

SUPREME COURT OF QUEENSLAND

CITATION: *Metal Manufactures Limited v Johnston & Anor* [2020] QCA 42

PARTIES: **METAL MANUFACTURES LIMITED**
ACN 003 762 641
(appellant)
v
GREGORY JOHNSTON
(first respondent)
ALFRED STOCKILL
(second respondent)

FILE NO/S: Appeal No 5310 of 2019
DC No 4794 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2019] QDC 62 (Porter QC DCJ)

DELIVERED ON: 13 March 2020

DELIVERED AT: Brisbane

HEARING DATE: 11 October 2019

JUDGES: Fraser and McMurdo JJA and Buss AJA

ORDERS: **Appeal dismissed with costs.**

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – EQUITABLE DOCTRINES AND PRESUMPTIONS – FIDUCIARY OBLIGATIONS – ASCERTAINMENT OF RELATIONSHIP – where the second respondent was an employee in one of the appellant’s stores – where the first respondent was the sole director and shareholder of a company which was a customer of the appellant – where the second respondent allowed the first respondent’s company to purchase goods on credit exceeding the agreed credit limit, resulting in the appellant being owed over \$300,000 – where the first respondent’s company was wound up as an insolvent company – where the appellant claimed that the second respondent owed a fiduciary duty to it, and breached that duty – where the appellant did not show that the second respondent benefited from allowing the appellant to exceed its credit limit – whether, as the appellant argued, the relationship between an employer and an employee is a fiduciary relationship in every case – whether the second respondent breached any fiduciary duty owed to the appellant
CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF

OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – DUTIES INVOLVING CONFLICTS OF INTEREST – IMPROPER USE OF POSITION – TO GAIN ADVANTAGE OR CAUSE DETRIMENT – where the appellant claimed that the second respondent breached a duty under s 182(1) of the *Corporations Act 2001* (Cth) – where the appellant did not show that the second respondent acted with the purpose of gaining an advantage for the first respondent or causing a detriment to the appellant – whether the second respondent breached a duty under s 182(1)

Corporations Act 2001 (Cth), s 182(1)

Chew v The Queen (1992) 173 CLR 626; [1992] HCA 18, applied

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, applied

Victoria University of Technology v Wilson (2004) 60 IPR 392; [2004] VSC 33, considered

COUNSEL: G Coveney for the appellant
The respondents each appeared on their own behalf

SOLICITORS: Case Legal for the appellant
The respondents each appeared on their own behalf

- [1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.
- [2] **McMURDO JA:** The appellant is a wholesale supplier of electrical products, trading under the name “Haymans”. For a few years until August 2013, it supplied a company called GMJ Electrical Projects Pty Ltd (“GMJ”), through the appellant’s branch at Ipswich.
- [3] From late 2012, GMJ was allowed to purchase from the appellant on credit, pursuant to the terms of a written agreement between them. At first the credit limit was \$20,000, and it was increased by an agreement in March 2013 to \$50,000. But GMJ failed to keep within its agreed limit. An employee at the appellant’s Ipswich branch, Mr Stockill, acting outside his authority, allowed GMJ, through its sole director and shareholder, Mr Johnston, to purchase goods on credit to the extent that by July 2013, it owed an amount of \$325,797.50.
- [4] The appellant brought this proceeding in the District Court, claiming from GMJ the amount owing by it, and failing recovery from GMJ, Mr Johnston and Mr Stockill as persons whose conduct had caused the appellant to suffer the loss from the debt being irrecoverable beyond the agreed limit of \$50,000. By the time of the trial, GMJ had been wound up as an insolvent company and it was clear that nothing would be recovered from it.¹
- [5] The appellant’s case against Mr Stockill was that by allowing GMJ to purchase goods beyond its credit limit, he breached a fiduciary duty arising from his

¹ The appellant had also sued Mr Johnston’s wife, but did not pursue that claim at the trial.

employment, and, as an employee he contravened s 182(1) of the *Corporations Act 2001* (Cth).

- [6] The appellant's case against Mr Johnston was dependent upon its case against Mr Stockill. It alleged that Mr Johnston knowingly assisted Mr Stockill to breach his fiduciary duty, so that he too should pay equitable compensation, and that he was a person involved in Mr Stockill's contravention of s 182(1), so that he too should compensate the appellant by an order under s 1317H of the *Corporations Act*.
- [7] In the judgment under appeal, these claims were dismissed.² The trial judge held that Mr Stockill did not owe a fiduciary duty, but only a contractual duty to serve his employer's interests. Further, if Mr Stockill had owed a fiduciary duty, it was not breached because Mr Stockill had not preferred his personal interest to that of the appellant. His Honour found that under s 182(1), Mr Stockill did improperly use his position as an employee, but rejected the appellant's case that he did so in order to gain an advantage for GMJ, or to cause a detriment to the appellant. In consequence of those findings, the appellant's claim against Mr Johnston failed.
- [8] By this appeal, it is argued that Mr Stockill should have been found to have owed and breached a fiduciary duty, and also to have contravened s 182. By the same arguments, it is contended that the case against Mr Johnston should have succeeded. The appellant seeks a judgment against each respondent in the amount of its claim.
- [9] For the reasons that follow, the trial judge was correct in dismissing these claims, and the appeal should be dismissed.

The appellant's pleaded case

- [10] The case ultimately pleaded for the appellant was within its fifth pleading which was filed on the last day of the trial.
- [11] The fiduciary duties said to have been owed by Mr Stockill were pleaded as follows:

“8. At all material times, Mr. Stockill owed to the plaintiff, relevantly, the following duties (herein called the “Fiduciary Duties”):

- (a) not to be in a position of conflict between his duty of loyalty to the plaintiff and his personal interest; and
- (b) not to obtain any unauthorised benefit from his fiduciary position.
- ~~(a) a duty to serve the plaintiff with fidelity and in good faith;~~
- ~~(b) a duty to act on behalf of and in the best interests of the plaintiff; and~~
- ~~(c) a duty to act with the scope of the authority conferred on him by the plaintiff.~~

² *Metal Manufacturers Limited v GMJ Electrical Projects Pty Ltd & Ors* [2019] QDC 62 (“Reasons”).

9. The Fiduciary Duties arise or are imposed by operation of law by reason of:
- (a) the relationship between the plaintiff and Mr. Stockill being that of employer and employee;
 - (b) Mr. Stockill being employed in a senior position with the plaintiff; and
 - (c) in the premises, a relationship of trust and confidence that existed between the plaintiff and Mr. Stockill.”

[12] There was also this allegation of an implied term of Mr Stockill’s contract of employment:

“10A. Further, it was an implied term (herein called the “Implied Term”) of Mr. Stockill’s contract of employment with the plaintiff, as part of the duty of fidelity and good faith owed to the plaintiff, that he would:

- (a) act loyally to the plaintiff, and not place himself in a position of conflict; and
- (b) not misuse his position as an employee to gain an advantage for himself.”

However this “contract case”, as the judge referred to it, was abandoned in final submissions.³

[13] It was alleged that Mr Stockill owed a statutory duty, according to s 182(1), as follows:

“10. At all times material times to this proceeding, Mr. Stockill owed to the plaintiff, relevantly, the further duty (herein called the “Statutory Duty”) pursuant to section 182(1) of the Corporations Act not to improperly use his position to:

- (a) gain an advantage for himself or for someone else; or
- (b) cause detriment to the plaintiff.”

[14] The appellant pleaded that in a period from late March to late April 2013, an agreement was made orally between Mr Stockill and Mr Johnston (which the pleading called the “Credit Limit Circumvention Agreement”) by which Mr Stockill agreed to cause the appellant to supply goods to GMJ in excess of the credit limit,⁴ and that a sale would not be recorded against GMJ’s account until the total actually owing by GMJ had been brought within the credit limit of \$50,000.⁵

[15] The conduct which was pleaded as a breach of fiduciary duty (and of the pleaded implied term of Mr Stockill’s contract of employment) was as follows:

“29. As the plaintiff’s employee Mr. Stockill had the plaintiff’s authority to cause the plaintiff to supply Goods on credit to the plaintiff’s customers to the value of their approved credit limits.

³ Reasons [249].

⁴ Pleading paragraphs 17 and 18.

⁵ Pleading paragraph 19.

30. Mr. Stockill:
- (a) entered into the Credit Limit Circumvention Agreement; and
 - (b) caused the plaintiff to supply the Goods to [GMJ], to the extent the value of those Goods exceeded the Credit Limit (together with (a), herein called the “Mr. Stockill Unauthorised Conduct”);

without:

- (c) the authority of the plaintiff;
 - (d) the written consent of the plaintiff;
 - (e) without the knowledge or acquiescence of the plaintiff; and
 - (f) the fully informed, or any, consent of the plaintiff.
31. In the premises, Mr. Stockill committed the Mr. Stockill Unauthorised Conduct:
- (a) in the interests, further or alternatively, for the profit, benefit or gain, of one or more of the following persons or entities:
 - (i) [GMJ]; and
 - (ii) [Mr Johnston]; and
 - (b) not in the interests, further or alternatively, any benefit or gain, of the plaintiff; and
 - (c) to the detriment of the plaintiff.
32. In the premises set forth in the two immediately preceding paragraphs, Mr. Stockill:
- (a) did not serve the plaintiff with fidelity and in good faith;
 - (b) did not act on behalf of and in the best interests of the plaintiff;
 - (c) was in a position of conflict in that he preferred the interests of the first and/or second defendants ahead of the plaintiff’s interests; and

thereby breached each of the Fiduciary Duties and the Implied Term.”

[16] The same conduct was said to have constituted a contravention of s 182(1), by which Mr Stockill improperly used his position as an employee of the appellant to gain an advantage for GMJ and Mr Johnston, and cause detriment to the appellant.⁶

[17] Against Mr Johnston, it was pleaded that Mr Stockill’s breach of fiduciary duties “amounted to a dishonest and fraudulent design on his part”, and that Mr Johnston knew, or ought to have known, that Mr Stockill’s conduct was in breach of his

⁶ Pleading paragraphs 33 and 34.

fiduciary duties.⁷ It was alleged that Mr Johnston knowingly participated in Mr Stockill's breach of those duties,⁸ and that he knowingly assisted Mr Stockill to do so.⁹ It was further alleged that Mr Johnston was involved in Mr Stockill's contravention of s 182 in each of the ways described in s 79 of the *Corporations Act*.

The findings of the trial judge

- [18] It is necessary to refer only to the findings made against Mr Stockill.
- [19] Mr Stockill was employed by the appellant as the manager of the Ipswich branch. In that position, it was possible for him to make unauthorised supplies without that being detected in the ordinary course of the appellant's business, and that the risk of detection came only from an audit or from "a whistle blower in his own branch".¹⁰ The trial judge thought that those facts might favour the recognition of an equitable duty being owed by Mr Stockill to his employer, beyond the duty which was an implied term of his contract of employment.¹¹
- [20] On the other hand, said his Honour, there were facts and circumstances against the existence of a fiduciary duty. Although he was manager of the Ipswich branch, Mr Stockill was not a senior employee in the appellant's business, having a modest salary and only about six staff under his supervision. He had no discretionary power to allow a customer any credit beyond that to which the appellant had agreed. His Honour said that therefore the appellant's position was not vulnerable to a wrongful exercise of any discretion conferred on Mr Stockill; and any vulnerability was only from his disobeying his instructions.¹² Consequently, his Honour found, this was not a case in which some special trust and confidence was placed in an employee, such that the law would recognise fiduciary duties in equity in addition to Mr Stockill's implied contractual obligations.¹³
- [21] Nevertheless the trial judge went on to consider whether Mr Stockill would have breached the pleaded fiduciary duties had they been owed. His Honour said that "this question depends upon whether Mr Stockill allowed his duty to [the appellant] to conflict with his personal interest."¹⁴ Earlier in the Reasons, the trial judge had described the scope of the alleged fiduciary duties in these terms:

"[220] It is also to be observed that the proscriptive duties breached were pleaded as being:

- (a) Mr Stockill putting himself in a position of conflict of duty and personal interest; and
- (b) Mr Stockill using his position to obtain a benefit for himself.

[221] The latter allegation can be disregarded. There was no evidence that Mr Stockill sought to obtain, or actually

⁷ Pleading paragraphs 55AB and 55AC.

⁸ Pleading paragraph 56.

⁹ Pleading paragraph 56A.

¹⁰ Reasons [241].

¹¹ Reasons [241]–[242].

¹² Reasons [243].

¹³ Reasons [246], [249].

¹⁴ Reasons [250].

received, a benefit for himself. The plaintiffs did not contend that he did.

[222] The question then is whether Mr Stockill put himself in a position of where his duty to Haymans (assuming a fiduciary obligation arose) and his personal interest were in conflict.”

[22] As to whether there was any such personal interest, his Honour found that “Mr Stockill did not seek nor receive any payment or other tangible personal benefit from GMJ for making the unauthorised supplies.”¹⁵

[23] His Honour made these further findings:¹⁶

- Mr Stockill deliberately made unauthorised credit supplies, knowing that they were prohibited by the policy of his employer;
- Mr Stockill “initiated (though at Mr Johnston’s request) the making of unauthorised supplies in March 2013”;
- Mr Stockill did not have discussions with Mr Johnston that gave rise to an oral agreement that he make the unauthorised supplies and conceal them from the appellant;
- Mr Stockill made the supplies in the belief that GMJ would ultimately pay for them and, at least initially, on the basis that GMJ’s “track record and work flow justified that belief (along with Mr Johnston’s reassurances of payment)”;
- Mr Stockill continued to make the supplies after he began to have doubts that the appellant would be paid, because Mr Stockill was committed to this course.

[24] The trial judge rejected the appellant’s argument that the personal interest of Mr Stockill was in securing business for the branch of which he was the manager. He noted that this interest was not pleaded, and observed that indeed there was no specific allegation in the pleading which identified a personal interest of Mr Stockill which was said to give rise to a conflict of duty and interest, or which was preferred over the interests of the plaintiff.¹⁷ Further, if this argument was to be considered, his Honour said that he would be unpersuaded by it.¹⁸ He referred to evidence that Mr Stockill had been concerned about the performance of the Ipswich branch, after the recent loss of a valuable customer, and that Mr Stockill felt responsibility for the ongoing employment of his staff. But his Honour said that there was no evidence that the branch was likely to close, or that Mr Stockill was under any pressure to increase sales, and nor was there evidence that Mr Stockill stood to gain from any commission, salary increase or promotion by increasing the turnover of the branch.¹⁹

[25] The trial judge then considered another possibility, which was that once Mr Stockill had embarked on making unauthorised supplies to GMJ, he had a personal interest

¹⁵ Reasons [251].

¹⁶ Ibid.

¹⁷ Reasons [255].

¹⁸ Reasons [257].

¹⁹ Ibid.

in continuing to do so in the hope of protecting his own employment.²⁰ This was a point which, it seems, had occurred to his Honour, because it was neither pleaded nor argued.²¹ But the trial judge said that the point could not succeed, at least because it was unpleaded and not argued especially when Mr Stockill was without legal representation. And it appears that his Honour might not have found the point persuasive, had it been argued.²²

[26] As noted already, his Honour was persuaded, in the terms of s 182(1), that Mr Stockill improperly used his position as an employee. On the authority of *R v Byrnes & Hopwood*,²³ he held that impropriety in this context does not depend upon a person's consciousness of impropriety, but instead consists of a breach of the standards of conduct that would be expected by reasonable persons with knowledge of the duties, powers and authorities of the position and the circumstances of the case. The trial judge stopped short of finding that Mr Stockill's conduct was dishonest, saying that the conduct was "not directed at obtaining some bribe or other personal benefit for himself."²⁴ However, in his Honour's conclusion, it was conduct which was "consciously wrongful", and Mr Stockill took "deliberate steps to conceal that conduct by not entering credit transactions on GMJ's account and later, by concealing the conduct from the [appellant's] auditor in August 2013". In those circumstances, it was held, his conduct was improper in the relevant sense.²⁵

[27] After discussing the judgment of the High Court in *Chew v The Queen*,²⁶ his Honour observed that the difficulty for the appellant, in its case under s 182(1), was in proving that Mr Stockill's subjective purpose was to cause a detriment to the appellant or to gain a benefit for GMJ and Mr Johnston.²⁷ It was not sufficient, he said, for the appellant to prove the effects of Mr Stockill's conduct as distinct from "his intention".²⁸ Nor was it sufficient to say that Mr Stockill must have intended to benefit GMJ or harm the appellant because that was the result of his conduct.²⁹ At that point his Honour said:³⁰

"There is no reason in principle why a court cannot in appropriate circumstances infer that a party intended the foreseeable consequences of his or her acts. However, it must be kept in mind that when that occurs, the Court is drawing an inference as to the person's actual state of mind."

[28] His Honour then concluded as follows:

"[266] In my opinion, the circumstances of this case do not sustain the inference because it is contrary to evidence which I have accepted. I have found that Mr Stockill believed at all times that Mr Johnston's company would pay for the goods supplied at least until June 2013. Indeed his conduct is irrational absent

²⁰ Reasons [258].

²¹ Reasons [259].

²² Ibid.

²³ [1995] HCA 1; (1995) 183 CLR 501 at 514-515, per Brennan, Deane, Toohey and Gaudron JJ.

²⁴ Reasons [262].

²⁵ Ibid.

²⁶ (1992) 173 CLR 626; [1992] HCA 18 ("*Chew*").

²⁷ Reasons [263].

²⁸ Reasons [264].

²⁹ Reasons [265].

³⁰ Ibid.

that belief. His belief (optimistic, even naïve, though it might seem in hindsight) was that the unauthorised supplies on credit would be paid for, to the benefit of Haymans, in the same way as the authorised supplies on credit. In those circumstances, his intention was that the unauthorised supplies benefit Haymans. He certainly could not on any view be held to have intended detriment to Haymans. Contrary to the submission in paragraph 28 of the plaintiff's submissions, the fact that Mr Stockill hoped (and in fact believed) that the decision would prove beneficial *is* the point.

[267] For this reason, the claim against Mr Stockill for breach of s. 182(1) is dismissed.

[268] I add the following observations.

[269] First, it does not assist the plaintiff to point to the limited evidence that Mr Stockill was motivated by a concern about the shortfall in sales at his branch following the loss of Queensland Rail for the reasons given in paragraphs [256] and [257], which apply *mutatis mutandis* to the s. 182(1) claims. And further, even if that was his intention, he did not intend detriment to Haymans.

[270] Second, even if I had not made the findings as to Mr Stockill's intention which I have made, it would be difficult to justify drawing any such adverse inferences where the suggestion that his intention was in fact to cause benefit to GMJ and detriment to Haymans was not dealt with in the evidence at all. This might have been an area where the plaintiff would have been permitted to cross examine by leading questions if it had emerged when Mr Stockill was questioned on these issues that he would give evidence contrary to Haymans' interests (as it is almost certain he would have)."

The arguments in this Court

Breach of fiduciary duty

[29] It is submitted for the appellant that in every case, the relationship between an employer and an employee is a fiduciary relationship. This is said to follow from what was said by Mason J in *Hospital Products Ltd v United States Surgical Corporation*,³¹ where the employment relationship was described as one of the "accepted fiduciary relationships". The submission is also said to be supported by the judgment of Gleeson CJ, Gaudron and Gummow JJ, and the separate judgment of Kirby J, in *Concut Pty Ltd v Worrell*.³²

[30] However, the statement by Mason J in *Hospital Products Ltd* must be put in context. Mason J there said:³³

"The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations

³¹ [1984] HCA 64; (1984) 156 CLR 41 at 96-97.

³² (2000) 75 ALJR 312; [2000] HCA 64.

³³ At 96-97.

(cf. *Phipps v. Boardman*), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. *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. The expressions “for”, “on behalf of”, and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed: see generally Weinrib, “The Fiduciary Obligation”, *University of Toronto Law Journal*, vol. 25 (1975), pp. 4-8. Thus a mere sub-contractor is not a fiduciary. Although his work may be described loosely as work which is to be carried out in the interests of the head contractor, the sub-contractor cannot in any meaningful sense be said to exercise a power or discretion which places the head contractor in a position of vulnerability.”

(Footnotes omitted, emphasis added.)

- [31] The “critical feature” identified by Mason J in that passage is the vulnerability of the principal to the abuse by the fiduciary of their position in the exercise of a power or discretion. The same critical feature was emphasised by Gleeson CJ, Gaudron and Gummow JJ in *Concut v Worrell*.³⁴ Not every employee will be in such a position.
- [32] In *Victoria University of Technology v Wilson*,³⁵ Nettle J said that whilst some employees, particularly senior employees, do owe fiduciary duties to their employers, others do not. Amongst the many cases cited by his Honour for that statement was the judgment of Hodgson CJ in Eq in *EFG Australia Ltd v Kennedy*,³⁶ who said that “[a]lthough the relationship of employer and employee is generally said to be a fiduciary relationship, it seems that the fiduciary obligations of junior or “ordinary” employees are narrower than those of senior employees, and indeed that in many respects ordinary employees are not fiduciaries at all”.³⁷ And to those cases can be added more recent decisions such as *Woolworths Ltd v Olson*,³⁸ *Bayley & Associates Pty Ltd v DBR Australia Pty Ltd*³⁹ (which the trial

³⁴ At 315 [17].

³⁵ (2004) 60 IPR 392 at 438 [145] (Supreme Court of Victoria).

³⁶ [1999] NSWSC 922.

³⁷ At [30].

³⁸ (2004) 184 FLR 121 at 185 [212] (Einstein J).

³⁹ [2013] FCA 1341 (Foster J).

judge in this case discussed) and *Countrywide Austral Pty Limited v Emergency Media Pty Ltd*.⁴⁰

- [33] His Honour’s conclusion, that Mr Stockill had effectively no discretionary power so that he could not have been a fiduciary, is open to doubt. As is submitted for the appellant, as the person in charge, Mr Stockill had effective control over what was supplied to a customer. However, it is unnecessary to decide whether Mr Stockill did owe a fiduciary duty to the appellant, because his Honour was correct to conclude that no breach of the pleaded fiduciary duty was proved.
- [34] The appellant accepts that it had to prove that there was some personal interest of Mr Stockill which conflicted with his duty to his employer. The appellant’s argument is that the personal interest of Mr Stockill came from “his intention to confer that benefit [the supply of goods beyond the credit limit] on GMJ.”⁴¹ In the appellant’s argument, Mr Stockill’s personal interest was further described as “his interest (no matter how hopeful he was of a positive outcome) in continuing to supply GMJ outside of its credit terms. It did not require him to obtain a personal benefit”. The argument seeks support from the judgment of McLure JA (as she then was), with whom Owen and Newnes JJA agreed, in *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd*,⁴² where it was said that a fiduciary’s personal interest may be non-pecuniary and indirect, and the existence of a conflict of the fiduciary’s personal interest and duty is not dependent on proving that the fiduciary acted with the intention of advancing its personal interests.⁴³
- [35] The appellant’s argument cannot be accepted. On the trial judge’s findings, there was no benefit which might have passed to Mr Stockill from allowing GMJ to trade outside its credit limit. Nor was there any actual or potential benefit in an indirect sense, such as a benefit which would or might be derived by a company of which Mr Stockill was a shareholder. If it could be said that Mr Stockill intended to confer a benefit upon GMJ (a question which is discussed below in relation to s 182), it does not follow that Mr Stockill had a personal interest in that outcome, such as to give rise to a conflict of interest and duty.

Section 182(1)

- [36] Section 182(1) is as follows:

“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.”

- [37] In *Chew v The Queen*, the High Court considered the meaning of what was then s 229(4) of the *Companies (Western Australia) Code*, which made it an offence for an officer or employee of a corporation to “make improper use of his position as such an officer or employee to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.” Mason CJ, Brennan,

⁴⁰ [2018] VSC 540 (Riordan J).

⁴¹ Appellant’s outline of argument, paragraph 28.

⁴² [2009] WASCA 143 at [71]-[75].

⁴³ Citing *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 103 (Mason J).

Gaudron and McHugh JJ held that the word “to” in that provision should be read as “in order to”, that is to say that it should be given a purposive meaning in preference to a causative meaning.⁴⁴ The terms of that provision are relevantly identical to s 182(1).

- [38] Consequently, the appellant had to prove that Mr Stockill facilitated the supply of goods to GMJ beyond its credit limit *with the purpose* of gaining an advantage for GMJ and Mr Johnston or causing a detriment to the appellant. Put another way, the appellant had to prove that Mr Stockill’s object, or the end to which his conduct was directed, was such an advantage or detriment.
- [39] In the appellant’s submission, this element of purpose was established because two things were proved, namely that:
- (a) Mr Stockill intended to supply goods to GMJ beyond its credit limit; and
 - (b) Mr Stockill believed that to do so would be an advantage to GMJ or a detriment to the appellant.⁴⁵
- [40] The submission is apparently based upon this passage from the judgment of the plurality in *Chew v The Queen*:⁴⁶

“In the course of argument, it was suggested that it was not necessary to establish that an accused person perceived that the alleged advantage or detriment was an advantage or detriment. We do not read the provision in that way. Once one concludes that there is a purposive element in the offence, it is necessary to establish not merely that the accused intended that *a* result should ensue, but also that the accused believed that the intended result would be an advantage for himself or herself or for some other person or a detriment to the corporation.”

- [41] The appellant misunderstands the effect of that passage. It is one thing that the proof of that intention and belief was necessary in the proof of the employee’s purpose; it is another to say that the proof of those things, without more, would prove that purpose.
- [42] The appellant submits that the evidence established that Mr Stockill intended to supply to GMJ beyond its credit limit and believed that he would cause a detriment to the appellant, upon the basis of oral evidence from Mr Stockill that he understood that these credit limits were important and strictly enforced by the appellant, and that what he was doing was wrong.⁴⁷ It is submitted that “his Honour’s analysis misdirects attention away from Mr Stockill’s intentional conduct and onto his hopes that that conduct, which he knew to be wrong, would eventually realise a benefit for [the appellant]”. In the same way, it is submitted that Mr Stockill “knew and believed that GMJ was receiving an advantage by being supplied with goods at a time when they were on credit hold.” The appellant’s argument acknowledges that Mr Stockill intended that GMJ would pay for the goods at some time. But it is said that this does not mean that he had no intention to put the appellant on risk of not getting paid, and to give GMJ an advantage.

⁴⁴ [1992] HCA 18; (1992) 173 CLR 626 at 630-632.

⁴⁵ Appellant’s outline of argument, paragraph 8.

⁴⁶ [1992] HCA 18; (1992) 173 CLR 626 at 633-634.

⁴⁷ Transcript 2, 49-50, 60.

- [43] These submissions are made upon the same misunderstanding of what had to be proved to satisfy the purposive element under s 182(1). The appellant had to establish that Mr Stockill intentionally supplied to GMJ beyond its credit limit, because his object was to detrimentally affect the appellant or to gain an advantage for GMJ and Mr Johnston. It had to establish that the reason for Mr Stockill's conduct was that he wanted to achieve the result of that detriment or advantage.
- [44] As his Honour said, the appellant's case, as summarised in its final written submissions,⁴⁸ was to the effect that there were results of Mr Stockill's conduct, but those submissions did not address the purposive element under s 182(1).⁴⁹ No finding was sought from the trial judge, or made by his Honour, that the purpose, that is to say the end or object of Mr Stockill's conduct, was to detrimentally affect the appellant or benefit GMJ and Mr Johnston.

Conclusion and orders

- [45] For these reasons, the trial judge was correct in deciding that the appellant's case against Mr Stockill, on either of the pleaded bases, was not established. It follows that he was also correct in dismissing the claim against Mr Johnston.
- [46] I would order that the appeal be dismissed with costs.
- [47] **BUSS AJA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

⁴⁸ Set out in Reasons [253].

⁴⁹ Reasons [264].