Proscriptive and prescriptive duties: is the distinction helpful and sustainable, and if so, what are the practical consequences?

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Justice Fabian Gleeson

Introduction

1. Consistent with the themes of this year's Conference, the issues raised by this first session are highly topical, the subject of divergent views, and highlight the need for careful examination of the particular factual circumstances to which relevant principles are sought to be applied.

2. The starting point is to observe that the proscriptive/prescriptive distinction first articulated by the High Court in *Breen v* Williams[1] in 1996, has been affirmed by the High Court in a trilogy of subsequent cases: *Pilmer v Duke Group Limited (in liq)*[2]; *Friend v Brooker*[3]; and *Howard v Federal Commissioner of Taxation*[4]. Four preliminary observations should be made immediately.

3. First, the High Court has spoken firmly against the imposition of prescriptive obligations. The law in Australia is that *equity* imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship (the no profit rule) and not to be in a position of conflict (the conflict rule).[5] The protective rationale for the proscriptive duties attaching to a fiduciary's powers is said[6] to be that explained by Mason J in *Hospital Products*

[1] *Breen v Williams* (1996) 186 CLR 71 at 93-94 (Dawson and Toohey JJ); at 113 (Gaudron and McHugh JJ).

[2] *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165 at 197-198.

[3] *Friend v Brooker* (2009) 239 CLR 129 at [74] (McHugh, Gummow, Hayne and Callinan JJ).

[4] *Howard v Federal Commissioner of Taxation* (2013) 253 CLR 83 at [31], [32] (French CJ and Keane J) and [56] (Hayne J and Crennan J).

[5] *Breen v Williams* at [113] (Gaudron and McHugh JJ). See also at [137]-[138] (Gummow J); cf the comments of Heydon and Crennan JJ in *Byrnes v Kendle* (2011) 243 CLR 253 at [122]; See [26] below.

[6] *Howard v FCT* at [33] (French CJ and Keane J).

Ltd v United States Surgical Corporation[7], which was quoted with approval in *Pilmer*[8]:

> 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.

4. As will be seen, and subject to any statutory duty of disclosure (see *Corporations Act*, s 191)[9], disclosure by the fiduciary is seen as part of a defence of fully informed consent.

5. Second, the High Court's emphasis on the proscriptive/prescriptive distinction has meant that much greater attention needs to be given to the different nature of the obligations imposed on directors - fiduciary, equitable, common law[10] and statutory. It has been observed that the dichotomy does not apply to the obligations of fiduciaries at general law (including statute): see the comments of Basten JA in *Duncan v Independent Commission Against Corruption*[11]. This has consequences not only for pleadings and consequential relief, but is equally important for corporate advisers grappling with the panoply of potential obligations confronting company directors in the discharge of their functions and duties.

6. Third, it goes without saying that the doctrine of precedent requires trial judges and intermediate appellate courts to faithfully observe and apply this distinction. That courts have done so can be seen in many of the cases. Nonetheless, difficulties have been encountered in trying to fit all actions required of fiduciaries into a proscriptive/prescriptive dichotomy. Without being exhaustive, several approaches can be seen in the cases post-*Breen*.

7. One approach has been to recast or rephrase a prescriptive obligation to take some step to a proscriptive duty of loyalty or to avoid conflicts of interests. That was the course taken by the trial judge (Owen J) in *Bell*[12]. Another is to distinguish the proscriptive/prescriptive dichotomy as being limited to the facts in *Breen*. That was the course taken by the West Australian Court of Appeal in

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[7] (1984) 156 CLR 41 at 97.

[8] (2001) 207 CLR 165 at 196 [70].

[9] *Corporations Act*, s 191 provides that a director must disclose to the other directors a material personal interest in a matter that relates to the affairs of the company unless exempted by sub-section (2).

[10] It is not to be overlooked that there is authority that directors owe a duty of skill and care at common law and in equity: *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109; *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438.

[11] *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 (*Duncan v ICAC*) at [623].

[12] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 (*Westpac v Bell Group (No 3)*).

Bell, in holding that the duty of company directors to act in good faith in the interests of the company and the duty to act for proper purposes are fiduciary duties.

8. Another approach has been to say that the proscriptive obligations imposed on fiduciaries, may mean that to avoid a conflict of interest (or profiting at the expense of the beneficiary) it is necessary for the fiduciary to take some positive step. This was the approach adopted by the trial judge (McDougall J) in *Duncan v Independent Commission Against Corruption* [13].

9. Yet another is to acknowledge (pay lip-service) to the distinction, but then apply long standing authority which characterises as a fiduciary obligation, a particular duty to take a positive step, such as the obligation imposed on promoters and directors to disclose material information in certain circumstances[14].

10. Fourth, questions arise as to how should trial judges and intermediate appellate courts deal with the Court of Appeal decision in *Bell* in the light of *Breen?*[15] Is the reasoning in *Bell* covered by the High Court's statement in *Farah*[16] that since there is a common law of Australia rather than of each Australian jurisdiction, the same principle as that in *Marlborough Gold*[17] applies in relation to non-statutory law? Does *Bell* identify a new principle of the common law of Australia in relation to the duties of company directors, or possibly simply affirm the existing (and earlier) law? Or is *Bell* to be understood as an interpretation of the existing common law, articulated in *Breen*? Are lower courts bound by what the High Court has said in *Breen* and subsequent cases, required to apply the proscriptive/prescriptive distinction to the duties of company directors? These are difficult questions. Similar issues were addressed by the NSW Court of Appeal in *Hasler v Singtel Optus Pty Ltd*[18] in relation to another aspect of the reasoning in *Bell* - that concerning the meaning of the words "dishonest and fraudulent design"[19].

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[13] *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018 at [205] (McDougall J).

[14] See the discussion below in relation to the duties of promoters and directors.

[15] I will refrain from expressing any concluded view on this question.

[16] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 98 at [135].

[17] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492, that intermediate appellate courts and trial judges should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced the interpretation is plainly wrong.

[18] (2014) 87 NSWLR 609 at [92] –[103] (Leeming JA; Gleeson JA agreeing at [6] –[12]); (*Hasler v Singtel*).

[19] In *Westpac v Bell Group (No 3)*, the Western Australian Court of Appeal (Drummond AJA, Lee AJA agreeing) suggested a "significant breaches" test of the fiduciary's conduct was sufficient to attract liability under the second limb of *Barnes v Addy*, however, in H*asler v Singtel* (Leeming JA, Gleeson JA agreeing), the New South Wales Court of Appeal concluded that this aspect of B*ell* was plainly wrong (or there were compelling reasons not to follow it).

11. This paper will briefly examine what was decided in *Breen v Williams* and the subsequent cases in which the High Court has emphasised the proscriptive/prescriptive distinction. Next, the paper will consider some of the areas where the actions required of a person standing in the position of a fiduciary, such as a company director, require the person to take positive measures. Are such obligations truly fiduciary in nature or merely equitable or common law obligations (including under statute)? Finally, the paper will consider the usefulness and sustainability of the distinction and its practical consequences.

12. As to the last matter, to anticipate what follows, the forensic advantages of characterising claims as involving a breach of fiduciary duty are generally viewed as providing more advantageous equitable remedies (equitable compensation, including compound interest, and third party claims based on *Barnes v Addy*), as well as avoiding the more stringent time limits of the common law.

The proscriptive/prescriptive distinction – what was decided in *Breen v Williams*?

13. *Breen v Williams* was a doctor-patient case. The patient sought access to her medical records. The High Court accepted that in certain circumstances the relationship of doctor and patient could be fiduciary. However, it did not follow that doctors had a positive duty to patients to grant them access to their medical records. Gaudron and McHugh JJ said[20]:

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

14. Dawson and Toohey JJ said[21] that there was "a tendency, not found in this country, but to be seen in the United States and to a lesser extent, Canada, to view a fiduciary relationship as imposing obligations which go beyond the extraction of loyalty". The current authors of *Equity, Doctrines and Remedies*[22], suggest that arguably the distinction between prescriptive and proscriptive duties were drawn too sharply in *Breen v Williams*, and that it would have sufficed to have held that the doctor in that case was not subject to the positive duty recognised in Canada, being a duty to act with "utmost good faith and loyalty".

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[20] (1996) 186 CLR 71 at 113.

[21] Ibid at 95.

[22] JD Heydon, MJ Leeming and PG Turner, Meagher, Gummow & Lehane's *Equity, Doctrines and Remedies* (5th Edn, 2014) (*Equity Doctrines and Remedies)* at [5-380].

15. Nonetheless, the High Court's rejection of a quasi-tortious duty of a fiduciary to act solely in the best interests of their principal was affirmed in *Pilmer v Duke Group Ltd (in liq)*[23]. *Pilmer* involved a report prepared by a firm of accountants in relation to a takeover bid as required by the ASX listing rules. The trial judge found that the accountant's report was prepared incompetently and in breach of their contractual and tortious duties, essentially because it erroneously stated the opinion that the price offered in the takeover was fair and reasonable.

16. The company had also alleged that the accountants had a conflict or a significant risk of conflict because some members of the firm of accountants had previously had business dealings with shareholders of the company launching the bid and with the directors of that company and the target company. The trial judge rejected this claim holding that the accountants did not give advice in the relevant sense for the purpose of liabilities as a fiduciary.

17. In confirming the approach and conclusion of the primary judge that there was no breach of fiduciary duty because no real or substantial possibility of a conflict was demonstrated, the plurality (McHugh, Gummow, Hayne and Callinan JJ) emphasised that fiduciary obligations are proscriptive rather than prescriptive in nature; and there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interest of their principals[24].

18. The plurality in *Pilmer* referred with approval[25] to the following remarks of Gummow J in *Breen v Williams*[26]:

> The trustee is, of course, a fiduciary. But the above obligations [to exercise the same care as an ordinary, prudent person of business would in observing the terms of the trust] arise from a particular characteristic, not of fiduciary obligations generally, but of the trust …
>
> Nor do these trustee obligations supply any proper foundations for the imposition upon fiduciaries in general of a quasi-tortious duty to act solely in the best interests of their principals. I agree with the observations of Gaudron and McHugh JJ upon what appears to be a contrary tendency in some of the Canadian decisions …
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> Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.

[23] (2001) 207 CLR 165.

[24] (2001) 207 CLR 165 at [74].

[25] Ibid at [74].

[26] (1996) 186 CLR 71 at 137-138.

19. In a separate judgment in *Pilmer*[27], Kirby J, while accepting that *Breen v Williams* embraces the proscriptive/prescriptive distinction, questioned the viability of the "supposed" dichotomy between proscriptive and prescriptive obligations, noting that "omissions quite frequently shade into commissions". Kirby J remarked that in *Breen v Williams*, Ms Breen's claim failed because it would have involved imposing on the suggested fiduciary positive obligations to act. Kirby J continued[28]:

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

20. In *Friend v Brooker*, the High Court rejected Brooker's attempt to recast a positive obligation as an obverse proscriptive duty. There, monies obtained by the respondent, Brooker, from third parties which were on-loaned to a company of which Brooker was one of two directors with the appellant, Friend. Such an arrangement was their common practice. The company went into liquidation and was unable to repay the loan to Brooker who then sought contribution from Friend on the basis that they were engaged in a common design or that there was some fiduciary obligation between them.

21. The NSW Court of Appeal found that Brooker and Friend owed each other a fiduciary obligation "to be equally and personally liable to each other for losses flowing from personal borrowings"[29]. The joint judgment of French CJ, Gummow, Hayne and Bell JJ (Heydon J also agreeing[30]) rejected that approach stating:

> … such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court[31].

22. *Howard v FCT* concerned the taxation implications of an award of equitable compensation in earlier proceedings. Howard, one of the successful parties in earlier litigation, did not declare his portion of the equitable compensation as part of his assessable income for the relevant tax year. He argued that he held the award of equitable compensation on constructive trust for a company of which he was a director. That was said to be a consequence of the fact that the company was seeking to invest in the relevant business opportunity, and so it was not open to Howard to appropriate any benefit arising from the

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[27] (2001) 207 CLR 165 at [127]-[128].

[28] Ibid at [127].

[29] *Brooker v Friend* (2006) NSWCA 385 at [154].

[30] *Friend v Brooker* (2009) 239 CLR 129 at [92].

[31] *Breen* and *Pilmer* were both cited in support of that statement in the joint judgment in *Friend v Booker*, which was described as "settled doctrine": at [85].

investment or the opportunity to invest in the project, due to his fiduciary position in relation to that company. That argument was rejected by the High Court.

23. French CJ and Keane J remarked[32] that both *Breen* and *Pilmer* are regarded as settled doctrine and that the relationship of director and company is one of a class of accepted relationships which attract proscriptive fiduciary duties, including the no profit rule and the no conflict rule. Their Honours made the following observations[33] concerning the practical consequences of the proscriptive/prescriptive distinction and a fiduciary's ability to defend such claims:

> 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 "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.

24. Hayne and Crennan JJ expressed similar reasoning regarding the content of directors' fiduciary duties[34]. Their Honours emphasised that a director is bound not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict; that these obligations are peculiar to fiduciaries; that such obligations are proscriptive, not prescriptive; and they are not quasi-tortious duties to act solely in the best interests of the principal. Their Honours found it unnecessary to decide whether there are two distinct obligations or they are properly to be seen as "one fundamental rule [which] embodies two themes" as suggested by Deane J in *Chan v Zacharia*[35].

25. One further matter should be noted. Each of *Pilmer*, *Friend v Brooker* and *Howard v FCT* involved fact situations removed from the medical context in *Breen*. There was no suggestion by the High Court in those cases that the proscriptive/prescriptive distinction was confined to the doctor/patient relationship. Indeed, as mentioned in *Howard v FCT*, French CJ and Keane J expressly referred to the proscriptive obligations of company directors.

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[32] *Howard v FCT* (2013) 253 CLR 83 at [31]-[32]

[33] Ibid at [35]

[34] Ibid at [54]-[57].

[35] *Chan v Zacharia* (1984) 154 CLR 178 at 198.

26. On the other hand, there has been some signs of judicial resistance. In *Byrnes v Kendle*, Heydon and Crennan JJ said that the proposition that the law does not impose positive legal duties on fiduciaries is "a very over-simplified proposition in relation to fiduciaries" and it has no application to a trustee[36].

27. *Byrnes v Kendle* involved a husband who had executed an instrument declaring that he held on trust for his wife an undivided half-share in a property, of which he was the registered proprietor. After they had both lived in the property for some time, the parties separated. The husband then let the property to his son of a previous marriage, but collected only a small amount of rent and made no attempt to collect rent for a substantial period of the son's tenancy. The wife assigned her interest in the property to her son by a previous marriage. The property was subsequently sold by consent. The wife's son sued the husband claiming payment of one-half of the net proceeds of sale, and amounts which he alleged the husband had failed to collect in respect of the tenancy arrangement. The High Court held that the husband was in breach of trust on every occasion that he declined to sue the son for failure to pay rent.

28. Interestingly, in addition to the comments of Heydon and Crennan JJ already mentioned, French CJ, in a separate judgment, found that the husband was subject to a fiduciary duty which he assumed when he declared the trust and retained the legal title to the land, and held that the Full Court of the Supreme Court of South Australia erred in holding that the husband's failure to ensure that the rent was paid by his son did not give rise to a breach of duty making him liable to compensate the wife in respect of her interest in the unpaid rent[37]. The joint judgment of Gummow and Hayne JJ, after observing as a general proposition that it is the duty of the trustee, where the trust estate includes land, to render the land productive by leasing it[38], found that it was a breach of duty by the husband in failing to take steps to recover rent due, but unpaid, by the tenant[39]. Their Honours refrained from commenting on [122] of the reasons of Heydon and Crennan JJ.

A fiduciary's duty of disclosure?

29. One frequently encountered question is whether disclosure of a conflict by the fiduciary is simply a means of avoiding a breach, not a duty. The authorities were reviewed by the Full Federal Court in *Blackmagic Design Pty Ltd v Overliese*[40].

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[36] (2011) 243 CLR 253 at [122].

[37] Ibid at [23].

[38] Ibid at [67].

[39] Ibid at [73].

[40] (2011) 276 ALR 646; [2011] FCAFC 24 (*Blackmagic*).

30. Besanko J (Finkelstein and Jacobsen JJ agreeing) described the orthodox approach as follows[41]. There is a breach when the fiduciary places them in the position of conflict. The breach is excused, or perhaps does not arise, if the principal consents. It is not enough that there be disclosure, there must be consent. (And, of course, consent must be fully informed.) Besanko J also observed that treating disclosure as part of a defence is consistent with fiduciary duties being prospective and not prescriptive.

31. If, as the High Court has emphasised, fiduciary obligations are proscriptive only, how does one reconcile older cases requiring the fiduciary to act in the interests of another person by taking positive action, such as disclosing information to that other person in certain circumstances? Some examples readily come to mind. First, invitations or inducements to invest in company shares. Second, and closely related to the first, obligations of disclosure by directors to shareholders of the *Bulfin v Bebarfald's Ltd* type[42]. Third, circumstances where disclosure of a conflict of interest may be insufficient to discharge the directors' statutory (or fiduciary) obligations.

Duties of promoters and directors

32. It is well-established that those who issue a prospectus or information proposal to potential investors, have an obligation of "utmost candour and honesty". As Lord Chelmsford LC explained in *Central Railway Co of Venezuela v Kisch*[43]:

> It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements.

33. That these propositions are not confined to invitations or inducements to invest in company shares[44], is made clear by the High Court which applied *Kisch* to the case of a person who was negotiating for a joint venture in *United Dominions Corporation Ltd v Brian Pty Ltd*[45].

34. *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*[46] involved an information memorandum provided to prospective investors in a unit trust. The question arose in a dispute between a unitholder and the trustee company, whether

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[41] *Blackmagic* was followed in *Yarrawonga Earthmoving & Garden Supplies Pty Ltd v Clem Court Pty Ltd* [2014] VSC 439 at [41] (Warren CJ); *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 at [69] (Le Miere J); *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* [2011] FCA 1154 at [92] (Tracey J).

[42] *Bulfin v Bebarfald's Ltd* (1938) 38 SR (NSW) 423.

[43] (1867) LR 2 HL 99 at 113.

[44] *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628.

[45] (1985) 157 CLR 1 at 12 (Mason, Brennan and Deane JJ), Gibbs CJ at 5-6.

[46] [2001] FCA 1628.

there was sufficient disclosure of the management fee payable to the manager. The quantum of such fees had an effect on the profit available for distribution to unitholders.

35. Finkelstein J observed that the obligation of "utmost candour and honesty" requires that the fiduciary must disclose material information. What is material is information that will influence a prospective participant in the venture to decide whether or not to become an actual participant[47]. Finkelstein J found that there had been sufficient disclosure in the document to satisfy the promoter's duty. His decision was reversed on appeal, but on other grounds[48].

36. Importantly, Finkelstein J noted the tension between imposing such a positive duty on a fiduciary and accepted principle that fiduciary obligations are only proscriptive (referring to *Breen* and *Pilmer*). His Honour acknowledged and resisted the temptation to recast the nature of the fiduciary obligation under consideration from a prescriptive obligation to disclose to a proscriptive duty of loyalty or to avoid conflicts of interest. He accepted that it might sometimes be necessary to be more precise, but concluded that the equitable obligation under consideration has been spoken of as a positive duty for well over one hundred years, referring to *Erlanger v New Sombrero Phosphate Company*[49]. Finkelstein J concluded that "the law will not be seriously injured if I continue to adopt the same language".

37. *Fitzwood* is consistent with *Breen* and *Pilmer*, if the disclosure obligation is viewed as equitable in nature, as distinct from truly fiduciary.

38. Let it be assumed, however, that a person in the position of the promoter or director in *Fitzwood* in fact failed to provide sufficient disclosure in the information memorandum to satisfy the promoter's or director's duty. What remedies might be available to the investor who subscribed for units in the unit trust established to hold the investment? If there is a breach of an equitable obligation of disclosure (but not a proscriptive fiduciary obligation) would not equitable remedies be available? And of course, statutory remedies for any breach of director's duties. While I return to this issue in the last section of the paper, mention should be made that the general approach of equity to transactions effective at law but flawed in equity, is that such transactions are voidable and liable to be set aside, but not void[50].

Is the *Bulfin v Bebarfalds Ltd* duty a fiduciary or an equitable duty?

39. The *Bulfin v Bebarfalds Ltd* duty is encapsulated in the following statement by Long Innes CJ in Eq:

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[47] *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 837-838.

[48] *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2002] FCAFC 285.

[49] (1878) 3 App Cas 1218 at 1229.

[50] *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142 (Dixon J). See the discussion by W Gummow AC – '*The equitable duties of company director'* (2013) 87 ALJ 753 at 755.

> … when directors are advising or urging a particular action or course of conduct upon members of the company, the authorities previously mentioned establish, in my opinion that they are under a duty to make full disclosure of all facts within their knowledge which are material to enable the members, or class of members, to determine upon their action.[51]

40. Earlier in *Bulfin* Long Innes CJ in Eq described the position of directors as "in a sense trustees for the company and shareholders"[52]. Whilst one commentator has observed that his Honour's judgment makes no mention of the duty being fiduciary in nature[53], arguably this criticism overlooks his Honour's characterisation of directors as "in a sense" the archetypal fiduciary. Moreover in *Peters' American Delicacy Co Ltd v Heath*[54], Latham CJ described this disclosure requirement of directors as one of "proper and accurate disclosure", when approving the statement set out above from *Bulfin*.

41. The duty of disclosure to shareholders has been frequently described as fiduciary. In *Devereaux Holdings Pty Ltd v Pelsart Resources NL* (No 2)[55] Young J (as his Honour then was) said:

> … there is an equitable principle that it is the fiduciary duty of directors not to mislead the corporators who are to consider whether to pass a resolution by providing them with material that is other than substantially full and true and this is especially so where the directors themselves may benefit from the passing of a resolution.

42. In *Chequepoint Securities Ltd v Claremont Petroleum NL*[56] McClelland J (as his Honour then was) said:

> This, however, does not preclude a challenge to the validity of the meeting on equitable grounds based on a breach of the fiduciary obligation of the directors to the company in connection with the consideration by the company in general meeting of business proposed by the directors. That obligation would, for example, require the directors to make full and true disclosure of any benefits which any director may derive from the passing of any resolution at the general meeting. As I have already indicated, no

[51] *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 at 440.

[52] Ibid at 430.

[53] B Nosworthy, "A Directors' Fiduciary Duty of Disclosure: The Case(s) Against" (2016) 39 UNSW Law Journal 1389.

[54] (1939) 61 CLR 457 at 486.

[55] (1985) 9 ACLR 956 at 958.

[56] (1986) 11 ACLR 94 at 96; See also *ENT Pty Ltd v Sunraysia Television Ltd* [2007] NSWSC 270 at [15]-[18], [33]-[35] (Austin J).

> non-disclosure of that kind is now alleged in the present case. The fiduciary obligation of directors, however, goes further than that. Where directors take it upon themselves to urge or recommend or advise members to exercise their powers in general meeting in a particular way, they are in general required to make a full and fair disclosure of all matters within their knowledge which would enable the members to make a properly informed judgment on the matters in question.

43. McLelland J seems to characterise the *Bulfin* duty as fiduciary, and not limited to cases where the directors may have a conflict of interest, or might otherwise obtain an unauthorised benefit.

44. In *Fraser v NRMA Holdings Ltd*[57] both the trial judge (Gummow J) and the Full Federal Court (Black CJ, von Doussa and Cooper JJ) had regard to the duties of directors, including the *Bulfin* duty, in order to give content to whether the conduct of directors was misleading and deceptive within the meaning of s 52 of the *Trade Practices Act 1974* (Cth). A booklet titled "Prospectus" and published to members of two NRMA companies in relation to the "demutualisation" of those companies had referred to "free shares". The Full Court said:

> The fiduciary duty is a duty to provide such material information as will fully and fairly inform members of what is to be considered at the meeting and for which their proxy may be sought.

The trial judge, Gummow J, observed[58]:

> The respective positions of the parties and other circumstances, which provide the basis for the imposition of a fiduciary relationship with a particular content, may also assist in explaining why in a course of dealing or other relationship, it is misleading or deceptive or likely to be such, if the defendant speaks only to a limited extent.

45. Gummow J referred to the statements of McLelland J in *Chequepoint Securities* set out above (which had cited both *Bulfin* and *Devereaux Holdings*) and said that McLelland J could be taken to say that "breach of such a fiduciary obligation did not have to be dishonest nor involve moral turpitude". Significantly, there was no evident disapproval by Gummow J of the idea that the duty of disclosure is a fiduciary one.

46. *Brunninghausen v Glavanics*[59] involved a claim for breach of fiduciary duty owed to the plaintiff-shareholder by the defendant (the sole effective director and majority shareholder) in connection with the sale of the plaintiff's shares to the defendant. The defendant had sought to purchase the plaintiff's shares at a

[57] (1995) 55 FCR 452 at 466.

[58] (1994) 52 FCR 1 at 18-19.

[59] (1999) 46 NSWLR 538 at [80].

price well below the price that which a third party was willing to pay, without telling the plaintiff about the existence of that offer. The NSW Court of Appeal (Handley JA, Priestley JA and Stein JA agreeing) said:

> This fiduciary duty is owed to shareholders who have personal rights to enforce it. It is akin to the duty of directors to inform shareholders of relevant information relating to a take-over ….

47. The Court's discussion of the *Bulfin* duty arose in the context of the defendant's contention (relying upon *Percival v Wright*[60]) that a director's fiduciary duties are owed only to the company and that no fiduciary duty is owed to shareholders to inform them of relevant negotiations. The Court rejected that proposition as an absolute statement, noting that while it is true generally that a director's fiduciary duties are owed to the company, the particular nature of the transaction may give rise to a fiduciary duty owed by the directors to the shareholders, offering among others, *Bulfin* and similar cases as examples of such a situation[61].

48. *Commonwealth Bank of Australia v Fernandez*[62] involved an application for the removal and replacement of an administrator (Mr Fernandez) of the Willmott Forests group of companies by CBA and St George Bank. The banks raised a number of issues about Mr Fernandez' capacity to carry out the "potentially enormous task" before him, but the ground in relation to which the *Bulfin* duty arose was his failure to notify creditors that he had received a consent to act from alternative administrators. Mr Fernandez was ultimately removed and replaced but not on this basis. Although Finkelstein J doubted the assumption of the parties that an administrator convening a meeting under *Corporations Act* s 436E is under the same duty to advise as is a director convening a meeting of members, he said[63]:

> there is a principle, applicable in company cases, that directors owe a fiduciary duty to members to give them full information of all matters material to the business that is to be transacted at a company meeting.

49. While all of the above decisions applying *Bulfin* pre-date *Breen*, except *Fernandez*, that is hardly a sufficient basis to treat them as incorrect in characterising the duty of disclosure as fiduciary. Arguably, the reasoning of Young J in *Deveraux Holdings* might be read as referring to an equitable obligation only, but it is difficult to read McLelland J in *Chequepoint Securities* the same way. Could all of these distinguished equity judges be said to have been operating under the same mistake? One might pause to doubt that suggestion when considering the rigidity of the dichotomy in *Breen*.

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[60] [1902] 2 Ch 421.

[61] (1993) 11 ACSR 543.

[62] [2010] FCA 1487 at [44].

[63] Ibid at [45].

The Bell Group decisions

50. Are the decisions in *Bell* are consistent with the proscriptive/prescriptive distinction? Did the High Court in *Breen*, *Pilmer*, *Friend v Brooker* and *Howard v FCT* intend to overrule earlier authority concerning the fiduciary duties of company directors? The facts in *Bell* are familiar. A greatly simplified outline will suffice. The case arose in the context of an attempted rescue by the directors of the Bell Group Ltd to avoid liquidation. The directors entered into an agreement to finance the debts of the Group. That involved each company in the Group agreeing to be liable for the loans to each other Group company and to provide security for those loans. That meant that some subsidiary companies with no prior indebtedness to the banks to mortgaged their assets. The purpose of this arrangement was to in effect buy time for the holding company in which to attempt to restructure the company's affairs in order to ensure that the holding company and the broader groups' survival. That did not occur. There was no successful restructure and the companies in the Bell Group were placed into liquidation. Non-bank creditors were excluded from access to the property of the companies the subject of the bank's security. The banks realised their security and recovered $283,000,000. The liquidators commenced proceedings against the banks to recover those proceeds, on various bases, including a *Barnes v Addy* claim.

51. The case involved alleged breaches of general law duties. There was no case based on breach of statutory duty[64]. Accordingly, there was no statutory accessorial liability claim made against the banks[65].

52. The pleaded breaches of fiduciary duties by the directors were first, to act bona fide in the interests of the companies, which included an obligation to act in the interests of creditors, present or future, of an insolvent company; (this was taken to be a pleading of a duty to act in the interests of an insolvent company by not causing the company to act to the prejudice to the interests of its creditors). Second, a fiduciary duty to exercise powers properly; (this was taken to be a pleading that powers of the companies not be exercised for an improper purpose.) Third, that the directors of the Australian companies and certain directors of the UK companies breached the fiduciary duty to avoid conflicts of interest.[66]

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[64] *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1; [2008] WASC 239 at 232 [4383] (*Bell Group v Westpac (No 9)*).

[65] At the time, the statutory accessorial liability provisions in s 38(1) of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980* (Cth) and the equivalent State legislation, was expressed in narrower terms than s 79 of the *Corporations* Act, read with s 1317H. In *Equiticorp Financial Services Ltd (NSW) v Equiticorp Financial Services Ltd (NZ)* (1992) 29 NSWLR 260, the trial judge (Giles J) expressed the view (at 309) that the context of s 38(1) is solely that of exposure to penalties. His Honour did not think that there could be seen an intention also to make the accessory liable to compensate the corporation. The contrary view was expressed by von Doussa J in *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 48 [22.88], albeit it seems that von Doussa J was not referred to the decision in *Equiticorp*.

[66] See summary in *Westpac v Bell Group (No 3)* (2012) 44 WAR 1 at 168 [910]-[912].

53. Importantly, it was common ground at trial that the directors were not acting in any dishonest or fraudulent reason, or to gain any personal advantage.

54. The Banks argued that the only fiduciary duties recognised in Australian law are proscriptive duties and it followed, the Banks submitted, that the duty of directors to act in the interests of the company and the duty to exercise powers properly are prescriptive, not proscriptive, and, accordingly, are not fiduciary. This argument was directed to avoiding accessorial liability under *Barnes v Addy*.

55. At one point in his reasons Owen J treated *Breen* and *Pilmer* as not applying generally, and not intending to overrule earlier High Court authorities that suggested that the duty to act in the interests of the company and the duty to exercise powers properly were fiduciary in character[67]. Later Owen J seems to accept the proscriptive/prescriptive distinction as valid, concluding that the duty to act in the interests of the company and the duty to exercise powers properly were fiduciary in duties as they both stemmed from a fundamental requirement for loyalty. Owen J then described these duties are proscriptive giving the following explaination:

> They do not prescribe what a director must do. They indicate that the director cannot act otherwise than bona fide and in the best interests of the company and for a proper purpose and cannot, when in a situation of conflict of interest, exercise his, her or its powers in the interests of himself, herself, itself or another and/or to the disadvantage of the company.[68]

56. Owen J expressed the view, that phrasing the duty (to exercise powers properly) in the negative does no damage to the language. (That with respect may be doubted). He observed that "under this formulation directors are prohibited from exercising power for an improper or collateral purpose or for an ulterior or illegitimate object or (put in a slightly different way) they cannot exercise powers other than in a spirit of fidelity to the purpose for which the powers were given".[69]

57. Owen J acknowledged that it is not easy to justify the reformulation of the duty to act in the interests of the company, but nonetheless rephrased the duty as meaning in substance, that the powers cannot be exercised in the interests of someone other than the company and/or in a way that is not in the best interests of the company.[70]

58. By this process of recasting the nature of the obligations, Owen J held that the power residing in the directors to cause a company to provide securities and

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[67] *Bell Group v Westpac (No 9)* at [4569] referring to the cases considered at [4553] including *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142-143.

[68] Ibid at [4578].

[69] Ibid at [4580].

[70] Ibid at [4581].

guarantees and indemnities for debts owed by that company or associated companies to third parties is a fiduciary power. He held that such power must not be exercised other than bona fide in furtherance of the purposes for which it is given and for the benefit of the company. Nor can the powers be exercised other than in accordance with the conflict rule. The exercise of a fiduciary power contrary to those strictures is a breach of fiduciary duty.[71]

59. In finding a breach of duty by the directors, Owen J found that the directors knew the companies were in a parlous financial state; they concentrated on the interests of the Bell Group as a whole and the distinct interest of each company in the group; they did not believe that the transactions were in the best interests of each company as a whole, taking into account its creditors, future creditors and shareholders; and that they failed to undertake an active consideration of certain financial materials, which they were obliged to do (being a positive, not a negative duty[72]); and that they entered the transactions for improper purposes[73].

60. The majority of the Western Australian Court of Appeal in *Bell* upheld Owen J's conclusions (Lee AJA and Drummond AJA; Carr AJA dissenting on the facts in relation to breach), but took a different approach to the proscriptive/prescriptive dichotomy.

61. Lee AJA distinguished *Breen* by reading down the comments in *Breen* to the context of the particular facts of that case concerning a very limited fiduciary relationship of patient and specialist medical practitioner[74]. He considered that acts of disloyalty that inflict detriment on the other party to the fiduciary relationship would include the failure to duly exercise a fiduciary power or perform an obligation in the fiduciary relationship[75]. He then reasoned that such conduct by the fiduciary is as disloyal to the fiduciary relationship as the gaining of profit or personal advancement, or failure to disclose conflict with personal interests and will give rise to a claim in equity to hold the delinquent fiduciary liable to the mark of a fundamental obligation undertaken in the fiduciary relationship[76]. Lee AJA continued[77]:

> The disloyalty of a fiduciary manifested by the repudiation of such an obligation, that results in detriment to the party to whom the obligation is owed, is as offensive to good conscience and equity as an act by a fiduciary that is in breach

[71] Ibid at [4582].

[72] See the view expressed in *Equity Doctrines and Remedies* at [5-410].

[73] *Bell Group v Westpac (No 9)* at [4295] –[6127].

[74] *Westpac v Bell Group (No 3)* at [900].

[75] Ibid at [895].

[76] Ibid at [896].

[77] Ibid at [898].

of a proscriptive fiduciary obligation, and entitlement to appropriate relief in equity should follow.

62. Drummond AJA distinguished *Breen* and *Pilmer* as not concerned with the position of company directors. His Honour said that directors have long been subject to duties to act bona fide in the interests of the company and to exercise their powers for proper purposes, both of which have long been described as fiduciary obligations[78].

63. Drummond AJA accepted that in some circumstances directors must take positive action if they are to properly fulfil their fiduciary duties to act bona fide and in the interests of the company and to exercise powers for proper purposes, even when no interests of their own may be affected.[79] Reference was made to the example given by Latham CJ in *Mills v Mills*[80] of directors exercising a power in circumstances which adversely affect the interests of one class of shareholders and benefit the interests of another. Drummond AJA reasoned, by analogy, that directors of financially distressed companies must, in performing their fiduciary duties to their company, give proper effect to the interests of creditors, though no interests of their own may be affected.[81] And the exercise of the power to grant security over company assets cannot always be accommodated within the proscriptive rubric identified in *Breen*.

64. Drummond AJA also observed that the proscriptive/prescriptive distinction does not appear to be consistent with the well-established rule that the scope of fiduciary duty in a particular relationship will vary and is to be determined according to the nature of the relationship and the facts of the particular case.[82]

65. Carr AJA, who dissented on the facts, remarked that on one view Owen J may have gone too far in elevating the duties, which he found the Bell Group directors had breached, into fiduciary duties[83]. However, Carr AJA concluded that he was not prepared to hold that the duties were other than fiduciary, the breach of which may give rise to liability under the first limb of *Barnes v Addy*.

66. One further matter should be mentioned. There was a difference of view in the Court of Appeal in *Bell* (which is strictly obiter), as to whether a director's duty

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[78] Ibid at [1962].

[79] Ibid at [1969].

[80] (1938) 60 CLR 150 at 164.

[81] *Westpac v Bell Group (No 3)* at [1969].

[82] *Westpac v Bell Group (No 3)* at [1970], referring to *Hospital Products Ltd v United States Surgical Corporation* at 69 (Gibbs CJ at [102]); (Mason J); *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11; and *Pilmer v Duke Group Ltd* at [77]; *Maguire v Makaronis* (1997) 188 CLR 449 at 464 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[83] *Westpac v Bell Group (No3)* at [1970].

to exercise care and skill is a fiduciary duty. Carr AJA accepted[84] that such a duty was not fiduciary referring to the distinction emphasised by Ipp JA in *Wheeler*[85], and noted that the liquidators never pleaded a breach of the duty of due care and skill. Lee AJA expressed the contrary view that the duty of care and diligence imposed in equity is a breach of fiduciary duty[86].

67. The approach in *Wheeler* and the English cases[87] to treating the duty of skill and care as an equitable duty not a fiduciary duty has some detractors[88]. However, I would venture to suggest that care needs to be exercised in elevating the criticisms of parts of the reasoning in the English cases, with the conclusion that the director's duty of skill and care is fiduciary rather than an equitable obligation. Again, the significance of this distinction is in the available remedies. Interestingly, there is no statutory accessorial liability in respect of breaches of the equivalent statutory duty of care and diligence under *Corporations Act*, s 180(1).

68. The *Bell* decisions have naturally generated much discussion. A few observations can be made.

69. First, like Lee AJA and Drummond AJA, some authors have suggested a possible narrow construction of *Breen* as concentrating on doctors, not fiduciaries generally[89]. Against that view, no such limitation was suggested in *Pilmer*, *Friend v Brooker* and *Howard v FCT*, and as indicated, the statement of French CJ and Keane J in *Howard v FCT* is to the contrary: see [23] above.

70. Second, one commentator has suggested that the duty to act bona fide in the best interests of the company and the duty to act for a proper purpose can be classified as proscriptive and therefore fiduciary, by separating the consideration of the power from the exercise of the power, when positive action

[84] *Westpac v Bell Group* (No3) at [2715].

[85] (1994) 11 WAR 187 at 239; See also the comments of Millett LJ in *Bristol West Building Society v Mothew* [1998] Ch 1 at 16; and Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205.

[86] *Westpac v Bell Group (No3)* at [871]-[873].

[87] See *Bristol West Building Society v Mothew* [1998] Ch 1 at 16; and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205.

[88] *Equity Doctrines and Remedies* at [5-325] – [5-375]; JD Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?", in S Degeling and J Edelman (eds) *Equity in Commercial Law* (1st ed, Lawbook Co, 2005) pp 185 -237.

[89] *Equity Doctrines and Remedies* at [5-420].

is required[90]. This type of temporal distinction seems, with respect, a little contorted[91].

71. Third, the authors of *Equity Doctrines and Remedies* identify a number of grounds for doubting the rigidity of the prospective/prescriptive distinction[92]. Those grounds include some of the older cases referred to above, where persons were treated as fiduciaries even if they owed positive duties, none of which were considered in *Breen* or the subsequent High Court cases.

72. Fourth, accepting that some breaches of directors' duties are breaches of equitable and/or statutory duties, even if not fiduciary duties, as already mentioned, the *Corporations Act* now provides for statutory accessorial liability via the definition of "involved" in *Corporations Act*, s 79 for breaches of ss 181(1), 182(1) and 183(1), but not breaches of s 180(1).

73. Fifth, the authors of *Equity Doctrines and Remedies*[93] also raise the interesting possibility of side-stepping the problem confronting a *Barnes v Addy* claim if the duty is not a fiduciary duty, by suggesting that accessorial liability might lie where the fiduciary is in breach of a duty which is not itself a fiduciary duty, if the requisite mental element for accessorial liability is present.

Multiple directorships and duties of disclosure

74. In the context of multiple directorships, questions arise as to whether it is sufficient for a director with conflicting duties, or a conflict of interest and duty, to disclose the conflict and not participate in the relevant decision.

75. Authority recognises that there are circumstances in which a conflict will not be avoided by simply disclosing the directors' interest in the transaction to the person to whom the duty is owed and withdrawing from participation in the transaction on that person's behalf[94]. Such cases include: *Permanent Building Society (in liq) v McGee*[95], which was upheld on appeal in *Wheeler*[96]; *Fitzsimmons v R*[97]; *Adler*, which was upheld on appeal[98]; and *Centofanti v Eekimotor Pty Ltd*[99].

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[90] RT Langford, '*Solving the Fiduciary Puzzle – The Bona Fide and Proper Purposes Duties of Company Directors'* (2013) 41 ABLR 127 at 134.

[91] See also the view expressed in *Equity Doctrines and Remedies* at [5-435].

[92] At [5-385] - [5-400].

[93] At [5-430], referring to W Gummow, "Knowing Assistance" (2013) 87 ALJ 311 at 318.

[94] At [432].

[95] (1993) 11 ACSR 260.

[96] (1994) 11 WAR 187; 14 ACSR 109.

[97] (1997) 23 ACSR 355 (Murray, Owen and Parker JJ).

76. As Bathurst CJ observed in *Duncan v ICAC*[100], these cases are consistent with the principle that what is required to avoid a conflict is fully informed consent on the part of the beneficiary of the fiduciary obligation[101].

77. *Fitzsimmons v R*[102] provides a good example. It concerned a reverse takeover of Kia Ora Gold Corp NL by Duke Holdings Limited, which involved Kia Ora providing funds to Duke so that Duke would be able to acquire a parcel of shares in Kia Ora. The applicant was a director of certain Duke companies and also a director of Kia Ora. Duke Holdings was in financial difficulty. Parker J dismissed the contention that the applicant's duty to act honestly in the affairs of Kia Ora necessarily 'rolled-back' to allow compliance with his duty to Duke. Parker J said that the intention of s 229(1) of the *Companies Code* is that regardless of conflicting duties, a director is to act honestly in the exercise of his powers in the discharge of his duties as a director of that company and that duty can require the disclosure of information known to the director which is material to issues being decided.

78. Owen J agreed with Parker, but added comments which Basten JA observed in *Duncan v ICAC*[103] might be considered more guarded. Owen J emphasised that each case will depend on its own facts. The starting point is that a director confronted with a possible conflict must assess his or her position and the minimum requirement will be disclosure of the interest. Owen J continued by observing that what action above and beyond mere disclosure the director must take will vary from case to case depending on the subject matter, the state of knowledge of the adverse information, the degree to which the director has been involved in the transaction, whether the director has been promoting the cause, the gravity of the possible outcome, the contingencies and commercial reality of the situation and so on. Thus, as Owen J remarked, it may not be enough for the director to simply refrain from voting or even to absent himself or herself from the meeting during discussion of the impugned business. The circumstances may require the director to take some positive action to identify clearly the perceived conflict and to suggest a course of action to limit the possible damage.

79. The facts in *Duncan v ICAC* are complex. The appellants were all shareholders (indirectly) and directors of Cascade and all, apart from one, were directors of White Energy. As White Energy proposed to purchase a major

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[98] [2003] NSWCA 131; (2003) 46 ACSR 504; *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64; [1999] SASC 97 at [666]-[670] (overruled in part, but not on this point in *Pilmer v Duke Group Ltd* (2001) 207 CLR 165; [2001] HCA 31; *Adler v Australian Securities and Investment Commission.*

[99] (1995) 65 SASR 31.

[100] At [438].

[101] *Maguire v Makaronis*, at [466].

[102] (1997) 23 ACSR 355 (Murray, Owen and Parker JJ).

[103] At [629].

asset from its own directors, the ASX was notified and an independent Board committee (IBC) set up to assess the proposal on behalf of White Energy and its shareholders.

80. The Commission made findings of corrupt conduct on the part of the appellants, based on their failure to reveal information to the IBC and their involvement in actions, which the Commission found were intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement[104]. The Commission reasoned that the directors breached their duty in circumstances where they were in a position of conflict by withholding significant information from the IBC. Essentially, the Commission concluded that disclosure of the conflict was insufficient to discharge the directors' statutory (or fiduciary) obligations.

81. The relevant Cascade directors commenced proceedings in the Supreme Court challenging the Commission's findings of corrupt conduct against them by way of judicial review. The primary judge (McDougall J) upheld the findings of the Commission against four individual applicants (Messrs Duncan, McGuigan, Poole and Atkinson), whilst rejecting aspects of the Commission's reasoning.

82. McDougall J accepted that there were occasions when the duty to avoid a conflict could require the taking of positive steps to avoid it. Nonetheless, he concluded that this was not the present case as the directors had removed themselves from the conflict. He found that the Commission erred in concluding that further steps were required.

83. One of the issues on appeal was whether the conduct the subject of the Commission's findings, was capable of constituting criminal offences for the purposes of the *Independent Commission Against Corruption Act* (the *ICAC Act*), s 9(1)(a), specifically whether the appellants (other than Mr Poole) could be found to have violated their duties as company directors, in contravention of s 184(1) of the *Corporations Act*. Section 184(1) essentially imposes criminal sanctions for a contravention of s 181 where the contravention is either intentionally dishonest or reckless.

84. Bathurst CJ identified the question as whether the steps taken by the appellant-directors, namely, disclosing their interests and not involving themselves in subsequent deliberations of White Energy concerning the transaction, was

[104] Cascade held a coal exploration licence over an area in the Bylong Valley, known as the Mount Penny tenement. A significant proportion of the land within the tenement was owned by interests associated with the Hon Edward Obeid MLC and members of his family, the market value of which increased four-fold as a result of the grant of the exploration licence. The Commission found that Cascade had entered into a joint venture agreement with the Obeid-controlled company with respect to the award of the Mount Penny exploration licence. The Commission further found that prior to the proposed sale the appellant-directors had taken steps to remove the Obeid family involvement from the joint venture which was seen to pose a potential risk to the value of the Mount Penny tenement: that risk being that the exploration licence might be cancelled by the Government, and that a mining lease might never be granted should the Obeids' involvement become known.

sufficient to avoid that conflict and if not, whether their conduct could be said to be intentionally dishonest[105].

85. Bathurst CJ noted[106] that the conflict in *Duncan v ICAC*[107] was not between the duties owed by the directors to White Energy and duties owed to Cascade, but rather the conflict was between their duties as directors of White Energy and their interests as sellers of their shares in Cascade to that company. Bathurst CJ observed[108] that if the directors were of the view that disclosure of the Obeid involvement would be detrimental to Cascade, they could have avoided a conflict by simply withdrawing from the transaction.

86. Bathurst CJ concluded that it was open to the Commission to be satisfied that it was not sufficient in the particular circumstances for the directors to disclose their interest in the transaction and not participate in the decision-making process of White Energy. The Chief Justice continued[109]:

> Having regard to the amount involved and the effect of disclosure of the Obeid involvement on the Cascade assets, the transaction proposed was, to say the least, improvident. Put simply, the directors believed that if the Obeid involvement was disclosed, the transaction would not proceed. It seems to me from those circumstances, this was a case where it was open to the Commission to find that the directors did not discharge their obligation to avoid placing themselves in a position of conflict by disclosing their interest in the transaction. The conflict inherent in selling effectively a flawed asset to a company to which they owe fiduciary obligations remained and it was open to find that in seeking to proceed with the transaction without disclosing the true position, the directors contravened their obligation to act in good faith in the interests of White Energy.

87. Beazley P relevantly agreed with Bathurst CJ on the construction of s 184(1) of the *Corporations Act*[110], that this provision gives rise to positive duties of disclosure, at least in some circumstances. Beazley P disagreed with the Chief Justice in relation to the application of s 184(1) to Mr Atkinson[111].

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[105] At [431].

[106] At [441]

[107] When considering the reasoning of the NSW Court of Appeal, it is important to keep in mind, as emphasised by Bathurst CJ at [422] that the relevant question on appeal was not whether in fact the appellant-directors against whom the finding was made contravened *Corporations Act*, s 184(1). Rather, the question was first, whether it was open to the Commission to be satisfied that such a contravention had occurred and second, whether it was open to the Commission to conclude, for the purposes of the *ICAC Act*, s 9(1)(a), that it would be open to a jury to conclude that such contravention had occurred.

[108] At [441].

[109] At [442].

[110] At [473].

[111] At [474].

88. Basten JA agreed with the Chief Justice on the construction of s 184(1) of the *Corporations Act*. As already mentioned Basten JA observed that the proscriptive/prescriptive distinction is unlikely to be determinative and, if treated as determinative, may lead to error. This was because the *Corporations Act* imposes affirmative actions on directors.

89. After referring to *Centofanti v Eekimitor Pty Ltd*, *Wheeler*, *McGee*, *Fitzsimmons v R*, and *Duke Group Ltd (in liq) v Pilmer*[112], Basten JA noted that the topic is dealt with in Austin and Ramsey, *Ford's* '*Principles of Corporations Law*'[113] by reference to the same cases without identifying conflicting authority or suggesting error of principle. Basten JA also referred to the views expressed by RI Barrett[114], writing in 1997, after these cases, that while legal principle of longstanding countenances membership of multiple boards, even where the companies concerned are competitors, more recent developments emphasise that it is not safe for a director always to deal with conflicts by the simple combination of silence and abstention.

90. The message for directors should be clear. Multiple directorships give rise to legal risk. Disclosure of a conflict and abstention may not be sufficient to discharge a director's positive duties (under the *Corporations Act* and in equity) to act bona fide in the best interests of the company and to act for proper purposes.

Is the distinction helpful and sustainable?

91. A single answer to this question does not seem possible. Rather, the question needs to be addressed at a number of levels.

92. As to whether the distinction is helpful, it is important first to recall the protective rationale for the proscriptive duties of a fiduciary, which has been already mentioned. This rationale largely explains the High Court's caution against imposing on fiduciaries in general a quasi-tortious duty to act solely in the best interests of their principals. The application of that rationale can be seen in later cases. In *P & V Industries Pty Ltd v Porto*[115] Hollingworth J held, applying the distinction in *Breen*, that a director does not owe a fiduciary duty to disclose his or her past wrongdoing, stating that the contrary view in England[116] does not represent the law in Australia.

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[112] (1999) 73 SASR 64.

[113] 15th Edn, LexisNexis, 2013, at [9.100].

[114] RI Barrett, '*Resolution of Directors'* Conflicts', (1997) 71 ALJ 677 at 679.

[115] *P & V Industries Pty Ltd v Porto* (2006) 14 VR 1, where Hollingworth J distinguished *Trevorrow v South Australia* (No 2) (2005) 94 SASR 1.

[116] *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] 2 BCLC 91 [41] –[44] (Arden LJ).

93. In *Motor Trades Association of Australia Superannuation Fund Pty Ltd v Rickus (No 3)*[117] Flick J rejected the contention that it was part of the fiduciary duty of a director to make full disclosure of documents produced to a regulatory authority, referring to the statement of Jacobsen J in *Australian Securities and Investments Commission v Citicorp Global Markets Australia Pty Ltd*[118] that a fiduciary does not have a positive duty to disclose information. Mr Rickus had failed to give the company copies of documents that he had produced to a regulatory authority in response to a notice to him personally, at a time when he was chairman of directors. Flick J held that the source of the director's duty to produce copies of the documents to the company was his duty to act in the best interests of the company.

94. On the other hand, as I have said, trying to fit all actions required of fiduciaries into a proscriptive/proscriptive dichotomy gives rise to difficulties. As seen in *Bell*, the distinction does not accommodate the statements in older authorities, to the effect that some positive duties of directors are fiduciary in character. Nor does the distinction sit easily with the statements to the effect that directors owe a duty of disclosure in certain circumstances that has been characterised as fiduciary in character.

95. Second, insofar as persons standing in the position of a fiduciary, such as company directors, owe obligations (either equitable or under the *Corporations Act*) some of which are positive in nature, the characterisation of an obligation as either equitable or statutory, rather than fiduciary, will be important in terms of the different remedial consequences. That different causation principles, remedies, and limitation periods apply to different causes of action is not new. This is something frequently encountered in the law.

96. Perhaps of more concern is the common experience that a multiplicity of causes of action tends to increase the length, cost and complexity of litigation. Against this, the desirability for coherence in the law tends in favour of maintaining the distinction insofar as it guards against conflating the different nature of a fiduciary's obligations (be they fiduciary, equitable, common law and statutory) with the different remedies available for particular causes of action.

97. As to whether the distinction is maintainable, some tentative comments can be offered. First, at least in the field of company directors, the characterisation by the Court of Appeal in *Bell* of breaches of certain positive obligations of directors as breaches of fiduciary obligations (the duty to act in good faith in the best interest of the company and the duty to act for proper purposes), is a direct challenge to the rigidity of the proscriptive/proscriptive distinction in *Breen*.

98. Second, it may be some time before the High Court addresses the status of *Bell,* noting that *Bell* itself settled after the High Court had granted special leave on certain questions. An appropriate vehicle to consider the issues in *Bell* may

[117] (2008) 69 ACSR 264 (Flick J). Note this decision pre-dated *Bell*.

[118] (2007) 160 FCR 35 at [375].

be some time away, particularly as the *Corporations Act* provides for statutory accessorial liability against third parties, in many ways similar to a *Barnes v Addy* claim, ignoring possible differences in applicable causation principles and the scope for proprietary remedies in equity.

99. Third, it can be expected that cases will arise in which there will be tension between the proposition in *Breen*, that a fiduciary has no positive duties, and the older authorities (some of which have been referred to above) which have held that a person in the position of a fiduciary has a duty of disclosure in certain circumstances. Is that obligation of disclosure a fiduciary or equitable obligation? It may not be necessary to be precise as to the nature of the obligation unless the available relief for breach of fiduciary duty is different to that available for breach of an equitable (or statutory obligation). But in the case of breach of an equitable (but non-fiduciary) obligation, why would different principles apply to such a claim compared to a claim for breach of fiduciary duty, except possibly for the availability of third party claims under *Barnes v Addy*?

Practical consequences of the distinction

100. The practical consequences of the proscriptive/prescriptive distinction have been adverted to above in terms of the availability of advantageous equitable remedies and the avoidance of stringent time limits. Some important qualifications, however, should be noted.

101. One relates to claims against third parties. Unlike the position in *Bell*, which did not involve any case based on breach of a director's statutory duty, the *Corporations Act* provides for statutory accessorial liability in relation to contraventions of the duty of good faith and proper purpose in s 181(1), and the obligations concerning use of position in s 182(1) and use of information in s 183(1), by providing that a person who is "involved" in a contravention of ss 181(1), 182(1) and 183(1), contravenes the relevant sub-section. Importantly however, statutory accessorial liability does not apply to breach of the obligation of care and diligence in s 180(1) of the *Corporations Act*. The question has been raised as to whether equity should do so[119], that is, should equity "follow the law" and not intervene on a different basis to that provided for in s 180(1) as read with s 79?

102. The expression "involved" is defined in *Corporations Act*, s 79 in the wide terms of persons who has aided, abetted, counselled or procured the contravention, or has induced the contravention, or has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention, or has conspired with others to effect the contravention.

103. Breaches of ss 181(1) and (2), 182(1) and (2) and 183(1) and (2) are defined as a corporation/scheme civil penalty provision: s 1317DA. The remedial consequences for breach of such a provision is compensation under s 1317H. Section 1317H(1) provides that a court may order a person to compensate a

[119] W Gummow AC, '*The Equitable Duties of Company Directors*' (2013) 87 ALJ 753 at 757.

corporation or registered scheme for damage suffered by the corporation or scheme if the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme and the damage has resulted from the corporation.

104. Section 1317H(2) provides that damage suffered by a corporation for the purposes of a compensation order, includes profits made by any person resulting from the contravention or the offence. In *Grimaldi v Chameleon Mining NL (No 2)*[120], the Full Court of the Federal Court observed that s 1317H was 'curious' in a number of respects. One is that s 1317H(2) extends the concept of 'compensation' in a manner which includes the profits made by the defendant. The Full Court expressed the view that[121] the 'include profits' formula is simply definitional in the sense that it brings within the compensatory scheme a type of claim (ie for profits made) which would not otherwise necessarily fall within the formula 'damage suffered by the corporation'. That is, it empowers the Court to compensate for profits made from a contravention without proof of a corresponding loss by the corporation.

105. Another difficulty which has been adverted to is the meaning of the word 'compensation' in s1317H. In *Agricultural Land Management Ltd v Jackson (No 2)*[122] Edelman J having posed the question whether this term would include concepts of 'substitutive' compensation as well as 'reparative' compensation, said that it is hard to see why it would not, explaining that:

> … these two different types of compensation correspond with the orders which were historically made after, respectively, an account in common form and an account on the footing of wilful default. In equity they became conflated in the label 'compensation'. It is difficult to see why an interpretation of the statutory embodiment of duties and remedies in equity would exclude a meaning of compensation which represented what was historically the most common form of account.[123]

106. Causation: The words "resulted from" refer to damage which, as a matter of fact, was caused by the contravention and should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct. There are authorities which say that the common sense test of causation referred to in *March v E&MH Stramare Pty Ltd*[124], can be applied to s 1317H[125]. However, it should not be overlooked that the High

[120] (2012) 200 FCR 296; [2012] FCAFC 6 at [625] (Finn, Stone and Perram JJ).

[121] Ibid at [630]-[631]

[122] (2014) 48 WAR 1; [2014] WASC 102 at [437]

[123] Ibid.

[124] (1991) 171 CLR 506

[125] *Adler v Australian Securities and Investment Commission* [2003] NSWCA 131; (2003) 46 ACSR 504 (*Adler v ASIC*) at [79] (Giles JA, Mason P and Beazley JA agreeing); *Hydrocool Pty Ltd v Hepburn* (2011) 83 ACSR 652; [2011] FCA 495 at [476].

Court has emphasised, in relation to analogous statutory compensation remedies under the *Trade Practices Act 1974* (Cth), s 82 and the *Fair Trading Act 1987* (NSW), s 68 that in deciding whether loss or damage is "by" misleading or deceptive conduct, and in assessing the amount of loss that is to be so characterised:

> it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found[126].

107. While it has often said that s 1317H does not import equitable principles of causation applicable to fiduciaries[127], the contrary view was expressed by Lee AJA in *Bell*[128] and has received support from Edelman J in *Agricultural Land Management Ltd v Jackson (No 2)*[129], where his Honour said:

> The application of an analogy with equitable compensation reaches the same conclusion; as explained above, reparative compensation for a breach of fiduciary duty of this type should involve a negative 'but for' criterion. Although Giles JA warned against the application of equitable analogies to s 1317H, it is hard to see why analogies cannot be drawn with the approach to causation taken to breaches of near-identical duties in equity. As I have explained, the meaning of causation is intimately connected with the character of the duty breached. Section 1317H provides remedies for provisions many of which concern breaches of duties owed by directors. Those duties were historically recognised only in the Court of Chancery. Perhaps for this reason, Lee AJA observed in *Westpac Banking Corporation v The Bell Group (No 3)* that it 'may be thought that the words 'as a result of' or 'resulted from' imported the test applied in equity for linking a breach of duty in equity to loss or damage suffered'.

108. In this regard, it will be recalled that equity's approach differs from that of common law in that it depends upon treating the fiduciary's obligations as one of a personal character to make restitution to the beneficiary or for the trust's estate. The obligation in equity is not limited or influenced by common law principles concerning remoteness of damage, foreseeability or causation. The question for consideration is not whether the loss was caused by or flowed from the breach. Rather, as Street J put it in *Re Dawson (deceased)*[130]:

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[126] *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [30] (Gleeson CJ referring to *Henville v Walker* (2001) 206 CLR 459 at [18], [96] and [164]-[165]; *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [26], [50] and [84]; and more generally *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568.

[127] *Adler v ASIC* (2003) 46 ACSR 504; [2003] NSWCA 131 at [709]; *Register of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412 at [159]-[160].

[128] *Westpac v Bell Group (No 3)* at [860] (Lee AJA).

[129] (2014) 48 WAR 1; [2014] WASC 102 at [452]

[130] [1966] 2 NSWLR 211 at 215; See also *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 273

> The enquiry in each case would appear to be whether the loss would have happened if there had been no breach?

109. Time limits: The time limit for a claim for a compensation order is no later than six years after the contravention: *Corporations Act*, s 1317K. However, in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable. The circumstances in which such an equity arises include where fraudulent conduct of the defendant has denied the plaintiff the opportunity to sue within the statutory period. That equity is satisfied by preventing the defendant from taking advantage of the plaintiff's omission to do so: *Gerace v Auzhair Supplies Pty Ltd*[131].

110. Compound interest: In *Bell*, Owen J awarded compound interest, at monthly rests, at Westpac's business indicator rate less one percent to compensate the Bell Group companies for being held out of their money[132]. However, the Court of Appeal in *Bell* made an award against the Banks of compound interest, calculated at monthly rates, at Westpac's overdraft rate plus one percent per annum[133]. The majority in the Court of Appeal took the view that compensation was to be provided for the disgorgement by the Banks of profits gained by the use of the money obtained from realisation of their securities[134].

111. A question which arises is whether compound interest may be awarded for a breach of equitable duty by a director which does not involve breach of a prospective fiduciary duty? The Hon W Gummow has suggested that the better view with regard to compound interest is that the power exists in relation to breach of equitable duty, and the manner of its exercise is a matter for the discretion of the Court[135].

112. As to whether a Court may award compound interest upon compensation awarded under *Corporations Act*, s 1317H, it has been suggested that the judgment of Lord Walker in *Sempra Metals Ltd v Inland Revenue*

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[131] (2014) 87 NSWLR 435 (Meagher JA, Beazley P and Emmett AJA agreeing).

[132] *Bell Group v Westpac (No 9)* at [9712]-[9718]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 10)* (2009) 71 ACSR 300; [2009] WASC 107 at [22]-[25].

[133] *Westpac v Bell Group (No 3)* at [1245]-[1249] (Lee AJA) and [2678] (Drummond AJA).

[134] It is beyond the scope of this article to explore the competing arguments advanced in the submissions by the parties on the appeal to the High Court (which ultimately settled) as to whether the majority's approach in *Bell* failed to recognise the distinctions between equitable compensation and an account of profits in circumstances where the trial judge (Owen J) was assessing equitable compensation.

[135] W Gummow AC, '*The Equitable Duties of Company Directors*' (2013) 87 ALJ 753 at 759 and the authorities referred to at fns 25, 26, 27 and 28.

Commissioners[136] suggests an affirmative answer to that question[137]. The Hon W Gummow has proffered the view that "much may turn upon the consistency of such a remedy with the particular statutory regime to which this equitable remedy would be auxiliary"[138], referring to *Commonwealth v SCI Operations Pty Ltd*[139]. It seems that the practical consequences in terms of an award of compound interest in equity as compared to at general law, including under statute, may be breaking down.

Conclusions

113. Doubt as to the rigidity of the prospective/prescriptive distinction emphasised by the High Court in *Breen* and subsequent cases has emerged on a number of fronts. The Court of Appeal's decision in *Bell* provides a direct challenge to the High Court's statement of the law with respect to the nature of fiduciary obligations. It is difficult to reconcile the High Court's statement with older authorities to the effect that in certain circumstances fiduciaries, such as promoters and directors, have positive duties of disclosure. Plainly, the proscriptive/prescriptive dichotomy does not apply to the *Corporations Act*, which in terms is reflective of general law principles and imposes affirmative obligations on company directors.

114. The proscriptive/prescriptive distinction is useful at a general level in emphasising the nature of fiduciary obligations, but the sustainability of the distinction may be open to doubt. The practical consequences of the distinction may be overstated in terms of the availability of equitable remedies compared to that at general law when one takes into account the availability of statutory accessorial liability claims, the potential for an award of compound interest in equity, and possibly, under the statute, and the general principle that, in purely equitable proceedings, equity follows the law in relation to time limits, subject to the exceptions noted in *Gerace v Auzhair Supplies Pty Ltd*.

[136] [2008] 1 AC 561 at 629-630.

[137] See fn 119 at 759.

[138] Ibid.

[139] (1998) 192 CLR 285 at [76].