SUPREME COURT OF QUEENSLAND

CITATION:	*Wood & Anor v Laverty & Ors* [2003] QSC 405
PARTIES:	**RONALD IAN WOOD and SUZANNE KAY WOOD** (first plaintiffs) **KALGER PTY LTD** ACN 062 256 964 (second plaintiff) **v** **KENNETH JOHN LAVERTY** (first defendant) **RICHARD PATRICK ROCHE** (second defendant) **MICHAEL JOHN KELLY** (third defendant) **PAUL EDWIN O'KEEFFE** (fourth defendant) **JOHN SHAW MONCRIEFF** (fifth defendant) **JANENE LORNA ATFIELD** (sixth defendant)
FILE NO:	10692 of 1999
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	4 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2003
JUDGE:	Muir J
ORDERS:	**(1) That paragraph 21 of the further amended statement of claim filed 27 August 2003 and paragraph 2 of the prayer for relief be struck out** **(2) That the plaintiffs' costs of and incidental to the application to be assessed on the standard basis be the plaintiffs' costs in the cause**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Pleading – Statement of Claim – where the defendants applied pursuant to UCPR 171 to strike out various parts of a pleading which are said to be statute barred, have no real prospect of success or not be legally sustainable – where it

was argued in the alternative that there should be summary judgment for the defendants – consideration of the principles of undue influence, unconscionable conduct and fiduciary duties – whether in the circumstances the pleadings ought be struck out or there should be summary judgment for the defendants

Limitation of Actions Act (Qld) 1974
Uniform Civil Procedure Rules (Qld) 1999, r 171, r 293(2)

Bester v Perpetual Trustee Co Ltd [1970] 3 NSWR 30
Blomley v Ryan (1956) 99 CLR 362
Bradley West Clarke List v Keeman (1998) ANZ Conv R 77
Breen v Williams (1996) 186 CLR 71
Carindale Country Club Estate Pty Ltd v Astill (1993) 42 FCR 307
Christensen v Scott (1996) 1 NZLR 273
Citicorp Australia Ltd v O'Brien (1996) 40 NSWLR 398
Clark Boyce v Mouat [1994] 1 AC 428
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447
Credit Lyonnaise Bank Nederland NV v Burch [1997] 1 All ER 144
Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371
Daniels v Anderson (1995) 37 NSWLR 438
Foss v Harbottle (1843) 2 Hare 461; 67 ER 189
Garofoli v Khom & Raimondi (1989) 77 CBR 84
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Gould & Birbeck & Bacon v Mt Oxide Mines (in liq) (1916) 22 CLR 490
Gould v Vaggelas (1985) 157 CLR 215
Harris v Milfull (2002) 43 ACSR 542.
Hawkins v Clayton (1988) 164 CLR 539
Huguenin v Buseby (1807) 14 Ves 273
Johnson v Buttress (1936) 56 CLR 113
Johnson v Gore Wood & Co [2002] 2 AC 1
Louth v Diprose (1992) 175 CLR 621
Mahoney v Purnell [1996] 3 All ER 61
Mallesons Stephen Jaques v KPMG Peat Marwick (1990) 4 WAR 357
New Zealand Netherlands Society v Kuys [1973] 1 WLR 1126
Pavan & Gowshan & Associates Pty Ltd v Ratnam (1996) 23 ACSR 214
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165
Prudential Assurance Co Ltd v Newman Industries (No 2) [1982] Ch 204
Queensland Mines Ltd v Hudson (1978) 52 ALJR 399
Spector v Ageda [1973] Ch 30
State of South Australia v Marcus Clark (1996) 19 ACSR 606

Treadwell v Martin (1976) 67 DLR (3d) 493
Woolworths Ltd v Kelly (1991) 22 NSWLR 189

COUNSEL: I R Perkins for the plaintiff
G Dempsey for the defendants

SOLICITORS: Russell and Company for the plaintiffs
Shannon Donaldson for the defendants

[1] **MUIR J:** The defendants apply for an order under r 171 of the *Uniform Civil Procedure Rules* that the further amended statement of claim filed on 27 August 2003 be struck out. Alternatively, the defendants seek summary judgment against the plaintiffs in respect of the following causes of action –

2.1 Breach of contract;
2.2 Undue influence;
2.3 Unconscionable conduct; and/or
2.4 Breach of fiduciary duty.

Summary of allegations in the statement of claim

[2] The first defendant is the senior partner of an accounting firm which, prior to the events giving rise to the proceeding, had prepared the income tax returns of the first plaintiffs (Mr and Mrs Wood) for a number of years. Also, the firm had given them financial advice concerning the investment of a superannuation payment received by Mr Wood. The other defendants are the first defendant's partners in the accounting firm.

[3] The first defendant, together with four others, was the registered proprietor of the land at Dalby on which the Country Club Hotel stands. Until about 1 December 1993 the hotel business was owned and operated by Metrolaw Pty Ltd, a company of which the first defendant was a director and shareholder.

[4] In late 1993 the first defendant made unsolicited representations to Mr Wood concerning the business and advised the first plaintiffs to purchase it. At the time the representations were made and the advice was given there existed a professional retainer between the defendants and the first plaintiffs under which the defendants prepared the first plaintiffs' income tax returns for a fee. The defendants had a duty of care to the plaintiffs which they breached by advising and failing to advise in the manner alleged.

[5] The first plaintiffs at material times were under a special disability in dealing with the first defendant and the first defendant was in a position of influence over the plaintiffs "particularly in respect to financial and investment matters". The first defendant took advantage of that position of influence to the disadvantage of the first plaintiffs.

[6] Further, or alternatively, the defendants were in a fiduciary relationship with the first plaintiffs and any company acquired by them for the purpose of purchasing the business.

[7] Acting on the representations and advice on 1 December 1993, the second plaintiff (a company of which the first plaintiffs were the sole directors and shareholders)

entered into: an agreement for the sale and purchase of the business; a lease between the second plaintiff as lessee and the first defendant and his co-owners as lessors and a bill of sale between Metrolaw Pty Ltd as grantor and the second plaintiff as grantee. The total sale price under the sale agreement was $153,694.99.

[8] It is now proposed to consider each of the defendants' grounds of challenge to the statement of claim.

Breach of contract – limitation period

[9] The plaintiffs accept that their cause of action based on breach of contract occurred more than six years prior to the commencement of the action and is thus statute barred.

Undue influence and unconscionable conduct – the bases of challenge

[10] It is submitted on behalf of the defendants that the claims for undue influence and unconscionable conduct have no real prospect of success because –

(a) The equitable compensation claimed is not an available remedy;
(b) The plaintiffs, prior to entering into the agreements, had independent advice; and
(c) There is no evidence to support the claims of undue influence or unconscionable conduct in the manner required by the authorities and the evidence of the plaintiffs is inconsistent with those claims.

Can the claim for equitable compensation be sustained?

[11] The plaintiffs' prayer for relief claims equitable compensation. It is submitted on behalf of the defendants that the proper remedy for undue influence is the setting aside of any contract entered into through its exercise and that no damages or compensation are available either at common law or in equity. The following passage in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*[1] is cited as authority for that proposition –

> "… the court would have set aside a conveyance for undue influence, but for an intervening mortgage to a third party. There appears to have been no claim in tort. Nevertheless, there was an award of 'damages' – being the difference between the fair value of the property and the price paid.
>
> Equity rescinds transactions vitiated by undue influence. Neither it nor common law give damages in respect of such complaints."

[12] That passage does not appear in the 4th edition (2002) in which it is said in paragraph 23-010 of equitable compensation –

> "It is available against all forms of fiduciary … or other equitable misbehaviour. May J[2] held that it was available to victims of undue influence … this case has been analysed by J D Heydon QC (as he

1 3rd ed, Butterworths 1992 paragraph [1531].
2 In *Mahoney v Purnell* [1996] 3 All ER 61.

> then was) in 'Equitable compensation for undue influence (1997) 113 LQR 8'."

[13] In that article Justice Heydon, as he now is, said of May J's conclusion that equitable compensation was available to the victim of undue influence –

> "This conclusion appears impeccable, with respect, and the wonder is only that May J evidently conceived himself to be exploring new territory, hence treading with corresponding caution."

[14] Heydon J is one of the authors of the 4th edition of *Equity: Doctrines and Remedies*. As Ms Dempsey, who appears for the defendants, accepts, there is also a Canadian authority to like effect.[3] Consequently, it can hardly be said that the plaintiffs' case in this respect "… is so clearly untenable that it cannot possibly succeed".[4]

The question of independent advice

[15] Ms Dempsey points to an affidavit of Mr Wood in which, in relation to the proposed transaction, the first defendant said "we would need to get lawyers involved" to which Mr Wood responded "I would arrange for Paul Sheehan (a solicitor) to handle it for me." Mr Wood further swears –

> "Mr Sheehan then acted for me in relation to the purchase. I really left the conveyancing up to him. I did not ask him to give me any business advice and did not expect he would do any more than a basic business conveyance."

[16] In order for the advice received by Mr Wood, as a general proposition, to be sufficient to relieve the defendants of the consequences of any undue influence the advice must be given by a person fully informed of all material facts and must go to the propriety and financial consequences of the transaction.[5] It is not sufficient that the plaintiff understands the legal effect of the transaction and intends to enter into it or that the advising solicitor (or other relevant expert) has satisfied himself of these matters. "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced …".[6] Also, the fact that advice was received will have limited effect if it was not understood or acted upon.

[17] The evidence to which I have referred, on the face of it, does not satisfy these requirements. Again, the *General Steel* test is not satisfied. Nor can it be said that the plaintiffs' case in this regard has "no real prospect of succeeding".[7]

Is the evidence sufficient to support the claims of undue influence and unconscionable conduct?

[18] The remaining point in relation to the undue influence and unconscionable conduct claims is that the evidence is inadequate to support the claims. It was submitted that, as the relationship between an accountant and client is not one in which undue

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3 *Treadwell v Martin* (1976) 67 DLR (3d) 493.

4 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129.

5 *Credit Lyonnaise Bank Nederland NV v Burch* [1997] 1 ER 1448 156; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30.

6 *Huguenin v Buseby* (1807) 14 Ves 273 at 300 per Lord Eldon LC.

7 *Uniform Civil Procedure Rules*, r 293(2).

influence is presumed, the plaintiffs were required to demonstrate that the relationship between them and the first defendant was one of "dominion" and "dependence" assessed by the closeness of relationship and the relative strength of character and personality of the party.[8] It is submitted also that the evidence does not support the allegations in the statement of claim of "special disability" on the part of the plaintiffs. In that regard it is said that none of the factors set out by Fullagar J in *Blomley v Ryan*[9] such as "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation" are present.

[19] In order to determine the merits of these submissions it is necessary to have regard to the principles to be applied in determining the existence of undue influence and unconscionable conduct.

Undue influence

[20] The following discussion by Brennan J in *Louth v Diprose*[10] explores the difference between undue influence and unconscionable conduct –

> "In *Commercial Bank of Australia Ltd v Amadio* ((1983) 151 CLR, at p 461), Mason J. distinguished unconscionable conduct from undue influence in these terms:
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> > 'In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.'
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> Deane J. (ibid., at p 474.) identified the difference in the nature of the two jurisdictions:
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> > 'Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.'
>
> Although the two jurisdictions are distinct, they both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property."

[21] In *Johnson v Buttress,*[11] Dixon J (as he then was) explained the principles relating to relief arising out of the exercise of undue influence in the following terms–

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8 *Johnson v Buttress* (1936) 56 CLR 113.

9 (1956) 99 CLR 362 at 405.

10 (1992) 175 CLR 621 at 627.

> "The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of (sic) affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other."

Unconscionable conduct

[22] The existence of a "special disability" on the part of the plaintiff, as the following discussion shows, whilst normally an element of unconscionable conduct, must be determined by reference to the circumstances of the transaction under consideration and may need to take into account the relative strengths and vulnerability of the parties.

[23] In *Louth v Diprose*,[12] Deane J. said –

> "It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or 'unconscionable' that the other party procure, accept or retain the benefit of, the disadvantaged party's assent to the imbued transaction in the circumstances in which he or she procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain' or retain the benefit of it.

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11 (*supra*) at 134.

12 (*supra*) at 637.

> The adverse circumstances, which may constitute a special disability for the purposes of the principle relating to relief against unconscionable dealing, may take a wide variety of forms and are not susceptible of being comprehensibly catalogued. In *Blomley v Ryan* (1956) 99 C.L.R. 362 at 405, Fullagar J. listed some examples of such special disability:
>
> > '… or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.'
>
> As Fullagar J remarked, the common characteristic of such adverse circumstances 'seems to me that they have the effect of placing one party at a serious disadvantage vis-à-vis the other'."

[24] In *Commercial Bank of Australia Ltd v Amadio*,[13] Mason J, after referring to Kitto J's identification in *Blomley v Ryan*[14] of the types of circumstances in which equity would grant relief on the ground of unconscionable conduct made the point that the situations mentioned were no more than examples of a general principle which applied "whenever one party by reason of some condition of circumstances is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created."

[25] Mason J continued –

> "I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.
> …
> In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances."

[26] In *Amadio*, Deane J[15] identified the guarantors' special disability, after reference to a passage of the judgment of McTiernan J and *Blomley v Ryan* in which his Honour said "The essence of such weakness is that the party is unable to judge for himself", as being a weakness which –

> "… constituted a special disability of Mr. and Mrs. Amadio in their dealing with the bank of the type necessary to enliven the equitable principles relating to relief against unconscionable dealing. Put more

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13 (1983) 151 CLR 447 at 462.
14 (*supra*) at 415.
15 At 477.

> precisely, the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document was that, to adapt the words of Fullagar J. quoted above, they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank."

[27] His Honour then proceeded to consider whether such "special disability" was sufficiently evident to the creditor to make it prima facie unfair or "unconscientious" of the creditor to procure the execution of the subject documents in the circumstances.

[28] Dawson J's approach, explained in the following passage from his judgment, is somewhat different in its emphasis – [16]

> "What is necessary for the application of the principle [discussed in *Blomley v Ryan*] is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain."

Conclusion in relation to the allegations of undue influence and unconscionable conduct

[29] Whilst the plaintiffs' case based on the principles just discussed appears to me to be a modest one, the scope of the principles discussed and the difficulty of determining their application in the absence of detailed findings of fact, make it inappropriate to dispose of the matter summarily. As Mr Perkins for the plaintiffs points out, the plaintiffs allege and swear to actual influence. That is a question of fact which ought be determined in conjunction with and against the background of other relevant facts and not merely by reference to allegations in a pleading. The plaintiffs' case is not so manifestly threadbare that it should not be permitted to go to trial. As the foregoing discussion shows, the applicable principles do not lend themselves readily to application by reference to bare statements of fact.

Fiduciary duty

[30] It was contended on behalf of the defendants that neither the allegations in the statement claim nor the facts sworn to on behalf of the plaintiffs established a basis for the existence of a fiduciary relationship between the first defendant and the plaintiffs. It was argued also that there was informed consent to any relevant conflict of interests as the plaintiffs were aware that the first defendant was a partner in the accounting firm and had an interest in the transaction. Finally, in this regard, it is submitted that the pleading wrongly alleges the existence of prescriptive obligations despite it being established by cases such as *Breen v Williams*[17] that fiduciary duties impose only proscriptive obligations.

[31] In relation to the question of whether a fiduciary relationship, arguably, could arise in the circumstances pleaded, Ms Dempsey relied on *Pavan & Gowshan &*

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16 *Amadio (supra)* at 489.

17 (1996) 186 CLR 71.

Associates Pty Ltd v Ratnam.[18] In that case it was held at first instance and upheld on appeal that a fiduciary relationship did not arise between a tax accountant and his client in circumstances in which the tax accountant advised the client, in order to reduce his tax liability, to invest in property which the tax accountant intended to develop. As the judgment of Beazley JA (with whose reasons Meagher JA agreed) makes plain, the determination of the existence or non existence of a fiduciary relationship involves a close consideration of the subject transaction and of the relationship between the parties at relevant times. Beazley JA placed emphasis on the absence of indicia of a fiduciary relationship such as "vulnerability, reliance and presence of loyalty, trust and confidence."

[32] Mahoney ACJ found that there was not a relationship of advisor and client between the appellant and respondent such as would give rise to fiduciary obligations by reference to the principles stated by Gibbs CJ in the following passage from his reasons *Daly v Sydney Stock Exchange Ltd.*[19] In that case his Honour said –[20]

> "Normally, a relation between the stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's interest in the transaction."

[33] Brennan J's view, [21] in which Wilson J concurred, was as follows –

> "Whenever a stockbroker or other person who holds himself out as having an expertise in advising on investment is approached for advice on investments and undertakes to give it, and giving that advice the advisor stands in a fiduciary relationship to the person whom he advises. The adviser cannon assume a position where his self-interest might conflict with the honest and impartial giving of advice…"

[34] In my view, if the plaintiffs' evidence is accepted, it is not unarguable that there was a relationship of advisor and client between the plaintiffs and the first defendant such as might give rise to a fiduciary relationship. Once again, this is a question which is best determined after careful consideration of all the relevant evidence.

Was there informed consent by the plaintiffs?

[35] A fiduciary may avoid liability to account to its principal if the principal consents to the fiduciary's conduct after "full and frank disclosure of all material facts"[22] or, as it was put in *Queensland Mines Ltd v Hudson*,[23] if the principal gives its "fully informed consent". Such consent need not be given expressly.[24]

[36] What is required for a fully informed consent is very much a factual question which necessitates consideration of matters such as the content of the transaction in question, the identity of the parties, previous business experience of the plaintiff and

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18 (1996) 23 ACSR 214 .
19 (1986) 160 CLR 371 at 377.
20 At 377.
21 At 385.
22 *New Zealand Netherlands Society v Kuys* [1973] 1 WLR 1126.
23 (1978) 52 ALJR 399.
24 *Queensland Mines Ltd v Hudson (supra)* and *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

the plaintiff's general level of understanding.[25] Of obvious relevance is the role of the fiduciary in the transaction. In this case, the fact that the first defendant recommended that the plaintiffs retain a solicitor and that the plaintiffs acted on that advice may not provide a complete defence unless relevant disclosure was made, particularly as the solicitor's retainer may not have extended to advice on the financial prospects of the proposed venture.[26] Independent advice, in any event, would not absolve the first defendant of the obligation to make full disclosure.

[37] The proposition advanced by Ms Dempsey is that it is sufficient for there to be informed consent that the plaintiffs be aware that the first defendant was a partner in the accounting firm and owned a share in the hotel business and land. As the above discussion shows, that contention is too simplistic.

[38] There is more substance in the point that some of the allegations of fiduciary duty[27] are legally unsustainable.

[39] Paragraph 29 of the statement of claim, in reliance on the allegations in a considerable number of earlier paragraphs in the pleading, alleges that the first defendant and the other defendants "were in a fiduciary relationship with the first plaintiffs and any company acquired by them in order to purchase the business".

[40] Paragraph 30 alleges that "in the premises" the defendants owed the plaintiffs' fiduciary duties to –

(a) advise the plaintiffs "of all information they possessed relevant to the making of the decision whether to purchase the Business…";
(b) obtain purchase terms for the plaintiffs that made the purchase economically feasible having regard to the trading history of the business, or otherwise to advise the plaintiffs that it was imprudent to purchase the business;
(c) avoid a conflict "between the interests of the first defendant and their duty to advise the plaintiffs";
(d) avoid a conflict between the defendants' duties to their clients Metrolaw Pty Ltd and the partners in the hotel business and the defendants' duties to the plaintiffs;
(e) "to advise the plaintiffs that they should seek advice from another, independent firm of accountants as to whether it was prudent for them to purchase the business and if so, on what terms."

[41] In *Pilmer v Duke Group Ltd (in liquidation)*,[28] the majority judgment referred to the following passage from the judgment of Gaudron and McHugh JJ in *Breen v Williams*[29] with approval –

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to

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25 See Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* 4th ed para 5-115 and *Bradley West Clarke List v Keeman* (1998) ANZ Conv R 77 at 79-80.

26 See eg. *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 and *Clark Boyce v Mouat* [1994] 1 AC 428 at 437.

27 Paragraph 30.

28 (2001) 207 CLR 165.

29 (1996) 186 CLR 71 at 113.

> obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."

[42] But it does not follow from these observations that a fiduciary may not have positive obligations or duties. In many cases he does. Solicitors[30] and company directors[31] have a duty to exercise due care, skill and diligence in the exercise of their respective duties. The content of a director's duties will vary according to the role the director is or ought be fulfilling.[32] Trustees are one of the more obvious types of fiduciary. A trustee's duties include duties to get in the trust property, to carry out the terms of the trust, to keep proper accounts and to exercise due care in the management of the trust business.[33]

[43] *Daly v The Sydney Stock Exchange Limited*[34] provides a further and particularly relevant example of a fiduciary having positive obligations. Brennan J, addressing the duties of a stockbroker, said – [35]

> "The duty of an investment adviser who is approached by a client for advice and undertakes to give it, and who proposes to offer the client an investment in which the adviser has a financial interest, is a heavy one. His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have but a third party did have a financial interest in the investment to be offered, to reveal fully the adviser's financial interest, and to obtain for the client the best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction. Such a duty has been established by authority:".

[44] From the foregoing discussion of principle, it may be see that there is nothing untoward in paragraph 30(c). Paragraphs (a), (b) and (e) allege positive obligations on the part of an alleged fiduciary but, the introductory words, "in the premises", show that the alleged duties arise from the facts alleged in the paragraphs and subparagraphs specified in paragraph 29. Although it may be erroneous to describe the duties alleged in subparagraphs (a), (b) and (e) of paragraph 30 as "fiduciary duties", on the pleadings, they are duties owed by a fiduciary. I note that the duty alleged to exist in (e) is supported by the Canadian case of *Garofoli v Khom & Raimondi.*[36]

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30 *Hawkins v Clayton* (1988) 164 CLR 539 at 575.
31 *Daniels v Anderson* (1995) 37 NSWLR 438.
32 *Gould & Birbeck & Bacon v Mt Oxide Mines (in liq)* (1916) 22 CLR 490 and *State of South Australia v Marcus Clark* (1996) 19 ACSR 606 at 628-9.
33 *Jacobs' Law of Trusts in Australia*, 5th ed, chapter 17.
34 (*supra*).
35 At 385.
36 (1989) 77 CBR 84 at 98.

[45] There can be no doubt about the case the defendants have to meet and, even if there is inaccuracy in the legal categorisation or descriptions employed, there would be little point in striking out the paragraphs and giving leave to re-plead.

[46] I doubt that the allegation in the first limb of paragraph 30(b) is legally sustainable, but as there was no challenge to it, except on the basis just discussed, I do not propose to discuss it further. Also, leaving that allegation in the pleading is most unlikely to result in any additional delay, confusion or expense.

[47] Thus far I have not specifically addressed paragraph 30(d). If the allegations of the existence of a fiduciary relationship are sustained, it will be found that the defendants were advising the plaintiffs in a transaction between the plaintiffs on the one hand and the first defendant and his partners in the hotel business on the other. The defendants would thus be in a position in which their duty to the plaintiffs would conflict with their interest in advancing the interests of their other clients. The first defendant, of course, would be in a more obvious position of conflict. One of the vices in the defendants' position, arguably at least, would be acting for clients (the plaintiffs) but withholding from them relevant knowledge possessed by the first defendant or gained through acting for the first defendant and his partners in the hotel business.[37]

[48] These observations are not intended to convey that subparagraph (d) contains a correct expression of principle. It does not. The duty of the fiduciary who has two sets of clients with competing interest is not as pleaded. The conflict remains that between the interest of the client on the one hand and the interest of the fiduciary on the other. The latter interest being, for example, an interest in promoting or furthering the interests of the other client.[38]

[49] The plaintiffs allege that they were aware that the first defendant was a partner in the accounting firm and that he had an interest in the hotel business. It is submitted that "this awareness of the interest of [the first defendant] in the transaction discharges any fiduciary obligation". *Daly v Sydney Stock Exchange* is said to be authority for that proposition. It is not and the proposition is legally untenable. Such knowledge may go some of the way towards establishing informed consent but it can hardly establish it without more. The relevant principles have been discussed earlier.

Loss and damage

[50] It is contended that the claims of the first plaintiffs are "derivative and cannot be brought as a personal proceeding according to the rule in *Foss v Harbottle*[39]". The claims which are challenged are the plaintiffs' claims of loss arising from –

> "… moneys lent to the second plaintiff … which the second plaintiff has no capacity to repay …
> … moneys lent to the second plaintiff from time to time to maintain cash flow which shall never be recovered as the second plaintiff has no capacity to repay …

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37 Cf, the observations of Sir Robert Megarry in *Spector v Ageda* [1973] Ch 30 at 48.

38 *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362, 363 and *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 312.

39 (1843) 2 Hare 461; 67 ER 189.

> … debt of second plaintiffs to [various creditors] which was guaranteed by the first plaintiffs, in which the first plaintiffs must pay because the second plaintiff has no capacity to pay."

[51] Reliance was placed by Ms Dempsey on the following passage from the judgment of the court in *Prudential Assurance Co Ltd v Newman Industries (No 2)* – [40]

> "But what [the plaintiff] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss."

[52] Again, the defendants' approach is too simplistic. It may be accepted that the above passage is a correct statement of basic principle. Any loss suffered by the second defendant company can be recovered only by it and the first plaintiffs cannot recover damages which are merely a reflection of the company's loss.[41] The first plaintiffs though may recover damages for any loss suffered by them which is distinct from the second defendant's loss provided, of course, that they have a sustainable cause of action.[42]

[53] The first plaintiffs allege a cause or causes of action against the defendants and also separate losses.

[54] If some of the losses claimed by the first plaintiffs overlap or equate with losses which the second plaintiff is found to have sustained, double recovery will need to be avoided. Until it is determined, however, that the losses claimed by the first plaintiffs are in fact losses of the second plaintiff or are merely a reflection of those losses[43] and that the first plaintiffs, as shareholders, will have the indirect benefit of the recovery of those losses, it cannot be demonstrated that the first plaintiffs' claims are unarguable. As the helpful discussion of the Court in *Harris v Milfull* shows, the law in this area is not completely settled and this, together with the need for careful analysis of the factual basis of relevant claims, makes the defendants' task on a strike out application a difficult one.

Conclusion

[55] The only part of the application which has succeeded is the unopposed relief based on the *Limitation of Actions Act*. However, as the plaintiffs' success on the application has not been complete, it is appropriate that their costs of the application be their costs in the cause.

[56] Subject to any further arguments, the parties may wish to advance, the orders will be –

(1) Paragraph 21 of the further amended statement of claim filed 27 August 2003 and paragraph 2 of the prayer for relief be struck out.

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40 [1982] Ch 204 at 222-223.

41 *Gould v Vaggelas* (1985) 157 CLR 215 at 219-220.

42 *Gould v Vaggelas (supra)* at 219-220 and 253; *Christensen v Scott* (1996) 1 NZLR 273; *Harris v Milfull* (2002) 43 ACSR 542; and *Johnson v Gore Wood & Co* [2002] 2 AC 1.

43 Cf *Johnson v Gore Wood & Co (supra)* at 36, 66-7.

(2) The plaintiffs' costs of and incidental to the application to be assessed on the standard basis be the plaintiffs' costs in the cause.

I note that the plaintiffs' claims in tort, which are alleged to give rise to duties identical to the alleged contractual duties, were not the subject of any challenge.