

44 The appellant pointed out that the compensation was paid directly to Disctronics and the costs recouped from that payment. Disctronics' payments were said to have discharged the obligations of the plaintiffs. The respondent argued that the latter submission had not been made out. Disctronics was itself a litigant in the proceedings. The respondent referred to the appellant's affidavit of 27 May 2010 in the Federal Court, in which he stated that "[o]n a net basis Disctronics thus expended an amount in excess of $1.2 million in legal fees and disbursements in relation to the proceedings before the Supreme Court of Victoria and Court of Appeal." The appellant submitted in reply that if he were lawfully entitled to the equitable compensation he would have been obliged to recoup the costs incurred by Disctronics for his benefit.

45 The appellant's submissions should not be accepted. He did not point to any error in what the Full Court had held nor suggest that it had failed to address submissions of the kind which he now puts to this Court. Given that Disctronics was a party in its own right, and given the terms of the litigation agreement, under which, in any event, Disctronics was to bear the relevant legal costs, there is no basis upon which this Court could conclude that the appellant had incurred any liability in relation to them.

Conclusion

46 For the preceding reasons, the appeal should be dismissed with costs.

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57 (2012) 206 FCR 329 at 337 [24].

58 (2012) 206 FCR 329 at 337 [24].

47 HAYNE AND CRENNAN JJ. In the Supreme Court of Victoria, the appellant taxpayer (and others) sued, and obtained judgment[59], for equitable compensation from Christopher Edmonds and Peter Cahill for breaches of fiduciary duties. Messrs Edmonds and Cahill ("the defaulting venturers") were found to have breached fiduciary duties they owed the appellant and three others (Kevin Donovan, Michael Quinert and Richard Bucknall) in connection with a joint venture the six had agreed to undertake. The plaintiffs alleged that the defaulting venturers had diverted to their own use a business opportunity being pursued by the joint venture.

48 Disctronics Ltd, a company of which the appellant and Messrs Donovan and Quinert were directors and shareholders, was a plaintiff in the Supreme Court proceedings. Its claim that the defaulting venturers owed it fiduciary duties was rejected.

49 The Commissioner of Taxation assessed the appellant to income tax on the basis that the amount the appellant received in satisfaction of the judgment was part of his assessable income for the relevant year (2005). The appellant alleged that he received the amount as trustee for Disctronics and that it was, therefore, incorrectly included[60] in his assessable income.

50 The appellant appeals to this Court against orders of the Full Court of the Federal Court of Australia (Middleton, Perram and Dodds-Streeton JJ) allowing[61], in part, the Commissioner's appeal against orders of a single judge of the Federal Court (Jessup J). The Full Court held, contrary to the decision[62] of the trial judge, that the sum received by the appellant in satisfaction of the judgment of the Supreme Court of Victoria was correctly included in his assessable income. The appeal to this Court should be dismissed.

51 The appellant's argument in support of the appeal had two principal strands. First, he submitted that the award of compensation made in his favour was a gain to him arising from a project in which Disctronics sought to invest and that he could not, consistently with his fiduciary duties to the company, retain that gain for himself to the exclusion of the company. Accordingly, so the argument continued, what the appellant received came to him as constructive

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59 *Disctronics Ltd v Edmonds* [2002] VSC 454; *Disctronics Ltd v Edmonds (No 2)* [2002] VSC 534; *Edmonds v Donovan* (2005) 12 VR 513.

60 *Income Tax Assessment Act* 1936 (Cth), ss 6(1), definition of "trustee", 96 and 97.

61 *Howard v Federal Commissioner of Taxation* (2012) 206 FCR 329.

62 *Howard v Federal Commissioner of Taxation (No 2)* (2011) 86 ATR 753.

trustee for Disctronics. Second, he submitted that an assignment agreement ("the litigation agreement") he had made with Disctronics and two of the other plaintiffs at about the time that the Supreme Court proceedings were instituted "operated as confirmation of the constructive trust arising from the directors' duties". Alternatively, he submitted that the agreement effected an assignment of the appellant's right to receive the amount of equitable compensation rather than the proceeds of that action.

52 The appellant made a third, but subsidiary, submission, namely that if his principal arguments were rejected, the Commissioner's assessment was excessive because the appellant should have been, but was not, allowed a deduction for the legal costs incurred in prosecuting the claim for equitable compensation. This submission should be rejected for the reasons given by French CJ and Keane J.

53 As Windeyer J said in *Norman v Federal Commissioner of Taxation*[63], "[b]efore examining the transaction[s] in detail, it is as well to consider the legal doctrines around which the argument revolved".

Fiduciary duties

54 A director of a company owes statutory and other duties to the company. At the time of the events and transactions which lie behind the issues in this case, the statutory duties were set out in s 232 of the Corporations Law[64]. But, as s 232(11) of the Corporations Law made plain, that section had effect[65] "in addition to, and not in derogation of, any rule of law relating to the duty or liability" of a director.

55 Those other duties included fiduciary duties. As Dixon J said in *Mills v Mills*[66], "[d]irectors of a company are fiduciary agents". Because the appellant was a director of Disctronics at all times material to this matter, he owed fiduciary (and other) duties to the company.

56 As a director, the appellant was bound not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. These

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63 (1963) 109 CLR 9 at 23-24; [1963] HCA 21.

64 See now *Corporations Act* 2001 (Cth), Pt 2D.1.

65 cf *Corporations Act* 2001, s 179(1).

66 (1938) 60 CLR 150 at 185; [1938] HCA 4.

obligations are peculiar to fiduciaries[67]. The obligations are[68] proscriptive, not prescriptive. They are not[69] quasi-tortious duties to act solely in the best interests of the principal. Nor are they obligations directed only to providing redress for loss or damage proved to have been suffered by the person to whom the duties are owed.

57 Whether there are two distinct obligations, or they are properly to be seen[70] as "one 'fundamental rule' [which] embodies two themes", need not be explored. It is convenient, for the purposes of this case, to treat the obligations as if they are distinct, while recognising that both may, and often will, be engaged by the one set of facts.

58 In this case, the appellant did not point to or rely upon any exercise of his powers as a director of Disctronics as being relevant to the arguments he advanced. No question arises in this case, therefore, of the application of the obligation or obligations, often compendiously described as the duty of directors to act in the interests of the company as a whole, examined and applied in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL*[71]. Rather, the appellant asserted that he was bound in equity to hold the compensation he received for Disctronics either because his duty and his interest conflicted or because the compensation was an unauthorised benefit obtained from the relationship.

Conflict of duties or conflict of duty and interest

59 It is well established[72] that "[i]t is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly

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67 *Breen v Williams* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ; [1996] HCA 57. See also Austin, "Moulding the Content of Fiduciary Duties", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 153 at 156; Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, (2010) at 39-40.

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

69 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 198 [74]; [2001] HCA 31.

70 *Chan v Zacharia* (1984) 154 CLR 178 at 198 per Deane J; [1984] HCA 36.

71 (1968) 121 CLR 483; [1968] HCA 37.

72 *Bray v Ford* [1896] AC 44 at 51.

provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict". The majority in *Pilmer v Duke Group Ltd (In liq)* said[73] of this obligation that "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'[74] between personal interests of the fiduciary and those to whom the duty is owed" or a conflict between competing duties.

60 But, as the majority in *Pilmer* also pointed out[75], it is necessary to recognise, and give due weight to the fact, that different minds may reach different conclusions as to the presence or absence of a real possibility of conflict between duty and interest or duty and duty. That is, the doctrine cannot "be inexorably applied and without regard to the particular circumstances of the situation"[76].

61 It follows that the working out of the application of the rule to company directors is not achieved by the bare repetition of its terms. Much closer attention must be given to the duties, interests and alleged manner of conflict than is given by simply observing that directors owe fiduciary duties. It is necessary to identify the duties or interests which are said to conflict or present a real possibility of conflict.

Obtaining an unauthorised benefit

62 It is equally well established that a fiduciary cannot profit from the relationship. A fiduciary must account for a profit or benefit obtained or received by reason or by use of the fiduciary position or by reason or by use of any opportunity or knowledge resulting from the position.

63 This obligation is engaged when a company director diverts a business opportunity of the company to his or her personal advantage. It may be engaged

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73 (2001) 207 CLR 165 at 199 [78].

74 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103 per Mason J; [1984] HCA 64. See also *Clay v Clay* (2001) 202 CLR 410 at 432-433 [46]-[47]; [2001] HCA 9.

75 (2001) 207 CLR 165 at 199 [79].

76 *Phelan v Middle States Oil Corporation* 220 F 2d 593 at 602 (1955) per Judge Learned Hand, cited by Mason J in *Hospital Products* (1984) 156 CLR 41 at 104 and the majority in *Pilmer* (2001) 207 CLR 165 at 199 [79].

by other circumstances. A director's diversion of the company's business opportunity will also commonly (perhaps inevitably) engage the director's obligation not to be in a position of conflict. But regardless of whether the obligation to avoid conflicts is engaged, a critical question presented for consideration in relation to the obligation not to obtain unauthorised benefits will be whether the director has obtained a benefit *by reason or by use of* the relationship between that director and the company.

64 That question requires careful attention to how and why it is said that the director obtained a benefit *by reason or by use of* the relationship. And as *Regal (Hastings) Ltd v Gulliver*[77] demonstrates, if the opportunity came to the director in the course or as a result of holding office as a director, it is not to the point to establish that the company could not or would not have exploited the opportunity. In *Regal (Hastings)*, the directors of the company were held bound to account to the company for their profit despite the company's inability to raise the capital necessary to undertake the venture from which the directors made their profit.

The facts

65 It is necessary to state, in summary form, the central facts relevant to the appellant's arguments. It is convenient to do so by reference to the findings made in the Supreme Court proceedings. Those findings were not challenged by the appellant in his proceedings against the Commissioner.

66 In the Supreme Court proceedings, the appellant and other plaintiffs (including Disctronics) alleged that, in early 1999, Messrs Donovan and Bucknall conceived an investment idea involving buying an underperforming public golf course, leasing it to a financially sound operator and using the rental stream not only to fund the acquisition but also to generate a return on investment.

67 By a series of intermediate steps and discussions, the details of which need not be traced, the appellant, Mr Quinert and the defaulting venturers were informed of, and expressed interest in pursuing, the idea. (The appellant and Messrs Donovan and Quinert were all associated with a firm of Melbourne solicitors.)

68 During the discussions, there was talk about Disctronics participating in the exploitation of the idea. Disctronics was a company used by the appellant

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77 [1967] 2 AC 134n. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; [1995] HCA 18.

and Messrs Donovan and Quinert as an investment vehicle and each was a shareholder and director of the company. During these discussions, it was proposed that Disctronics would provide up to $1.5 million equity in the project.

69 In the Supreme Court proceedings, the trial judge (Warren J) found[78] that on 20 July 1999 "the parties resolved to embark on a joint venture involving Donovan, [the appellant], Quinert, Bucknall [and the defaulting venturers] in quite loose terms so as to acquire" the golf course. Her Honour found[79] that "[t]he joint venture did *not* encompass Disctronics as a member" (emphasis added).

70 The minutes of the meeting at which Warren J found the joint venture to be constituted recorded that the parties intended that the golf course, once bought and let to a tenant, would be sold and the resulting profit divided between the six venturers. This profit became known in the proceedings as a "day-one profit" divisible between the venturers.

71 Warren J found[80] that, at or soon after the making of the joint venture agreement, the venturers agreed upon the identity of the proposed tenant of the golf course and the proposed tenant agreed upon the terms on which it would take a lease (including the amount of rent it would pay). Her Honour found[81] that the venturers knew that the owner of the golf course was willing to sell the land for a price which the venturers were willing to pay. Her Honour further found[82] that the venturers had agreed that it would be necessary to raise both debt and equity finance but had not agreed upon who would provide the equity.

72 Thereafter the venturers disagreed about how the project should be implemented. The appellant and others wanted Disctronics to participate, but the defaulting venturers did not agree. At least some of the proposals for Disctronics' involvement would have reduced the "day-one profit" available for division between the participants.

73 The defaulting venturers diverted the venture to their own use by procuring a company which they controlled to buy and then lease the golf course.

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78 [2002] VSC 454 at [43].

79 [2002] VSC 454 at [43].

80 [2002] VSC 454 at [43], [45]-[46].

81 [2002] VSC 454 at [47].

82 [2002] VSC 454 at [46].

74 Warren J ordered[83] that the defaulting venturers (and the company to which they diverted the venture) pay the plaintiffs, but not Disctronics, equitable compensation in an amount based[84] on the profit arising from the acquisition, management and eventual sale of the golf course.

75 The defaulting venturers appealed to the Court of Appeal against the orders of Warren J. The Court of Appeal did not disturb any of the relevant findings made by Warren J and dismissed the defaulting venturers' appeal.

76 The Court of Appeal did not disturb her Honour's conclusion that Disctronics was not entitled to equitable compensation. The Court accepted[85] that at least Mr Donovan had intended that Disctronics would, if possible, be the ultimate purchaser of the tenanted golf course and that the proposals to bring about that result which were made after the formation of the joint venture were not repudiatory breaches of the joint venture agreement. It is, therefore, convenient to consider the appellant's appeal to this Court about his liability to income tax on the footing that Disctronics sought, at all times, to purchase the golf course subject to the tenancy which the joint venture sought to procure.

77 For the purposes of deciding the appellant's liability to income tax, it is not necessary to explore why the joint venturers did not agree on Disctronics' involvement in the project. Further, it is at least convenient, and for the reasons given earlier[86], it may well be legally necessary[87], to ignore whether Disctronics could or would have reached terms for its involvement in the project which would have been commercially acceptable to it or both to it and to all of the participants in the joint venture. That is, it is convenient, and may be legally necessary, to put aside any consideration of some matters on which the Full Court of the Federal Court relied[88] in reaching the decision against which the appellant appeals to this Court. In particular, whether the necessary equity investment would have exceeded the sum of $1.5 million which Disctronics had

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83 [2002] VSC 454 at [216]-[217]; [2002] VSC 534.

84 [2002] VSC 534 at [6], [42].

85 (2005) 12 VR 513 at 526-527 [30]-[31], 532-533 [45] per Phillips JA (Winneke P and Charles JA agreeing).

86 At [62]-[64].

87 *Regal (Hastings)* [1967] 2 AC 134n.

88 (2012) 206 FCR 329 at 336-337 [19].

available, and whether the conditions which Disctronics put upon its involvement could be or were met, should be treated as irrelevant.

The appellant's argument

78 The appellant's argument that he received the amount allowed as equitable compensation as constructive trustee for Disctronics proceeded in four steps. First, he submitted that a director has a fiduciary duty not to put his or her own interests in conflict with those of the company of which he or she is a director. Second, he submitted that "any gain which comes to [the director] *from any venture in which the company has decided to invest* is received as constructive trustee for the company" (emphasis added). This constructive trust, the appellant submitted, subsists whether or not the director breaches his or her duty. Third, the appellant submitted that Disctronics "pursued the investment in the golf course until final disposition of the Supreme Court proceedings" and that his duties to Disctronics "subsisted while it continued to pursue the investment". Fourth, the appellant submitted that the award of equitable compensation made by the Supreme Court was a gain to the appellant *arising from the project in which Disctronics sought to invest*. The fact that Disctronics could not, or did not, make the investment was said to be irrelevant. It followed, so the appellant argued, that, consistently with his duties to the company, the appellant could not retain the gain for himself to the exclusion of the company and what he received came to him as constructive trustee for the company.

79 As expressed, the appellant's argument might be understood as turning on the proposition that the amount received as equitable compensation was a gain arising from a venture or project of Disctronics'. These reasons will show that this proposition was not established. But as the argument was developed, the appellant placed chief weight upon the proposition that, as a director of Disctronics, he was obliged not to put his own interests in conflict with those of the company. It is necessary, in these circumstances, to consider each of the obligations which were identified at the outset of these reasons: the obligation not to obtain unauthorised benefits and the obligation to avoid conflict of duties or of duty and interest.

80 Before doing so, it is convenient to mention one other aspect of the matter with a view to putting it aside from further consideration.

Gain or profit

81 The gain or profit to which the appellant pointed was the appellant's receipt of equitable compensation in satisfaction of the judgment he (with others) had obtained against the defaulting venturers. It is convenient to treat the appellant's receipt of his proportionate part of the judgment sum as a gain or profit of a relevant kind without pausing to examine whether or how that is so.

Given that the amount of compensation he was awarded was assessed[89] by reference to the profit obtained by the defaulting venturers, it may very well be right to describe it (as these reasons will) as a "gain or profit", but that need not be decided in this case.

82 As will later appear, it is also convenient to treat that gain or profit as arising[90] when the defaulting venturers diverted the opportunity to pursue the venture to their own use by procuring the purchase of the golf course. Certainly, the gain or profit arose no earlier than then, and it is not necessary to examine whether it is better to treat it as arising only upon the Supreme Court's making its award of equitable compensation or upon that judgment's being satisfied. Again, these are matters which need not be decided.

Obtaining an unauthorised benefit in this case?

83 The appellant asserted that "the project" was one in which Disctronics sought to invest and, in at least some parts of the argument, the appellant appeared to treat that proposition as sufficient to engage the obligation not to obtain an unauthorised benefit from the relationship constituted by the appellant's being a director of Disctronics. The opportunity to invest in the golf course was, the appellant submitted, "a maturing business opportunity" which Disctronics was "actively pursuing". It was not open to the appellant, the submission continued, "to appropriate for his own benefit" either that opportunity or any benefit which came to him from it.

84 It may be noted that, as expressed, the appellant's argument invites several further questions in order to reveal its precise content. So, for example, what exactly was the relevant "opportunity"? What was meant by saying that the opportunity was "maturing"[91]? Yet, leaving aside questions of this kind, the underlying proposition upon which this aspect of the appellant's argument depended was that for him to obtain and retain the equitable compensation which was awarded would constitute his diverting to *his* use a business opportunity which was properly described as Disctronics'.

85 So expressed, the argument might be thought to have depended upon the engagement of some novel fiduciary principle about "diversion of opportunity"

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89 [2002] VSC 454 at [216]; [2002] VSC 534 at [6], [42].

90 cf *Chan v Zacharia* (1984) 154 CLR 178 at 199 per Deane J.

91 cf *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 at 607 per Laskin J; *Pacifica Shipping Co Ltd v Andersen* [1986] 2 NZLR 328 at 334, 338-339 per Davison CJ.

or some extension of existing principle. But at no point in the argument did the appellant suggest that his case depended upon engaging or developing any new principle. Rather, to the extent to which the appellant's argument depended upon notions of "appropriation" or "diversion", it sought principally to engage the obligation not to obtain unauthorised benefits. To the extent to which it depended upon the notion of Disctronics "actively pursuing" the opportunity, it sought principally to raise questions about conflict of duties or conflict of duty and interest. (Because the obligations intersect in their application, no more categorical statement can be made.)

86 Asserting that Disctronics "sought" or "desired" to invest in "the project" (whether by becoming purchaser of the tenanted golf course or in some other role) does not demonstrate that the appellant's gain or profit was an unauthorised gain or profit which he held on trust for Disctronics. Instead, it is necessary to ask[92] whether the identified gain or profit was obtained or received *by reason or by use of* the appellant's position as a director of Disctronics or *by reason or by use of* any opportunity or knowledge resulting from that position. It was not.

87 Unlike *Regal (Hastings)*, the appellant made no transaction in the course of his management of Disctronics. He did not obtain or receive the gain or profit by using in any way "the position and knowledge possessed by [him] in virtue of" his office as director[93]. And he did not obtain or receive the gain or profit *by reason or by use of* any opportunity or knowledge resulting from his office as a director of Disctronics. So much may be taken to have been rightly recognised by the appellant's concession in oral argument that "the opportunity did not come to [him] by reason of his office".

88 By suing for and recovering equitable compensation from the defaulting venturers the appellant did not obtain a gain or profit by reason or by use of his position as a director of Disctronics. The award of compensation was for the diversion by the defaulting venturers of the *joint venturers'* opportunity to pursue a profitable venture by buying and leasing the golf course. As is explained below, the opportunity thus diverted was the joint venturers', not Disctronics'. The compensation awarded was for the defaulting venturers' diversion of the joint venturers' opportunity, not of Disctronics'. The appellant did not obtain that (or any other) gain or profit by use of any opportunity or knowledge resulting from his position as a director of Disctronics.

89 The obligation not to obtain an unauthorised benefit from the fiduciary relationship was not engaged.

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92 *Chan v Zacharia* (1984) 154 CLR 178 at 198 per Deane J.

93 *Regal (Hastings)* [1967] 2 AC 134n at 153 per Lord Macmillan.

90 Was the gain or profit obtained or received in circumstances where there existed a conflict between the appellant's duties or between his duty as a director of Disctronics and his personal interests? Was the gain or profit obtained or received where there was a real possibility of such conflict?

Conflict of duties or conflict of duty and interest in this case?

91 In *Furs Ltd v Tomkies*, Rich, Dixon and Evatt JJ said[94]:

> "If, when it is his duty to safeguard and further the interests of the company, [a director] uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability."

But as that passage and later judicial[95] and academic[96] writing makes plain, it is necessary to identify with care the subject matter over which the fiduciary obligations extend. The duty which a fiduciary owes may not (and usually will not) attach to every aspect of the fiduciary's conduct.

92 The venture which the defaulting venturers were found to have wrongly turned to their account was a venture between the six individuals. It was not a venture to which Disctronics was a party. Disctronics had asserted in the Supreme Court that it, too, had been one of the joint venturers and that the defaulting venturers should compensate it as well, but its claim was rejected. The appellant did not contend to the contrary in his proceedings against the Commissioner. And it followed from what was held in the Supreme Court litigation (to which Disctronics was a party) that if the appellant had diverted to Disctronics the business opportunity which the joint venturers sought to pursue, he would have been as much in breach of his fiduciary obligations to his co-venturers as the defaulting venturers were when they diverted the opportunity to their own advantage.

93 Having agreed upon a venture with his co-venturers, the appellant *attempted* to have the others agree to Disctronics playing a part in that venture,

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94 (1936) 54 CLR 583 at 592; [1936] HCA 3.

95 See, for example, *Breen v Williams* (1996) 186 CLR 71 at 82 per Brennan CJ, citing *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409 per Dixon J; [1929] HCA 24.

96 Finn, *Fiduciary Obligations*, (1977) at 233-234 [540]-[541]; Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, (2010) at 179.

not as one of the venturers, but as purchaser of the golf course land. If it was his duty to seek to introduce Disctronics to the venture, he performed that duty. But he was not able to have Disctronics play a part in any venture concerning the golf course before the defaulting venturers diverted the opportunity to pursue the venture to their own use by themselves procuring the purchase of the golf course.

94 It may be assumed that, before the defaulting venturers diverted the venture to their own use, the appellant's duty as a director of Disctronics was to seek to have the company acquire the golf course at least cost to it. And his interest as a joint venturer was to use the land (whether by sale subject to tenancy, or holding the land as landlord) in whatever way would provide greatest profit at least cost. It may also be assumed that his duty to his co-venturers was to do his part in bringing about that result. *If* the venture had not been diverted by the defaulting venturers, there may have been some conflict between his duty and his interests. *If* Disctronics had bought the tenanted golf course, there may have been some conflict between his duty and his interests. But the venture was diverted. Disctronics did not buy the golf course. The appellant made no gain or profit before the joint venturers' opportunity for profit (and any hope which Disctronics may have had for profit) was foreclosed by the defaulting venturers' conduct. Once the defaulting venturers had diverted the opportunity, there was no conflict thereafter between the appellant's duties or between his duty and his interests and there was no real possibility of conflict.

95 It may be accepted that, as the appellant argued, Disctronics did not take "No" for an answer, and continued to pursue its desire to be involved in the venture at all times up to and including both the institution of the Supreme Court proceedings and their prosecution to final judgment. But, as the terms of the litigation agreement (to which later reference will be made) reveal, Disctronics, the appellant and other directors of the company made common cause against the defaulting venturers in the Supreme Court proceedings. By agreement, the plaintiffs in that action (including Disctronics and the appellant) were represented by the same legal representatives (necessarily assuming identity of interest between the plaintiffs in their pursuit of the proceedings). The agreement provided that the plaintiffs would be represented in the proceedings at the cost of Disctronics. The directors of Disctronics agreed that they would pay any sum awarded in their favour to Disctronics. And the claims which the appellant pursued in the suit were not contingent upon Disctronics succeeding in its claims.

96 From the time of the defaulting venturers' diversion of the venture, up to and including the final determination of the Supreme Court proceedings, the appellant's duties to Disctronics, his duties to his co-venturers and his personal interests were all aligned. The appellant had no conflict between his duties or his duty and interests and there was no real possibility of conflict.

97 It may be noted, in passing, that to the extent to which the appellant sought to have Disctronics play a part in the venture, his efforts in that regard may have all been authorised by Disctronics, which no doubt recognised that the appellant was to be, or was already, a party to the venture. Negotiation about the terms on which Disctronics would become involved took place with both Disctronics and the other venturers well aware that the appellant was negotiating about the terms on which a company of which he was a director would become involved in the venture. The better view may well be that there was informed consent by all parties to the appellant's taking the steps which he did. And the proposal by the appellant and other directors of Disctronics that they would "rebate their entitlements" to Disctronics may have ameliorated, perhaps even eliminated, any substantial possibility of conflict. Similarly, the litigation agreement (made shortly before the commencement of the Supreme Court proceedings) may be taken to show authorisation of any conflict if the gain or profit were taken to have been obtained only when the award was made in those proceedings or later satisfied. But, for the reasons which have been given, it is not necessary to pursue any of these questions about informed consent or the effect of the proposal to "rebate" entitlements.

98 The gain or profit which the appellant received did not arise in circumstances where, at the time he became entitled to or received the gain or profit, he had any unauthorised conflict between his duties to Disctronics and to his co-venturers or his duty to Disctronics and his personal interests, or in circumstances where there was a real possibility of conflict. Even if, as has been assumed, the appellant became entitled to a gain or profit once the defaulting venturers diverted the venture to their own use, he made no gain or profit in circumstances where his duties or his duty and interest conflicted or where there was a real possibility of conflict. And, as has been demonstrated, the appellant obtained no gain or profit by reason or by use of his position as a director of Disctronics or by reason or by use of any opportunity or knowledge resulting from that position.

99 That being so, the appellant did not hold the amount he received as equitable compensation on a constructive trust for Disctronics.

The litigation agreement

100 After the defaulting venturers had arranged for the purchase of the golf course (to the exclusion of their co-venturers), Disctronics lodged a caveat over the land on which the golf course stood. Disctronics claimed that the land was held subject to a constructive trust in its favour. The purchaser of the land instituted proceedings in the Supreme Court of Victoria for removal of the caveat. Disctronics, the appellant and the three other joint venturers who had been prevented by the steps taken by the defaulting venturers from pursuing the

venture instituted the proceedings against the defaulting venturers which were mentioned at the outset of these reasons.

101 Before the Supreme Court proceedings were commenced, Disctronics, the appellant and two of the other three plaintiffs made the litigation agreement. In the agreement, the appellant and those other two plaintiffs were referred to as "the directors" and, as has been noted, each was a director of Disctronics. The agreement recorded that the directors had agreed that the fourth individual plaintiff in the proceedings (Mr Bucknall) would not be liable for any legal costs or disbursements associated with the proceedings or for any damages or costs orders made in favour of the defaulting venturers. The agreement provided that Disctronics would pay all costs and disbursements associated with the prosecution of the proceedings. The agreement further provided that:

> "In consideration of [Disctronics'] promises [to pay all costs and disbursements] the directors, and each of them, assign absolutely unto and to the sole use of [Disctronics], any award of damages (whether on revenue or capital account), costs or interest made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings and the ultimate outcome thereof".

Did the appellant thus assign to Disctronics, as the appellant submitted, his right to receive equitable compensation, or did he assign any proceeds of the action, if and when they were received?

102 The appellant rightly[97] accepted that, for him to succeed in this branch of his argument, the litigation agreement must be construed as assigning to Disctronics the right to receive what was ultimately paid to him. If the litigation agreement provided for the present assignment for value of something to be acquired in the future, it must be "construed as an agreement to assign the thing *when it is acquired*"[98] (emphasis added). If the litigation agreement provided for the assignment of future income, dissociated from the proprietary interest which produced the income, the proceeds of the action, when received in 2005, were income in the hands of the appellant[99].

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97 *Norman* (1963) 109 CLR 9 at 24-25 per Windeyer J; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 450-451 per Barwick CJ, Stephen, Mason and Wilson JJ; [1980] HCA 6; *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159 at 165-168 per Mason CJ; [1987] HCA 61.

98 *Norman* (1963) 109 CLR 9 at 24 per Windeyer J.

99 *Booth* (1987) 164 CLR 159 at 167 per Mason CJ.

103 The appellant identified the subject matter of the assignment as "the rights under the award" made by the Supreme Court in 2002. That is, the appellant identified the subject matter of the assignment as the future judgment debt, not the cause or causes of action which the appellant pursued in the proceedings instituted in the Supreme Court.

104 The better construction of the litigation agreement is that it provided for the assignment of any proceeds of the action, not for the assignment of the appellant's rights under any judgment obtained in the proceedings. The reference to "on revenue or capital account", coupled with the reference to the "ultimate outcome" of the proceedings, more readily fits with understanding the expression "any award of damages ... costs or interest made in their favour" as referring to *sums* received rather than the underlying *rights* to receive those sums. And although the litigation agreement was made before this Court's decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[100], adopting this preferred construction would not have presented any question of maintenance or champerty. Disctronics was no mere bystander to the litigation; it was itself a party to that litigation and it agreed to pay the costs of the litigation.

105 This being the preferable construction of the litigation agreement, this branch of the appellant's argument must be rejected.

Conclusion and orders

106 For the reasons given, the appellant's appeal should be dismissed with costs.

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100 (2006) 229 CLR 386; [2006] HCA 41.

107 GAGELER J. I agree that the appeal should be dismissed. I agree with Hayne and Crennan JJ as to the effect of the litigation agreement. I agree with French CJ and Keane J as to the deduction of legal costs. I prefer to state my own reasons for concluding that the appellant, Mr Howard, received and held the sum of equitable compensation awarded to him by the Supreme Court of Victoria on his own account.

108 Mr Howard would have been liable to account to Disctronics for the sum of equitable compensation awarded to him only if obtaining or retaining that sum would have breached an obligation of loyalty Mr Howard owed to Disctronics as an incident of his fiduciary relationship as a director of Disctronics. The "overlapping themes" informing that liability to account were identified by Deane J in *Chan v Zacharia*[101]:

> "The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage."

109 Mr Howard relied on the first of those themes. He disavowed reliance on the second. His counsel said of the second:

> "That theme does not arise in the present case because the opportunity did not come to [Mr Howard] by reason of his office. It is rather a matter of him having brought the opportunity to the company."

110 Mr Howard's reliance solely on the existence of a conflict between his personal interest and his fiduciary duty as the basis of his asserted liability to account to Disctronics invites attention to the nature and scope of the fiduciary duty on which he relies. As the Full Court of the Federal Court (Finn, Stone and Perram JJ) explained in *Grimaldi v Chameleon Mining NL (No 2)*[102]:

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101 (1984) 154 CLR 178 at 198-199; [1984] HCA 36. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558; [1995] HCA 18.

102 (2012) 200 FCR 296 at 345-346 [179], citing *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408; [1929] HCA 24. See also *Boardman v Phipps* [1967] 2 AC 46 at 127; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 at 451; [1972] 2 All ER 162 at 173.

> "The concept of 'duty' in the 'conflict of duty and interest' formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary's discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines '[t]he subject matter over which the fiduciary obligations extend' for conflict of duty and interest and conflict of duty and duty purposes".

111 Here, the identification of the subject matter over which Mr Howard's fiduciary obligations extended for conflict of duty and interest purposes requires identification of the relevant undertaking in which Disctronics was engaged. It was in respect of that undertaking that Mr Howard, as a director, had the responsibility of acting for and on behalf of Disctronics. It was in discharging that responsibility that Mr Howard was obliged to act in Disctronics' interest to the exclusion of his own interest.

112 Mr Howard sought to characterise the undertaking of Disctronics as the pursuit of a "maturing business opportunity"[103] for investment in the golf course. That characterisation, for present purposes, is too broad and imprecise.

113 Disctronics never became a party to the joint venture and was never pursuing a business opportunity commensurate with that which was being pursued by the joint venture to which Mr Howard in his personal capacity had always been a party. The more limited business opportunity brought to and taken up by Disctronics was that mapped out for it by Mr Howard and the other joint venturers who were directors of Disctronics, as recorded in recital B to the litigation agreement. That business opportunity was for Disctronics to become the end-purchaser of the golf course and to receive a rebate of any entitlement the directors might have as a result of their participation in the joint venture if two contingencies were fulfilled: the equity contribution of the end-purchaser did not exceed $1.5 million; and the other joint venturers agreed.

114 Through no failure on the part of Mr Howard to act in Disctronics' interest, those two contingencies were not fulfilled. The business opportunity of Disctronics did not come to fruition, and had been irrevocably lost by the time of

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103 Cf *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 at 607.

the commencement of the proceedings against Mr Edmonds and Mr Cahill in the Supreme Court of Victoria.

115 In the proceedings in the Supreme Court of Victoria, again through no failure on the part of Mr Howard to act in Disctronics' interest, Mr Howard was successful in his claim that Mr Edmonds and Mr Cahill had breached fiduciary duties they owed to him[104], while Disctronics was unsuccessful in its claim that Mr Edmonds and Mr Cahill owed fiduciary duties to Disctronics[105]. The sum of equitable compensation awarded to Mr Howard was compensation to Mr Howard for Mr Edmonds' and Mr Cahill's breach of their fiduciary duties to him, calculated as Mr Howard's one sixth share of what Mr Edmonds and Mr Cahill gained in breach of their fiduciary duties to Mr Howard and to the other three joint venturers[106]. It was not compensation for any loss to Disctronics.

116 There was in those circumstances no conflict, and no substantial possibility of conflict, between the personal interest of Mr Howard in obtaining or retaining the sum of equitable compensation awarded to him and the fiduciary duty of Mr Howard as a director of Disctronics to act in the interest of Disctronics.

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104 *Disctronics Ltd v Edmonds* [2002] VSC 454 at [156], [178]; *Edmonds v Donovan* (2005) 12 VR 513 at 539 [62].

105 *Disctronics Ltd v Edmonds* [2002] VSC 454 at [179]-[180]; *Edmonds v Donovan* (2005) 12 VR 513 at 549-550 [95].

106 *Disctronics Ltd v Edmonds* [2002] VSC 454 at [216]; *Edmonds v Donovan* (2005) 12 VR 513 at 544-545 [80]-[81].