Some issues in enforcement of directors' duties

Paper delivered in LAW5357 Corporate governance and directors' duties

Monash University, 29 October 2020

Justice Ashley Black

A Judge of the Supreme Court of New South Wales

Introduction

I will address several areas of overlap between duties and remedies in equity and the corporations law. I will deal first deal with some differences in international enforcement approaches. I will then turn to some recent Australian case law in directors' duties in equity and by statute; then with an overlap between claims for breach of directors' duties, derivative actions and oppression claims; then with compensation and applications for interlocutory injunctions in equity and under the *Corporations Act*; and lastly with open issues in accessorial liability in equity and under the *Corporations Act*. I will focus on several recent cases in doing so.

Differences in international enforcement approaches to directors' duties

There are significant differences in the substantive content of relevant legal regimes and in the way in which they are enforced, even in the common law jurisdictions.

Professor Hill has noted that, under Delaware law, which governs the operation of a significant proportion of larger United States companies, all duties owed by directors, including the duty of care, tend to be classified as fiduciary, and only proscriptive duties are treated as fiduciary under Australian law.[1] The business judgment rule under Delaware law appears to operate more widely than the corresponding Australian rule. The constitution of a Delaware company will typically exclude director's liabilities for negligence (including gross negligence), whereas such an exclusion is prohibited under Australian law. Professor Hill also points out that directors' fiduciary duties are purely equitable in Delaware; UK statutory duties replace but are not necessarily coextensive with directors' general law duties; and Australian statutory duties overlap with general law duties, as we will see below.

Turning now public enforcement of directors' duties, the introduction of the civil penalty regime in the *Corporations Act* provided a framework for claims for breach of directors' duties brought by the Australian Securities and Investments Commission ("ASIC").[2] In an empirical study taken in Australia

[1] JG Hill, "Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance" (2020) 5 *UC Irvine J Int'l Trans Nat'l and Corp L* 163.

[2] There is voluminous academic literature considering the operation of these provisions, including M Welsh, "ASIC, Civil Penalties and Compensation Orders under the Corporations Act 2001 (2003-2004) *CLQ* 13; M Welsh, "11 Years On — An Examination of ASIC's Use of an Expanding Civil Penalty Regime" (2004) 17 *AJCL* 175; M Welsh, "Adler, Whitlam & Others: Judicial Interpretation of the Civil Penalty Provisions of the Corporations Act 2001" (2005) 18

covering the period to 2015 noted that, in Australia, Ms Varzaly found that cases against directors of public companies were more likely to be brought by ASIC, and public enforcement was more likely to concern breaches of directors' duties of care for insider trading.[3] By contrast, there is little public enforcement of directors' duties in Delaware and, at least historically, in the United Kingdom.[4]

Ms Varzaly's study also noted that cases brought against directors of proprietary companies were more likely to be initiated by "private" parties; that cases brought by private parties were more likely to involve misappropriation and self-dealing in breach of fiduciary duty; and that a significant amount of private enforcement action was taken by the company itself rather than by shareholders, reflecting the limits in respect of derivative actions. I would add, however, that a review of corporations matters heard in the Federal Court of Australia and the State Supreme Courts would disclose numerous applications for leave to bring statutory derivative actions, most of which succeed, and a significant number of oppression claims which rely on a alleged breaches of directors' duties, without separately seeking leave to bring a statutory derivate action. At the international level, Professor Hill notes that there is significant amount of case law involving shareholder claims for alleged breaches of the duty of loyalty in Delaware, but also little private enforcement of directors' duties in the United Kingdom.[5]

Breach of the statutory and general law duty of care and diligence

Claims for breach of the duty of care and diligence are most often brought by ASIC[6], or might be brought by the company, usually after a change of control

---

AJCL 243; A Rees, "Civil Penalties: Emphasising the Adjective or the Noun" (2006) 34 *ABLR* 139; V Comino, "Civil or Criminal Penalties for Corporate Misconduct: Which Way Ahead?" (2006) 34 *ABLR* 428; J Knackstredt, "The Evolution in Civil Penalties Proceedings" (2006) 24 *C&SLJ* 56; V Comino, "The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime" (2007) 20 *AJCL* 183; M Welsh, "The regulatory dilemma: The choice between overlapping criminal sanctions and civil penalties for contraventions of the directors' duty provisions" (2009) 27 *C&SLJ* 370; R M Jones and M Welsh, "Towards a Public Enforcement Model for Directors' Duty of Oversight" (2012) 95 *Vanderbilt J of Transnat'l Law* 343; M Welsh, "Rediscovering the Public Potential of Corporate Law" (2014) 42 *Fed L Rev* 217.

[3] J Varzaly, "The Enforcement of Directors' Duties in Australia: An Empirical Analysis" (2015) 16 *European Bus Org LR* 281.

[4] The evidence of the low level of enforcement activity in the United Kingdom is somewhat dated: J Armour, "Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment", April 2008, accessible at http://ssrn.com/abstract=1133542; J Armour et al, "Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States" (2009) 6 *J Empirical Legal Stud* 687; for more recent commentary, see A Keay, "The Public Enforcement of Directors' Duties: A Normative Inquiry" (2014) 43 *Comm L World Rev* 89.

[5] JG Hill, "Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance", note 1 above.

[6] Well-known examples include proceedings brought by ASIC in relation to the failures of HIH, One.Tel, the James Hardie matter and the failure of Storm Financial: *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; [2002] NSWSC 171; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229; *Morley v Australian Securities and Investments Commission* (2010) 81 ACSR 285; [2010] NSWCA 331; *Australian Securities and Investments Commission v Hellicar*

or change of management or against a former director or employee[7], or by a liquidator.[8] They could also be brought in a statutory derivative action or in an oppression claim, which I address below.

Section 180 of the *Corporations Act* deals with a director's duty of care and diligence. That section requires a director or other officer of a corporation to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer. The statutory duty of care and diligence under that section overlaps with directors' duty of care arising at general law.

In *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253; [2002] NSWSC 171 at [372], Santow J noted that the duties imposed by the section are essentially the same as directors' duties at general law; that, in determining whether a director had exercised reasonable care and diligence, the test was what an ordinary person, with the director's knowledge and experience, might be expected to have done in the circumstances if he or she was acting on his or her own behalf; and that the duty of care and diligence would require special vigilance in a situation of potential conflict, requiring scrupulous concern on the part of those officers who become aware of that transaction to ensure that any necessary corporate approvals are obtained and safeguards put in place.[9] The cases indicate that a contravention of that section generally requires that an act or omission involve a reasonably foreseeable risk of harm to the company's interests, and that risk of harm must be balanced against the potential benefits that could reasonably be expected to accrue to the company from that conduct.[10] The case law also generally supports the view that this section cannot be used to impose liability on a director merely because the company has contravened another provision of the *Corporations Act*, but that section may be breached by a director's conduct in authorising conduct that risks exposing the company to civil penalties or another liability under the *Corporations Act*, at least if that risk is clear and countervailing potential benefits are insignificant.[11]

(2012) 247 CLR 345; (2012) 88 ACSR 246; [2012] HCA 17; *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52.

[7] For example, *Vanguard Financial Planners Pty Ltd v Ale* (2018) 354 ALR 711(2018) 125 ACSR 1; [2018] NSWSC 314; *Taxa Australia Pty Ltd v Wang* (2018) 130 ACSR 531; [2018] NSWSC 1412; *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1270.

[8] For recent examples in the Supreme Court of New South Wales, *Re Waterfront Investments Group Pty Ltd (in liq)* (2015) 105 ACSR 280; [2015] NSWSC 18.

[9] That decision was upheld by the Court of Appeal in *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504; 179 FLR 1; [2003] NSWCA 131, cited with approval in *Parker v Tucker* (2010) 77 ACSR 525; [2010] FCA 263 at [70] per Gordon J and *Diamond Hill Mining Pty Ltd v Huang Jim Mining Pty Ltd* (2011) 84 ACSR 616; [2011] VSC 288 at [90] per Croft J.

[10] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.

[11] *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373; *Australian Securities and Investments Commission v Mariner Corp* [2015] FCA 589; (2015) 241 FLR 502; 327 ALR 95; 106 ACSR 343; *Australian Securities and Investments*

At first instance in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023, Edelman J (then sitting in the Federal court of Australia) held that the directors of Storm Financial, Mr and Mrs Cassimatis, had contravened s 180 of the Corporations Act in exercising their powers as directors of Storm in a manner that caused or permitted (by omission) inappropriate advice to be given by that entity to a particular class of investors who were, inter alia, retired or close to retirement and had little or no prospect of rebuilding their financial position if they suffered substantial loss. In the penalty judgment in *Australian Securities and Investments Commission v Cassimatis (No 9)* [2018] FCA 385, Dowsett J noted the continuance of the relevant conduct over a lengthy period, raised the possibility that the financial penalty of $70,000 sought by the Australian Securities and Investments Commission ("ASIC") against each of them was on the "low side", but imposed that penalty, and also ordered that Mr and Mrs Cassimatis be disqualified for seven years from managing a company.

The finding at first instance of breach of directors' duties by Mr and Mrs Cassimatis was upheld by the majority in *Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52. At first instance in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023, Edelman J (then sitting in the Federal Court of Australia) had held that the directors of Storm Financial, Mr and Mrs Cassimatis, had contravened s 180 of the *Corporations Act* in exercising their powers as directors of Storm in a manner that caused or permitted (by omission) Storm to contravene the suitability requirements in former s 945A of the Act by giving inappropriate advice to be given by that entity to the class of investors who were, inter alia, retired or close to retirement and had little or no prospect of rebuilding their financial position if they suffered substantial loss.

On appeal, Mr and Mrs Cassimatis challenged both Edelman J's finding that Storm had contravened s 945A of the Act and his Honour's finding that they had contravened s 180 of the Act, and contended that Storm's corporate interests were identical to their interests as its only shareholders. The majority (Greenwood and Thawley JJ) upheld both findings and held that the Mr and Mrs Cassimatis had breached their duty by failing to guard against foreseeable harm to Storm Financial arising from the contravention of former s 945A of the Act. The decision provides an important analysis of what has been described as "stepping stone" liability, and the majority recognised that liability in that case was established in a different manner.

Greenwood J observed (at [79] that:

Commission v Cassimatis (No 8) [2016] FCA 1023; (2016) 336 ALR 209 at [539]; for commentary see A Herzberg and H Anderson, "Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability" (2012) 40 *Federal Law Review* 181; T Bednall and P Hanrahan, "Officers' liability for mandatory corporate disclosure: two paths, two destinations?" (2013) 31 *C&SLJ* 474, AJ Black, "Directors' Statutory and General Law Accessory Liability for Corporate Wrongdoing" (2013) 31 *C&SLJ* 511; R Teele Langford, "Corporate Culpability, Stepping Stones and Mariner: Contention Surrounding Directors' Duties where the Company Breaches the Law" (2016) 34 *C&SLJ* 75.

> “The contraventions of the particular sections of the Act by Storm were, of course, material to the foreseeable risk of serious harm to Storm which the appellants, as a matter of primary obligation on their part, were required to guard against, in the exercise of their powers of management and the discharge of their duties of management, by exercising the required statutory degree of objective care and diligence that a reasonable person would exercise in their position, in the corporation’s circumstances and having the same responsibilities within the corporation as the appellants, particularly having regard to the degree of control the appellants exercised over Storm ... Had ASIC not been able to establish conduct that engaged contraventions of the sections of the Act by Storm as found, it would have been difficult, if not impossible, to sustain the contention that the appellants engaged in a contravention of s 180(1) by failing to guard against a foreseeable risk of serious harm to Storm which was said to have arisen out of such contraventions. Importantly in this context, shorthand phrases such as stepping stones to liability on the part of a director or officer are unhelpful and apt to throw sand in the eyes of the analysis. The appellants were not found to have contravened s 180 of the Act because the corporation contravened the Act. The contraventions of the Act by Storm were a necessary element of the harm, but not sufficient by themselves to result in a contravention of s 180 by the appellants as directors. The foundation of the liability of the appellants resides entirely in their own conduct in contravention of the objective degree of care and diligence.”

His Honour summarised (at [174]-[177) several matters that gave rise to the contravention by Mr and Mrs Cassimatis, including that a reasonable director, in Storm’s circumstances and having their responsibilities, would have taken precautions to prevent the giving of the relevant advice to vulnerable investors; their failure to act in the way a reasonable director would have acted in the relevant circumstances would give rise to a foreseeable risk of contraventions of former s 945A (and also s 912A(1)(a) and (b)) which would expose the company to a potential loss of its Australian financial services licence and potential harm in the form of a threat to its existence; and that conduct, coupled with the foreseeable risk of harm to Storm’s interests, was conduct of the appellants engaging a contravention of s 180 of the Act. His Honour then observed held (at [178]) that:

> “the contravention of s 180(1), by the appellants, did not arise simply because the corporation contravened [former s 945A]. The contraventions by Storm arose out of a primary failure on the part of the appellants, as directors, to act in accordance with the objective standard of care and diligence required of them by s 180(1), and features of that conduct engaged conduct which brought about the contraventions by Storm of the identified sections of the Act.”

His Honour also observed (at [196] that:

> “the shareholders cannot sanction, ratify or approve, qua themselves as directors, their own conduct in contravention of s 180. Nor can they release themselves from such a contravention. That follows because of the normative, objective, irreducible standard of care and diligence directors must live up to, as adopted by the Parliament according to the text of the section …”.

Thawley J similarly observed (at [464]-[465]) that:

> "Section 180(1) applies according to its terms. It imposes a duty to meet the specified standard of care in exercising powers and discharging duties. In this particular case, the question of whether the standard was met arose in the context of the corporation having contravened the Corporations Act. ASIC conducted its case on the basis that it had to establish such a contravention … ASIC's case was that the conduct of Mr and Mrs Cassimatis as directors of Storm failed to meet the standard of care and diligence required by s 180(1). Their conduct exposed Storm to a foreseeable risk of harm, in circumstances where reasonable directors, with the same responsibilities as Mr and Mrs Cassimatis, in Storm's circumstances, would not have done so or would have taken some preventative action. The material facts which gave rise to the foreseeable harm included that their conduct caused Storm to contravene the Corporations Act. The issues which arise under s 180 require attention to the circumstances as they existed at the time of the exercise of powers and discharge of duties. A breach of s 180(1), in situations broadly analogous to the present, might potentially be demonstrated by showing that conduct exposed the company to relevant jeopardy because it was likely to result in future contravention by the company or that the direct and immediate consequence of the conduct was that the company contravened the Corporations Act or some other law. It might potentially be demonstrated by showing that a failure to act was likely to result in contravention by the company or failed to bring a continuing contravention to an end. Whether or not there was a failure to meet the standard prescribed by s 180(1) depends on the particular facts.
>
> A breach of s 180(1) lies in the director's conduct in not meeting the relevant standard in light of such matters. A company's contravention might be a material fact relevant to the question whether a director failed to meet the standard mandated by s 180(1) by exposing a company to risk; but it is not an essential ingredient of liability in the way it is in a case of accessorial liability."

His Honour also observed (at [465]) that Edelman J had approached the matter as a question of direct liability of Mr and Mrs Cassimatis for failing to meet the standard of care and diligence set by s 180(1) and not as a "backdoor method" for visiting accessorial liability upon them for a contravention by Storm. His Honour also held (at [472]) that:

> "It is of course relevant to the degree of care and diligence which s 180(1) requires to have regard to the fact that the corporation's interests include the interests of the shareholders and that acquiescence on the part of the shareholders might affect the practical content of what s 180(1) requires ... But it is step too far to say that 100% shareholders can approve their own contravention of s 180(1) as directors. Shareholders cannot release directors from the statutory duties imposed by ss 180, 181 and 182 … It might also be observed that, in a situation where a company nears insolvency, 100% shareholders could not ratify their decisions as directors where those decisions prejudice the interests of creditors."

Rares J agreed with the majority in upholding the finding at first instance that Storm had contravened former s 945A of the *Act* but dissented as to the finding of a contravention of s 180 of the *Act*.

There is also a developing interaction in the case law between a company's continuous disclosure obligations and directors' duty of care and diligence. In *Australian Securities and Investments Commission v Vocation Ltd (in liq)* [2019] FCA 807, the Federal Court of Australia considered the scope of a director's liability for breach of duty, in the context of continuous disclosure and the provision of information to underwriters in respect of a capital raising. Vocation Ltd ("Vocation") was listed on the Australian Securities Exchange ("ASX") and conducted a vocational education and training services business, which substantially depended on Victorian Government funding for educational courses. The relevant government department ("DEECD") partly withheld funding for educational courses offered by Vocation, by reason of a suspected breach of the funding agreements. Information provided by management to Vocation's board underestimated the potential revenue implications of these matters, Vocation also delayed in disclosing those matters to the ASX and, when it did so, stated that their impact would not be material. Vocation also undertook a fully underwritten private placement and provided information to the underwriter which also understated the implications of these matters.

Nicholas J held that Vocation had contravened the continuous disclosure requirements under s 674 of the *Corporations Act* and had also contravened the prohibition on misleading or deceptive conduct in s 1041H of the *Act* in its answers to a diligence questionnaire in respect of the private placement. ASIC also alleged that several of Vocation's officers had breached their duties in respect of these matters. His Honour held that Vocation's chief executive officer had contravened the duty of care and diligence under s 180 of the *Act* in causing or permitting Vocation's contravention of both provisions. His Honour also held that Vocation's chair had accepted information provided by management uncritically and without challenging the correctness of the advice or the assumptions on which that advice was given, and had contravened s 180(1) of the *Act* during the period after Vocation had received legal advice confirming that DEECD was entitled to withhold its funding, and he had been provided with relevant correspondence and had assumed responsibility for negotiations with DEECD. His Honour also found that Vocation's chief financial officer and company secretary had contravened the statutory duty of care and diligence under s 180 of the *Act* in respect of representations made to the underwriter in response to the due diligence questionnaire.
A similar finding was also recently reached in *Australian Securities & Investments Commission v Big Star Energy Ltd (No 3)* [2020] FCA 1442. ASIC there alleged that Big Star Energy Ltd ("Big Star") had breached its continuous disclosure obligations under s 674 of the *Act* by announcing that it had entered into two sale agreements in respect of significant assets, without disclosing the identity of the purchaser or the fact that it had not assessed the prospect of the purchaser completing the sale agreement or that the purchaser had advised that it had funding in place in respect of only one of those agreements. ASIC also contended that Mr Cruickshank, who was a

director of Big Star, was knowingly involved in that contravention or had alternatively contravened s 180(1) of the *Act* by failing to exercise due skill and care in causing or permitting the company to contravene s 674 of the *Act*.

Banks-Smith J found that Big Star had contravened s 674(2) of the *Act* by failing to notify ASX of three matters, the identity of the purchaser under the relevant agreements, that it had not verified or determined the purchaser's capacity to complete the agreements and that it had been informed by the purchaser that it had not yet received all funding approvals necessary to complete the purchase of the assets. Her Honour followed earlier authorities, including *Australian Securities and Investments Commission v Vocation Ltd (in liq)* above, in holding that knowing involvement in that contravention required not only that a director knew the underlying facts, but also that he or she knew that the information was material in the relevant sense. Her Honour found that it was not established that Mr Cruickshank had actual knowledge that the information was of a nature that it had to be disclosed, and his knowing involvement in the company's contravention of the continuing disclosure obligation was therefore not established.

However, her Honour found that Mr Cruickshank had contravened s 180 of the *Act* by failing to exercise reasonable care and diligence in respect of the disclosure, that failure had caused Big Star to contravene the continuous disclosure requirements under s 674 of the *Act* and it was foreseeable that that contravention might harm Big Star's interests. This approach is similar to that taken by Nicholas J in *Australian Securities and Investments Commission v Vocation Ltd (in liq)* above. Again, that approach might be described as involving "stepping stones" reasoning, but is ultimately no more than a finding of breach of directors' duties in the particular case, where that breach arises from a failure to comply with another statutory requirement. Her Honour also found, again reaching the same result as *Australian Securities and Investments Commission v Vocation Ltd (in liq)* above, that a director's decision to cause a company not to disclose information was not a business judgment for the purposes of the business judgment rule in s 180(2) of the *Act*, and that the factual elements of that rule were not made out in any event.

In *Australian Securities and Investments Commission v Mitchell (No 2)* [2020] FCA 1098, ASIC brought proceedings against the chair and a non-executive director of Tennis Australia, in respect of Tennis Australia's decision in May 2013 to renew domestic broadcast rights held by a television broadcaster ("Seven") for five years for a substantial payment. ASIC alleged that Mr Stephen Healy, the chair of Tennis Australia had breached of s 180 of the Corporations Act, primarily by not including additional documents in board packs for board meetings, and that conduct had deprived Tennis Australia of the opportunity to obtain a higher fee for broadcast rights from a competitive tender. The claim against Mr Healy failed.

Beach J observed (at [1397]) that the standard of reasonableness required by s 180 is an objective standard and requires directors to act with the skill and diligence which ordinary prudence would require under similar circumstances, and it is necessary to consider the corporation's circumstances and position and the director’s responsibility within the corporation. His Honour reviewed the case law as to the role of a chair (at [1398]ff) and observed that the chair’s responsibilities depended on what he or she has undertaken to do and has represented that he or she would do, and that there are also general expectations of a chair’s role, including not only to chair board meetings and shareholders’ meetings, but also to set the agenda for board meetings, ensure that that the board has sufficient information and sufficient time to consider issues, ensure that board members work effectively together and promote workable and harmonious relationships between directors (in particular non-executive directors) and the chief executive officer and executive management. His Honour also observed (at [1416]) that the chair has particular responsibility for ensuring that the board sets and implements the company’s culture and appropriate corporate governance structures. His Honour noted that the chair is also expected to supervise the task of monitoring the performance of each director and the performance of board committees and the board as a whole and matters relating to the appointment of new directors and ensure continuing education and development of directors and to ensure appropriate communication with shareholders and that their interests are properly considered.

Beach J also observed (at [1431]) that, in order for conduct to contravene s 180 of the Act, it must have created at least a foreseeable risk of harm to the company’s interests, and that an assessment of such a risk and any potential benefit of the action will take place with reference to the corporation’s circumstances and the director’s responsibility and office. His Honour observed (at [1433]-[1434]) that a plaintiff had the onus of establishing the elements of a breach of s 180(1) of the Act, although a defendant director may have an evidentiary onus in some respects and (at [1435]) that a director had the legal and evidentiary onus of establishing each of the elements of the business judgment rule defence and a plaintiff need not disprove that defence, following *ASIC v Rich* (2003) 174 FLR 128 at [7283]ff as to the elements of that defence. His Honour also doubted (at [1441]) whether the question of what information was provided to a company’s board was a business judgment for the purpose of that defence. His Honour held (at [1556]) that the chair’s duty of reasonable care and diligence did not require that he countermand the chief executive officer’s assessment of what information should be put before the board in the relevant circumstances and that ASIC had not shown a foreseeable risk of harm following from the alleged acts and omissions on the part of the chair. In *Australian Securities and Investments Commission v Mitchell (No 2)* above, ASIC also alleged that a non-executive director of Tennis Australia, Mr Harold Mitchell, had breached ss 180, 182 and 183 of the Corporations Act. I will deal with that aspect of the case in dealing with ss 182 and 183 of the Act below.

Directors’ breach of fiduciary duty at general law and statutory duties

General law duties

These claims are also most often brought by ASIC, by the company after a change of control or change of management or against a former director or employee, or by a liquidator. The relationship between a director and company is, of course, a traditional, status-based, fiduciary relationship.[12] Turning first to the position in equity, the High Court has, of course, emphasised that Australian courts only recognise fiduciary duties of proscriptive or prohibitive character, imposing the obligation on the fiduciary not to obtain an unauthorised profit or to be in a position of conflict, and the existence of a fiduciary relationship does not impose a positive legal duty on the fiduciary to act in the beneficiary's interests.[13]

A different result may still be open in the corporations law. In the appeal in *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; (2012) 44 WAR 1, the majority in the Court of Appeal of the Supreme Court of Western Australia held that the director's duties to act in good faith and in the company's interests and for proper purposes, although imposing positive obligations, can nonetheless be characterised as fiduciary, and Carr AJA took substantially the same view.[14] This question was subsequently noted in *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [345]ff, where Edelman J observed that it may be incorrect, on the current state of Australian authorities, to characterise a breach of positive duties by a director, such as duties to act in good faith and in a company's interests and for proper purposes, as a breach of fiduciary duty. His Honour nonetheless noted (at [348]-[349]) that the High Court "appears to have recognised that there may be a fiduciary prescriptive liability to account, where that liability is associated with a proscriptive fiduciary duty"[15]; that it may be possible to describe the "proper purposes" duty in negative terms, as a duty not to act for collateral purposes; and that the duty or duties to act in good faith in the interests of the company could alternatively be characterised as prescriptive conditions upon the exercise of a fiduciary power.

The emphasis on the proscriptive character of fiduciary duties in Australian law means that Australian courts have not been prepared to recognise an affirmative duty of disclosure applying to directors or company officers as a separate fiduciary duty or an incident of the no conflict rule. A director's non-disclosure of information relevant to the company, or indeed of his or her own breach of duty, is therefore generally not a separate breach of duty.[16] The

---

[12] *Hospital Products Ltd v United States Surgical Corp* [1984] HCA 64; (1984) 156 CLR 41 per Gibbs CJ at 68. For a sample of the academic literature, see RP Austin, "Fiduciary Accountability for Business Opportunities" in PD Finn (ed), *Equity and Commercial Relationships*, 1987; WMC Gummow, "The equitable duties of company directors" (2013) 87 *ALJ* 753; JD Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in S Degeling and J Edelman, *Equity in Commercial Law* (2005) at 187–237; M Pearce, "Company directors as 'super-fiduciaries'" (2013) 87 *ALJ* 464; Rosemary Teele Langford, *Directors' Duties: Principles and Application*, 2014.

[13] *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71; *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 at 197–8.

[14] At [918]-[933] per Lee AJA, at [1956] and [1978] per Drummond AJA. Carr AJA also observed (at [2733]) that he was not prepared to hold, on the present state of authority, that duties to act in the company's interests were not fiduciary duties.

[15] Referring to *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 at 290.

[16] *Compaq Computer Australia Pty Ltd v Merry* [1998] FCA 968; (1998) 157 ALR 1 at 21; *National Mutual Property Services Australia Pty Ltd v Citibank Savings Ltd* [1998] FCA 564; *Fitzwood Pty Ltd v Unique Gold Pty Ltd (in liq)* [2001] FCA 1628; (2001) 188 ALR 566 at [32]–[33]; *Dresna Pty Ltd v Linknarf Management Services Pty Ltd (in liq)* [2006] FCAFC 193;

fact of disclosure may, of course, still be relevant to informed consent to or ratification of conduct that would otherwise be a breach of fiduciary duty. English law has taken a different approach, treating a fiduciary's non-disclosure of a breach of duty as itself a potential breach of fiduciary duty.[17]

Issues as to the scope of the no conflict and no profit rules

The no conflict and no profit rules are of course well-recognised incidents of a fiduciary position. There is one significant limitation to the no conflict rule. In equity, a duty to avoid conflicts of interest only arises in that part of a relationship between a fiduciary and his or her beneficiary that is fiduciary in character.[18] That proposition also applies to the scope of a director's duties. In *Howard v Federal Commissioner of Taxation* [2014] HCA 83; (2014) 253 CLR 11, a company director contended that he was not liable for a tax on a judgment in his favour because he had received the amount of the judgment as constructive trustee for a company of which he was a director. The High Court rejected that proposition, on the basis that the director had not obtained any gain or benefit by use of his position as a director, there was no conflict and no substantial possibility of conflict between his personal interest and his duty to the company and therefore no basis for a constructive trust. French CJ and Keane J noted (at [34]) that the limits of fiduciary duties were to be determined by the character of the relationship, the parties' express agreement and their course of dealings and that:

> "[t]he 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."

The scope of the no conflict and no profit rules has been considered in recent cases concerning directors. In *Coope v LCM Litigation Fund Pty Ltd* (2016) 333 ALR 524; [2016] NSWCA 37, Payne JA (with whom Gleeson and Leeming JJA agreed) summarised the no conflict and no profit rule as follows (at [105]):

> "A 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 the personal interest of the fiduciary and those to whom the duty is owed … A conflict arises if there is a real and sensible possibility that the personal interests of the fiduciary divide the loyalty of the fiduciary with the result that he or she could not properly discharge their duties to the beneficiary. …"

(2006) 156 FCR 474 at [130]–[132]; *P & V Industries Pty Ltd v Ponto* [2007] VSC 64 at [24]–[30]; *Collard v Western Australia (No 4)* [2013] WASC 455 at [1096], [1211]–[1214].

[17] *Item Software (UK) Ltd v Fassihi* [2004] EWCA (Civ) 1244; *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch) at [65]; *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369 at [192]–[195]; *McTear v Engelhard* [2014] EWHC 1056 (Ch) at [10]–[91].

[18] *Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 per Dixon J; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 at 1130 per Lord Wilberforce.

The Court there accepted that there was no positive obligation of disclosure upon a senior executive who was negotiating separation arrangements with the company, with the intention of joining a significant competitor, but that disclosure was the only defence to a breach of his fiduciary duty in those circumstances. The Court there found that the extent of information disclosed by that senior executive was not sufficient to comply with his disclosure obligations in order to achieve informed consent.

The application of the no conflict and no profit rules in a particular case can raise difficult questions of judgment, which would make it more difficult to predict the outcome of litigation. This difficulty was recognised in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016) 116 ACSR 566; [2016] NSWCA 347, where Bathurst CJ (at [4]; Sackville AJA to similar effect at [133]) referred to the High Court's decisions in *Pilmer v Duke Group Ltd (in liq)* above and *Howard v Federal Commissioner of Taxation* above and observed that:

> "[D]ifferent 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 and the doctrine cannot be inexorably applied without regard to the particular circumstances of the relationship."

The Court there upheld a finding at first instance that actions by a director in setting up a rival business could adversely affect a company in the conduct of its business, and that conduct had placed the director in a position where his duty to the company conflicted with his interests in establishing and promoting the new business.

The no conflict rule has a strict application in the sense that, if a transaction has occurred in conflict of interest, a fiduciary (including a company director) cannot avoid a breach of that rule by asserting the fairness of the transaction or that it was in the company's best interests or that the director was not acting with subjective dishonesty.[19] However, there are differing views as to whether the duty is breached by the existence of a position of conflict, or only by the pursuit of a director's personal interest while he or she is in a position of conflict.[20] There will often be little practical difference between the two approaches. In the cases where the wider view has been expressed, the director has generally acted in a position of conflict in any event.

The corresponding statutory directors' duties

---

[19] M Scott Donald, "Managing the Possibility of Conflict" (2015) *Australian Superannuation Law Bulletin* 89.

[20] *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; (2008) 39 WAR 1; 70 ACSR 1 at [4503]–[4504]; *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102; (2014) 48 WAR 1; 98 ACSR 615; *Re Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789; (2014) 101 ACSR 233; R Teele Langford, "Directors' Duties: Conflicts, Proactive Disclosure and s 181 of the Corporations Act" (2015) 33(3) *C&SLJ* 205; J Campbell, "Fiduciary Relationships in a Commercial Context", Sydney Law School, Legal Studies Research Paper, No 14/26; R Teele Langford & I M Ramsay, "Directors' conflicts: Must a conflict be pursued for there to be a breach of duty?" (2015) 9 *J Eq* 281.

Section 181 of the *Corporations Act* requires a director or officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose. That section overlaps with the director's general law duties to act for proper purposes and in good faith and in the company's interests. The bulk of authority indicates that this section requires a director to act in what he or she honestly believes to be the best interests of the company, and that the substantial purpose for which they discharge their duties must be a proper one, a matter which is determined on an objective approach.[21] The scope of this section was recently considered by the Court of Appeal of the Supreme Court of New South Wales in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, where the Court held that it was open to the Independent Commission Against Corruption to find that the directors had not discharged an obligation to avoid a conflict of interest, in connection with the sale of a flawed asset to a company which would generate a profit for the directors, by withdrawing from the decision-making process as to the transaction without disclosing the true position.

Section 182 of the *Corporations Act* prohibits a director, secretary, officer or employee of a corporation from improperly using his or her position to gain an advantage for himself or herself or someone else or cause detriment to the corporation, and that section reflects the fiduciary obligation of a director under the general law. Section 183 of the *Corporations Act* in turn prohibits a director or officer or employee of a corporation from improperly using information to gain an advantage for themselves or someone else or cause detriment to the corporation. These sections are regularly found to have been breached by conduct that, for example, diverts business from a company to another entity or involves misuse of confidential information.[22]

In *Australian Securities and Investments Commission v Mitchell (No 2)* above, Beach J observed (at [1516]ff) that the test whether conduct is improper for the purposes of s 182-183 is objective and (at [1517], citing *R v Byrnes* (1995) 183 CLR 501 and *Doyle v ASIC* (2005) 227 CLR 18) that impropriety is established when a director is in "breach of the standard of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authorities of his position as a director" and (at

---

[21] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* above per Lee AJA and Drummond AJA, although Carr AJA treated that question as primarily subjective; *Re Colorado Products Pty Ltd (in prov liq)* above at [421]; *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 at [494]; *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307; (2016) 339 ALR 659 at [75] (per Meagher JA, with whom Bathurst CJ and Beazley P agreed).

[22] For a small selection of the cases, see *Landmark Underwriting Agency Pty Ltd v Kilborn* [2006] NSWSC 1108 at [71]; *Colorado Products* above at [432]–[433]; *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004; (2015) 109 ACSR 465 (claim against a senior employee); *Prestige Lifting Services Pty Ltd v Williams* [2015] FCA 1063; (2015) 333 ALR 674 (former executive director and former employee of a company breached fiduciary and contractual duties and these sections by diverting projects away from the company to a new entity in competition with the company and by misuse of confidential information); *SBA Music Pty Ltd v Hall (No 3)* [2015] FCA 1079 at [28], [31]-[35] (independent contractor who performed the most senior management role within a company contravened the sections in taking up business opportunities of the company for his own benefit).

[1518]) whether impropriety was established was again to be assessed by reference to the particular duties and responsibilities of the director. His Honour held (at [1523]) that a director's purpose is an element of the contravention, directed to "the end sought to be achieved". His Honour observed (at [1525]) that a contravention of s 182 is established if a director "made improper use of his position for the purpose of gaining an advantage for himself or for some other person" and that it was not necessary to show that conduct brought about that advantage. His Honour identified (at [1537]) the aspects of ASIC's case against Mr Mitchell as comprising communications with Seven and private discussions with a Seven executive; interference with Tennis Australia's senior management including undermining its chief executive officer's authority; and withholding information from the board of Tennis Australia. His Honour found (at [1725]) that a breach of s 180(1) was established and that no breach of s 183 was established because, even if there was objective impropriety, the purposive element was missing. His Honour foreshadowed that declarations of breach would be made in respect of Mr Mitchell, a moderate pecuniary penalty would be ordered but no disqualification order should be made.

Narrowing of scope of statutory directors' duties

In equity, the person to whom a fiduciary duty is owed can narrow the scope of that duty or ratify a breach of that duty, and a company's constitution or shareholders in general meeting can similarly narrow the scope of a director's duty, although not so as to bind a company to a transaction that constitutes a fraud on its creditors.[23] A director's statutory duties are less readily excluded or narrowed by shareholders than general law duties. In *Angas Law Services Pty Ltd (in liq) v Carabelas* [2005] HCA 23; (2005) 226 CLR 507 at [32], Gleeson CJ and Heydon J noted that shareholders could not release directors from the statutory duties imposed by a predecessor to s 182 of the *Corporations Act*, although their acquiescence in a course of conduct might affect the practical content of those duties and be relevant to whether the element of impropriety necessary to a breach of the section was established.[24]

Oppression claims and derivative actions under ss 236-236 of the *Corporations Act*

Claims for breach of directors' duties can sometimes be brought within an oppression claim without a separate application for leave to bring a derivative action. Section 232 of the *Corporations Act* provides that the Court may make an order under s 233 of the *Act* if the conduct of a company's affairs, or an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company is either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to or unfairly discriminatory against a

[23] *Bilta (UK) Ltd (in liq) v Nazir* [2015] UKSC 23; [2016] AC 1; *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* [2016] FCA 1351 at [278], [284].
[24] For commentary, see I Devendra, "Statutory directors' duties, the civil penalty regime and shareholder ratification: What role does the public interest play?" (2014) 32 *C&SLJ* 399.

member or members whether in that capacity or in another capacity. Section 233 of the *Act* in turn specifies a series of remedies that may be available in an oppression case, a number of which involve orders against the company, including, for example, an order that the company be wound up, that its existing constitution be modified or repealed, or regulating the conduct of the company's affairs in the future.

Conduct that amounts to a breach of directors' duties, such as the diversion of assets or opportunities from a company to other entities, may also establish oppression.[25] The majority of the cases indicate that the court can make an order for an account of profits or compensation in favour of the company, but not an individual shareholder, in an oppression action, although that claim could otherwise only be brought by the company or as a derivative action with leave of the court.[26] There remains an open question whether the court, in oppression proceedings concerning a corporate trustee, has power to make orders in respect of the trust.[27]

Statutory derivative actions

Applications are often brought, with mixed success, for leave to bring statutory derivative actions under s 237 of the *Corporations Act*, or in the court's inherent jurisdiction which is applicable where a company is in liquidation or, possibly, other forms of insolvency administration. The relevant considerations for grant of leave to bring a derivative claim are specified in s 237(2) of the *Corporations Act*, which requires the court to grant leave if satisfied of five matters, including that the applicant is acting in good faith; that the grant of leave is in the best interests of the company; and that there is a serious question to be tried. Matters relevant to whether the applicant is acting in good faith include the applicant's honest belief that a good cause of action exists and has reasonable prospects of success (although that belief will be tested against whether a reasonable person in the circumstances would hold that belief) and whether the applicant is seeking to bring the action

[25] *Martin v Australian Squash Club Pty Ltd* (1996) 14 ACLC 452; *Dodrill v Irish Restaurant & Bar Co Pty Ltd* [2009] QSC 317; *Vigliaroni v CPS Investment Holdings Pty Ltd* [2009] VSC 428; (2009) 74 ACSR 282; *Vadori v AAV Plumbing Pty Ltd* [2010] NSWSC 274; (2010) 77 ACSR 616; *Re Cheal Industries Pty Ltd; Fitzpatrick v Cheal* [2012] NSWSC 261; (2012) 264 FLR 313; and see the discussion of the overlap between claims for breach of fiduciary duties and oppression in RJ Turner, "Directors' Fiduciary Duties and Oppression in closely-held Corporations" (2013) 31 *C&SLJ* 278.

[26] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672; 19 ACLC 856; *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191; *Re Chime Corp Ltd* [2004] 7 HKCFAR 546; *Gamlestaden v Baltic Partners Ltd* [2007] 4 All ER 164 at 172; *Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95; (2008) 66 ACSR 359 per Young CJ in Eq at [361], rev'd on another point in the High Court [2009] HCA 25; (2009) 238 CLR 304; 257 ALR 610; *LPD Holdings (Aus) Pty Ltd v Phillips* [2013] QSC 225; (2013) 281 FLR 227 at [53], [56]; *Re JGS Investment Holdings Pty Ltd* [2014] NSWSC 1532. For commentary, see E Boros, "remedies in oppression cases for derivative wrongs" (20140 *C&SLJ* 151.

[27] The view that the court has such a power was accepted in *Wain v Drapac* [2012] VSC 156 and in *Arhanghelschi v Ussher* [2013] VSC 253; (2013) 94 ACSR 86; to the contrary *Kizquari, Trust Company Limited v Noosa Venture 1 Pty Ltd* [2010] NSWSC 1334; (2010) 80 ACSR 485; and see B Heape, "Oppression proceedings and trust remedies: what are the limits?" (2013) 31 *C&SLJ* 325.

for a collateral purpose.[28] The case law indicates that the requirement that the grant of leave is in the best interests of the company is a relatively demanding one and the Court must be satisfied that the proposed action actually is, on the balance of probabilities, in the company's best interest, with relevant matters including the prospects of success of the proceedings, their likely costs, the likely recovery if the proceedings are successful and the likely consequences if they are not.[29] A party seeking such leave is typically required to indemnify the company against costs, charges and expenses of and incidental to bringing and continuing the derivative claims for which leave is granted.[30] Sections 236–237 do not apply to a company that is in liquidation but leave to bring derivative actions can be granted in the court's inherent jurisdiction in that case.[31]

Orders for compensation and account of profits in equity

Equitable compensation is now readily available for breach of an equitable duty, including breach of fiduciary duty, and also for equitable non-fiduciary duties such as the equitable duty of care and skill applicable to directors.[32] In *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383, in a case alleging breach of fiduciary duty by employees of and consultants to a law firm, Sackville AJA (with whom Meagher and Barrett JJA agreed) summarised the principles underlying equitable compensation as follows:

> "Equitable compensation has three principal features … First, the primary purpose of the remedy is compensation for what has been lost. Thus, compensation is ordinarily computed by reference to the detriment suffered by the plaintiff … Secondly, the assessment of equitable compensation is not fettered by common law principles, such as remoteness of damage or foreseeability, which can diminish the quantum of damages at common law. The justification for the difference in approach is that the obligation to make restitution which courts of equity have imposed on defaulting trustees and fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract … Thirdly, although the equitable duties imposed on a fiduciary have an element of deterrence …, as a general proposition there is no element of penalty in the assessment of compensation …. [citations omitted]"

---

[28] *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583; (2002) 42 ACSR 313 at 320-321; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 at [29]; *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52; (2008) 65 ACSR 661; *Showtime Management Australia Pty Ltd v Showtime Presents Pty Ltd* [2008] NSWSC 618 at [77]; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91; (2011) 86 ACSR 432 at [110]–[111]; *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235 at [58]; *Huang v Wang* [2016] NSWCA 164; (2016) 114 ACSR 586.

[29] *Swansson v Pratt* above; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* above at [44].

[30] *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd* [2012] NSWSC 462 at [33]; *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480 at [29]; *Re Sundara Pty Ltd* [2015] NSWSC 1694.

[31] *Chahwan v Euphoric Pty Ltd (trading as Clay & Michel)* [2008] NSWCA 52; (2008) 245 ALR 780; *Carpenter v Pioneer Park Pty Ltd* [2008] NSWSC 551; (2008) 71 NSWLR 577 at [23] – [36]; *Re Sundara Pty Ltd* [2015] NSWSC 1694.

[32] *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187.

There are still significant open issues as to the approach to causation in assessing compensation for breach of trust and, perhaps less controversially, for breach of fiduciary duty. In *Swindle v Harrison* [1997] 4 All ER 705, at 733–734, Mummery LJ observed that there "is no equitable by-pass of the need to establish causation" and a unanimous High Court approved that observation in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484 at [44]. The most expansive approach to causation applies to a trustee who misapplies trust property, who can be required to restore the trust property or, if that is not possible, pay an equivalent monetary amount into the trust, and that liability is not limited by considerations of causation or remoteness.[33]

That approach can also be applied where a director misapplies company property in breach of fiduciary duty. In *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272, Spigelman CJ noted (at 274–275) that:

> "[A] claim for equitable compensation for breach of a fiduciary obligation requires a causal link between the breach and loss. Causation in equity is not, however, susceptible to the formulation of a single test. It is necessary to identify the purpose of the particular rule to determine the appropriate approach to issues of causation."

The Chief Justice also noted that the question of causation for breach of a director's fiduciary duty at general law was not determined by the causation principles applicable in respect of his breach of statutory obligation.

In *Nicholls v Michael Wilson & Partners Ltd* above, Sackville AJA (with whom Meagher and Barrett JJA agreed) observed at [172] that:

> "It is common ground that a claim for equitable compensation requires a causal link between the breach and the loss …. Thus to claim equitable compensation for the appellants' breaches of fiduciary duty, [the respondent] must establish that it has sustained losses and that there is a causal link between the losses claimed and the breaches."

His Honour summarised the principles arising from *O'Halloran v RT Thomas & Family Pty Ltd* above (at [174], omitting citations) as follows:

> - Analysis of causation depends on the rule being applied. Thus, the "common sense" answer to a question of causation will differ according to the purpose for which the question is asked. In order to answer such a question, it is necessary to identify the purpose and scope of the relevant rule ….

---

[33] *Re Dawson*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* (1966) 84 WN (Pt 1) (NSW) 399; [1966] 2 NSWR 211; *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 at 469-470; 144 ALR 729; *Youyang v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484; WMC Gummow, "Compensation for breach of Fiduciary duty" in TG Youdan (ed), *Equity, Fiduciaries and Trusts*, 1989; M O Meara, "Causation, Remoteness and Equitable Compensation" (2005) 26 *Aust Bar Rev* 51. A different position, closer to common law principles, has been taken in the United Kingdom: *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503; P Ryan, "Examining breaches of fiduciary duty by solicitors in commercial arrangements" (2016) *AJCL* 209.

- Questions of causation of loss said to arise from breaches of fiduciary obligations are to be determined in a different way from questions of causation arising from breaches of common law obligations …

- The object of equitable compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation. Unlike damages at common law, however, the loss as a consequence of the breach is to be assessed with the full benefit of hindsight …

- Where equitable compensation is sought for breaches of fiduciary duty, it is necessary to identify criteria which supply an adequate or sufficient connection between the equitable compensation claimed and the breaches of duty … [See also Beach Petroleum v Kennedy, at [429]–[430], pointing out that there is a normative aspect to the determination of issues of causation.]

- In the case of a trustee dealing with trust property in breach of a trust, a sufficient connection will be established irrespective of the identification of a separate and concurrent cause when the loss would not have occurred if there had been no breach of duty. The policy underlying this strict principle applies equally to a breach of fiduciary duty by a director of a company, since equity is concerned not only to compensate the plaintiff, but to enforce the duty of the director … Thus the approach to causation which has been adopted for the trustee of a traditional trust should be applied to fraudulent dispositions of company property in breach of fiduciary duty ..."

Generally speaking, the case law does not permit an inquiry into the relative importance of contributory causes in determining compensation for a breach of a director's fiduciary duty, and the principles of causation applicable to breach of duty by a trustee of a traditional trust may be applied, given the vulnerability of a company which places its property in the power of directors.[34] The court will apply the benefit of hindsight and ordinarily determine the amount of compensation at the date of trial.[35]

The High Court also considered the scope of an account of profits for knowing participation in a dishonest breach of fiduciary duty in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1; (2018) 130 ACSR 359; [2018] HCA 43. In that case, the appellant, Ancient Order of Foresters in Victoria Friendly Society Ltd ("Foresters") had relied on a business plan provided by two employees of Lifeplan Australia Friendly Society Ltd ("Lifeplan"), prepared from Lifeplan's confidential information, in deciding to employ those two persons and seek to take a significant part of Lifeplan's business and customer base. At first

[34] *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; 29 ACSR 148; 12 ACLC 1705; *Southern Real Estate Pty Ltd v Dellow* [2003] SASC 318; (2003) 87 SASR 1 at [48]-[49]; *Hydrocool Pty Ltd v Hepburn (No 4)* [2011] FCA 495; (2011) 279 ALR 646; 83 ACSR 652.
[35] *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 13 WAR 11; 11 ACSR 785 at 851-852; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 at 235; 14 ACSR 109; 12 ACLC 674; *Southern Real Estate Pty Ltd v Dellow* above at [52]; *Hydrocool Pty Ltd v Hepburn (No 4)* above.

instance[36], the Federal Court had ordered an account of profits against the employees but not against Foresters. On appeal, the Full Court of the Federal Court[37] ordered an account of profits against Foresters for nearly $6.6 million, quantified as the net present value of the relevant business over the five year term of that business plan. On further appeal, the High Court (Nettle J dissenting) ordered an account of profits in favour of Lifeplan for the entire capital value of the business that Foresters had taken from Lifeplan. The majority judgments emphasise the need for a remedy which vindicates the equitable obligation that was breached. Gageler J (with whom Kiefel CJ, Keane and Edelman JJ agreed) observed that a fiduciary or third party may be required to account for a benefit or profit obtained "by reason of" a breach of fiduciary duty; that the causation requirement may be satisfied if the benefit or profit would not have been earned but for the breach; and, once a benefit or profit is shown to have arisen by reason of the breach, the defendant bears the onus of establishing that it would be inequitable to require it to account for the whole of that benefit or profit.

In *CellOS Software Ltd v Huber* (2020) 144 ACSR 267; [2020] FCA 505 at [9]-[19], Beach J recently set out a full summary of the principles applicable to an account of profits, following *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* above.

Some English academic literature has sought to explain the different approaches to causation by distinguishing between substitutive and reparative compensation. Substitutive equitable compensation relates to a claim for the substituted value of an asset dissipated by a trustee or custodian without authority, by analogy with the common account, where a trustee is required to account for how it has dealt with trust assets without need for any allegation of wrongdoing. A claim that a director had misapplied company property would be treated as a claim for substitutive compensation. Reparative equitable compensation involves a claim for reparation for loss suffered by breach of duty, for example for a loss suffered by a breach of a duty of loyalty or director's fiduciary duties, and extends only to the loss caused by the breach.[38] That approach has been taken up by Edelman J in decisions in the Supreme Court of Western Australia, but its wider future is still open.[39]

Orders under ss 1317H and 1317HA of the *Corporations Act*

The jurisdiction to award equitable compensation or an account of profits for breach of fiduciary duty overlaps with the statutory power to award

[36] *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 364.
[37] *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99.
[38] J Glister, "Equitable Compensation" in J. Glister and P Ridge, *Fault Lines in Equity,* 2012, pp 144, 157–158; C Mitchell "Compensation for Breach of Fiduciary Duty" (2013) 66 *Current Legal Problems* 307; S Degeling & J Hudson, "Equitable Money Remedies against Financial Advisors who give 'Advice about Advice'" (2015) 33 *C&SLJ* 166 at 171. This approach is noted, with a degree of scepticism, by the current authors of *Meagher, Gummow & Lehane's Equity, Doctrines & Remedies*, 5th ed, [23.610]ff.
[39] *Nicholson v Morgan (No 3)* [2013] WASC 110 at [98]ff; *Agricultural Land Management Ltd v Jackson* above at [341]-[342], [349] [363]-[368], [376]ff.

compensation for breach of some, but not all, of the obligations imposed under the *Corporations Act*. That power extends only to breaches of those sections that are designated as a civil penalty provision or a financial civil penalty provision under the *Corporations Act*.

Section 1317H(1) of the *Corporations Act* provides that a court may order a person to compensate a corporation or registered scheme (but not a shareholder, unitholder or third party) for damage suffered by the corporation or scheme if that person has contravened a corporation/scheme civil penalty provision (as defined) in relation to the corporation or scheme and the damage resulted from the contravention. Section 1317HA(1) is wider, providing for recovery of compensation by a person who has suffered loss as a result of a contravention of a financial services civil penalty provision.[40] The case law indicates that the words "resulted from" in these sections refer to damage which, as a matter of fact, was caused by the contravention and that they should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct and do not import equitable principles of causation applicable to fiduciaries.[41]

Compensation under these sections is assessed by reference to the loss at the date the order is made rather than as at the date of the contravention, which broadly reflects the approach in equity rather than in contractual damages.[42] Common law principles relating to the duty to mitigate are also not directly applicable to actions for compensation under ss 1317H and 1317HA, although a defendant may seek to show that a claimant's unreasonable conduct resulted in its losses, and has the onus of establishing the loss arising from such conduct.[43] In the recent decision in *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* [2016] FCA 1351, Gleeson J followed the decisions of the United Kingdom House of Lords and Supreme Court[44] in holding that a company may suffer loss, which can be recovered against its directors, when it is exposed to large liabilities that it has no capacity to meet, although it is a "$2 company" and never had a capacity to meet those liabilities. That approach is of real advantage to a company's creditors, if they

---

[40] For completeness, a person who suffers loss or damage by conduct of another person in contravention of the prohibition on misleading and deceptive conduct under *Corporations Act* s 1041H may recover damages under s 1041I and a person who suffers loss or damage by conduct that contravenes the prohibition on misleading or deceptive conduct under *Australian Securities and Investments Commission Act* 2001 (Cth) s 12DA may recover damages under *ASIC Act* s 12GF.

[41] *Adler v Australian Securities & Investments Commission* (2003) 179 FLR 1; 46 ACSR 504; [2003] NSWCA 131 at [709]; *Australian Securities & Investments Commission v Australian Investors Forum Pty Ltd (No 3)* [2005] NSWSC 1198; (2005) 56 ACSR 204 at [63]; *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412 at [159]–[160], to the contrary *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* above at [860] per Lee AJA, noting that the test does not require further inquiry as to the directness or immediacy of the consequences.

[42] *Ho v Akai Pty Ltd (in liq)* [2006] FCAFC 159; (2006) 24 ACLC 1526; *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2012] NSWSC 834; (2012) 264 FLR 392.

[43] *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452; (2015) 331 ALR 185; (2015) 111 ACSR 1 at [712], [717]–[718].

[44] *Stone and Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] UKHL 39; [2009] 1 AC 1391 at [231]; *Bilta (UK) Ltd (in liq) v Nazir* above at [178].

are exposed by transactions in breach of duty to liabilities which the company has no capacity to meet.

The statutory provisions also permit, in effect, recovery of loss in the manner of an account of profits in equity. Sections 1317H(2) and 1317HA(2) provide that, in determining the damage suffered for the purposes of making a compensation order, profits made by any person resulting from that contravention or the offence are included.[45] The effect of those subsections is to allow the court to order compensation including profits made by a wrongdoer, even if there is no corresponding loss on the claimant's part.[46]

Injunctions in equity and under s 1324 of the *Corporations Act*

In determining whether to grant an interlocutory injunction in its equitable jurisdiction, the court will apply the principles set out in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; (2006) 227 CLR 57, where Gummow and Hayne JJ noted (at [65])[47] that that determination involved inquiries as to (1) whether the plaintiff had made out a sufficient likelihood of success to justify the preservation of the status quo pending the trial; and (2) whether the inconvenience or injury that the plaintiff would likely suffer if an injunction was refused outweighed the injury that the defendant would suffer if an injunction were granted. The questions whether the applicant has a seriously arguable case and the balance of convenience are interrelated, since the greater the extent to which the balance of convenience favours one course over another, the less strong a case for final relief might be required to justify an injunction and, conversely, the stronger the case for final relief, the less may be required to tip the balance of convenience in the applicant’s favour. In determining whether to grant a final injunction, the court will of course have regard to whether damages are an adequate remedy and any discretionary considerations.

Similar but not identical issues arise in respect of the Court’s power to order interim or final injunctive relief under s 1324(1) of the *Corporations Act.* That section allows an order in the nature of injunctive relief where a person has engaged in, is engaging in or is proposing to engage in conduct that constituted, constitutes or would constitute, inter alia, a contravention of the *Corporations Act*, and such an order may also be made against a person who is “knowingly concerned” in or party to that contravention. The case law has emphasised that the court is exercising a statutory jurisdiction rather than equitable jurisdiction under this section and that different considerations can apply.[48]

---

[45] *Ho v Akai Pty Ltd (in liq)* above; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296; 287 ALR 22 at [630]-[631]; *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248; (2016) 259 IR 384 at [424].

[46] *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16; (2013) 296 ALR 418; (2013) 93 ACSR 76 at [54].

[47] Referring to *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

[48] *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; (2002) 42 ACSR 605 at [18]–[20], [36]; *Australian Securities and Investments*

Section 1324(4) authorises the court to grant an interim injunction where, in its opinion, it is desirable to do so, pending determination of an application or a final injunction under s 1324(1). There are potential differences of approach in an application for an interlocutory injunction in equity and an interim injunction under s 1324(4) of the *Corporations Act.* Some cases suggest that an interim injunction should not be granted under s 1324(4) unless there is a serious question to be tried as to the applicant's entitlement to final injunctive relief under s 1324(1) and that equitable principles such as the balance of convenience may be relevant to the grant of an interim injunction under this section, at least in an application of a person other than ASIC.[49] Other cases indicate that, particularly in applications for interlocutory relief by ASIC, the court's exercise of its statutory jurisdiction under the section is not restricted by discretionary considerations applicable to an injunction in equity, and the court should have regard to the public interest in curtailing possible wrongdoing, the countervailing expectation of persons that their commercial activities will not be restricted until a matter has been determined at a hearing, whether there has been or is a continuing or proposed contravention of the *Corporations Act* and whether an interim injunction would serve a purpose under the *Corporations Act* or would promote ASIC's corporate regulation objectives.[50]

In *CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd* [2016] WASC 231, Le Miere J referred to both views and expressed the view (at [13]) that:

> "Although traditional equitable principles do not circumscribe the court's consideration of an application for an interim injunction under the s 1324(4) of the Corporations Act, the court will always examine carefully whether there is a serious question to be tried and where the balance of convenience lies and will not grant an injunction where it would not have done so if it were exercising its traditional equity jurisdiction unless there are matters relating to the statutory obligation sought to be enforced or the public interest which require the grant of the injunction."

Section 1324(8) in turn provides that the court must not require ASIC or another person, as a condition of granting an interim injunction, to give an undertaking as to damages. There is an open question whether the Court can

---

Commission v Triton Underwriting Insurance Agency [2003] NSWSC 1145; (2003) 48 ACSR 249 at [25].

[49] *Liquorland (Australia) Pty Ltd v Anghie* [2001] VSC 362; (2001) 20 ACLC 58; *Westgold Resources NL v Precious Metals Australia Ltd* [2002] WASC 85; (2002) 41 ACSR 672; *Australian Securities and Investments Commission v Marshall-Bell Hawkins Ltd* [2002] FCA 1511; (2002) 43 ACSR 340; *Tekinvest Pty Ltd v Lazarom* [2004] NSWSC 940; (2005) NSW ConvR 56-119 at [21]; *Australian Securities and Investments Commission v Mapstone* [2006] NSWSC 993; (2006) 59 ACSR 214; 24 ACLC 1246 at [34]; *Australian Securities & Investments Commission v Cycclone Magnetic Engines Inc* [2009] QSC 58; (2009) 71 ACSR 1 at [248].

[50] *Corporate Affairs Commission v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566; 5 ACLC 269; *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* above; *Australian Securities and Investments Commission v Triton Underwriting Insurance Agency* above at [23].

take into account the absence of such an undertaking in determining where the balance of convenience lies.[51]

Third party liability in equity and under the *Corporations Act*

Under the well-known first and second limbs in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252; (1874) 43 LJ Ch 513, a person may be held liable for knowing receipt of trust property or for knowing assistance in a breach of fiduciary duty, where that breach can be characterised as amounting to a "dishonest and fraudulent design".[52]

The matters that are required to establish the element of a "dishonest and fraudulent design" in a claim for knowing assistance have been formulated in different terms in recent cases. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89, the High Court observed (at [179]) that *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 established a requirement that any breach of trust or breach of fiduciary duty relied on to establish liability for knowing assistance must be dishonest and fraudulent, so that the impugned conduct must involve circumstances attracting a degree of opprobrium beyond an innocent breach of trust or duty (at [183]). On appeal in *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* above, the majority (Drummond AJA at [2112]-[2113], [2117], with whom Lee AJA agreed at [1099]) held that liability could be established if the breach of duty was more than trivial and too serious to be excusable on the basis that the fiduciary had acted honestly, reasonably and ought fairly to be excused under provisions such as s 1318 of the *Corporations Act*.

A different view was taken by the Court of Appeal of the Supreme Court of New South Wales in *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266; (2014) 311 ALR 494; 101 ACSR 167, where Leeming and Gleeson JJA indicated their disagreement with the view expressed by the majority in *Bell Group*, so far as it treated *Farah Constructions* as expanding the concept of a dishonest and fraudulent design to include all breaches of duty more serious than a trivial breach and not excusable by statute. Barrett JA did not express a view as to that matter.

In *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307; (2016) 339 ALR 659, Meagher JA (with whom Bathurst CJ and Beazley P agreed) observed that a claim for accessorial liability to a breach of fiduciary duty against a director requires that the appellant show that the director had acted deliberately and with the purpose of preferring his personal interest, such that his doing so was dishonest and involved impropriety. The Court dismissed an accessorial liability claim against a firm of solicitors, on the basis that it had not been established that the director's conduct there involved any dishonesty and a claim for knowing assistance could not be established.

[51] *Australian Securities and Investments Commission v Mapstone* above.
[52] For recent commentary, see P Ridge, "Equitable Accessorial Liability: Moving Beyond Barnes v Addy" (2014) 8 *J Eq* 28; P Cahill, "Commercial equity: The unsettled second limb of *Barnes v Addy*" (2016) 42 *Aust Bar Rev* 1.

The elements necessary to establish knowing participation in a breach of directors' duties at general law were also recently considered in *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* above at [306]ff, where Gleeson J summarised the relevant principles as follows (omitting references to authority):

> "a person who assists a fiduciary to breach his fiduciary duties, with knowledge of a dishonest and fraudulent design on the part of the fiduciary, is liable as though they were the fiduciary ... This includes liability to disgorge the property transferred to them by another person in breach of that person's fiduciary duty, as well as in personam liability …"

The two limbs of *Barnes v Addy* are not exhaustive statements of the circumstances in which a third person who participates in a breach of fiduciary duty or breach of trust could be liable as an accessory, and a third party may also be held liable if he or she knowingly procures a breach of trust or breach of fiduciary duty or receives property transferred without authority, without showing a dishonest or fraudulent design.[53]

Various provisions of the *Corporations Act* impose liability on a person involved in a contravention of the *Corporations Act*[54] within the meaning of s 79 of the *Corporations Act*. That concept includes a person who aids, abets or induces a contravention and also a person who is knowingly concerned in or party to a contravention. Knowing concern, for that purpose, requires that a person is an intentional participant in the contravention, and that he or she have knowledge of the essential elements of the contravention which must exist at the time of the alleged contravention, and constructive knowledge is not sufficient for that propose.[55] In a recent decision in *Gore v Australian*

---

[53] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2009) 230 CLR 89 at [161]; *Grimaldi v Chameleon Mining NL (No 2)* 2012] FCAFC 6; (2012) 200 FCR 296; 287 ALR 22; 87 ACSR 260 [at [242] – [247]; *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd* (No 3) [2013] WASC 183 at [639]ff; *Hasler v Singtel Optus Pty Ltd* above at [68]-[83]; *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81; (2016) 91 NSWLR 732; (2016) 18 BPR 35,799; *Re Elsmore Resources Ltd* [2016] NSWSC 856; (2016) 114 ACSR 297; *Great Investment Ltd v Warner* [2016] FCAFC 85; (2016) 335 ALR 542; 114 ACSR 33; WMC Gummow, "Knowing Assistance" (2013) 87 *ALJ* 311.

[54] This definition takes effect in conjunction with substantive provisions which make it a contravention for a person to be involved in a contravention of the *Corporations Act* by another person, for example, ss 181, 182 and 183 (directors' duties); s 209(2)-(3) (related party transactions); s 254L(2)-(3) (redemption of redeemable preference shares); s 256D(3)-(4) (share capital reductions); s 412(9) as to the provision of an explanatory statement in relation to a compromise with creditors; or which impose civil liability upon a person involved in a contravention, for example s 1041I as to misleading or deceptive conduct in relation to financial products or services.

[55] *Giorgianni v R* (1985) 156 CLR 473 at 494, 501; *Edwards v R* (1992) 173 CLR 653; 7 ACSR 500; *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; (2002) 41 ACSR 72; 20 ACLC 576 at [209] , on appeal *Adler v Australian Securities and Investments Commission; Williams v Australian Securities and Investments Commission* [2003] NSWCA 131; (2003) 46 ACSR 504; 21 ACLC 1810; *Forge v Australian Securities and Investments Commission* [2004] NSWCA 448; (2004) 213 ALR 574; 52 ACSR 1 at [202]; *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* above at [108]-[118]; *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; (2006)

Securities and Investments Commission [2017] FCAFC 13, the Full Court of the Federal Court of Australia considered what is necessary to establish that a person is knowingly concerned in a contravention of s 727 of the *Corporations Act*, which prohibits the issue of a disclosure document that was not lodged with ASIC, where disclosure is required under Pt 6D.2 of the *Corporations Act*. In a joint judgment, Dowsett and Gleeson JJ observed (at [38]) that, in order to establish accessorial liability, the plaintiff must show that the alleged accessory knows the relevant factual matters leading to illegality, and it is not necessary to show that he or she knew of the relevant legal provisions which rendered the conduct unlawful. In a separate judgment, Rares J reached the same result, although the steps in his Honour's reasoning and that of the majority may differ, and the plurality indicated (at [1]) disagreement with Rares J's approach.

Conclusion

I have dealt with several disparate matters in this paper, linked by little more than the fact that they involved equity or the *Corporations Act* and seemed, possibly from an idiosyncratic perspective, to be interesting and of practical importance. It is possible, however, to make several comments by way of conclusion.

There are plainly significant areas of overlap between duties and remedies in equity and under the *Corporations Act.* The overlap between directors' equitable and fiduciary duties and their statutory duties is an obvious example, reflected in practice by the fact that few cases for breach of those duties do not invoke both the equitable and the statutory duties, and fewer still (if any) give rise to different results as between the equitable and the statutory claims. There are, however, areas of potential difference, including as to the extent to which the equitable and statutory duties may be narrowed or breach of them ratified by shareholders. I have also discussed the possible overlaps of claims by a company for breach of directors' duties, by a shareholder in an oppression case which may seek to recover the company's loss, or in a derivative action brought with leave under ss 236 and 237 of the *Corporations Act* or granted in the court's inherent jurisdiction where a company is in insolvency administration.

There is also an overlap between claims for equitable compensation or an account of profits in equity and under ss 1317H and 1317HA of the *Corporations Act*, although more liberal causation principles may apply in equity, and the statutory provisions are not available for all contraventions of the *Corporations Act.* We have also seen that there may be a difference in approach to interlocutory injunctions in equity and under s 1324 of the *Corporations Act*, and the power to order damages under s 1324(10) of the *Corporations Act* has, rightly or wrongly, been treated as relatively narrow in the case law. I have also touched upon the scope for accessorial liability in equity and under the *Corporations Act*, and we have seen a continuing focus in the case law on the extent of knowledge that is required for accessorial

---

59 ACSR 373; 24 ACLC 1308 at [92]; *Digital Cinema Network Pty Ltd v Omnilab Media Pty Ltd (No 2)* [2011] FCA 509 at [170]-[171].

liability, but also an important recognition in the case law that accessorial liability can arise in equity in several ways, and not only under *Barnes v Addy* above.

LAW5357 Corporate governance and directors' duties

Some issues in enforcement of directors' duties (Guest lecturer, Justice Ashley Black)

Reading list

Differences in international enforcement approaches

Required

A Keay, "An assessment of private enforcement actions for directors' breaches of duty" (2014) 33 *CJQ* 76

J Varzaly, "The Enforcement of Directors' Duties in Australia: An Empirical Analysis" (2015) 16 *European Bus Org LR* 281, available at SSRN: https://ssrn.com/abstract=2906566

Recommended

JG Hill, "Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance" (2020) 5 *UC Irvine J int'l Transnat'l & Comp L* 163

J Armour et al, "Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States" (2009) 6 *J Empirical Legal Stud* 687

RM Jones & M Welsh, "Towards a Public Enforcement Model for Directors'' Duty of Oversight" (2012) 45 *Vand J Transnat'l L* 343

A Keay, "The Public Enforcement of Directors' Duties: A Normative Inquiry" (2014) 43 *Comm L World Rev* 89

Duty of care and diligence

Recommended

Australian Securities and Investments Commission v Cassimatis (No 8) (2016) 336 ALR 209; [2016] FCA 1023

Australian Securities and Investments Commission v Cassimatis (No 9) [2018] FCA 385

Cassimatis v Australian Securities and Investments Commission (2020) 376 ALR 261; (2020) 144 ACSR 107; [2020] FCAFC 52

Australian Securities and Investments Commission v Vocation Ltd (in liq) [2019] FCA 807

Australian Securities and Investments Commission v Mitchell (No 2) [2020] FCA 1098

Australian Securities & Investments Commission v Big Star Energy Ltd (No 3) [2020] FCA 1442

Directors' breach of fiduciary duty at general law and statutory duties

Required

Howard v Federal Commissioner of Taxation (2014) 253 CLR 11; [2014] HCA 83

Recommended

Coope v LCM Litigation Fund Pty Ltd (2016) 333 ALR 524; [2016] NSWCA 37

Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd (2016) 116 ACSR 566; [2016] NSWCA 347

Duncan v Independent Commission Against Corruption [2016] NSWCA 143

Angas Law Services Pty Ltd (in liq) v Carabelas [2005] HCA 23; (2005) 226 CLR 507

Orders for compensation and account of profits in equity and under ss 1317H and 1317HA of the *Corporations Act*

Required

Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd (2018) 360 ALR 1; (2018) 130 ACSR 359; [2018] HCA 43

Recommended

Nicholls v Michael Wilson & Partners Ltd [2012] NSWCA 383

O'Halloran v RT Thomas & Family Pty Ltd (1998) 45 NSWLR 262

CellOS Software Ltd v Huber (2020) 144 ACSR 267; [2020] FCA 505