SUPREME COURT OF QUEENSLAND

CITATION:	*DTM Constructions P/L trading as QA Developments v Poole & Anor* [2017] QSC 210
PARTIES:	**DTM CONSTRUCTIONS PTY LTD ACN 104 066 462 trading as QA DEVELOPMENTS** (plaintiff) **v** **JUSTIN REID POOLE** **(first defendant)** **DARRYL ROY HOPKINS** (second defendant)
FILE NO/S:	No 12855 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, 12 and 13 April 2017. Written submissions 26 April, 3, 12, 15 May 2017, 4 and 8 August 2017
JUDGE:	Ann Lyons SJA
ORDERS:	**1. The parties are directed to provide short minutes of orders in accordance with these reasons by 12 October 2017.** **2. The parties are directed to provide short submissions as to the calculation of interest and as to costs by 12 October 2017.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND CONSIDERATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – GENERALLY – where the plaintiff company is involved in the construction industry – where the first defendant became a director of the plaintiff company – where the second defendant was involved

in the operations of the plaintiff company – where the defendants held interests in other companies in the construction industry prior to and during their involvement with the plaintiff company – where the plaintiff alleges that the defendants breached their duties at general law and under ss 180 – 183 of the *Corporations Act* 2001 (Cth) as a director and officer of the plaintiff company when they diverted business opportunities from the plaintiff to companies in which they held an interest – whether the second defendant was an officer of the plaintiff company – whether the defendants breached their duties under the *Corporations Act* 2001 (Cth) – whether the defendants breached their duties as fiduciaries

CORPORATIONS – MANAGEMENT AND CONSIDERATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – REMEDIES AND PENALTIES FOR BREACH OF DUTY – where the plaintiff alleges that the defendants breached their duties at general law and under ss 180 – 183 of the *Corporations Act* 2001 (Cth) as a director and officer of the plaintiff company when they diverted business opportunities from the plaintiff to companies in which they held an interest – where the plaintiff claims statutory and equitable compensation – where the defendants breached some of their duties – whether the plaintiff is entitled to statutory and equitable compensation

Corporations Act 2001(Cth), s 180, s 181, s 182, s 183, s 1317H

Australian Securities & Investments Commission v Adler (2002) 41 ACSR 72
Australian Securities and Investments Commission v Doyle and another (2001) 38 ACSR 606
Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9) [2012] NSWSC 984
Birchnell v Equity Trustees (1929) 42 CLR 384
Burg v Horn (1967) 380 F 2d 897
Canadian Aero Services Ltd v O'Malley [1974] SCR 592
Chan v Zacharia (1984) 154 CLR 178
Club of the Clubs Pty Ltd v King Network Group Pty Ltd (No 2) [2007] NSWSC 574
Dempster v Mallina Holdings Ltd (1994) 15 ASCR 1
Gemstone Corp of Australia Ltd v Grasso (1994) 13 ASCR

695
GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers [2005] VSCA 113
Grimaldi v Chameleon Mining NL (No 2) (2012) 87 ASCR 260
Hospital Products Ltd v United States Surgical Corp [1984] HCA 64; (1984) 156 CLR 41
Lifeplan Australia Friendly Society Ltd v Woff [2016] FCA 248
Parker v Tucker [2010] FCA 263
Permanent Building Society (in liq) v Wheeler & Ors (1994) 14 ACSR 109
Shafron v Australian Securities & Investments Commission [2012] HCA 18; (2012) 247 CLR 465
Streeter v Western Areas Exploration Pty Ltd (No 2) [2011] WASCA 17
R v Donald; Ex parte Attorney-General (1993) 11 ACLC 712
V-Flow Pty Limited v Holyoake Industries (Vic) Pty Limited [2013] FCAFC 16
Warman International Ltd v Dwyer (1995) 182 CLR 544

COUNSEL:	P W Hackett with P G Jeffery for the plaintiff M Lawrence for the first and second defendants
SOLICITORS:	Evans Lawyers for the plaintiff MDR Lawyers for the first and second defendants

These proceedings

[2] The plaintiff company, DTM Constructions Pty Ltd trading as QA Developments (QA), is involved in the building and construction industry including in the development and construction of house and land packages. The defendants Justin Poole and Darryl Hopkins have a history of involvement in the marketing and sale of house and land packages through Arctic Properties Pty Ltd (Arctic). Between 2010 and 2015 the plaintiff company used Arctic Properties to market their houses.

[3] In late 2012 discussions began about both defendants becoming shareholders in the plaintiff company. They ultimately became shareholders effective from 31 December 2012. Mr Poole subsequently became a director and ASIC records that period to be from 9 October 2013 until 18 September 2015. Mr Hopkins declined an appointment as a director but he became involved in the operations of the company to such an extent that it is argued he became an officer of the company.

[4] It is alleged that in late 2014 and in 2015, both defendants acted in breach of their duties under the *Corporations Act* 2001 (Cth) (the Act) when they diverted opportunities for building contracts from the plaintiff to various other building and construction companies in which they had an interest. It is also alleged that they facilitated the sale of

house and land packages through entities other than the plaintiff and not for the plaintiff's benefit. This conduct is also alleged by the plaintiff to be a breach of the defendants' fiduciary duties to the plaintiff company. I note however that whilst the plaintiff alleges the defendants owed a duty to exercise reasonable care under the general law, it does not seem to be relied upon in the final submissions.

[5] The plaintiff claims damages for the loss of profits the plaintiff would have earned but for the defendants' breaches of their duties under the Act and at equity. The plaintiff has elected to claim damages for breach of fiduciary duties pursuant to an equitable compensation order, and also seeks damages for contravention of duties under the Act pursuant to an order under s 1317H of the Act.

[6] The defendants argue that there has been no breach of any duties under the Act and that the case falls within the recognised principle that certain fiduciary relationships qualify the general law not to act in conflict of interest. It is argued that liability as a fiduciary will not arise in circumstances where the fiduciary's actions have been authorised by the circumstances of their appointment, or by the effective assent of the person to whom the duty is owed. The defendants argue that there was no exclusivity attached to the referral arrangement with Arctic and the defendants had the plaintiff's consent to continue referring building work to third parties.

[7] In order to ascertain whether there has been any breach of the duties owed to the plaintiff either at general law or pursuant to the Act and whether the defendants' actions are within a recognised category of exceptions as argued, it is necessary at the outset to understand the nature and background of the plaintiff company and the evolving nature of the relationship between the plaintiff company and the defendants.

The parties and the nature of their businesses

[8] DTM Constructions Pty Ltd was incorporated on 14 March 2003 and has operated in the building and construction industry since that time. Mr David Ham holds the registration as the nominee builder for the company. He has been a licensed builder in his own right for the last 35 years and at all times either he, his wife or both have been directors of the plaintiff company.

[9] In 2009 Mr Ham and Mr Donald Gates set up a business which was to be run through the plaintiff company. The business was called QA Developments (QA). Mr Gates became a director and equal shareholder of QA and Mr Ham became the nominee builder for the business. For this to occur, Mr Ham's wife replaced him as a director of QA.

[10] Mr Ham was initially concerned with building homes for owner-occupiers. However in late 2009, coincident with the establishment of QA, the focus shifted to building town houses and units as well as houses and "dual occupancy" buildings (a duplex, or a house with a "granny flat") for the investor market. QA acquired or secured land by way of 'put' and 'call' options, which are agreements whereby the vendor of property gives a person a 'call' option to buy the property and that person then gives the vendor a 'put' option to sell it to them. The idea behind these types of agreements is to essentially

create the effect of a contract of sale before the contract is finalised, allowing the contracting parties some flexibility as to the final form of the contract as well as the "purchaser" the ability to 'on sell'.[1]

[11] The business of QA, insofar as it related to the construction of houses, developed through referrals from marketers. Essentially a marketer identifies a lot upon which a dwelling can be built, obtains pricing for the construction of the dwelling from a building company and then markets the complete 'house and land' package to potential buyers.[2] However, projects also came to QA without the intervention of a marketer. Town house developments were the result of direct contact between the developer and QA; and sometimes a developer (apparently of a subdivision creating residential allotments) would refer to QA a person who wished to have a house constructed on an allotment.

[12] QA developed a good working relationship with a marketer called Arctic Properties Pty Ltd which had been incorporated on 5 November 2010 by its directors Mr Poole and Mr Hopkins, the first and second defendants in this trial. Arctic was involved as an intermediate marketer/facilitator. It would identify lots, find builders who would have a standard design house suitable for the lot, obtain a price for building the house, produce a brochure for the house and land package, and then refer the property to its "marketing channels" – real estate agents, or marketing groups operating in Australia or overseas, who would market the "package", usually as an investment property. Arctic was not a licensed builder and whilst it would identify land owned by others it had not in the relevant period acquired land itself.

[13] Between 2010 and 2012 Arctic referred building work to QA in relation to land that had already been sourced by others. Eventually the working relationship between the two companies was such that in October 2012 it was decided by Mr Ham, Mr Gates, Mr Poole and Mr Hopkins that both companies would relocate their working premises to a shared office space at 3355 Pacific Highway, Slacks Creek. The office premises was a two-storey building and both companies occupied the first floor, with Arctic taking a larger area of floor space than QA. There was a single lease for the premises, though there were separate entrances to the office space and one shared boardroom.

[14] At around the same time in October 2012 there were discussions about Mr Poole and Mr Hopkins becoming shareholders of QA. It was ultimately agreed that Mr Poole and Mr Hopkins would each be allocated around 15 per cent or 16 per cent of QA's shares.[3] No money was paid for the shares by either Poole or Hopkins. The consideration for these shares was contested by the parties at trial. The plaintiff submits that the shares

---

1 See *Vale 1 Pty Ltd as Trustee for the Vale 1 Trust v Delorain Pty Ltd as Trustee for the Delorain Trust* [2010] QCA 259; *Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd* [2011] QCA 49.

2 Evidence of Mr Ham, T1-39 L13-34; Evidence of Mr Hopkins, T4-17 L22 – T4-18 L42.

3 Note that plaintiff company conducts itself as a unit trust. Units in the trust are allocated in the same proportions as shares.

were given to Poole and Hopkins in exchange for Arctic exclusively referring building work to QA, whereas the defendants submit that the shares were given to them in recognition of the fact that Arctic provided the majority of QA's work and having a shareholding in QA would serve to secure that work into the future. The defendants argue that at no time were they under an obligation to refer work exclusively to QA.

[15] During the period from 9 October 2013 until 18 September 2015 the first defendant, Mr Poole, admits that he was a director of QA. It is also alleged that the second defendant, Mr Hopkins, was an officer of QA during the same period. Mr Poole and Mr Hopkins were shareholders from 31 December 2012 although the ASIC documents were not updated until a later point in time.

[16] It was uncontested at trial that despite being shareholders and having roles in both Arctic and QA since late 2012, Mr Poole and Mr Hopkins subsequently also became directors or shareholders of three other entities, namely; UIH Building Solutions Pty Ltd (UIH); Aspiration (Qld) Pty Ltd ACN 601765191 (Aspiration Qld) and Coronation Hill No 1 Pty Ltd (Coronation Hill). This occurred during the period of their involvement at QA in circumstances where Mr Ham was unaware of their involvement at the time. Those three entities became involved in the construction of houses and/or the purchase of land for the development of house and land packages. It is essentially argued that those entities entered into direct competition with QA.

[17] Aspiration Qld was incorporated on 11 September 2014. Aspiration Qld has Mr Poole and Mr Hopkins as its directors and shareholders, and is involved in the marketing and sale of house and land packages. The company has held shares in Aspiration Homes Pty Ltd (Aspiration Homes) since 3 October 2014. Aspiration Homes is and has been a licensed builder since 24 February 2015.

[18] Coronation Hill No 1 Pty Ltd (Coronation Hill) was incorporated on 2 December 2014 and has Poole and Hopkins as its directors. This company was created by the defendants for the purpose of acquiring lots of land via put and call option agreements.

[19] UIH is a building company which was incorporated on 3 September 2013. Mr Gates has been a director since its incorporation and Poole has been a shareholder and one of its directors since 1 July 2015. Hopkins was one of its shareholders from 1 July 2015 until 8 December 2015, at which time his shares were transferred to his wife Rebecca Hopkins. On 23 December 2015 those shares were transferred to Mr Hopkins' lawyer, Michael Russ, and on 26 February 2015 they were then transferred to Catherine Tallack.[4]

The dispute

Duties owed

[20] It is alleged that Poole and Hopkins, as a director and an officer of QA, each had duties;

---

4 Exhibit 1 Tab 1.

(a) pursuant to s 180 and s 181 of the Act and under the general law, to use reasonable care and skill in the exercise of their powers and the discharge of their duties as a director and officer of QA;

and

(b) pursuant to s 182 and s 183 of the Act and under general law to act in the best interests of the members of QA and to prevent a conflict of interest with the interests of the company or their duty to the company or its members.

Particulars of the breach of duties

[21] The plaintiff argues that the defendants breached their duties by firstly, using their positions as director and officer of QA from November 2014 to divert opportunities to acquire 21 blocks of land at an estate called 'Coronation Hill'. It is argued that Coronation Hill No 1 Pty Ltd entered into put and call options for 21 blocks of land at the estate in circumstances where QA should have had the opportunity to acquire the land. A deposit for these 21 blocks was then paid by Poole and Hopkins in February 2015 during their continued involvement with QA.

[22] It is also alleged that from 11 September 2014 until 18 September 2015, both Poole and Hopkins breached their duties by using their positions at QA to divert building and construction contracts from QA to Aspiration Homes and/or UIH. The allegations relate to the following projects:

(1) The diversion of a contract on 11 May 2015 for the building and construction of a new home at Hoffman Way, Bundamba, in an amount of $263,636;

(2) The diversion of a contract in an amount of $1,242,000 to Aspiration Homes around 25 May 2015 for the building and construction of a five unit development at Riding Road, Balmoral, whereby a contract in an amount of $1,191,860.08 was ultimately entered into;

(3) The diversion of a call option to Aspiration Homes in relation to a contract for the building and construction of a property at Lot 38 Birdwing Crescent, Jimboomba, around 29 May 2015 whereby a contract was entered into on 1 June 2015 in an amount of $238,100;

(4) The diversion of a contract for the building and construction of 12 Units on a property at Springwood Rd, Springwood, in June 2015 in an amount of $1,936,364;

(5) The diversion of the opportunity to acquire 21 lots of land at an estate named 'Coronation Hill' via put and call option agreements;

(6) The diversion of four contracts for the building and construction of new homes at Chandon Court, Hillcrest (part of the estate named 'Coronation Hill') on 4 August 2015, 17 June 2015, 13 July 2015 and 11 June 2015 in the amounts of $265,110,

$263,182, $263,182, $263,182 respectively and the diversion of 5 other lots at Chandon Court on dates unknown; and

(7) The diversion of a contract in relation to six townhouses at 29 Hunter Street, Greenslopes, on 24 August 2015 for the amount of $1,282,000.

[23] It is also argued that Poole and Hopkins acted in breach of their duties by facilitating the sale of house and land packages by or through entities other than QA and not for the benefit of QA. It is argued that they provided confidential information from QA to various third parties, namely, Aspiration Homes, Aspiration Qld, Arctic Properties, UIH and/or Coronation Hill No 1 Pty Ltd to the detriment of QA, for the purpose of benefiting themselves through their interest in and positions with those entities.

[24] The plaintiff therefore pleads in its Further Amended Statement of Claim (FASOC) that the defendants conduct has caused loss and damage to QA as follows:

(a) by depriving QA of profits on building and construction projects in an amount of $918,858.83, calculated at a rate of 15.4 per cent on building and construction contracts being the gross profit margin for the financial year ended 2014;

(b) by depriving QA of profits on the house and land packages described in (a) and

(c) by disposing of assets of QA comprising building contracts and other agreements for no value.

[25] QA claims the following relief in its FASOC:

(a) That the defendants pay $1,121,508.90 in damages for breach of duty;

(b) Further damages calculated as follows:

(i) 15.4% of the difference between the price that the 21 Lots at Coronation Hill Estate were acquired for and the selling price of those Lots; or

(ii) $210,000 calculated at the rate of $10,000 per lot for the 21 Lots;

(c) An account be taken of any monies received by the defendants due to their association with Aspiration Homes, Aspiration Qld, Arctic Properties, UIH and/or Coronation Hill No 1 Pty Ltd and the amounts so received be paid to the plaintiff; and

(d) Costs.

[26] The plaintiff now seeks, by its submissions received 4 August 2017, to pursue only an equitable compensation order and a compensation order pursuant to s 1317H of the Act. The plaintiff no longer seeks an account for profits.

[27] Against that background it is necessary to first consider the concept of fiduciary duties and the relevant statutory duties under the Act.

The duties of directors and officers under the general law

[28] As Ford's classic text on the *Principles of Corporations Law*[5] notes, the power to control a company is vested in its directors, however this power comes with great opportunities for fraud and mismanagement. Accordingly "The law responds to the directors' position of temptation and the vulnerability of shareholders by subjecting the directors to strict fiduciary and statutory duties." A director is in a fiduciary relationship with the company and the principles of equity demand a high standard of conduct. Those principles require directors to avoid a conflict of duty and interest, and further require that they not take advantage of their position to secure a personal benefit. As Mason J stated in *Hospital Products Ltd v United States Surgical Corp*:[6]

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

[29] As Ford explains, the main function of these duties is to ensure the loyalty of directors to their companies, particularly as directors are in a position to engage in transactions to benefit themselves at the expense of the company. Therefore, positive duties are incumbent on a director, which include the duty to act in good faith in the best interests of the company, the duty to act for proper corporate purposes and the duty to give proper consideration to matters.

Statutory duties under the *Corporations Act*

[30] A director's equitable duties as a fiduciary are then reinforced by the statutory duties set out in ss 180-183 of the Act. There are both positive duties as outlined in ss 180 and 181 and then negative aspects of the duties as outlined in ss 182 and 183, which include the duty to avoid conflicts of interest.

[31] The statutory duties include:

(i) The duty to act with reasonable care and diligence (s 180);

(ii) The duty to act in good faith in the best interests of the company and for a proper purpose (s 181); and

---

5 13th Edition p 337 at [8.010].

6 [1984] HCA 64; (1984) 156 CLR 41.

(iii) The duty not to improperly use their position or information (s 182, s 183).

[32] It should be noted that the duties imposed by ss 180-183 are imposed not only on a director but on an officer of a company.[7] An officer is defined in s 9 as including a director or secretary of a corporation or a person "who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation".

Duties pursuant to s 180

[33] In answering the question as to whether a director or other officer has exercised reasonable care and diligence, the Court needs to balance the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.[8] Section 180 is in the following terms:

"**Section 180**

Care and diligence--civil obligation only

Care and diligence--directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

---

7 *Corporations Act* 2001 (Cth), s 179(2).

8 *Australian Securities and Investments Commission v Doyle and another* (2001) 38 ACSR 606 at [222].

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)--it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

"business judgment " means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation."

[34] The requirements of s 180(1) of the Act will have been satisfied if the director or officer proves that they made their judgment in good faith for a proper purpose, did not have a material interest in the subject matter of the judgment, informed themselves about the subject matter to the extent they reasonably believed to be appropriate[9] and rationally believed the judgment to be in the best interests of the corporation. That limited test is satisfied if the evidence shows the defendant believed his judgment was in the best interests of the corporation and the belief was supported by a process of reasoning which was sufficient to warrant describing it as a 'rational belief', whether or not the process is objectively convincing. The onus of proof is on the director seeking to take advantage of the defence although I note that neither defendant in this case has pleaded the statutory defence.

[35] The High Court in *Shafron v Australian Securities & Investments Commission*[10] held that the degree of care and diligence required by s 180 of the Act is fixed as an objective standard identified by reference firstly to the element identified in paragraph (a), being the corporation's circumstances, and the elements identified in (b), namely the office and responsibilities within the corporation that the officer occupied. The Court considered that the responsibilities were not confined to the statutory responsibilities and that they include whatever responsibilities the officer had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

[36] Accordingly, a director or officer of a corporation must 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 in the "corporation's circumstances", which requires a consideration of the nature and type of the corporation. Furthermore, as the decision in *Shafron* indicated, there needs to be a consideration of the care and

---

9 *Corporations Act* 2001 (Cth), s 180(2).

10 [2012] HCA 18; (2012) 247 CLR 465.

diligence a reasonable person would exercise if they occupied the office held by the director or officer, and had the same responsibilities as the director or officer.

[37] There is therefore an objective and a subjective test involved in determining whether an officer or director has acted with appropriate care and diligence, given the Court is required to not only consider the care and skill a reasonable person would exercise but to take into account the actual position of the officer in the corporation and the type of corporation in question.

[38] As Gordon J stated in *Parker v Tucker*[11] the relevant principles in relation to the section were really set out by Santow J in *Adler*,[12] who noted that at least in relation to s 180 of the Act "the duties imposed upon directors are essentially the same as the duties of directors under the common law".

Duties pursuant to s 181

[39] In relation to the duty of good faith set out in s 181 of the Act, the case law establishes that the principles applicable in determining whether a director has acted for an improper purpose and in abuse of their power includes an analysis of the following principles.[13] First, fiduciary powers under the duties of directors may be exercised only for the purposes for which they were conferred and not for any collateral purpose. Secondly, it must be shown that the substantial purpose of the director's actions was improper. Thirdly, altruistic or honest behaviour will not prevent a finding of improper conduct or that the conduct was carried out for an improper or collateral purpose. Whether acts were performed in good faith and in the interests of the company is to be objectively determined. Lastly, the Court must determine whether, but for the improper or collateral purpose, the directors would have performed the act impugned.[14]

"**Section 181**

"Good faith--civil obligations

Good faith--directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

---

11 [2010] FCA 263.

12 (2002) 41 ACSR 72 at 168.

13 *Permanent Building Society (in liq) v Wheeler & Ors* (1994) 14 ACSR 109.

14 Ibid at 137.

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2:This subsection is a civil penalty provision (see section 1317E)."

[40] Accordingly, it is clear that a director or officer must exercise their powers and discharge their duties in good faith and in the best interests of the corporation and for a proper purpose. A director can be in breach if their powers are exercised for an improper purpose. Proof is required that the directors knew, based on an objective assessment, that they were not acting in the best interests of the company. This involves a knowledge or awareness that what had been done was not in the best interests of the company.

Duties pursuant to s 182

[41] In terms of s 182, there is a prohibition in the section on a director, secretary or other officer gaining an advantage for themselves in their position.

"**Section 182**

"Use of position--civil obligations

Use of position--directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E)."

[42] In *Australian Securities & Investments Commissioner v Adler*[15] Goldberg J considered that causing a company to enter into an agreement which confers unreasonable personal benefits on a director is a breach of s 180, s 181 and s 182. It was also held that it is sufficient to establish that the conduct of a company was carried out to gain an

---

15 (2002) 41 ACSR 72 at 184.

advantage for that director or someone else, without also having to establish that the advantage was actually achieved.

[43] Accordingly a director or officer cannot improperly use their position to gain advantage for themselves or someone else, or to cause a detriment to the corporation. It is also clear that an officer will be in breach of this duty where they engage in conduct with the purpose of obtaining a benefit for anyone or causing a detriment to the company, irrespective of what actually occurs. The intention must be to bring about those specific results. It does not require proof that an advantage has in fact been gained. It is a breach of fiduciary duty[16] to secretly arrange contracts with other companies in which they have an interest which is undisclosed.

Duties pursuant to s 183

[44] Section 183 prohibits a person who obtains information as the director or officer of a corporation from improperly using the information to gain any advantage for themselves or to cause a detriment to the corporation. The section provides;

"**Section 183**

"Use of information--civil obligations

Use of information--directors, other officers and employees

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection."

[45] Therefore a director or officer of QA would owe a duty to QA to avoid a conflict of duty and interest, and not to take advantage of any information they obtain in their positions to secure a personal benefit.

The defendants' position

[46] The defendants' argue that there are no breaches of duty as alleged either under the general law or under the Act because this case falls within the principle articulated by

---

16 *R v Donald; Ex parte Attorney-General* (1993) 11 ACLC 712 at 714.

Mason J in *Hospital Products Ltd v United States Surgical Corp*[17] that certain fiduciary relationships qualify the general law of the duty not to act in a conflict of interest as follows:

> "The fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or real or substantial possibility of conflict between his personal interests and those of the persons whom he is bound to protect."

[47] The defendants' position is that liability as a fiduciary will not arise in circumstances where the fiduciary's actions have been authorised, essentially by the circumstances of his appointment or by the effective assent of the person to whom the duty is owed. In this regard, particular reliance is placed on the statement in *Chan v Zacharia* [18] in relation to the fiduciary duties owed by directors and officers of a company:

> "Many of the statements of the general principle requiring a fiduciary to account for a personal benefit or gain are framed in absolute terms – 'inflexible', 'inexorably', 'however honest and well-intentioned', 'universal application'…
>
> …**The liability to account as a constructive trustee will not arise where the person under the fiduciary duty has been duly authorized, either by the instrument or agreement creating the fiduciary duty or by the circumstances of his appointment or by the informed and effective assent of the person to whom the obligation is owed, to act in the manner in which he has acted**" (my emphasis).

[48] This approach was also endorsed in *Streeter v Western Areas Exploration Pty Ltd (No 2)*[19] where Murphy JA stated that a determination of a breach of a duty depended on the character and scope of the relationship between the parties and the mere fact that an opportunity comes to a fiduciary in the course of such a relationship does not necessarily mean that there has been a breach of duty. In *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9)*[20] Black J had also confirmed the following statement:

> "The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd*

---

17 (1984) 156 CLR 41 at 103.

18 (1984) 154 CLR 178 at 204-205.

19 [2011] WASCA 17.

20 [2012] NSWSC 984 at [141].

> [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition 'that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case' as 'fundamental'."

[49] Counsel for the defendant therefore argues that a director may at the same time be a director of a competitor and carry on a competing business. The defendants argue that whilst Arctic continued to refer matters to QA after October 2012, it was never agreed that there would be an exclusive arrangement whereby Arctic would only refer matters to QA. Although there was no evidence to this effect at trial, Arctic maintains that it continued to refer matters to other third parties including other builders and developers after October 2012.

[50] It is because of this lack of exclusivity that the defendants maintain that their relationship with QA is one which falls within one of the recognised exceptions to the duty not to act in a conflict of interest.[21] In this regard it is argued that, consistent with the principles in *Hospital Products Ltd v United States Surgical Corp*[22] and *Chan v Zacharia,*[23] if a person is duly authorised by the terms of his appointment or by assent from the person to whom the obligation is owed, then the liability to account will not arise because it would be unconscientious to do so.

[51] Having already discussed the nature of the respective businesses and the roles the parties played in those businesses as at late 2012 it is necessary to determine the nature of the agreement and whether those roles and businesses changed after the agreement was entered into in late 2012.

What was the agreement?

[52] In terms of the formalities, it was agreed that the ownership of QA shares would be effective as from 31 December 2012 however the ASIC records were not updated at that time. The defendants were both paid a profit share in accordance with their percentage shareholding in the 2013 financial year. Mr Poole admits being a director from 9 October 2013 until 18 September 2015. Mr Hopkins denies being an officer of the company as defined by the Act during that period and argues that he ceased having any involvement with the company after 10 April 2015.

Evidence of Mr Ham

[53] Mr Ham maintains that shares in QA were offered to Poole, Hopkins and a third man called Horne "for 100 per cent of their sales".[24] His evidence was that in the first meeting in the boardroom of QA and Arctic's shared office space, there was a

---

21 See Defendants' Submissions received 26 April 2017, at [12]-[25].

22 (1984) 156 CLR 41.

23 (1984) 154 CLR 178 at 204-205.

24 T1-41 LL26-28.

discussion between Ham, Poole and Hopkins about offering one-third of the shares in QA to Arctic for exclusive referrals. Mr Ham's evidence was that this arrangement would operate from 31 December 2012. Ham stated that initially the share offering was between Horne, Hopkins and Poole however when Mr Horne left Arctic, his share was apportioned between Mr Poole and Mr Hopkins. The shareholding was not formalised in any particular way at that point in time because the men were "very busy"[25] and trusted one another.[26] The arrangement was later formalised when Mr Gates left QA in June 2013.

[54] Mr Ham indicated that when QA was conducted by just himself and Mr Gates, all business decisions were made together and whilst they had meetings, Mr Ham stated that they were not formal director's meetings and decisions were not minuted. After the defendants became involved in QA in October 2012, Mr Ham stated that the business decisions of QA were made between himself and Mr Gates on the one side, and Mr Poole and Mr Hopkins as business partners and directors on the other.[27] The four men had meetings and would decide which way processes were going to go. They would all have their jobs to do at the end of the meeting. Mr Poole helped in particular with accounting and with external sales from townhouses but was not really involved in the 'construction side'. Mr Ham stated that during this time he was more the construction manager and CEO. He looked after all aspects of construction and managed the supervisors.[28]

[55] After the oral agreement was reached Mr Ham stated that he was paid a salary but Mr Poole and Mr Hopkins were not. They did however take regular weekly drawings from late 2013. This was an advance draw of a profit share. Mr Ham conceded that Mr Hopkins was less involved in the day to day running of QA than Mr Poole.

Evidence of Mr Gates

[56] Mr Gates, the previous director of QA, indicated in his evidence that the discussions about Mr Poole and Mr Hopkins receiving a shareholding in the business had an evolution. Mr Gates said the first stage was a discussion whereby he and Mr Ham discussed giving Poole and Hopkins a shareholding in the business as an incentive. The attraction was that by offering shares it locked in a referral to their business.[29] He agreed that Poole and Hopkins initially were to receive a third shareholding each together with Mr Horne, but that as discussions evolved Mr Horne dropped out and the agreement was struck with Poole and Hopkins only. Poole and Hopkins were ultimately given about 15 per cent of the shares in QA. Mr Gates stated that when he left the business, Poole and Hopkins' shareholding increased to 25 per cent each. Mr Gates

---

25 T1-42 LL13-16.

26 T1-65 LL25-30.

27 T1-3 LL5-9.

28 T1-43 L27-33; T1-72 LL36-40.

29 T3-91 LL15-16.

stated that when he was involved in QA, the meetings in relation to the business involved the four of them: Mr Ham, Mr Poole, Mr Hopkins and himself.[30]

[57] Mr Gates gave evidence that the arrangement with Arctic in relation to house and land packages was that "they would supply us what they could". He also said, "they were helping our business grow from their external leads" and the only condition on the involvement of Mr Poole and Mr Hopkins was that "we were partners in the building company".

[58] When asked to elaborate on the statement that "they would supply us what they could", Mr Gates said that Mr Poole and Mr Hopkins were also interested in unit development, but that he and Mr Ham did not have a lot of experience in building units. The implication would seem to be that all opportunities for a house and land package which came to Mr Poole and Mr Hopkins would be passed on to QA. However on Mr Ham's evidence QA's business was not limited to building houses; and on the description of the business of Arctic Properties in the evidence of Mr Hopkins[31] and Ms Kelly,[32] it is unlikely that it extended to the marketing of units.

Evidence of Mr Hopkins

[59] Mr Hopkins also gave evidence and agreed that the relationship with QA and Arctic evolved in late 2012 against a background of Arctic moving QA building stock. He stated that he had a good insight into what QA was doing as he was their subcontractor[33] and as QA's only floor and wall tiler, Hopkins stated it became apparent to him that QA were not doing a lot of business outside of Arctic.[34] Hopkins stated that QA 'stock' was building houses and dwellings that were supplied to the market. A developer's 'stock' was the blocks of land on which those houses and dwellings were built.

[60] In terms of Arctic Properties, Hopkins stated that Arctic was moving QA stock as well as developer's stock, and that when those two things combined it became Arctic's stock, which was put on Arctic's stock list. Hopkins stated that the Arctic stock list was made up of house and land packages from various builders and various developers. Hopkin's evidence was that "stock" was therefore "three different peoples' stock". He continued: "So for me, stock is three different people's stock. It's Arctic Properties' stock when it combines, it's a developer's stock, and it's a builder's stock."[35]

---

30 T3-91 LL37-39.

31 T4-18.

32 T4-78.

33 T4-21 LL1-12.

34 Ibid.

35 T4-22 L4-6.

[61] In terms of Arctic moving other builders' and developers' stock, Mr Hopkins stated "– if your question is was Mr Ham aware that we moved other builders' dwellings? Absolutely. He knew one of the builders, Daytona Constructions from Claremont. He knew him."[36] This appears to be a reference to a project in which Arctic was engaged between 2010 and 2012.[37]

[62] Mr Hopkins stated that he recalled the discussions in late 2012 in the following terms:

> "My recollection is that I put it to David [Ham] and Don [Gates] that they might be interested in giving us a shareholding, so that we were moving a lot of their stock. I thought we were in a position of authority to negotiate that deal. They knew that we worked with other builders. They knew that I was a guy that had multiple businesses. I thought we were in a position for them to give us some shareholdings."[38]

[63] He continued:

> "And tell her Honour the full extent of what you all agreed to, you, Don, Mr Ham and Justin Poole?---Okay. In that meeting, I probably did the majority of the negotiation in regards to Mr Poole and Mr Horne, and Mr Ham would've been the one doing the talking on behalf of Mr Gates and himself. So the conversation was held primarily between David and myself. I put out there that we would be interested in having a shareholding. He and Don clearly had been talking about that. They – they came back at a 30 per cent shareholding for us, and ---".[39]

[64] Mr Hopkins confirmed in his evidence that there was no formalisation of the arrangement by any written communication.[40] He indicated that after coming to the arrangement, the next step in the evolution of their business activities was that Arctic positioned themselves to not only get paid to package and market QA products but also to 'push' QA stock onto any developer's stock Arctic had available to it. Mr Hopkins stated, "so we started…pushing QA onto any stock that we had on land….Pushing QA product because that's why we negotiated it, so we could get almost a double dip of what we were already doing."[41] He also stated that, after the agreement, he started to receive a share of the profits of the business of QA.

---

36 T4-22 L30-33.

37 T4-18 to T4-20.

38 T4-22 LL43-46 to T4-23 L1.

39 T4-23 LL17-23.

40 T4-23 LL37-39.

41 T4-23 LL46-47.

[65] Hopkins stated that he and Poole were surprised they managed to get the shareholding in QA without having to pay any money.[42] He stated that they started pushing QA stock[43] but that they also got commissions when they 'referred on' to other builders.[44] Mr Hopkins confirmed that when he and Poole's QA shareholding increased from 15 or 16 per cent to 25 per cent, they paid for that increase in the shareholding.

Evidence of Mr Poole

[66] Mr Poole also gave evidence and stated that there was a point in time that QA and Arctic wanted to intensify their business relationship. His explanation of events was in the following terms:

> "Darryl and I were approached with Marcus Horne and offered an 11 per cent share each in QA Developments, DTM Constructions in September 2012. That was never an official agreement, but we understood it that we were getting effectively profit shares to the tune of 11 per cent each.
>
> And why was that arrangement struck?---I believe so QA – we were providing a lot of jobs to a lot of builders at that point in time.
>
> ...
>
> I believe so we would give the majority of our work to QA Developments moving forward."[45]

[67] He stated that after that arrangement was struck, business continued as usual:

> "No changes?--- …
>
> Business as usual. And can you please describe to the court very briefly – we've had a lot of evidence about what exactly these businesses do, but could you please describe to the court your knowledge of what those activities are?---We went and – Arctic Properties was aggregator of stock. We went and found the land from a developer. Put a package, got a builder to put a house on that land, packaged it together and it was promote through marketing groups to sell on to end buyers, which were all generally investors.
>
> … but you accept, don't you, Mr Poole, that after October 2012, or around that time, Arctic Property Group was in the business offices directly next to

---

42 T4-23 LL29-35.

43 T4-23 LL41-47.

44 T4-22 LL27-32.

45 T4-84 LL12-35.

> - - -?---I actually think it was, like, the first week of October 2012 we moved in."[46]

[68] Mr Poole, with reference to his sending emails on behalf of QA, described himself as "the liaison between Arctic Properties and QA Developments and getting a package together and then promoting the material out to the market"[47]. He also said that "the premise of why we were offered the shares" in QA was to secure referrals for it from Arctic Properties.[48]

[69] Mr Poole agreed that there were several businesses operating out of the part of the shared office space that Arctic occupied.

Findings

[70] Having considered the evidence in relation to the initial agreement in October 2012 between Mr Ham and Mr Gates on the one hand and Mr Poole and Mr Hopkins on the other, there is no dispute that there was no agreement in writing. Whilst it is unclear who made the initial approach about the possibility of a shareholding, it is clear that discussions were held in late 2012, that ultimately an offer of shares was made and that no monetary consideration was required. The agreement was reached at a point in time where Arctic was giving most, but not all, of its building referrals to QA.

[71] Mr Ham clearly had a genuine belief that QA would receive all of the referrals from Arctic, particularly as the defendants did not purchase the initial shareholding. There can also be no doubt that a consequence of the agreement reached was that the more referrals that Arctic made to QA, the more profit there would be to Mr Poole and Mr Hopkins.

[72] Whilst there is no evidence that it was specifically agreed between the parties that the defendants would refer all building contracts that came to Arctic to QA, clearly it would have been part of their roles with QA to try and get building contracts for QA. It would also seem clear that part of their roles at QA would have involved finding land upon which to build QA houses. The evidence also establishes that they were also involved in the day to day operations of QA in that Mr Poole was involved in the townhouse and accounting side and Mr Hopkins was involved in decisions concerning the management of the construction business.

[73] The evidence of both Mr Hopkins and Mr Poole was that at the time they obtained the shareholding they had their own business interests in mind and that after the agreement was entered into, business continued as usual. Arctic continued finding land from developers and marketing house and land packages most of which had houses build by QA. QA continued to construct houses. After October 2012 Mr Hopkins also continued

---

46 T4-85 LL8-21.

47 T 4-85 L35.

48 T 4-92 L33.

to conduct his other businesses from the shared office premises, which included a tiling business, a landscaping business and a tile supply business.

[74] On my analysis of the evidence it would seem to me that the relationship between the parties in late 2012 was such that QA and Arctic were not in competition with each other in any way at that point in time. In fact their relative activities complemented each other and "business as usual" did not envisage either defendant being involved in a building or construction business, given that neither defendant was a registered builder and notably all previous building work had been conducted by QA Developments. Neither did "business as usual" involve either defendant buying land.[49] Mr Ham's evidence was that QA built on land sourced by Arctic but that QA had also previously purchased land in its own right and entered into put and call option agreements in relation to land.

[75] At the time of the agreement in late 2012 Arctic was sourcing land on which to put houses built by a builder from the stock of developers. I note Mr Gorman's evidence that he came to know Mr Hopkins in mid-2013 or 2014 when his company was selling "developed land lots" through Arctic. He stated that his company would buy the raw land and then get all the approvals and do all the civil works, get the land titles to issue and then sell the developed land on through companies such as Arctic. I understand that to mean that the developers initially owned the land. It is my understanding that the marketers would source land for clients from a developer, get a builder such as QA to price the cost of building one of its standard houses on the land, and then arrange for the marketing of the "package", with the purchaser paying for the land as well as the construction cost. While Arctic sourced the land, it did not buy the land itself or build houses.

[76] Accordingly, against that background of factual findings I can find no evidence that the defendants were authorised by the terms of the agreement to enter into opportunities that were in direct competition to those undertaken by QA. I can find no evidence to support the argument that the defendants were duly authorized by the agreement with Mr Ham in 2012 to refer building work or land development opportunities to companies they themselves had an interest in.

[77] If the defendants were not expressly authorised, then did they have the effective consent of the plaintiff to undertake those opportunities because of the nature of the relationship between the parties at the time?

[78] The defendants submit that the nature of the relationship between the parties in late 2012 was such that they had "consent to continue referring building work to any third parties and not simply the plaintiff". I do not consider this to be correct. It is not consistent with what Mr Poole described as the "premise" on which the shares were offered, or Mr Hopkins' statement that, after the agreement, they "started pushing QA onto any stock we had in land…Pushing QA product…".

---

[49] Mr Woodward, T2-39 L36 to T2-40 L7, LL13-18 and Mr Hopkins, T4-68 LL7-9.

[79] Nor is there acceptable evidence that, after the agreement, Arctic continued to refer opportunities to builders other than QA. The only example suggested by either Mr Hopkins or Mr Poole was "Claremont", but that was a project in which they were engaged between 2010 and 2012. Not a single document was introduced into evidence to demonstrate that Arctic continued to refer opportunities to builders other than QA after the agreement, and before the occasions which are the subject of the claims of the plaintiff in these proceedings. At one point, to explain the absence of such documents, Mr Hopkins said, "Potentially, there's not documents that exist."[50] Given that the role of Arctic was to obtain a price from a builder for the construction of a particular house on a particular block, and then prepare a brochure for submission to a marketer, as a result of which Arctic would receive remuneration, that evidence is extraordinary. Nor is there any evidence that Mr Ham knew, after the agreement, that Arctic continued to refer opportunities to other builders, and still less, that he assented to it.

[80] In addition, none of Mr Poole, Mr Hopkins or Arctic Properties was a registered builder at the time of the agreement in 2012; nor did they have any interest in building or construction companies at that point in time. In my view, therefore, there is no evidence that in late 2012 the defendants were referring work to building and construction businesses and land development businesses that they had an interest in. Furthermore there could be no such evidence because in late 2012, the businesses in question were not in existence.

[81] In this regard I turn to an examination of the history of the incorporation of those companies. I also note the submission that the defendants had Mr Ham's effective consent because he knew, or must have known, of their involvement in such companies.

The incorporation of Aspiration (Qld) Pty Ltd on 11 September 2014, Aspiration Homes Pty Ltd on 3 October 2014 and Coronation Hill Number 1 Pty Ltd on 2 December 2014

[82] The evidence indicates that in late 2014 both defendants became involved in other building and construction businesses and a land development company. The defendants had incorporated Aspiration (Qld) Pty Ltd in September 2014 to market house and land packages[51] and there is evidence that they had an agreement with Mr Woodward, a builder, to establish Aspiration Homes to build houses. Aspiration Homes was incorporated on 3 October 2014 and has been a licensed builder since 24 February 2015. Mr Woodward's evidence is relevant in this regard.[52] His evidence was as follows: [53]

"And you are a director of Aspiration Homes Proprietary Limited?---Yes.

---

50 T4-63 L18.

51 T1-47 LL5-7, T2-40 LL31-33, T4-94 LL16-17.

52 T1-47 LL5-7, T2-40 LL31-33, T4-94 LL16-17.

53 T2-39 L17 to T2-40 L29.

And you are a builder by trade?---Yes.

And I think you are the licensee builder for Aspiration Homes?---I'm the nominee under the QBCC, yes.

Thank you. Aspiration Homes was incorporated in about October 2014; do you recollect that?---I believe so, yes.

And it was established by you as a new business, was it not?---Yes.

Had you been performing building work prior to that date?---Yes.

But under another entity. Did you conduct building work prior to the incorporation of Aspiration Homes?---Yes.

Under another entity or in your own right?---Under – under other entities.

Could you tell her Honour why it was that you established the company Aspiration Homes?---It was put up as a new venture to construct residential housing.

And was that venture struck up with you and other persons?---Yes, it was.

Could you tell her Honour who those other persons were?---It was Justin Poole and Darryl Hopkins.

And the enterprise that the company was to embark upon was to build residential houses on new residential sites?---Correct.

What is often known in the industry as house and land packages, Mr Woodward?---We weren't – we weren't selling land, we were just [indistinct] construction.

> I'm sorry, I didn't just – could you repeat that. I didn't quite pick it up?---I said sorry, no, we didn't do any – we didn't sell land, we only did – we only did construction of housing.
>
> I see. So the land component would belong to your client?---Correct. The clients would sell the land and we'd build the house. And we'd build the land to deliver a house and land package. Typically to investors or developers.
>
> Now, when you formed this venture with Mr Poole and Mr Hopkins, did you know of their association with QA Developments?---Yes.
>
> What did you understand their association with QA Developments to be?---I understood that they would be operating the business QA and that they were – they were leaving that company and looking to start a new entity.
>
> Again, sorry, the speaker in this court keeps cutting in and out, Mr Woodward. It might be the mobile phone you're on, I'm not sure but could you repeat that answer?---Sorry, what was the question again?
>
> What did you understand Mr Poole and Mr Hopkins' association with QA Developments to be?---I understood that they had another housing business that they operated called QA Developments and that that was another business they had.
>
> Did you understand them to also be in a marketing business of Arctic Properties?---I saw the name but I didn't – I didn't know anything about it, no."

[83] Both defendants were directors of and shareholders in Aspiration (Qld), which has shares in Aspiration Homes. Neither defendant disclosed to QA or Mr Ham that they had an interest in Aspiration (Qld) and Aspiration Homes[54] and that they were referring work to Aspiration Homes.[55] Mr Hopkins' evidence was in the following terms:[56]

---

[54] T1-47 LL9-10, T2-40 L35, Mr Hopkins, T4-68 LL20-27.

[55] T2-T2-43 L43-44, T2-44 LL1-7.

[56] T4-68 L13 – T4-69 L2.

"I think that's perfectly clear. Now, when did you strike that deal with Charlie Woodward, roughly? We know it's in '14, because the companies are incorporated - - -?---Yeah, I think it was around September or October, towards the end there.

Coincidentally, the time that Aspiration Queensland incorporated and Aspiration Homes are incorporated?---Okay, if you say so.

Now, you never disclosed to Mr Ham that you had that arrangement with Mr Woodward, did you?---No.

You never disclosed to Mr Ham that you had incorporated Aspiration Queensland?---No.

And you never disclosed to Mr Ham that your company, Aspiration Queensland, had 30 per cent of the ordinary shares in Aspiration Homes?---No.

Why not?---I didn't think I had to. I didn't tell him what was going on with anything in the Arctic Group at any level. I wasn't under pressure to tell him that.

I see?---Shareholder and all of the staff.

So in September or October 2014, you were still in the same premises with QA?---That's correct.

And there's no falling out or dispute that this stage, and you set up with Mr Woodward exactly the same arrangement you had with QA and don't tell Mr Ham about it?---I don't think there was any "don't tell Mr Ham about it" but I didn't tell Mr Ham about it, if that's what you're asking me.

Have you ever sought any advice, Mr Hopkins, about your obligations to disclose competing business interests with business partners?---Yes.

And when did you seek that advice?---Over the years with my solicitor and accountant.

> And did you ever seek any advice in relation to establishing the arrangement with Aspiration Queensland and Mr Woodward and not having to tell Mr Ham?---No."

[84] Furthermore, whilst UIH Building Solutions Pty Ltd had been incorporated on 3 September 2013 it would seem that both Mr Poole and Mr Hopkins became shareholders in 2015 and Mr Poole a director since 1 July 2015. That involvement in a building and construction company was not disclosed to QA or Mr Ham.

[85] On 2 December 2014 Coronation Hill Number 1 Pty Ltd was incorporated, with Mr Poole and Mr Hopkins as directors. Neither defendant disclosed their involvement in this company to QA or Mr Ham nor did they disclose that they were embarking upon securing land via put and call option agreements through that company, which Mr Ham maintains was a role previously performed only by QA Developments.[57]

[86] Furthermore, there is evidence that the defendants were trying to keep their involvement with these companies a secret and were actively concealing their involvement in them from Mr Ham, given that after the agreement with Mr Woodward the defendants were directing staff to send emails to their new email addresses[58] or to blind copy[59] them in on emails that concerned those companies. There is no doubt that the defendants were emailing information belonging to QA Developments to Aspiration Homes without the consent or knowledge of Mr Ham.[60]

[87] It must be concluded that in late 2014 both defendants became involved in the establishment of corporations which acted as competitors to QA for building contracts and a competitor for the purchase of blocks of land for development via put and call option agreements.

[88] Having considered that factual material and the submissions of counsel I consider that in determining whether the defendants breached their duties under the Act and as fiduciaries under the general law the question is not simply whether the agreement with QA was one which expressly required exclusive referrals of opportunities for building contracts and possible land sites to QA. This issue of exclusivity is but one element which needs to be considered in determining the nature of the relationship between the parties and whether there has been a breach of duties as argued. The fundamental question of breach requires a determination of the nature of QA's business and the nature of the defendants' business at the time of the agreement in late 2012, and the extent to which the defendants' subsequent conduct was authorised or effectively assented to by the plaintiff such that it would be unconscientious to assert a breach of duty. In this regard I need to determine at the outset whether Mr Hopkins was an officer of QA as argued by the plaintiff.

---

57 T2-41 L44 to T2-42 L2 and Exhibit 1 Tab 40 and T3-43 L1, LL4-18, T4-95 LL9-14.

58 Exhibit 2, Tab 38.

59 Exhibit 2, Tab 46.

60 Exhibit 2, Tab 39 and 42.

Was Mr Hopkins an officer of QA?

[89] The relationship between Mr Ham and Messrs Poole and Hopkins clearly evolved to another level when Mr Poole accepted a role as a director of QA in 2013. The evidence indicates that that directorship was subsequently formalised with ASIC and Mr Poole admits that he was a director from October 2013 to September 2015. It is also clear that Mr Gates retired as a director of QA after 30 June 2013.

[90] Mr Hopkins declined the offer to be a director of QA but he remained involved in the business. Was he thereby an officer of QA as defined by the Act?

[91] The *Corporations Act* 2001 (Cth) includes in its definition of an officer of a corporation or an entity which is neither an individual nor a corporation "a person who makes, or participates in making decisions that affect the whole or a substantial part of the business of the entity".[61]

[92] Mr Ham's evidence was that he, Poole and Hopkins would have regular meetings and at one point Mr Hopkins suggested it be every two weeks.[62] He stated that at the meetings they would look how QA was going and talk about where the business was at. The meetings were mainly held in the boardroom of the shared office premises, but subsequently the men would have morning breakfasts at the Coffee Club at Springwood. Those meetings were not minuted in any way. At times those meetings would involve other people, particularly QA's General Manager.

[93] Mr Ham stated that he made all the construction decisions but he did not make the management decisions by himself and that both Mr Hopkins and Mr Poole were involved in that process. Mr Poole became more involved in the estimating aspect of the business as time went by. Mr Ham accepted that Mr Hopkins played a lesser role than Mr Poole but stated that he was actively involved.

[94] QA's former General Manager, Ms Beckton, also gave evidence. Ms Beckton's evidence was that when she was the General Manager she was told that the senior management of QA comprised Messrs Ham, Poole and Hopkins.[63] She was told in clear terms that Mr Poole and Mr Hopkins were in charge when Mr Ham was away and she also indicated that Mr Hopkins told her to report to him in Mr Ham's absence.

[95] In relation to the evidence tendered at trial, I accept that it indicates that Mr Hopkins was involved in the employment of the Business Development Manager, David Crane. There is email confirmation of this dated 28 January 2014. There is also evidence which indicates Hopkins provided instructions to QA account staff in February 2014 in relation to making payments. In March 2014 there was an email from Hopkins to QA staff arranging purchase orders for cranes on some of the development sites and on 29

---

61 *Corporations Act* 2001 (Cth), s 9.

62 T1-47 LL14-19.

63 T2-27 LL42-44.

May 2014 he was invited to a tax planning meeting with QA accountants along with Messrs Ham, Poole and Mrs Ham. Further emails dated 17 June 2014 indicate Hopkins' involvement in the employment of a labourer. On 15 October 2014 he was involved in emails advising on a salary range for the new General Manager, and on 10 November 2014 Hopkins provided instructions to the General Manager to obtain a Building Code from the Housing Industry Association. It is significant that on 18 November 2014 he and Mr Poole gave instructions to the accounts staff which overruled an instruction previously given by Mr Ham.

[96] The submissions of counsel for the plaintiff outline[64] a series of emails between December 2014 and 10 April 2015 which involve some 16 separate emails, each pertaining to Mr Hopkins' role as an officer of QA. I consider that those emails, together with the matters I have referred to in the paragraph above, give a clear indication of the depth of Mr Hopkins' involvement in the business and indicate that he consistently participated in making decisions that affected the business, or a substantial part of the business.

[97] I accept the submission by counsel for the plaintiff that there was no restriction on any information provided to Mr Hopkins during the period in which he was involved with QA. It is also clear that Mr Hopkins gave instructions to the General Manager and Accounts Manager and that he was involved in two interviews to employ QA's General Manager, Ms Beckton. Similarly, the evidence indicates that he was involved in the dismissal of Ms Beckton. I also accept that the evidence indicates that Hopkins helped QA whenever he was required and that Hopkins, Poole and Ham had meetings regularly. There is clear indication in my view that Mr Hopkins was involved in monetary and staff decisions as well as management meetings. I am satisfied therefore that he was acting as an officer of QA from at least early 2014.

[98] Mr Hopkins gave evidence about the breakdown of his relationship with Mr Ham and his indication to him around 9 April 2015 or later on the following Monday 14 April 2015 "I'm out. I'm out of all dealings with QA. I'm out."[65] It would seem that there was then an argument about the fact that Hopkins expected to be paid for his shareholdings. Mr Ham accepts that he left QA "sometime in April". I am satisfied that whilst Mr Hopkins acted as an officer of QA as defined by s 9 of the Act, that ceased from 14 April 2015.

[99] Accordingly, Mr Hopkins was subject to duties under ss 180-183 of the Act during that period and also under the general law. Mr Poole was similarly subject to these duties during his time as a director of QA.

What were the duties of the defendants as a director and officer?

[100] Clearly then both defendants in their positions at QA owed duties to QA to advance and promote the interests of the company. It was a building and construction company

---

64 At [55].

65 Evidence of Mr Hopkins, T4-31 LL9-10.

which specialised in the construction of houses marketed as house and land packages, as well as doing some unit developments.

[101] Mr Hopkins in his evidence[66] indicated that there were two parts to a building company, namely what happens on site where the building work is done and what happens in the office where all the pricing and quoting is done. The evidence is that both defendants were involved in management decisions. I understand that to mean that both defendants were usually involved in the office side of the business.

[102] Mr Poole was particularly involved with the accounting side as well as townhouse sales. He said in his evidence that he was "effectively the liaison between Arctic Properties and QA Developments and getting a package together and then promoting that material out to the market".[67] He was also at times involved in the actual construction side when Mr Ham was not available and he supervised the construction of a building development in Cloncurry, although he was not generally as involved in the actual supervision of building works as he was not a builder. Mr Hopkins was also involved in the construction side at times and indicated that at one stage, he helped QA with "an engineering type question".

[103] Both defendants were taking a profit share of the business and they both took weekly drawings from the business. Part of their roles in the day to day management of the business would have necessarily involved pricing for work that came to QA as well as generally facilitating the opportunities for QA to construct houses on land which was available for development. Mr Hopkins agreed[68] that he organised for tax invoices in respect of "preliminary works" to be sent to customers by QA.

[104] Whilst both defendants were directors of Arctic at the same time that they were directors of QA, it must be remembered that Arctic's business was to market properties for sale. When Mr Hopkins was asked about his activities at Arctic whilst involved with QA he said[69] "I was still one of the faces of Arctic Property, and when I say that, I mean the captains of the ship were Justin and myself and I'd always been used in that perspective, somebody to meet important developers, meet builders, meet marketers" and "in an Arctic Properties space, I'd have to be in a meeting with somebody chasing me down on a land deal or a marketer".[70]

[105] Significantly, Arctic did not build houses or purchase land. In this regard I note Mr Hopkins evidence was as follows:[71]

---

66 T4-25 LL35-40.

67 T4-85 LL34-36.

68 T4-55 LL10-13.

69 T4-27 LL26-29.

70 T4-26 LL43-44.

71 T4-58 L28 – T4-59 L45.

"Now, do you recall at one stage being asked about business cards being provided to you for QA Developments?---No, no. I've sent some emails in and around that. I can't talk in particular but I don't recall that, but I do think there were generic QA Developments business cards that got handed out to us in Arctic Group to, you know, open doors for negotiation when we were telling people in regards to land that this is potentially somebody that we packaged their product with.

Or that QA would package its product with, a building product with land?---Well, land would be packaged with a builder. Arctic Properties would do that work. A lot of developers, they don't want to package their product with a builder of disrepute.

Mr Hopkins, I thought we dealt with this before lunch. Arctic Properties didn't buy land?---No, that's right.

Builders like – and you accept that QA was a buyer of land or a securer of land - - -?---Securer of land.

Yes, to - - -?---Before - - -

- - - to package with its building products?---They didn't secure the land in regards to they didn't run around and put their name on a bunch of land. You asked me did they secure the land prior to my involvement with them?

Yes?---They did.

And they did that after your involvement with them?---Yes, but you didn't ask me how they secured it. You just asked me did they secure it.

But it's not something that Arctic did?---Yes, it is. Exactly the same – exactly the same way as how QA did that before. Talked to real estate agents, talked to developers, ask them to put a hold on the block of land so we've got time to put a package on it. QA did that before my time. We did that at Arctic Properties before my involvement at QA. You have a two-week window. There's no security put down, but you have secured the block for a package. That's what I meant by that.

Okay. Let's stop and pause with your new answer?---That was my answer. It wasn't a new one.

Thank you. In relation to Arctic Properties securing land in the way you've just described?---Yes.

It would not enter into a contract to purchase the land; correct?---No.

And it would not enter into a put and call option in respect of the land?---No.

It would ask, at best, a developer to hold that block of land?---That's correct.

Until you as a middle man, referrer, facilitator - - -?---Any of the above. Yep.

- - - marketer, call it what you wish, found a builder, either a builder that would build a house on the site, such that it could be marketed as a hand and land package to an end-use buyer; correct?---That is correct.

Or you would find somebody that – a third party, through a real estate agent that may want to buy the land and separately enter into a build contract?---Real estate agents wouldn't have bought the land.

I thought my question was clear. I'll put it again. Until a real estate agent found an end-use buyer - - -?---Yes, that's correct, like a marketer.

- - - who would buy the land and enter separate my into a building contract?---Like a marketer.

But at no stage did Arctic buy land?---That's correct."

[106] It would seem to me therefore that any work or opportunities for work that came to either defendant involving the building and construction of houses or the purchase of land for development were opportunities which came to them through their involvement with QA, and not Arctic.

The real issues in dispute

[107] I now turn to an analysis of whether there has been a breach of the duties incumbent on the defendants as alleged by the plaintiff. At paragraphs [7] and [8] of the FASOC the plaintiff pleads the Duties and Obligations in general terms as follows:

> "7. Poole and Hopkins as director and officer of QA Developments each had a duty pursuant to s 180 and 181 as well as duties under the general law to use reasonable care and skill in the exercise of their powers and the discharge of their duties as a director of QA Developments
>
> 8. Poole and Hopkins as director and officer of QA Developments each had a duty pursuant to s 182 and 183 as well as duties under the general law to act in the best interest of the members of QA Developments and to prevent a conflict of interest with those of the company or their duty to the company or its members."

[108] In this regard I note that despite pleading a breach of the duty to exercise reasonable care under the general law, this has not been relied upon in the plaintiff's final submissions and accordingly can be ignored. Similarly although the final submissions refer to s 180 of the Act there are no submissions which argue that the defendants failed to exercise care or show diligence in the exercise of their powers or the discharge of their duties. Accordingly breaches of duties pursuant to this section will not therefore be addressed in these reasons.

[109] There are further difficulties in analysing the conduct of the defendants which QA complains of in terms of breaches of the Act. Quite apart from the difficulties I have already identified with respect to the plaintiff's allegations against the defendants under the general law and with respect to s 180, there are also difficulties with s 181, 182 and 183. In particular, in relation to s 181, is it argued that they were exercising powers as office holders, but not in good faith, or not for a proper purpose? If so, which powers as office holders were they said to be exercising? Is it said that they did not discharge their duties as office holders in good faith and for a proper purpose? Those allegations require an identification of the relevant duties and either an allegation that those duties were not performed or that in performing those duties, the officer or director did not act in good faith or for a proper purpose.

[110] Similarly with respect to ss 182 and 183, the conduct must relate to the use by the officer or director of the officer or directors position in the corporation. The failure to particularise those assertions poses some challenges.

[111] The pleading against the defendants is that as a director and officer of the plaintiff, they breached their duties at general law and under the Act. The FASOC however does not in terms allege that the defendants were fiduciaries of the plaintiff but rather alleges that Poole was a director of the plaintiff and Hopkins was an officer under s 9 of the Act. Furthermore relief depends on receipt of a benefit or obtaining a gain, in circumstances where a conflict or a significant possibility of conflict exists between the person's fiduciary duty and his personal interest; or which the person obtained or received by reason of the fiduciary position; or of opportunity of knowledge resulting from it. The difficulty with the allegations against Hopkins in the pleadings and the submissions is

that many of the diversions alleged do not occur until after Hopkins ceased all involvement with QA after 14 April 2015.

[112] It would seem to me that the substance of the plaintiff's argument is that the defendants were fiduciaries and they breached their duties to avoid a conflict of interest because during the time they held positions at QA, they took advantage of opportunities and information that came to them in those positions to benefit themselves and not QA.

Fiduciary duty

[113] There can be no doubt that a duty of loyalty is the essence of a fiduciary relationship and that it arises in situations where the nature of the relationship gives rise to a legitimate expectation that a person will not use their position in a way which is adverse to the interests of the principal. The leading commentators on Corporations Law[72] acknowledge the difficulty in addressing the breadth of the fiduciary doctrine and the need to identify some specific legal principles. There is a recognition of the following rules. First that directors must not, in any matter falling within the scope of their service, have a personal interest or inconsistent engagement with a third party except with the company's fully informed consent, which is referred to as the conflict rule. Second that directors must not misuse their position for their own or a third parties possible advantage without the company's fully informed consent and they must account to the company for any gain which they make in connection with their fiduciary office, which is referred to as the profit rule. Third, directors must not misappropriate the company's property for their own or a third party's benefit, which is referred to as the misappropriation rule.

[114] In *Streeter* McClure P discussed the conflict rule - one of the two rules relevant in that case - as follows:

> "First the conflict rule. A fiduciary is under an obligation, without informed consent, not to promote the personal interest of a fiduciary by making or pursuing a gain or benefit in circumstances in which there is a conflict or a real or substantial possibility of a conflict between the personal interests of the fiduciary and those whom he is bound to protect: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103; *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165 [78].
>
> Mason J in *Hospital Products* stated the conflict rule in terms of a conflict between 'interest and interest'. I understand the analysis to be as follows. A fiduciary has (within the scope of his engagement or undertaking) a duty of undivided loyalty to the person to whom the duty is owed, in this case the company of which he is a director. Thus, ordinarily a director cannot have

---

72 Ford's *Principles of Corporations Law* (13th ed) at [9.020].

personal interests that conflict with the interests of the company. Although the conflict rule is usually formulated in terms of the need to avoid a conflict of duty and interest, the Mason J formulation assists in the understanding (and application) of the conflict rule.

If a director has a positive duty (even if non-fiduciary) to pursue or acquire a particular benefit (which includes an opportunity) or property for the company and seeks that property for his private purposes, there will be a conflict of interest and interest. That is, the existence of a positive duty has the consequence that the company will have a relevant interest in the particular benefit or property for the purpose of the conflict rule. This does not involve the enforcement of a prescriptive fiduciary duty. This analysis may provide an answer to the conundrum about whether the 'duty' with which a fiduciary's interest must not conflict is confined to fiduciary duties and if so, what duties are encompassed within that rubric. The conflict rule also prohibits a conflict of duty and duty.

It has been observed that in the case of company directors, the conflict rule is not strictly applied: *Ford's Principles of Corporations Law* (13th ed) [9.060]. Thus a director can also be a shareholder and act with a personal interest even though the director cannot be shown to have freed his or her mind of that personal interest: *Mills v Mills* (1938) 60 CLR 150. It is also said that a director is permitted to occupy board positions in competing companies: *London and Mashonaland Exporation Co Ltd v New Mashonaland Exploration Co Ltd* [1981] WN 165; *Bell v Lever Brothers Ltd* [1932] AC 161, 195. There are similar examples in other types of fiduciary relationships. For example, real estate agents are entitled to act for multiple vendors of real estate even though the vendors are in competition for purchasers in the same geographic or other relevant market."

[115] Murphy JA in the same decision examined the scope of the relationship as fiduciary by reference to the decision of Dixon J in *Birtchnell v Equity Trustees*[73] as follows:

"In *Birtchnell v Equity Trustees*, Dixon J held that the 'subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained not merely from the express agreement of the parties … but also from the course of dealing actually pursued by the firm'.

His Honour continued:

'Of the duties imposed by these doctrines, one which is material for the decision of this case is that which forbids a partner from withholding from

---

[73] (1929) 42 CLR 384.

the firm any opportunity of advantage which falls within the scope of its undertakings, and from using for his own exclusive benefit, information, knowledge or resources to which the firm is entitled. (See *Dean v MacDowell* [(1881) 6 App Cas 79]; *Aas v Benham* [(1891) 2 Ch 258, Bowen LJ]; and cf *Trimble v Goldberg* [(1906) AC 499], and also secs 33 and 34 of the Victorian *Partnership Act* 1915.) Another duty of present materiality is that which requires a fiduciary to refrain from engagements which conflict, or which may possibly conflict, with the interests of those whom he is bound to protect. (*Aberdeen Railway Co v Blaikie Bros* [(1854) 1 Macq 461] (408).'

Dixon J also said:

'[T]he partnership was entitled to avail itself of any opportunity to embark upon such a transaction which came to the knowledge of the partners or any of them, and knowledge and information acquired by a partner as to the readiness of a client to share such profits, as to the conditions upon which he would do so, and generally as to every fact bearing upon the terms which the partnership might negotiate with him were all matters which no partner could lawfully withhold from the firm and turn to his own account. The relation between such a client and the partnership is a matter affecting the joint interests which each member was bound to safeguard and protect, and no member could enter into dealings or engagements which conflicted or might conflict with those interests or which gave him a 'bias against the fair discharge of his duty' in that respect (412).'

Isaacs J said:

> 'For my purpose, I rely on part of s 33 and on the rules of Equity saved by s 4, which enable us properly to understand and apply s 33. Section 33 enacts that (1) 'Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction' concerning the business of the firm, etc. The section is not new law (see per Lindley LJ in *Aas v Benham* [(1891) 2 Ch at p 255], since that case, as pointed out in *Pollock's Digest of the Law of Partnership* [11th ed], p 95, was commenced before the Act was passed.) The section plainly cannot be confined to matters within the scope of the partnership.'

The contrary view would open a wide door to fraud, besides being opposed to what Lindley LJ says at the page mentioned. If, for instance, A and B are in partnership as wholesale grocers, and B arranges with C, a retail grocer, to share C's profits if B influences A to agree to supply C, I take it as clear that B's arrangement with C is a 'transaction concerning the partnership,' though C's business itself is wholly outside its scope. The case would fall

> within the observations of Cotton LJ in *Dean v MacDowell* [8 Ch D at 354], 'acquired by him by reason of his connection with the firm' (394)."

[116] I have also found Murphy JA's analysis of the 1973 Canadian decision of *Canadian Aero Services Ltd v O'Malley*[74] to be of particular assistance in the circumstances of this case. In that decision Laskin J referred to the New York case of *Burg v Horn*[75] and indicated that issue in that case was not the usurpation of an opportunity which the particular company was pursuing, but the "more far-reaching question" of whether a director was obliged to offer to the company, before taking them for himself, opportunities in its line of business, of which he, rather than the company, became aware and which he pursued. Laskin J noted that the majority in that case considered that there needed to be a determination, in each case, by "considering the relationship between director and company, whether a duty to offer the company all opportunities within its line of business was fairly to be implied".[76]

[117] In particular Laskin J referred to "The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. **Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge"** (emphasis added).[77]

[118] Bearing those principles in mind I turn to the specific allegations of breach.

Did the defendants breach their duties as fiduciaries or under the *Corporations Act* when the 21 blocks of land at Coronation Hill were acquired?

Background

[119] The defendants admit that that they acquired the 21 blocks of land at Coronation Hill via put and call option agreements.

[120] Mr Hopkins' evidence was that in early December 2014, Mr Poole was approached by a real estate agent Glen Sainsbury about land available for acquisition and 'packaging' at a new housing estate called Coronation Hill. The real estate agent was a contact known

---

74 [1974] SCR 592.

75 (1967) 380 F 2d 897.

76 At 612-613.

77 At 620.

to both of them through their work with Arctic. He stated that "Glen was a somebody (sic) that we worked with on and off over the years at Arctic Properties. He's a real estate agent that sells land. We were pretty handy to a guy like Glen because of what we did in Arctic Properties for obvious reasons."[78] Mr Poole told Mr Hopkins about the opportunity to acquire the land[79] and he continued to work with the agent "to see if we could secure some of the blocks of land."

[121] After some negotiation by Poole it became known that the developer of the estate wanted to sell the blocks of land outright or by put and call option agreements only. At that point in time Arctic did not use put and call option agreements but QA did. In his evidence, Mr Hopkins said that this "pretty much knocked it out for us [Arctic]. Justin [Poole] came back and told me that one was pretty much dead, because all they wanted was put and call".[80] Mr Hopkins continued; "I said, well you know, why don't we do that? Why don't we do that together? Justin was open to that, like we thought it was something we could do. I mean we didn't – we at Arctic Properties didn't do put and call agreements, it's not a thing we did, too much risk for whoever's involved usually."[81]

[122] Ultimately Mr Hopkins and Mr Poole decided to pursue the opportunity and enter into put and call option agreements together. On 2 December 2014 Poole and Hopkins incorporated the company 'Coronation Hill No 1 Pty Ltd' for the purpose of securing the 21 blocks of land[82] and towards the end of December 2014 Poole and Hopkins had entered into put and call option agreements with the developer. A deposit for the 21 put and call option agreements was paid on 10 February 2015.[83]

[123] Neither Mr Hopkins nor Mr Poole told Mr Ham about the opportunity to secure land at the Coronation Hill estate.

[124] The plaintiff argues the defendants breached their duties as directors or officers of QA when they entered into put and call options in December 2014 in relation to the 21 blocks of land at Coronation Hill.

Factual Findings

[125] I accept that the basic facts establishing the dispute are not contested. The evidence indicates that the opportunity to purchase the 21 blocks of land at Coronation Hill came to the defendants due to a direct approach to Mr Poole from a real estate agent who was known to Arctic Properties. There is no evidence that the opportunity came to them in

---

78 Evidence of Mr Hopkins, T4-40 L47 – T4-41 L 3.

79 Evidence of Mr Hopkins, T4-40 L25 – T4-41 L10.

80 Evidence of Mr Hopkins, T4-41 LL28-30.

81 Evidence of Mr Hopkins, T4-41 LL25-34.

82 Evidence of Mr Hopkins, T4-71 LL1-2.

83 Exhibit 1, Tab 40.

their capacity as either a director or officer of QA, given there is no evidence that the real estate agent was actually aware of the existence of QA or that either defendant was involved with QA. However, that referral clearly came at a time when Mr Poole and Mr Hopkins were in fact a director and officer (respectively) of QA Developments and it was an opportunity of the type which QA had pursued in the past. It was not an opportunity of the kind that either defendant had ever pursued in any capacity. It was clearly beyond the scope of what Arctic Properties had done in the past and beyond their roles as directors of Arctic, given Arctic was a marketing company.

[126] The defendants did not offer the opportunity to purchase the land at Coronation Hill to QA.

[127] The defendants did not inform anyone at QA of the opportunity to purchase the land at Coronation Hill.

[128] The defendants did not inform anyone at QA that they were considering taking the opportunity for themselves.

[129] In order to purchase the properties via a put and call option agreement the defendants incorporated a new company called Coronation Hill No 1 Pty Ltd.

[130] The business activities of Coronation Hill No 1 Pty Ltd were in direct competition to the business activities of QA.

Did the defendants breach their duties?

[131] Given the factual findings I have made I am satisfied a breach of s 181 has been established given the defendants did not at all perform their duty to make the opportunity known to QA and they thereby failed in my view to perform their duties in good faith.

[132] As already outlined with respect to a breach of s 182, the conduct must relate to the use by the officer or director of their position. QA has not attempted to demonstrate that, in relation to this land, the defendants were using their position (whether to gain an advantage; or to cause detriment to QA). No breach of s 182 has been established.

[133] QA has not attempted to show that either defendant obtained knowledge about this land because of their position as a director and officer of QA. No breach of s 183 has been established.

[134] That leaves an examination of the defendants' duties as fiduciaries. As Deane J held in *Chan v Zacharia*[84] the doctrine relating to fiduciary obligations is often expressed in terms that a fiduciary is not allowed to put himself in a position where his interest and his duty may conflict. His Honour considered that:

---

84 (1984) 154 CLR 178.

> "[23] …The equitable principle governing the liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement 'in which he has, or can have, a personal interest conflicting ... with the interests of those whom he is bound to protect' (per Lord Cranworth L.C., *Aberdeen Railway Co. v. Blaikie Brothers* (1854) 1 Macq 461, at p 471) or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed."

[135] It would seem to me that whilst both defendants were actively engaged in roles at QA with obligations to QA they took an opportunity for themselves and did not refer it to QA. I am satisfied that Poole and Hopkins breached their fiduciary duties and were prohibited by the conflict rule from investing in and being directors of a company which purchased land for development via put and call option agreements. There is no evidence that QA gave its informed consent to their doing so.

[136] I am satisfied that the plaintiff has established that the defendants, as either a director of officer of QA, breached their fiduciary obligations when they entered into put and call option agreements to purchase the 21 blocks of land at Coronation Hill in December 2014.

Was there a diversion of a contract on 11 May 2015 for the building and construction of a new home at Hoffman Way, Bundamba, in an amount of $263,636 and a consequential breach of duties by the defendants?

The contract

[137] This contract relates to a piece of land on Lot 19, Hoffman Way, Bundamba. The piece of land is situated within a housing estate which was developed by a company owned by property developer Mr Dan Gorman. The lot was intended for ultimate purchase by Mr Gorman's half-brother, and Mr Gorman and his business associate Mr Hoarder were active in negotiations directed to the construction of a house on this block, and its sale to Mr Gorman's half-brother.

[138] Mr Gorman met Mr Hopkins and Mr Poole in 2014, at a time when he had been dealing with Arctic (at this time they were respectively an officer and a director of QA). He believed that Mr Ham was "involved in the group", and knew he "was the builder".[85]

[139] Prior to the dispute concerning Lot 19, Mr Gorman had entered into a number of put and call option agreements with QA in relation to other lots on the estate.

[140] Mr Gorman gave evidence that he met with Mr Ham on site to discuss various lots on the estate including Lot 19. On Mr Gorman's evidence that was no later than March

---

[85] T3-97 LL43-45.

2014.[86] Lot 19 was described by Mr Gorman as having a "slope" which made it more difficult than usual to build on.[87] Mr Gorman gave evidence that, at the meeting, Mr Ham did not want to build on this pocket of lots because of the slope.[88] The effect of Mr Ham's evidence was that, contrary to his own view, Mr Poole and Mr Hopkins decided that QA should build on lots in the estate which were steeper than Lot 19, which it did; and that the slope on Lot 19 did not make it difficult to build on.[89]

[141] The plaintiff submits that the defendants breached their duties as a director and officer of QA by diverting the contract for Lot 19 to Aspiration Homes, in circumstances where unbeknownst to Mr Ham and QA,[90] they were both directors and shareholders of the company Aspiration Qld, which holds one third of the shares of Aspiration Homes.[91] The plaintiff relies on the evidence of Mr Charles Woodward, the sole director of Aspiration Homes, who stated that the contract was referred to him by either Mr Poole or Mr Hopkins.[92] The plaintiff notes that the preparation of the contract between QA and the owners of the property indicates that Mr Ham and QA were willing to build on the Lot despite the slope and refers to Mr Ham's evidence that QA would have built the house for $290,000.00.[93]

[142] One of QA's house designs ("Petrie") was used for this lot.[94] Mr Gorman asked Mr Poole for a price from QA for the construction of the house on Lot 19.[95] Mr Poole then instructed staff to prepare a contract at a price of $305,000, and sent the contract to Mr Hoarder.[96] The contract was never signed.

[143] It is significant that on 14 May 2015 Aspiration Homes then entered into a contract on the same lot with the same clients for $290,000.

[144] It is at this point convenient to deal with the evidence of Mr Gorman about his meeting with Mr Ham in 2014. If the conversation occurred at all, it seems unlikely on the evidence relating to the topography of Lot 19 to have included that lot. The proposition that Mr Ham had declined to build on the site due it being a sloping block is simply not credible in circumstances where the evidence indicates that a contract was in fact

---

86 See T3-115 to T3-116.

87 T3-100 LL23-29.

88 T3-101 L25.

89 T3-52 LL19-40.

90 Evidence of Mr Ham, T1-55 LL5-7.

91 Evidence of Mr Woodward, T2-39 L36 to T2-40 L7. See also evidence of Mr Hopkins, T4-68 LL7-9.

92 T2-41 LL6-10.

93 T1-58 LL26-28.

94 T4-98 L40; T3-52 L35.

95 T4-99 L5.

96 T4-111 LL11-13.

prepared for QA to build on the site and where the house that was actually built on the site was a QA design. Mr Ham's evidence on this point seems more likely to be true, and I accept it. Moreover the advancement of this evidence by Mr Gorman seems to me to be some indication of his alignment with the defendants.

[145] Mr Hopkins gave evidence that after he left QA in April 2015, he worked for a couple of months from an office building owned by Mr Gorman and where Mr Gorman had his office. Mr Hopkins stated that Mr Gorman approached him there to get a price for the construction of the house, which Mr Hopkins obtained from Aspiration Homes.

[146] Mr Gorman gave evidence in somewhat similar terms. He said that Mr Hopkins came into his boardroom; he was previously aware that Mr Gorman was getting a house built by his son-in-law; and when Mr Gorman said he had a price from another group, Mr Hopkins asked if Mr Gorman would like a quote from him.[97] After further discussion of the price, Mr Gorman said he would recommend it to his half-brother.

[147] A meeting occurred at Mr Gorman's office on 9 November 2015 attended by Mr Gorman, Mr Hoarder, Mr Ham and Ms Mallitt (employed at QA as part of the administration team). Mr Gorman accepted during cross examination that Ms Mallitt was at the meeting to take notes;[98] but later denied that notes were being taken of the meeting at all.[99] He also initially denied receiving a copy of the minutes taken by Ms Mallitt,[100] but later accepted the existence of an email sending a copy to him.[101] The minutes recorded, "David Hoarder advised that Justin Poole and Darryl Hopkins came to see them with a more competitive price than QA Developments with Aspiration Homes".[102] Those minutes and the email became Exhibit 9 in the trial. Mr Gorman denied reading the email, and denied the accuracy of the minutes. No attempt was made to require Ms Mallitt for cross-examination.

Findings

[148] It is difficult to accept the evidence of Mr Gorman of the circumstances in which Aspiration Homes came to be the builder of the house at Hoffman Way. His evidence about the minutes of the meeting in November is inconsistent, and in part seemed motivated by a desire to deny what appeared to be an objective account of what happened. I was unimpressed with his attitude generally, and his cavalier approach to the questions that were put to him. I do not consider he was a credible witness.

---

97 T3-217 LL15-36.

98 T3-116 L30.

99 T3-119 LL24 – 39.

100 Exhibit 9.

101 T3-119 L40.

102 Exhibit 9.

[149] Nor did I find the evidence of Mr Hopkins on this question to be convincing. When Mr Hopkins left QA, there appears there was some hostility because QA was not using Mr Hopkins' tile supply company. On his evidence, Mr Gorman gave him the plans for the house, which were used for pricing the construction. Mr Hopkins denied knowing that the plans were for a QA design[103]. He had an obvious interest in doing so, and it seems unlikely to be true. Mr Hopkins was the only floor and wall tiler for QA;[104] Arctic was "pushing" QA's stock; Mr Hopkins was involved in meetings with people "chasing me down on a land deal or a marketer".[105] These matters, and my finding about Mr Hopkins' role generally in QA, make it unlikely that he did not know that the plans were for a QA design, and I reject his evidence to that effect.

[150] Mr Woodward, the sole director of Aspiration Homes and the registered builder, gave evidence that the contract was referred to Aspiration Homes by either Mr Poole or Mr Hopkins. There is no acceptable direct evidence as to which of them did. Nor is there any other explanation for the fact that Aspiration Homes ultimately contracted to construct the house on Lot 19.

[151] The relationship between Mr Gorman on the one hand and the defendants on the other developed while the latter were a director and officer of the plaintiff. Although it appears that, at that time, Arctic Properties had its own interest, as accepted by QA, in profiting from marketing house and land packages, and accordingly its own basis for a relationship with a developer such as Mr Gorman, they were inevitably also dealing with Mr Gorman on behalf of QA, and were subject to the duties they owed to it. The relationship was undoubtedly advanced by the provision of the QA house design for the lot.

[152] If and to the extent that Mr Poole's conduct led to the contract with Aspiration Homes, that conduct occurred while he was a director of the plaintiff. The same can be said of conduct of Mr Hopkins before he left QA on 14 April 2015. If and to the extent the contract was the result of his conduct in the short period of a couple of weeks leading up to the contract with Aspiration Homes, he made use of advantages acquired while he was an officer of the plaintiff. If the conduct was that of Mr Hopkins, I do not accept that Mr Poole was unaware of it. Aspiration Homes was a relatively new venture for them both. Mr Poole had been significantly involved in the dealings between QA and Mr Gorman on this project. It seems to me that he was aware of and at least acquiesced in any conduct of Mr Hopkins which resulted in the contract with Aspiration Homes.

[153] I am therefore satisfied that this contract was the result of a breach by both of the defendants of their fiduciary obligations to the plaintiff. The evidence is not sufficiently clear to enable me to reach a positive conclusion about breaches of ss 182 and 183.

---

103 T4-73 LL20-40.

104 T4-21 L5.

105 T4-26 L45.

Was there a diversion of a contract for the building and construction of a five unit development at Riding Road, Balmoral, around 25 May 2015 and a consequential breach of duties by the defendants?

The contract

[154] The contract relates to a five unit development at Riding Road, Balmoral, for $1,242,000.00. The contract was to be between the company Brisbane Lifestyle Projects Pty Ltd on one hand and a builder on the other. Both the client and the project were referred to the plaintiff by Matt Dendle of Viking Property in early 2015.[106]

[155] From 15 March to 1 May 2015, eleven email exchanges occurred between the client and Messrs Poole, Hopkins and Ham on behalf of QA about the finalisation of the contract.[107] Relevantly on 26 March 2015 an email was sent by Mr Dendle to Poole and Hopkins indicating that the client was ready to contract with QA.[108] On 27 March 2015 QA acquired the relevant contract, a draft of which was subsequently completed by a member of the QA team.[109]

[156] On 1 April 2015 Mr Hardy on behalf of Brisbane Lifestyle Projects Pty Ltd sent an email to Mr Ham in respect of the draft contract which had been sent to Mr Hardy by QA for perusal. After discussing the terms of the draft contract, the email from Mr Hardy finishes with the following sentence:[110]

> "All go ready to pay for engineer before we sign contract in good faith. I mentioned this to Meryl and Daryl".

[157] On 25 May 2015 however, a contract was signed between Aspiration Homes and Brisbane Lifestyle Projects Pty Ltd for $1,311,046.09.[111]

[158] The defendants argue that Mr Ham provided no evidence to support the allegation that the contract for the project at Riding Road was diverted by them. In particular, the defendants submit that Mr Ham's evidence "does not conclusively exclude an hypothesis of an alternative cause for the building contract opportunities as arising from actions that are not in breach of duty [sic]".[112] The defendants argue that while Mr Ham's evidence shows he was in preliminary discussions with Adam Hardy about drawing up the contract for the Riding Road project, the gap in Mr Ham's evidence as

---

106 Exhibit 2, Tab 71.

107 See Exhibit 2, Tabs 31, 68, 70, 71, 72-74.

108 Exhibit 2, Tab 71.

109 Exhibit 2, Tab 73.

110 Exhibit 2, Tab 74.

111 Exhibit 2, Tab 76.

112 Defendants' Closing Submissions at [33].

to why the contract was ultimately given to another builder "opens the door on any number of causes for the building contract going away from the Plaintiff".[113]

[159] The defendants also submit that, even if preliminary work was prepared or completed by QA for a contract, it did not mean that the ultimate building contract would go to QA. The defendants say that Mr Ham's evidence that if he priced a job, invariably the customer appointed the plaintiff as the builder,[114] is "contrary [to] the basic principle of contract law that unless there is offer, acceptance and consideration, there is no contract however promising the probability may appear".[115]

[160] In my view there is clear evidence that QA had reached an agreement with Brisbane Lifestyle Projects to build and construct those five units. The evidence of Mr Woodward at trial and the evidence contained in the email exchanges between March and May 2015 indicate the contact by the client was initially with QA. In particular it is clear that on 27 March 2015 QA acquired and prepared the relevant contract forms indicating a build cost of $1,242,000. Mr Ham then received an email from the client discussing the terms of the contract and there were subsequent emails from the client discussing the terms of the contract on 1 April 2015. On 7 April there were further emails in relation to the terms of the contract and a Bill of Quantities was also prepared. No written contract was however signed.

[161] Mr Hopkins' evidence at trial is relevant in this regard:[116]

> "So on about a week after I had walked away completely from anything to do with QA, Adam Hardy rang me in a panic. Adam's always in a panic. I know now that, but Adam rang me in a panic, asking me could I help him out with getting some pricing from QA Developments, because I'd met him in that meeting. I told him I didn't have anything to do with QA. Told him I was long gone from QA. He asked me what I was doing now. I told him that Arctic Properties, in effect, had morphed into a different location, with different branding, that we were moving different builders' products. Told him that I was trying to get out of one shareholding at QA. That brought up – I had a shareholding in Aspiration Homes. He asked to catch up at the Coffee Club Springwood."

Findings

[162] Having considered the evidence, I am satisfied that the opportunity for the contract came to both Poole and Hopkins due to their involvement with QA. The contract between Aspiration Homes and Building Lifestyle projects was also signed whilst Poole

---

113 Ibid, [39].

114 T1-56 LL25-31.

115 Defendants' Closing Submissions at [27].

116 T4-43 L42 to T4-44 L5.

was still a director of QA Developments. Mr Woodward gave evidence that the contract with the client and Aspiration Homes came from either Mr Poole or Mr Hopkins. There is clear evidence that both the defendants have been directors and shareholders of Aspiration (Qld) since 11 September 2014 and that company has held shares in Aspiration Homes since 3 October 2014. Aspiration Homes has been a licensed builder since 24 February 2015. If and to the extent that Mr Poole's conduct led to the contract with Aspiration Homes, that conduct occurred while he was a director of the plaintiff. In relation to Mr Hopkins there can be no doubt he made use of advantages acquired while he was an officer of the plaintiff. If the conduct was that of Mr Hopkins, I do not accept that Mr Poole was unaware of it. Neither of the defendants disclosed to Mr Ham or anyone at QA that they had an interest in Aspiration Homes or that Aspiration Homes were about to enter into this contract with the client.

[163] I am therefore satisfied that this contract was the result of a breach by both of the defendants of their fiduciary obligations to the plaintiff. The evidence is not sufficiently clear to enable me to reach a positive conclusion about breaches of ss 182 and 183.

Was there a diversion of a contract for the building and construction of a property at Birdwing Crescent, Jimboomba, around 29 May 2015 and a consequential breach of duties by the defendants?

The contract

[164] This project relates to a contract for the sale of land and for the subsequent construction of a dwelling at Birdwing Crescent, Jimboomba. The land was to be sold via a put and call option agreement and the construction of the dwelling was to be undertaken for a self-managed super fund.[117] Evidence was led at trial that contracts for 'self-managed super fund builds' are more complex than usual construction projects because they are governed by a different type of building contract and the builder has to be able to fund the construction process.[118]

[165] The opportunities relating to a lot at Birdwing Crescent, Jimboomba was referred to Arctic through one of their marketeers.[119] Ms Kelly, an employee of both Arctic and Aspiration Homes, was the person at Arctic who received the information relating to the land. Ms Kelly reported to Mr Poole and Mr Hopkins.[120] She gave evidence that at one point she believed that QA might be able to do the deal. She continued: "And then it

---

117 See evidence of Ms Kelly, T4-80 LL8-10.

118 Evidence of Ms Kelly, T4-79 LL36-41.

119 Evidence of Ms Kelly, T4-80 LL5-10.

120 Evidence of Ms Kelly, T4-78 LL26-31.

became known to me at some point after I'd told the client that it was potentially going to happen, that no it wasn't- they weren't going to do it. 'They' meaning QA".[121]

[166] Between 16 April and 27 April 2015 Mr Poole, presumably on behalf of QA[122] given he used his QA email address, negotiated the availability and terms for the purchase of the land with a company called Peet Limited.[123] These negotiations were conducted by email while Mr Poole was on stress leave from QA and working from home. On 1 May 2015 Peet Limited asked Mr Poole for the details of the entity purchasing the land at Birdwing Crescent, Jimboomba, to which Mr Poole responded with QA's details.[124]

[167] On a date unknown to the parties, a put and call option agreement for the purchase of the land at Birdwing Crescent was prepared by a firm of solicitors. The put and call option agreement shows that the document has been altered by hand to change the details of the purchasing entity from those of QA to Aspiration Homes. The agreement was executed on 29 May 2015 with Aspiration Homes as the purchasing entity.[125]

[168] It is alleged by the plaintiff that Poole in his capacity as director procured a put and call option agreement between the owner and QA in early 2015 and then changed the grantee to Aspiration Homes on or about 29 May 2015. The call option was then exercised by Aspiration Homes resulting in a contract of sale dated 1 June 2015 in the amount of $238,100.

[169] The plaintiff argues that the contracts were diverted in circumstances whereby QA had the financial capacity to proceed with the put and call option[126] and was prepared, despite the allegations of the defendants, to build for a self-managed super fund. The plaintiff denies the allegation that it rejected the opportunity to build on the land because it was not prepared to undertake a build for a self-managed superfund and indeed, denies a conversation to this effect having taken place at all.[127] Mr Ham gave evidence at trial that QA undertook builds for self-managed super funds at the time in question.[128]

[170] Ms Kelly gave evidence at trial that she had been told by Mr Poole that QA would not undertake the build for a self-managed super fund. There is no direct evidence however that QA rejected the opportunity to build on the land at Jimboomba because the build was for a self-managed super fund. The evidence of Ms Kelly was that she never

---

121 Evidence of Ms Kelly, T4-80 LL12-17.

122 Mr Poole used his QA email address in all negotiations, see Exhibit 2 Tabs 62 and 63.

123 Exhibit 2, Tab 62.

124 Exhibit 2, Tab 62 at p 266.

125 Exhibit 2, Tab 65.

126 Evidence of Mr Ham, T1-55 LL9-11.

127 Evidence of Mr Ham, T3-58 L30 to T3-59 L26; T3-83 LL5-19.

128 Evidence of Mr Ham, T3-83 LL5-19.

directly had a conversation with Mr Ham about self-managed super funds and that that information came through both the defendants around May 2015.[129] Ms Kelly also gave evidence that she worked at Arctic from September 2012 to April 2015 and she believed that QA had done at least one job with a self-managed super fund in that period.

[171] Ms Kelly's evidence about Aspiration Homes' involvement with the contract at Birdwing Crescent is that she had a conversation with Mr Hopkins as follows:

> "I actually spoke with Darryl [Hopkins] about that after I received information from Justin [Poole] to say QA were not going to build, at which point Darryl told they that we may have a solution and that would be to put it through a different builder, being Aspiration Homes".[130]

[172] Mr Woodward's evidence was that this contract was referred to Aspiration Homes by either Mr Poole or Mr Hopkins.

[173] Mr Ham was not informed by Mr Poole or Mr Hopkins of their involvement in Aspiration Homes or that Aspiration Homes was going to enter into the put and call option with Peet Limited instead of QA.

Findings

[174] In my view the evidence supports the inference that the contract was diverted to Aspiration Homes by Poole whilst he was a director of QA. I am satisfied that Poole has breached s 182 of the Act in that he used his position in QA to divert an opportunity from QA to Aspiration Homes and that was done to gain an advantage to himself given it was diverted to a company in which he held an interest. I am also satisfied that he came to know of the opportunity as a director and that he improperly used his position such that it breached s 183. In those circumstances, I am also satisfied that he has breached his duties as a fiduciary.

[175] I am also satisfied that Mr Hopkins during the period was an officer and, prior to him ceasing to be an officer on 14 April 2015, he took steps to facilitate the diversion of that contract, though the actual diversion did not occur until 29 May 2015 some six weeks after he left QA. Mr Hopkins was also a fiduciary until 14 April 2015 and had a duty not to avail himself of an opportunity which came to his knowledge as a fiduciary. It is clear that the diversion was to Aspiration Homes: a company that both defendants had an interest in as they had been directors and shareholders of Aspiration (Qld) since September 2014. Aspiration (Qld) holds one third of the ordinary shares in Aspiration Homes. I am satisfied those actions constitute breaches of s 182 and 183 of the Act by Mr Hopkins, as well as a breach of his fiduciary duties.

---

129 Evidence of Ms Kelly, T4-79 L40.

130 Evidence of Ms Kelly, T4-80 LL26-29.

Was there a diversion of a contract for the building and construction of 12 units at 75 Springwood Road, Springwood in June 2015 and a consequential breach of duties by the defendants?

[176] The plaintiff argues that both Poole and Hopkins breached their duties by using their positions after 11 September 2014 to divert building and construction opportunities from QA to Aspiration Homes and/or UIH. In particular it is alleged that they diverted opportunities in relation to the development at Springwood Road, Springwood, whereby QA had a preliminary agreement with the owner/developer to amend unit designs and to construct 12 units. It is alleged that this was diverted to UIH on or about 4 June 2015 and the contract had a value of $1,936,364.

[177] Counsel for the defendants argues that the opportunity for the project at Springwood Road came to the defendants independently of their involvement with QA. Counsel refers to the evidence of the owner of the land at Springwood Road, Mr Athens, that he and his wife were referred directly to Mr Hopkins by the property developer Mr Gorman. Mr Athens gave evidence that he and his wife had spoken to a "fair few" builders and after being introduced to Mr Hopkins, had ultimately asked him to manage the project for them.[131]

[178] The defendants also argue that although Mr Ham had "accurate knowledge"[132] of the preliminary agreement between QA and the owner/developer to amend the unit designs, there was a "vast gap" in his knowledge of how the opportunity came to UIH.[133] As such, the defendants submit that the plaintiff has failed to establish a clear link between the purported breaches of the defendants and the loss of the building contract opportunity at Springwood Road.

The contract

[179] The project for the construction of the 12 unit dwelling on the property at 75 Springwood Road, Springwood was referred to QA by the property developer Mr Gorman. Mr Gorman acted on behalf of the property owners Mr and Mrs Athens. Mr Gorman and Mr Athens gave evidence at trial.

[180] The evidence indicates that in December 2014 Mr Hopkins on behalf of QA[134] entered into a Preliminary Agreement with the clients in relation to this project.[135] The Preliminary Agreement was dated 3 December 2014. The purpose of the Preliminary Agreement was to enable an accurate build cost to be prepared so that eventually, a

---

131 T4-6 LL15-34.

132 Defendants' Closing Submissions at [35].

133 Ibid.

134 Evidence of Mr Athens, T4-11 L22-24.

135 Exhibit 2, Tab 19.

Building Contract could be entered into for QA to complete the building project for the client.[136]

[181] Between December 2014 and February 2015 various steps were undertaken by Mr Hopkins to complete the 'preliminaries' on this project. These steps included the preparation of purchase orders and fee proposals as well as the issuing of Progress Claim Certificates to the clients. Mr Ham and Mr Hopkins also gave evidence that the project was discussed at director's meetings involving Messrs Ham, Hopkins and Poole.[137] On 18 February 2015 the clients paid $32,791.00 to QA under the Preliminary Agreement and by 23 March 2015 QA had issued a Progress Claim Certificate to Mr Hopkins in respect of the project, to be passed on to the clients.[138]

[182] Mr Poole took over the organisation of this project after Mr Hopkins had given notice he was leaving QA in April 2015. Between 1 May 2015 and 4 May 2015 Mr Poole sent various emails following up on progress made[139] and by 18 May 2015 a third revision of the building application architectural drawings were issued.[140]

[183] There can be no doubt therefore that all of the initial interactions were with Hopkins on behalf of QA, but that the involvement with QA continued through Poole after Hopkins had left.

[184] On 4 June 2015 a Building Contract for this project was entered into by the clients and UIH.[141] Significantly in my view Mr Gates, the director of UIH, gave evidence that the project was brought to UIH by Mr Hopkins and that Mr Hopkins did not disclose that QA had previously worked on the project.[142]

[185] On 8 July 2015 a final Progress Claim Certificate was prepared by QA and issued to the clients. On 9 July 2015 the clients paid QA $7,851.05 under this Progress Claim Certificate.

Findings

[186] I am satisfied that Poole as director of QA diverted the contract from QA and that Hopkins during his period as an officer took steps to divert the contract from QA to a company he clearly had an interest in.

---

136 See evidence of Mr Ham, T1-56 LL19-36.

137 Evidence of Mr Ham, T1-53 LL19-30; Evidence of Mr Hopkins, T4-39 LL15-26.

138 Exhibit 2, Tabs 55 and 55.

139 Exhibit 2, Tabs 56 and 57.

140 Exhibit 2, Tab 59.

141 Exhibit 2, Tab 60.

142 Evidence of Mr Gates, T3-93 LL45-47.

[187] I am therefore satisfied that the defendants breached their duties under s 182 and 183 of the Act and as fiduciaries.

Coronation Hill, '<u>Part 2</u>': Was there a diversion of four contracts for the construction of four houses on Lots 2, 3, 8 and 21 at Chandon Court, Hillcrest on 25 May, 26 May, 5 July and 31 July 2105 in the amounts of $263,182, $263,181, $263,182 and $265,110.

The contracts

[188] These contracts relate to the building of homes on four blocks of land at a subdivision at Chandon Court, Hillcrest, which forms part of the Coronation Hill Estate referred to above. The blocks of land in question are situated at Lots 2, 3, 8 and 21 respectively and at the relevant time, none of these blocks of land were developed.

[189] In February 2015 QA tendered an expression of interest in relation to each of the four lots. Mr Ham explained that once QA put an expression of interest in, "we [QA] have to sit on those blocks of land until the land is developed and then, once they're developed and registered, then our clients can settle on them and we build on them".[143] He gave evidence that QA had capacity to do the work required for the four lots at the subdivision at Chandon Court, Hillcrest.[144]

[190] There is evidence that Mr Poole was copied in on an email on 20 April 2015 (six days after Hopkins left QA) from Jane Kelly at Arctic to the Australian Property Centre seeking confirmation that Lot 2 had been sold to Aspiration Homes and stating "I know we have had packages out for QA on that one also, just wanted to make sure we were on the same page."[145] Mr Poole responded that he did not wish to be copied into information about Aspiration unless it was a blind copy.[146]

[191] Between May and July 2015, contracts for the building of houses on these four lots were entered into by Aspiration Homes in the following amounts on the following dates 25 May, 26 May, 5 July and 31 July 2015 in the amounts of $263,182, $263,181, $263,182 and $265,110.

Findings

[192] There can be no doubt therefore that those contracts came to QA initially when both defendants were actively involved with QA. I am satisfied that Poole as director of QA diverted the contract from QA and that Hopkins during his period as an officer took steps to divert the contracts from QA to Aspiration Homes, a company he clearly had an interest in. As previously outlined the evidence indicates that in September 2014

---

143 T1-58 LL40-47.

144 T1-58 LL34-36.

145 Exhibit 1 Tab 46.

146 Ibid.

Hopkins and Poole entered into an agreement with Charles Woodward to establish Aspiration Homes and pursuant to that agreement Poole and Hopkins would have one third of the ordinary shares in Aspiration Homes held by Aspiration (Qld). There is also no doubt that Aspiration Homes did not obtain its builders licence until 24 February 2015.

[193] Neither Poole nor Hopkins disclosed their interest in Aspiration Homes or Aspiration (Qld) to Mr Ham, or disclosed the fact they were about to enter into these contracts. I am therefore satisfied that they breached their duties under ss 182 and 183 of the Act and as fiduciaries.

[194] Whilst the plaintiff argues that there was a diversion of five *other* building and construction contracts at Chandon Court, Hillcrest, I am not satisfied this aspect of the claim has been established given that the details of those five additional have not been disclosed by the defendants or Aspiration Homes.

Was there a diversion of a contract in relation to six townhouses at 29 Hunter Street, Greenslopes on 24 August 2015 for the amount of $1,282,000 and a consequential breach of duties by the defendants?

The contract

[195] This project relates to the building of six townhouses at 29 Hunter Street, Greenslopes. In early 2015 the project was referred to QA by Matt Dendle, a property developer at Viking Properties.[147] QA costed the project at $1,241,300.00[148] and on 16 March 2015 the project was entered into the QA Database known as 'Companion'.[149] On 27 March 2015 QA acquired the standard form building contract from the Housing Industry Association[150] and a Certificate of Currency was issued by QA to the clients for the purpose of obtaining finance to build.[151]

[196] The terms of the contract were discussed in email correspondence between QA and Mr Hardy, the project manager and representative of the clients,[152] on 1 April 2015 and again on 7 April 2015.[153] On 1 May 2015 Mr Poole in his capacity as director of QA enquired with QA's estimator, Mr Thew, as to the progress of the project.[154]

---

147 Exhibit 3, Tab 71.

148 Exhibit 3, Tab 80.

149 Exhibit 5.

150 Exhibit 3, Tab 73.

151 Exhibit 3, Tab 72; See also evidence of Mr Ham at T3-35 LL15-19.

152 See evidence of Mr Hopkins, T4-47 LL44-46.

153 Exhibit 3, Tab 74.

[197] On 24 August 2015 Aspiration Homes entered into a contract for this project for $1,410,200.00.[155] The contract prepared by QA in March 2015 was not signed.

[198] The plaintiff submits that the contract for this project was diverted from QA to Aspiration Homes by Mr Poole, as a director of QA and the liaison at QA for the project.[156] The plaintiff argues that at the time Mr Poole emailed QA's estimator about the progress of the project, Mr Hopkins had recently left QA and Mr Poole was on sick leave from QA but remained a director.

[199] The evidence of Mr Ham is that at all times QA was ready to complete the work required by the project and his evidence was that in his 35 years' experience, a preliminary agreement leads to the building contract if the work goes ahead.[157] There is also evidence which indicates that QA prepared the building contract and issued the Certificate of Currency. Mr Ham's evidence is that the Certificate of Currency was only issued by QA at the request of the clients.[158]

[200] The clear evidence is that in September 2014 Mr Woodward reached an agreement with Mr Poole and Mr Hopkins to establish Aspiration Homes for the purpose of performing building work previously conducted by QA, which Mr Woodward was told by Mr Poole and Mr Hopkins was winding up.[159]

Findings

[201] I am satisfied that Mr Poole has breached s 182 of the Act in that he used his position at QA to divert an opportunity from QA to Aspiration Homes and that was done to gain an advantage to himself, given it was diverted to a company in which he held an interest. I am also satisfied that he came to know of the opportunity as a director and that he improperly used his position such that it breached s 183. In those circumstances I am also satisfied that he has breached his duties as a fiduciary.

[202] I am not satisfied however that the plaintiff has established a beach of any duty by Mr Hopkins in respect of this contract, as there is no clear evidence that Hopkins took steps to divert or facilitate the diversion of that contract before he ceased being an officer on 14 April 2015.

The plaintiff's pleaded case

---

154 Exhibit 2, Tab 56.

155 Exhibit 3, Tab 83.

156 T3-34 LL20-27.

157 T1-56 LL19-36.

158 Evidence of Mr Ham, T3-35 LL15-19.

159 T2-39 L36 to T2-40 L7, LL13-18.

[203] The plaintiff claims at paragraph 12(a), (aa)(i) and (aa)(ii) of the Amended Statement of Claim (filed 13 April 2017) damages for breach of duty. The quantum of these damages has been calculated by reference to the loss of profit sustained by the plaintiff for each of the contracts or opportunities alleged to have been diverted by the defendants. The loss of profit itself is calculated at 15.4% of the contract price for each of the diverted contracts or opportunities. The 15.4% is QA's gross profit margin for the year of 2014. That is a figure of $1,121,508.90 plus $210,000 being the calculation of the lost profits for the 21 lots at Coronation Hill.

[204] The plaintiff's Amended Statement of Claim[160] sought an order that "an account be taken of any monies received by the defendants as a consequence of their association with Aspiration Homes, Aspiration Qld, Arctic, UIH and/or Coronation Hill and the amounts so received be paid to the plaintiff". It is understood that the plaintiff is asking for an account of profits by this paragraph.

[205] The plaintiff's final written submissions[161] dated 3 May 2017 then claimed that that the plaintiff was entitled to a compensation order pursuant to s 1317H of the Act, as well as an equitable compensation order for breach of fiduciary duty.

[206] The quantum of the relief sought is a total amount of $1,331,508.90 which was calculated in the same way it was in the plaintiff's Amended Statement of Claim and as such, is a claim for damages for loss caused by the breach of duties.[162] At paragraph 174 and onwards, the plaintiff submits that the appropriate orders to be made by the Court are for damages in the amount of $1,331,508.90.

[207] In the plaintiff's written closing submissions, no mention is made of either an account of profits or a further amount of damages to be calculated at 15.4% of the difference between the purchase and selling price of the 21 lots at Coronation Hill Estate (as per paragraph 12(b) of the Amended Statement of Claim).

[208] It was therefore unclear whether the plaintiff was intending on electing for an account of profits as opposed to an equitable compensation order.

[209] It was also unclear whether the plaintiff was asking the Court to make a compensation order pursuant to s 1317H of the Act.

The defendants' submissions

[210] The defendants' closing submissions state at paragraph 68 that the plaintiff has elected to seek an account of profits and that, "given the plaintiff expressly excluded

---

160 At [12](b).

161 At [2].

162 From [156].

compensation orders under Part 9.4B of the *Corporations Act* (Cth) 2001, the case may only proceed under the principles governing an account of profits".

[211] The defendants then made only one reference to equitable compensation in their closing submissions and stated that "even if the Court was being asked to consider a case based on equitable compensation, the Plaintiff's case still fails to come up to proof".[163] No further submission on a claim for equitable compensation was made in either the defendants' closing submissions or submissions in reply (where the defendants raised issues as to quantum, as opposed to the remedy sought).

[212] Given the lack of clarity and confusion of terms in the submissions, further submissions were sought from the parties.

The plaintiff's further submissions

Remedy

[213] In its further submissions dated 4 August 2017, the plaintiff indicated that it does not seek an account of profits and instead elects an equitable compensation order for the defendants' alleged breach of fiduciary duties.

[214] The plaintiff also stated that, in addition to an equitable compensation order for the defendants' breach of fiduciary duties, the plaintiff seeks statutory compensation under s 1317H of the Act for contravention of duties under ss 180-183 of the Act.

[215] The plaintiff cites *V-Flow Pty Limited v Holyoake Industries (Vic) Pty Limited*[164] and *Grimaldi v Chameleon Mining NL (No 2)*[165] as authority to support its claim for both equitable compensation for breach of fiduciary duty, and statutory compensation under s 1317H of the Act for contravention of director's duties under the Act. In particular, the plaintiff notes that the Full Court in *Grimaldi* held that the appellant was liable at equity and under the Act and that both forms of relief were appropriate. The Full Court did not consider granting both forms of relief amounted to a double recovery of profits.[166]

Quantum

[216] On the issue of quantum for each of the orders sought by the plaintiff, it is submitted that the amount able to be awarded by the Court under each order is the same, namely

---

163 At [72].

164 [2013] FCAFC 16 at [53].

165 (2012) 87 ASCR 260 at [637-634].

166 Ibid, at [585]-[590].

an amount of $1,331,508.90 for the loss of profits the plaintiff would have received but for the defendants' breaches of their duties at law and equity.

[217] In this regard the plaintiff submits that the object of an equitable compensation order is restitution of what the 'victim' has lost, which may be calculated by reference to the profit made by the errant fiduciary.[167]

[218] In relation to a compensation order under s 1317H of the Act, the plaintiff argues that the section itself enables a Court to include profits in any order made and cites *V-Flow*[168] as authority to support the submission that profits may be included despite there being no corresponding loss to the corporation.

[219] The plaintiff submits that the loss suffered by the plaintiff in this case can only be determined by reference to the loss of profits the plaintiff would have earned but for the defendants' breaches.

[220] Relying on the case law allowing the Court to quantify an equitable compensation order with reference to profits made by an errant fiduciary, as well as the case law allowing the Court to include profits in a statutory compensation order without showing a corresponding loss, the plaintiff submits that it should be awarded $1,331,508.90 for the defendants' breach of fiduciary duties, and $1,331,508.90 for the defendants' contraventions of the Act.

The defendants' further submissions

[221] In further submission received on 8 August 2017, Counsel for the defendants confirmed the defendants' position that the plaintiff's pleaded case was for an account of profits and that the ASOC failed to specifically plead damages under s 1317H of the Act. The further submissions reassert the position that the plaintiff has failed to come up to proof to support the claim for loss.

[222] In particular it is argued that none of the owners of the six projects in contention were called to give evidence as to profit and that neither of the defendants were cross examined about the profits made by them on the building projects. It is also argued that there is no evidence to support any loss of profits at a margin of 15.4% or any formula as to an appropriate profit margin.

Remedies available

[223] A number of remedies are available for breach of director's duties. The remedies sought are as follows.

Compensation at general law

---

167 *V-Flow Pty Limited v Holyoake Industries (Vic) Pty Limited* [2013] FCAFC 16 at [55].

168 Ibid, at [54], citing *Grimaldi* at [630]-[631].

[224] Section 185 of the Act preserves the right to bring a claim for monetary compensation under general law for any loss caused by a breach of ss 180 or 181. In the case of a director, the basis of a claim under general law could be for the breach of a duty of care and diligence arising in common law negligence, or in equity.[169] As previously noted this aspect of the claim was not pursued in the final submissions.

Compensation Order under the Corporations Act *2001 (Cth)*

[225] Section 1317H of the Act empowers the court to order a person to compensate a corporation for damage suffered by the corporation as a result of the contravention of a civil penalty provision. The decision to make a compensation order is in the court's discretion.[170] A compensation order under this section can be made without a declaration of contravention under s 1317E but the order must specify the amount of the compensation. The section provides that a court may order a person to compensate a corporation for damage suffered by the corporation if the person has contravened a civil penalty provision in relation to the corporation, and if damage resulted from the contravention.[171]

[226] Only damage that "resulted from" the defendant's contravention can be the subject of a compensation order. In *Australian Securities and Investments Commission v Rich*[172] this test was said to have been satisfied if the defendant's actions were so connected to the damage suffered by the corporation that, as a matter of ordinary common sense and experience, they should be regarded as the cause.

[227] Relevantly, subsection (2) provides that "In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence". Essentially then, the corporation is entitled to recover an amount equivalent to profits made from the contravention by either the contravening party or by a third party, regardless of whether or not the corporation also suffered a loss.

[228] Ford in his text *Principles of Corporations Law* notes that the wording of subsection (2) confuses whether, as set out in *Grimaldi v Chameleon Mining NL (No 2)*[173] "the Court is obliged or merely empowered, if it awards compensation for damage suffered, to

---

169 *Permanent Building Society (in liq) v Wheeler* (1994) 14 ASCR 109.

170 *HIH v Adler* [2002] NSWSC 171, cited in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 87 ASCR 260 at [627].

171 Note: the language of the section implies that the common law test of causation must be applied rather than the "but for" test: *Maguire v Makaronis* (1997) 144 ALR 729.

172 (2009) 75 ASCR 1.

173 (2012) 87 ASCR 260 at [628].

include profits".[174] The Full Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* concluded however that the words "include profits" in subsection (2) do not impose on the Courts an obligation to include profits in a compensation order under s 1317H. The court held that the subsection "empowers the court to compensate for profits made from a contravention without proof of a corresponding loss".

[229] Though the wording of s 1317H appears to allow a Court to make an order for both profits and compensation, recent decisions of the Federal Court have held that the section should not be taken to have a wider operation than the equitable principles relating to account of profits.[175] In *V-Flow Pty Limited v Holyoake Industries (Vic) Pty Limited,*[176] the Full Federal Court stated at [82]:

> "[82] The damages for the lost opportunity included the anticipated profits that Holyoake would have earned had the respondents not acted as they did and instead allowed Holyoake to exploit the opportunity of acquiring Variflow's business. **If profits made by V-Flow and Messrs Aloe and Matkovic were added, under s 1317H(2), to Holyoake's damages for loss of opportunity, in arriving at the damages payable under s 1317H(1), the overall award would be inflated unjustifiably by double counting of the profit element.** There may be cases where the wrongdoer's conduct results in damage from loss of opportunity that both the wrongdoer and the injured party could not exploit, where it would be appropriate to make a cumulative award under s 1317H(1) and s 1317H(2) that includes the wrongdoer's profits. That would be because those profits would not have taken account of the value of the opportunity that the injured party could not exploit as a result of the wrongdoer's conduct. But that is not this case. In the present case, the value of Holyoake's loss of opportunity will compensate it for the profits the wrongdoers in fact earned as well as further loss it incurred that resulted from their contraventions" (emphasis added).

Equitable remedies for breach of fiduciary duty

[230] The duties owed by a director (or officer) to their company are described as fiduciary.[177] In this case the fiduciary duty that is alleged to have been breached by the defendants is

---

174 At [3.400.12].

175 *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248 per Besanko J. Though this decision was overturned on appeal, it was done so on the basis of causation and no comment was made as to the validity or not of Besanko J's dicta relating to the operation of s 1317H as it concerns the intersection of profits and compensation orders under s 1317H of the Act.

176 [2013] FCAFC 16.

177 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 141.

the duty against conflicts of interest.[178] A fiduciary will be accountable for any benefit or gain acquired through breach of his or her duty, though the nature of the remedy will vary according to the circumstances of the case.[179] Relevant to the case here are the two equitable remedies of an account of profits, and equitable compensation. It should be noted at the outset that a plaintiff cannot claim both an account of profits and equitable compensation.

[231] An account of profits is an equitable remedy requiring a fiduciary who has improperly profited from his or her office (or otherwise made some gain in circumstances involving a conflict of interest) to account to the company for "all and any profits" derived from the breach of duty.[180] Peter Devonshire in his article, *Account of Profits for Breach of Fiduciary Duty* describes the remedy as operating to "strip a fiduciary of unauthorised gains".[181]

[232] Equitable compensation may be awarded by the court in response to a breach of fiduciary duty.[182] An important distinction between this and an account of profits is that equitable compensation is measured against the loss suffered by the principal (or company in this case), not the profits derived by the fiduciary. A grant of compensation may be awarded by reference to the defendant's gain,[183] however a plaintiff need not show a specific loss suffered as a result of the breach.[184] A plaintiff cannot receive both an account of profits and an equitable compensation order for breach:[185] an election must be made at the time judgment is given.[186] A plaintiff may however choose a 'split election' if there are two or more defendants.[187]

[233] There can be no doubt that the plaintiff has now made a clear election for equitable compensation and not an account of profits. That election has also been made as required before formal orders have been made.

Relief

[234] Having found that there has been a breach of fiduciary duty and various breaches of ss 181, 182 and 183 of the Act I am satisfied that the plaintiff is entitled to equitable

---

178 See for example, *Chan v Zacharia* (1984) 154 CLR 178 at 198.

179 *Halsbury's Laws of Australia* at [185-81].

180 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

181 P Devonshire, 'Account of profit for breach of fiduciary duty' (2010) 32 (3) *Sydney Law Review* 389.

182 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

183 *Dempster v Mallina Holdings Ltd* (1994) 15 ASCR 1.

184 *Gemstone Corp of Australia Ltd v Grasso* (1994) 13 ASCR 695.

185 *Club of the Clubs Pty Ltd v King Network Group Pty Ltd (No 2)* [2007] NSWSC 574.

186 *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113.

187 Ibid.

compensation for breaches of fiduciary duty and statutory compensation for the breaches of the Act as outlined in these reasons. I am also satisfied that the quantum of that damage should be calculated on the same basis. That is restitution for what the plaintiff has lost by way of the actions of the defendants. The real question is whether the loss would have occurred but for the breach.

[235] As the Full Court of the Federal Court held in *V-Flow,*[188] with respect to the remedy of equitable compensation:

> "[55] The object of the equitable remedy of compensation or damages is restitution of what the victim has lost. The question is whether the loss would have occurred but for the breach. While the monetary sum awarded to the victim is normally computed by reference to the detriment actually suffered by the victim, it may occasionally be computed by reference to the profit that has been made by the errant fiduciary. Nevertheless, the primary purpose of equitable compensation or damages is compensatory (*Nocton v Lord Ashburton* [1914] AC 932; *Re Dawson* (1966) 84 WN (Pt 1) (NSW) 399). No element of penalty is involved. (Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (4th ed) at [23–02]).
>
> [56] The obligation imposed by equity to pay damages or compensation is not fettered by the usual notions that serve to diminish the quantum of an award of damages at common law. The obligation imposed by equity upon an errant fiduciary is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract. Thus, the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation (*Hill v Rose* [1990] VR 129 at 144). However, while foreseeability is not a concern in assessing equitable compensation or damages, the only losses that are made good are those that, on a common sense view of causation, are caused by the breach of duty (*Canson Enterprises Ltd v Boughton and Co* [1991] 3 SCR 534 at 556)."

[236] As the Court noted in *V-Flow*[189] in calculating the relevant profit the Court will adopt the "nearest approximation to justice that it can make (*Dart* at 119). In principle, there is nothing wrong with the Court estimating the profit by drawing inferences, provided that there is some evidence of actual profit (*Apand* at 571)."

[237] The contract price for those contracts diverted from QA to third parties can be established by the third party contracts. In addition, the financial statements for QA establish its gross profit margin on turnover. Whilst Counsel for QA argues that the figures for the 2015 financial year are affected by the defendants' breaches of duty, I consider that a more appropriate figure is the average of the three years, which is 13.4%.

---

188 *V-Flow Pty Limited v Holyoake Industries (Vic) Pty Limited* [2013] FCAFC 16 at [55-56].

189 Ibid at [58].

	2013 [190]	***2014*** [191]	***2015*** [192]
Sales	10,066,098	15,150,692	24,234,028
Cost of goods sold	8,597,950	12,823,410	21,700,597
Gross Profit	1,468,147	2,327,282	2,533,431
Gross Profit margin	14.5%	15.4%	10.5%

Equitable Compensation for breach of fiduciary duty

[238] In my view the loss to the plaintiff which is attributable to a breach of fiduciary duty can be calculated in the following way.

Coronation Hill Estate, Part 1

[239] In relation to the diversion of the opportunity to enter into 21 put and call option agreements for 21 blocks of land at Coronation Hill Estate which occurred in December 2014, with payment occurring on 10 February 2015, the diversion of the of opportunity from QA clearly went to a company incorporated by defendants named Coronation Hill Number 1 Pty Ltd. The contract price for each of these put and call option agreements was not disclosed and as such, the plaintiff relies on the contract price of another lot in the estate secured by defendants via put and call option agreement, which was $152,900. I am satisfied therefore that the loss of (potential) profit to QA, based on an estimated contract price, would be in the order of $10,000.00 as contended for by the plaintiff. The accords with a total loss of $210,000.00.

Coronation Hill Estate, Part 2

[240] In relation to the diversion of four building contracts at Chandon Court, Hillcrest (part of the Coronation Hill estate), it is clear that there was a diversion of four separate contracts for the building of houses on four lots. The relevant dates were 11 June 2015 for (Lot 21), 17 June 2015 for (Lot 3), 13 July 2015 for (Lot 8) and 4 August 2015 for (Lot 2). The contract price for each was, $263,182 (Lot 21), $263,182 (Lot 3), $263,182 (Lot 8) and $265,110 (Lot 2). I am satisfied that an appropriate figure to compensate for the loss of (potential) profit to QA for each based on a 13.4% profit margin is $35,266.38 (Lot 21), $35,266.38 (Lot 3), $35,266.38 (Lot 8) and $35,524.74 (Lot 2).

Hoffman Way, Bundamba

---

190 Exhibit 3 Tab 88.

191 Exhibit 3 Tab 88.

192 Exhibit 3 Tab 89.

[241] In relation to the diversion of the contract for the construction of a house at Hoffman Way, Bundamba, the diversion of the building contract occurred on 11 May 2015. The diversion was from QA to Aspiration Homes. The contract price was $263,636. I am satisfied that the appropriate figure to compensate for the loss of (potential) profit to QA at a 13.4% profit margin is $35, 327.84.

Riding Road, Balmoral

[242] In relation to the diversion of a contract for the building of 5 units at Riding Road, Balmoral, this diversion occurred around 25 May 2015 and involved a diversion from QA to Aspiration Homes in circumstances where the contract price was $1,191,860. I am satisfied that the appropriate figure to compensate for the loss of (potential) profit to QA at a 13.4% profit margin is $159,709.24.

Birdwing Crescent, Jimboomba

[243] In relation to Birdwing Crescent, Jimboomba, the diversion of the opportunity to enter into a put and call option agreement to purchase land at that location ultimately led to the diversion of the building contract on that land. The evidence establishes that the land was worth $152,900. The diversion of agreement occurred around 29 May 2015 and was from QA to Aspiration Homes. As the price of the eventual building contract was $238,100, I am satisfied that the appropriate figure to compensate for the loss of (potential) profit to QA at a 13.4% profit margin is $31,905.40.

Springwood Road, Springwood

[244] In relation to Springwood Road, Springwood, the diversion of contract related to a contract for the building of 12 units. The diversion occurred on 4 June 2015 and was from QA to UIH. In circumstances where the contract price was $1,936,364 I am satisfied that the appropriate figure to compensate for the loss of (potential) profit to QA at a 13.4% profit margin is $259,472.77.

Hunter Street, Greenslopes

[245] In relation to Hunter Street, Greenslopes, the diversion of the contract was for the building of six townhouses. The diversion occurred on 24 August 2015 and was from QA to Aspiration Homes. The contract price was $1,282,000 and I am therefore satisfied that the appropriate figure to compensate for the loss of (potential) profit to QA at a 13.4% profit margin is $171,788.00.

Compensation Order under the *Corporations Act* 2001 (Cth)

[246] I am satisfied that in the circumstances where I have found that the plaintiff has established a relevant breach of duty by a particular defendant under the Act that the calculation of the loss should be based on the same factors I have outlined in relation to the quantification of the loss on the basis of equitable compensation.

[247] In my view the following table which is based on a Table in the FASoC can be adapted to reflect the loss I am satisfied has been established by the breaches of duty.

Property	***Ref***	***Contract Value (excluding GST)***	***Date of Contract***	***Builder***	***Loss of Profit (13.4% of contract value)***
75 Springwood Rd	Ex 2 Tab 60	$1,936,364	04/06/15	UIH Building Solutions	
Lot 38 Birdwig Crescent	Ex 2 Tab 65	$238,100	01/06/15	Aspiration Homes	
333 Riding Road, Balmoral	Ex 2 Tab 76	$1,191,860	25/05/15	Aspiration Homes	
19 Hoffman Way	Ex 2 Tab 79	$263,636	11/05/15	Aspiration Homes	
29 Hunters Street, Greenslopes	Ex 3 Tab 83	$1,282,000	24/08/15	Aspiration Homes	
Lot 2 Hillcrest, Coronation Hill Estate	Ex 3 Tab 84	$265,110	04/08/15	Aspiration Homes	
Lot 3 Hillcrest, Coronation Hill Estate	Ex 3 Tab 85	$263,182	17/06/15	Aspiration Homes	
Lot 8 Hillcrest, Coronation Hill Estate	Ex 3 Tab 86	$263,182	13/07/15	Aspiration Homes	
Lot 21 Hillcrest, Coronation Hill Estate	Ex 3 Tab 87	$263,182	11/06/15	Aspiration Homes	
5 other lots at Coronation Hill Estate	NA	5 x $263,182 $1,315,910	Unknown	Aspiration Homes	
		$7,282,526			

[248] The parties are directed to provide short minutes of orders in accordance with these reasons by 12 October 2017.

[249] The parties are directed to provide short submissions as to the calculation of interest and as to costs by 12 October 2017.