SUPREME COURT OF QUEENSLAND

CITATION:	*Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2003] QSC 402
PARTIES:	**SOUTHERN CROSS MINE MANAGEMENT PTY LTD (ACN 082 767 548)** (plaintiff) **v** **ENSHAM RESOURCES PTY LTD (ACN 011 048 678)** (first defendant) and **BLIGH COAL LIMITED (ACN 010 186 393)** (second defendant) and **IDEMITSU QUEENSLAND PTY LTD (ACN 010 236 272)** (third defendant) and **EPDC (AUSTRALIA) PTY LTD (ACN 002 307 682)** (fourth defendant) and **LG INTERNATIIONAL (AUSTRALIA) PTY LTD (ACN 002 806 831)** (fifth defendant) and **KENNETH JOHN FOOTS** (first defendant added by Counterclaim) and **FOOTS PTY LTD (ACN 010 195 061)** (second defendant added by Counterclaim) and **RAYMOND NORMAN BIRD** (third defendant added by Counterclaim) and **LITTLE DIGGER MINING LIMITED (ACN 096 110 717)** (fourth defendant added by Counterclaim) and **NORMA AGNES FOOTS** (fifth defendant added by Counterclaim) and **KENNETH JOSEPH HILL** (third party to Counterclaim) and

KENNETH JOHN FOOTS & RAYMOND NORMAN BIRD
(fourth parties to Counterclaim)

FILE NO: S 9548 of 2002

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 26 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 29 October 2003

JUDGE: Chesterman J

ORDER:

1. **Order that the words 'and the JV parties' in paragraphs 24 and 25, and in the prayer for relief, in the statement of claim should be struck out.**

2. **Order that paragraph 51B of the statement of claim be struck out.**

3. **Costs reserved**

CATCHWORDS: CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DIRECTORS AND OTHER OFFICERS – FIDUCIARY POSITION - Duty to act in the interests of the company as a whole - Where an alleged failure by company directors to protect the interests of their company and associated joint venture parties - Whether there are particular dealings between the applicants and the joint venturers which give rise to a fiduciary relationship

EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – Whether the director's fiduciary duty to his company prevents the recognition of a concurrent and identical duty to the shareholders covering the same subject matter – consideration of *Brunninghausen v Glavanics* (1999) 46 NSWLR 538

PROCEDURE - PLEADINGS- Application pursuant to UCPR 171 to strike out part of a pleading which is said to disclose no reasonable cause of action

Uniform Civil Procedure Rules (Qld), Rule 171

Allen v Hyatt (1914) 30 TLR 444
Breen v Williams (1996) 186 CLR 71
Brunninghausen v Glavanics (1999) 46 NSWLR 538

Charlton v Baber (2003) NSWSC 745
Coleman & Ors v Myers & Ors [1977] 2 NZLR 225
Glandon Pty Ltd v Strata Consolidated Pty Ltd (No. 3) unreported NSWSC, 4 June 1990
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
Norberg v Wynrib (1992) 2 SCR 226
Pilmer v Duke Group Ltd (In Liquidation) (2001) 207 CLR 165
Securities and Exchange Commission v Chenery Corporation (1943) 318 US 80
Young v Murphy [1996] 1 VR 269

COUNSEL: Mr P Keane QC with him Mr S R Lumb for the applicants/ first and second defendants added by counterclaim

Mr G D O'Sullivan for the plaintiff and fourth defendant added by counterclaim

Mr W Sofronoff QC with him Ms M A Hoch for the first, second, third, fourth and fifth defendants

Mr J C Bell QC with him Mr D A Kelly for the third defendant added by counterclaim

SOLICITORS: Minter Ellison for the first and second defendants added by counterclaim

James Watt & Co for the plaintiff and the fourth defendant added by counterclaim

Allens Arthur Robinson for the first, second, third, fourth and fifth defendants

Gateway Lawyers as town agents for South & Geldard for the third defendant added by Counterclaim

[1] The first defendant ("Ensham") is the operator of an open cut coalmine in Central Queensland. The mining venture is known as the "Ensham Coal Joint Venture". The venturers are the second, third, fourth and fifth defendants ("joint venturers") who are the shareholders in Ensham in the proportions 37.5 per cent; 47.5 per cent; 10 per cent and 5 per cent respectively. The interests of the joint venturers in the Ensham Coal Joint Venture are in the same proportions as their respective shareholding in Ensham. Until 30 July 1999 Ensham owned and operated two drag lines to remove overburden from the coal seam. It required additional stripping capacity. The plaintiff owned a dragline. Ensham made a contract with the plaintiff by which the plaintiff stripped overburden for payment at an agreed rate ("the dragline agreement"). The first defendant added by counterclaim ("Foots") was at all material times employed by Ensham as its chief executive officer. The third defendant by counterclaim ("Bird") was Ensham's

mine manager. The second defendant added by counterclaim is a company connected with the first and fifth defendants by counterclaim.

[2] On 16 September 2002 Ensham rescinded the dragline agreement. It has not paid for a substantial amount of work performed by the plaintiff pursuant to the agreement. The plaintiff has sued to recover the unpaid amount.

[3] Ensham resists the claim and has counterclaimed against its former employees and their companies alleging that the decision to enter into the dragline agreement came as a result of advice and information given by Foots and Bird in breach of their fiduciary duties to Ensham. The point shortly put is that those defendants by counterclaim have an interest in the plaintiff and they stood to profit from its performance of the dragline agreement. Ensham claims that, properly advised, it would have bought a dragline itself, bigger than the plaintiff's machine. The result would have been a more efficient and economical mine and a saving of the payments due under the dragline agreement.

[4] The defendants' claim against the first, second and third defendants by counterclaim the sum of about $100,000,000 being an account of profits earned by the plaintiff from the dragline agreement, as well as the loss suffered by Ensham in not acquiring a larger capacity dragline in 1999.

[5] By separate applications the first, second and third defendants by counterclaim seek orders, the effect of which is that the claim against them by the joint venturers be struck out. The application is brought pursuant to *UCPR* 171 which relevantly empowers the court to strike out all or part of a pleading which discloses no reasonable cause of action. The applicants wish to have struck out the words 'and the JV parties' where they appear in paragraphs 24 and 25 of the statement of claim and in the prayer for relief. As well they seek to have paragraph 51B struck out. It alleges that Ensham or 'alternatively the JV parties' suffered loss by reason of the alleged breaches of duty on the part of the applicants. If those passages are struck out the counterclaim would contain no claim by the joint venturers against the applicants.

[6] The principles are clear. The pleading which asserts the claim by the joint venturers against the first, second and third defendants by counterclaim must be so clearly untenable that it cannot possibly succeed. For the purposes of the application the court must assume that the joint venturers will prove the facts alleged in their counterclaim.

[7] To understand the arguments it is necessary to set out in brief form the essential allegations from the counterclaim. They are:

> '13. The Ensham coal project is, and was at all material times:
>
> (a) A joint venture between (the second, third, fourth and fifth defendants) (collectively 'the JV parties')
>
> (b) The owner of an open cut thermal coal mining operation … known as the Ensham mine ("the mine").
>
> 14. (Ensham) is and was at all material times:

(a) The operator of the Ensham coal project; and

(b) Owned by the JV parties in accordance with their respective interests in the Ensham coal project.

14A. At all material times Ensham:

(a) Acted for and on behalf of the JV parties; and

(b) Acquired and held the assets of the Ensham coal project on trust for the JV parties

pursuant to an agreement between the JV parties and Ensham.

16A. At all material times Foots agreed or undertook to act in the interests of … Ensham and the JV parties in the performance of his duties as chief executive officer of Ensham.

Particulars

Insofar as (the agreement) was in writing it was contained in … a letter of employment … from Ensham to Foots which provided *inter alia*:

You shall be responsible for ensuring the implementation of the objectives of the companies[1] and of the Ensham joint venture in accordance with the policies and directions of the board of directors of the company and the management committee of the joint venture … You shall devote your time and attention to and use your best interests in furtherance of the interests of the companies and the joint venture …

18. At all material times Bird agreed or undertook to act in the interests of … Ensham and the JV parties in the performance of his duties as general manager of the mine[2].

20. At all material times:

(a) The Ensham coal project was supervised and controlled by a management committee ("the JV Management Committee").

(b) The JV Management Committee was comprised of a representative of each of the JV parties.

(c) The representatives of the JV parties were foreign nationals whose knowledge and experience of Australian coal mining was inferior to that of the senior executives employed by Ensham.

---

1 The companies were Ensham and an associated selling company. The word is not a reference to any of the joint venturers.

2 Particulars of the agreement are similar to those appearing in para 16A.

(d) The representatives of the JV parties changed from time to time.

21. At all material times:

(a) The business operations of the Ensham coal project were managed on a day to day basis by senior executives employed by Ensham ("Ensham management") … (which) included Foots and Bird.

(c) Representatives of Ensham management attended the JV Management Committee meetings and provided information, advice and recommendations to the … Committee …

22. Each of Foots and Bird had substantial experience in Australian coal mining, to the knowledge of the JV parties.

22A. At all material times after they were respectively employed by Ensham (Foots and Bird):

(a) Were in a position to gain in the course of their employment information which related to the management, supervision and conduct of the operations of the joint venture by Ensham which was, to their knowledge, not in the possession of the JV parties.

(b) In their respective capacities as chief executive officer and general manager were in a position to control the provision of any such information to the JV parties.

(c) Knew, as was the fact, that the JV parties depended upon them for the provision of information and advice in relation to the operation of the Ensham coal project.

(d) Had a contractual duty to further the interests of Ensham and the JV parties.

23. At all material times the JV Management Committee and each of the JV parties:

(a) Relied upon Ensham management for information, advice and recommendations in respect of the mining operations of the Ensham coal project.

(b) Placed trust and confidence in Foots and Bird.

(c) Depended upon (them) to provide … such information as was material to the decisions that had to be made by the JV Management Committee and the JV parties.

(d) Were, by reason of the matters pleaded … entitled to expect (and did expect) Foots and Bird would act in the interests of Ensham and the JV parties.

(e) Were vulnerable to abuse by (them) of their ability and power to give or withhold information, advise or recommendation.

24. By reason of the matters pleaded in paragraphs 13, 14, 14A, 16(a), 16A, 20, 21, 22, 22A and 23 Foots owed a fiduciary duty to Ensham and the JV parties:

(a) To act solely in the best interests of Ensham …

25. By reason of the matters pleaded … Bird owed a fiduciary duty to Ensham and the JV parties:

(a) To act solely in the best interests of Ensham …'

[8] There follow allegations which it is possible to summarise without setting them out extensively. They concern the alleged failure by Foots and Bird to protect the interests of Ensham and the JV parties. It is alleged they preferred their own interests by recommending the making of the dragline agreement. The allegations are that Foots misled Ensham and the JV parties about the availability of a larger dragline. He told them that the only dragline on the market was small and that the vendor would not sell it to Ensham because it was a competitor. The vendor would, however, sell it to another company (the plaintiff) with which Ensham could contract for the removal of overburden. Neither Foots nor Bird informed Ensham or the JV parties of the full extent of their interest in the plaintiff. In the result Foots recommended to the JV parties that Ensham make the dragline agreement with the plaintiff. The truth was that a larger capacity dragline could have been bought or leased by Ensham with consequent reduction of cost and increase of productivity.

[9] Paragraph 49 then alleges that by reason of these matter Foots and Bird:

> 'Placed themselves in a position whereby their own interest to profit from a contract between (the plaintiff) and Ensham conflicted with their duty to Ensham and the JV parties to act solely in the best interests of Ensham'.

Paragraphs 51A and 51B are in these terms:

'51A. But for such breaches of duty, Ensham would not have entered into the dragline agreement, but would have purchased or leased a second hand drag line with a (larger) bucket capacity …

51B. In consequence of such breaches of duty, Ensham or, alternatively, the JV parties suffered loss. Particulars of loss will be provided by a report of David Van Homrigh.'

Mr Van Homrigh's report reveals that he was instructed to undertake the following calculation:

> 1. Account of profits – an account of profits earned by (the plaintiff) as a result of Ensham entering into the dragline agreement.
>
> 2. Actual cost – the costs actually incurred for the period 1 November 1989 to 30 April 2003 and projected … for the period 1 May 2003 to 31 March 2005 by Ensham as a result of entering the drag line agreement.
>
> 3. The loss to Ensham as a result of entering the dragline agreement instead of acquiring a (larger) drag line. …'

Section 6 of the report sets out the methodology applied by Mr Van Homrigh to assess the economic loss occasioned by the decision to enter the dragline agreement rather than to acquire a larger machine. Mr Van Homrigh wrote:

> 'The general purpose in making an assessment of economic loss is to estimate the amount required to put Ensham in the approximate financial position in which it would have been, had the breach not been committed.'

[10] Section 9 of the report deals with the position of the joint venturers. A calculation of their loss seems to be no more than the loss calculated for Ensham divided by the joint venturer's respective interests in the joint venture and the shareholding of Ensham, adjusted for the applicable income tax rate for each of the joint venturers so as to arrive at their after-tax loss.

[11] The applicants were employees of Ensham not its directors. Nevertheless the argument proceeded on the basis that their position and the fiduciary duties they owed by reason of their employment were akin to those owed by directors to their companies. The applicants' submission is that a director's fiduciary duties are owed to the company and not its shareholders. Indeed, it is submitted, that the director's fiduciary duty to his company prevents the recognition of a concurrent and identical duty to the shareholders covering the same subject matter. It will have been noticed that in paragraphs 24 and 25 of the statement of claim the allegations of fiduciary duty concerning the applicants are that they owed the same duty to both Ensham, their employer and the joint venturers, its shareholders. The applicants argue that the pleaded case of a fiduciary duty owed by them to the joint venturers is untenable because, as pleaded, the duty is owed concurrently to both Ensham and the joint venturers, it covers the same subject matter and is identical in scope and content. Equity, it is said, does not recognise such a duty. The cases principally relied upon for the proposition are *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 and *Charlton v Baber* (2003) NSWSC 745.

[12] The facts in *Brunninghausen* were that the plaintiff and defendant were respectively minority and majority shareholders in a company. Both were directors but only the defendant took any interest in the running of the company. The two were related by marriage but did not get on. Following family pressure to resolve their differences the plaintiff offered to sell his shares in the company to the defendant.

Coincidentally an approach was made by a third party to acquire the company's business for a substantial price. The defendant concluded the negotiations for his acquisition of the plaintiff's shares without informing him of the other party's interest in the company which had the result of increasing the value of its shares. On what appears to be rather tenuous factual grounds the court found that the plaintiff was entitled to expect that the defendant, his brother-in-law, would not cheat him and he therefore reposed trust and confidence in him, giving rise to a fiduciary obligation not to profit at his expense. What is important in the case is the discussion of principle. Handley JA (with whom Priestley and Stein JJA agreed) said:

> 'A director occupies a fiduciary position in the company and owes fiduciary duties to it. The general principle established for well over 100 years is that a director's fiduciary duties in relation to the company's affairs are owed to the company. This reflects the distinction between the company and its members … The breach of a fiduciary duty owed by director to the company attracts an accounting or an award of compensation or damages in favour of the company alone, the losses of individual shareholders being derivative not personal … (546-7)
>
> If fiduciary duties owed by directors to their companies were also owed to the shareholders, directors would be liable to harassing actions brought by minority shareholders. Since in that event each shareholder would have a personal right, directors would also be exposed to a multiplicity of actions. There are therefore good reasons behind the established rule that in general a director's fiduciary duties are owed only to the company. (547)
>
> The general principle that a director's fiduciary duties are owed to the company and not to shareholders is undoubtedly correct, and its validity is undiminished. The question is whether the principle applies in a case, such as the present, where the transaction did not concern the company, but only another shareholder. (549)
>
> Where a director's fiduciary duties are owed to the company this prevents the recognition of concurrent and identical duties to its shareholders covering the same subject matter. However this should not preclude the recognition of a fiduciary duty to shareholders in relation to dealings in their shares where this would not compete with any duty owed to the company.' (549-50)

[13] His Honour then reviewed a large number of authorities and identified several categories of case in which the courts have recognised the existence of some fiduciary duties owed by directors to shareholders. They include:

> (a) Those in which directors seek further capital from their shareholders and the issue of new shares or making calls on shares.

(b) Transactions involving an offer by an outsider to buy all the shareholding in a company where the directors have particular knowledge of the value of the shares and the worth of the offer.

(c) Proposing resolutions which will affect the undertaking of the company for adoption by a general meeting.

By analogy with the cases which recognise a fiduciary duty between directors who promote a company and shareholders who are encouraged to subscribe for shares, and those cases in which directors have been held obliged to disclose material facts concerning an offer to buy shares, Handley JA thought that the defendant was obliged to reveal the existence of the offer to the plaintiff whose shares he was negotiating to buy.

It should be noted that the fiduciary duty found to exist was not one owed coextensively to the shareholder and the company. It was not a duty concerning the operation of the company's affairs. It was a duty owed by a director and majority shareholder to a minority shareholder ignorant of the company's affairs in negotiations for the acquisition of that shareholder's interest.

[14] It was this point which was important in *Charlton v Baber*, the facts of which there were two shareholders in a company which was eventually wound up. The minority shareholder alleged that the other shareholder, as a director of the company, had breached the duties he owed the company, thereby causing its demise. According to Barrett J (para 3):

> 'Separately and in his own right, (the plaintiff) seeks to pursue in the same proceedings claims he considers himself to have against (the defendant) for conduct entailing a breach of some form of fiduciary duty owed by (the defendant) to (the plaintiff) …'

Two paragraphs in the statement of claim alleged in identical term the existence of a fiduciary duty in the defendant to the plaintiff and to the company. Barrett J was referred to *Brunninghausen* about which he said:

> 'The situation was one in which there was, on the facts, a particular relationship between the parties. That, it was said, did not create a comprehensive fiduciary duty. It did, however, create a fiduciary duty that was "limited" to actions by the defendant necessary to negate the effect, in the particular circumstances, of his taking advantage in an unconscionable way of the superior position occupied by him as against the plaintiff. The Court of Appeal emphasised that fiduciary duties having identical content cannot be owed both to the company and to one or more of its shareholders in relation to the same subject matter; and that, to the extent that they exist at all, fiduciary duties owed by directors to shareholders can be recognised only where they "would not compete with" any duty owed to the company. In short the company remains the beneficiary of the comprehensive fiduciary duties to which directors are subject by virtue of their office; and parallel duties in corresponding form are not owed to any shareholder, although particular circumstances

> may give rise to a particular duty owed by a particular director to a particular shareholder …'

In the absence of a specific plea of facts showing a particular relationship between the plaintiff and the defendant which could be recognised as a fiduciary one the pleading was struck out.

[15] The applicants endorse expressions found in both these authorities. They submit that the counterclaim does not show a relationship between them and the joint venturers different to that between them and their employer, Ensham. It is the 'ordinary case' of the shareholders of the employer company complaining of a breach of fiduciary duty owed to the company. It is not a case, it is submitted, in which there are particular dealings between the applicants and the joint venturers which would give rise to a fiduciary obligation. The third applicant's submissions stress that the counterclaim does not plead facts tending to establish that the joint venturers suffered any loss separate and distinct from the loss suffered by Ensham in the event that a breach of fiduciary duty to it is proved. On this point it is stressed that the opportunity to purchase a larger dragline was lost to Ensham, not to the joint venturers. The counterclaim pleads that Ensham would have purchased or leased such a dragline. To adopt the words of Handley JA, a fiduciary duty owed to the shareholders to prevent loss to Ensham is meaningless.

[16] The applicants also point out that the allegation against them is that of a fiduciary duty owed in the same terms arising out of their employment but owed both to the employer and their employer's shareholders. This is said to be the concurrent and coextensive duty which equity will not recognise. It is noteworthy that the pleading alleges that the fiduciary owed to the joint venture parties was to act in the best interests of Ensham. It is impossible to see why an obligation to act solely in the best interests of Ensham should give rise to a fiduciary duty to the joint venturers. The cases which have analysed the ingredients necessary to give rise to a fiduciary duty have emphasised the reciprocity between fiduciary and beneficiary; the 'special opportunity to exercise the power or discretion to the detriment of that other person who was accordingly vulnerable to abuse …'. Per Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97.

[17] Moreover the superfluity of the alleged fiduciary duty owed by the applicants to their employer's shareholders is seen by the allegation that they had an obligation to act solely in the best interests of their employer. This, logically, must exclude any additional duty to act in the interests of the shareholders. Another consideration has already been mentioned. The opportunity which is said to have been lost by reason of the breach of fiduciary duty by the applicants was Ensham's to purchase or lease a larger dragline. Given that the applicants were Ensham's employees and it was Ensham who lost the opportunity there seems no scope for a fiduciary duty to the shareholders to operate.

[18] The response of the joint venturers is to challenge the correctness of the remarks in *Brunninghausen* that the existence of a director's fiduciary duties to the company prevents the recognition of concurrent and identical duties to shareholders covering the same subject matter. It is submitted that that proposition would invert the true principle: that the occupation of a directorship is a source of obligation not of

immunity. To quote the judgment of Woodhouse J in *Coleman & Ors v Myers & Ors* [1977] 2 NZLR 225 at 324:

> '… It is not the law that anybody holding the office of director … is for that reason alone to be released from what would otherwise be regarded as a fiduciary responsibility owed to those in the position of shareholders …'

[19] Reliance was placed also on a judgment of Young J *Gladdon Pty Ltd v Strata Consolidated Pty Ltd (No. 3)* unreported NSWSC 4 June 1990 affirmed in (1993) 11 ACSR 543. His Honour concluded:

> 'Drawing all these threads together it seems that the current Australian position is as follows:
>
> 1. Merely because a person is a director of a company will not necessarily mean that he or she will owe fiduciary obligations to the members of the company as such.
>
> 2. Proposition 1 must not be read as indicating that a person who is a director may never have a fiduciary obligation to a member.
>
> 3. Where there are special circumstances arising on the facts of a particular case, a director may owe a fiduciary duty to a member.'

[20] The joint venturers' point also to the remarks of Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71 at 107 that the categories of fiduciary relationship are not closed and that the approach of the courts is to identify circumstances which indicate the existence of a fiduciary relationship leaving the court to determine in a particular case whether or not the relationship existed.

[21] It is then submitted that the particular circumstances of the case as set out in the pleadings give rise to an arguable fiduciary obligation between applicants and the joint venturers. The circumstances identified are that there are:

> '… Co-venturers who supervise and control their own coal project by means of a management committee attended by their representatives. They have appointed a third party, Ensham, to hold assets on trust for them and to act for them and on their behalf. By that third party, they have appointed (the first and third applicants) to implement their objectives and the objectives of the joint venture. That (those applicants) are employed by Ensham is beside the point. They attended meetings of the management committee and gave advice and made recommendations to the JV parties' representatives. The JV parties trusted them, placed confidence in them and relied upon them.'

[22] The argument continues that the cases discussed by Handley JA in *Brunninghausen*, such as *Allen v Hyatt* (1914) 30 TLR 444 and *Coleman* 'were decided, not by reference to some narrow rule regarding obligations owed to shareholders in respect

of dealings in relation to the acquisition of their shares', but by the application of the wider principle identified in such cases as *Hospital Products* and *Breen v Williams*.

[23] Although:

> '… the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his … relations with another …' (per Dawson and Toohey JJ in *Breen* at 92)

the definition which has secured the widest acceptance is that of Mason J in *Hospital Products* at 96-7:

> 'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for 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.'

[24] Speaking of this passage Dawson and Toohey JJ said in *Breen*, (93):

> 'Mason J did not intend to suggest that this description of a fiduciary relationship isolated those features from other relationships of trust and confidence which do not impose fiduciary obligations. It is not the case that whenever there is 'a job to be performed' … and entrusting a job to someone involves reposing substantial trust and confidence in that person, a fiduciary relationship arises. But it is of significance that a fiduciary acts in a representative character in the exercise of his responsibility.'

In *Pilmer v Duke Group Ltd* (in liquidation) (2001) 207 CLR 165 at 197 McHugh Gummow Hayne and Cullinan JJ quoted with approval a passage from the judgment of McLachlin J in *Norberg v Wynrib* (1992) 2 SCR 226 at 272:

> 'The essence of a fiduciary relationship … is that one party exercises power on behalf of another and pledges himself … to act in the best interests of the other.'

[25] The joint venturers' case as pleaded may be summarised in this way:

> 'Foots and Bird were employed by Ensham on terms that obliged them to implement the objectives of the joint venture and directions of the Management Committee. Ensham was owned by the joint venturers and it "acted for and on behalf of" the joint venturers. The operations of the venture i.e. mining and selling coal were supervised and controlled by a Management Committee consisting of

> representatives of the joint venturers. Foots and Bird attended Management Committee meetings. By reason of their employment and their experience in coal mining their knowledge and understanding of facts relevant to the operation of the mine was superior to the joint venturers who necessarily had to depend and rely upon what Foots and Bird told them. Because of the foregoing the joint venturers in fact trusted and placed confidence in Foots and Bird and expected them to act in the best interests of Ensham and the joint venturers. As a consequence of their trust and confidence they were vulnerable to misuse by Foots and Bird of information and advice they gave the joint venturers. Therefore Foots and Bird owed a fiduciary duty to Ensham and the joint venturers to act solely in the best interests of Ensham and not to themselves profit from their position as fiduciaries.'

[26] The pleaded allegations are a little vague. There is not, for example, any identification of the precise legal relationship between Ensham and the joint venturers other than the shareholding. There is no description of the relationship between the Management Committee and the board of directors of Ensham which, one would suppose, would be the source of direction and control of the mine's operations. Ensham was, after all, the mine operator and the legal owner of the mine and its equipment. The statement of claim does not identify Ensham's directors. As well as these lacunae the assertions of the defendants' confidence and vulnerability are put in very general terms.

[27] No doubt this generality works in favour of the joint venturers. It is only in cases where it is demonstrable beyond doubt that there is no substance in a pleaded claim that it can be struck out. If there was a possibility that a claim, though vaguely pleaded, is capable of acceptance it should go to trial though, no doubt, with added particularity.

[28] The joint venturers described their case in these terms:

> 'This is not a case where the JV parties are shareholders of a company, suing in that capacity as such. They are co-venturers who supervise and control their own coal project by means of a Management Committee attended by their representatives. They have appointed a third party, Ensham, to hold assets on trust for them and to act for them and on their behalf. By that third party, they have appointed Foots and Bird to implement their objectives and the objectives of their joint venture. That Foots and Bird are employed by Ensham is beside the point. They attended meetings of the Management Committee and gave advice and made recommendations to the JV parties' representatives. The JV parties trusted them, placed confidence in them and relied upon them.'

[29] The submission is obviously couched in terms suggestive of a fiduciary relationship but as the majority judgment in *Pilmer* reminds us, at 198-199 quoting the judgment of Frankfurter J in *Securities and Exchange Commission v Chenery Corporation* (1943) 318 US 80 at 85-86:

> 'But to say that a man is a fiduciary only begins analysis: it gives direction to further enquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respects has he failed to discharge those obligations? And what are the consequences of his deviation from duty?'

As well, one should recall to mind the warning given by Dawson and Toohey JJ that not every relationship involving trust and confidence is a fiduciary one.

[30] When one has regard to these more particular questions the answer to the present debate can be found in the general statement of principle in *Brunninghausen*. A director (or employee) may owe fiduciary obligations to the shareholders of the company of which he is director or employee, but if there be such a duty it will spring from particular dealings in particular circumstances between them. Such a duty will not be concurrent with and identical to the fiduciary duties owed to the company with respect to the company's property or undertaking.

[31] The case which the pleading endeavours to make out, that there was a particular reciprocal relationship between Foots and Bird on the one hand, and the joint venturers on the other, is one which gives rise to the very same obligations and duties as Foots and Bird owed Ensham, their employer. The case is exactly that proscribed by *Brunninghausen.* Foots and Bird are said to owe the joint venturers precisely the same fiduciary duty they owe Ensham. The transactions in which it is said the fiduciary obligations should have been observed were those which concerned Ensham in the operation of the mine. Indeed the duty which it is said Foots and Bird owed the joint venturers was to protect the interests of Ensham. Such a duty, it seems to me, 'lacks all practical content.'

[32] If one has regard to the questions posed by Frankfurter J one receives answers that the alleged obligation owed by Foots and Bird as a fiduciary to the joint venturers was a duty to protect Ensham or, putting it slightly differently, the duty owed to the joint venturers was a duty to perform their contract of employment with Ensham loyally. The consequence of the deviation from that duty is that Ensham lost the opportunity to acquire the larger dragline. These answers show that the alleged duty to the joint venturers merely duplicates that owed to Ensham. It is supernumerary. The authority of *Brunninghausen* suggests that it is therefore unnecessary. The recognition and enforcement of the fiduciary duty from Foots and Bird to Ensham would be sufficient to protect the joint venturers' interests. No separate duty is required.

[33] *Brunninghausen* is not binding on me. The principle which it expresses and on which the applicants rely is probably *obiter dicta* because the case turned upon the existence of a separate duty owed by a director to a minority shareholder. Nevertheless the principle was accepted as correct by Barrett J. Accordingly the appropriate course is to accept that decision as authoritative.

[34] In summary the telling points are, I think, that the fiduciary duty alleged in favour of the joint venturers is one to protect the interests of Ensham and that the breach of duty resulted in a loss to Ensham. This highlights the point made by *Brunninghausen*, that there is no scope for the operation of an identical fiduciary duty to Ensham's shareholders.

[35] The joint venturers placed much reliance upon the fact that Ensham held its assets on trust for joint venturers. This does not seem to me to make a difference. I was not referred to any case in which employees or directors of a trustee company were held to owe fiduciary obligations directly to the beneficiaries. The authority of *Young v Murphy* [1996] 1 VR 269 at 301-302 contradicts the joint venturers' submission in this regard.

[36] For these reasons the words 'and the JV parties' in paragraphs 24 and 25, and in the prayer for relief, in the statement of claim should be struck out.

[37] The applicants further seek an order that the counter-claim by the joint venturers against them be struck out. This is the logical consequence of deleting the joint venturers' claim from the pleading. Nevertheless I do not think the order should be made. If judgment were given it would determine for all time the joint venturers' claims against the applicants. That should only be done where it is clear that no possible reformulation of the claim could succeed. It is not obvious that that is the case.

[38] The applicants also seek to have paragraph 51B of the statement of claim struck out. It will be remembered that that paragraph alleges that Ensham 'or the JV parties' suffered loss in consequence of the applicants' breaches of fiduciary duty. It follows from the early discussion and ruling that the claim by the joint venturers cannot be sustained and should be struck out. Apart from that point the applicants complain that the paragraph should be struck out on the basis that the loss complained of must have been suffered by an identifiable plaintiff . A plea to recover damages in the alternative is embarrassing.

[39] The paragraphs which lead up to the allegation in paragraph 51B are paragraphs 49, 50, 51 and 51A. By paragraph 49 it is said that the applicants' conduct constituted breaches of fiduciary duty 'to Ensham and the JV parties' in that they placed themselves in a position whereby their own interests in the plaintiff conflicted with their duty to Ensham and the JV parties to act solely in the best interests of Ensham; and in that regard used their knowledge gained as employees for their own advantage. Paragraph 50 pleads that the plaintiff by reason of the knowledge of its directors dishonestly assisted in the applicants' breaches of fiduciary duty. Paragraph 51 pleads that in consequence of those breaches of fiduciary duty by the applicant the JV parties consented to Ensham entering into the dragline agreement to the benefit of the applicants. Paragraph 51A alleges that but for the breaches of fiduciary duty Ensham would not have made the dragline agreement but would rather have bought or leased its own dragline. Paragraph 51B then pleads loss suffered by Ensham or the JV parties.

[40] The applicants complained that the allegation of loss:

> 'Is patently embarrassing in that the loss must have been suffered by one or the other and that the defendants must know which entity has, in fact, suffered the loss. No facts are pleaded to justify the claim being made in the alternative.'

[41] I agree with these submissions and with the further submission that the facts pleaded identify Ensham as the entity who can claim the loss. No facts are pleaded in support of a claim by the joint venturers. This claim would, in the circumstances, be

derivative only. I have already quoted some passages from the report of Mr Van Homrigh which contains particulars of the claimed loss. It is clear from that report that the loss is Ensham's. Mr Van Homrigh's report is not merely evidence relied on by Ensham and the joint venturers. It is put forward as particulars of their case and as such it identifies Ensham as having suffered the loss. This is consistent with the pleading that it was Ensham which lost the opportunity to purchase a dragline and which instead made the dragline agreement with the plaintiff.

[42] Accordingly I order that paragraph 51B of the statement of claim be struck out.