SUPREME COURT OF QUEENSLAND

CITATION:	*Potts & Anor v Robins & Ors* [2013] QCA 273
PARTIES:	**GREGORY POTTS** (first appellant) **NICLYN PTY LTD (ACN 074 123 854) in its own right and as trustee of the POTTS FAMILY TRUST** (second appellant) **v** **ERNEST WILLIAM ROBINS &** **MAUREEN DAWN ROBINS as trustees for the ROBINS SUPERANNUATION FUND** (first respondents) **ERIKA PETELSKI** (second respondent) **JOHN VACCANEO & JENNIFER VACCANEO** (third respondents) **RONALD WALTER HERBERT &** **BRONWYN EUNICE HERBERT as trustees for the HERBERT SUPERANNUATION FUND** (fourth respondents) **KO TAI HSI & TENG YI-YU HSI** (fifth respondents)
FILE NO/S:	Appeal No 3118 of 2013 DC No 3371 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2013
JUDGES:	Margaret McMurdo P and Muir and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where a solicitor nominee company, Law Partners Mortgages Pty Ltd (LPM), advanced loans for the purchase of lots 1, 2 and 9 (the management units) and the management rights in respect of the Biloela Motor Inn – where the loans were

secured by registered mortgages held by LPM on behalf of the respondents – where the second appellant became registered as second mortgagee of lots 1, 2 and 9 – where liquidators appointed in respect of LPM convened a meeting on 18 December 2001 attended by the first appellant (a director of the second appellant) and representatives of the respondents – where the primary judge found that at the meeting the first appellant undertook to supervise the management of the Biloela Motor Inn on behalf of all of the investors and to act to protect the interests of the respondents by advising them of matters which might come to his attention as a result of his supervision and which might adversely affect their interests – where the appellants contend that the primary judge's findings as to the agreement or understanding between the appellants and the respondents were contrary to the evidence at trial – where the first appellant gave undertakings that he would "continue to supervise the management of the motel" with a view to its future sale – where contemporaneous correspondence was "clearly indicative" of the first appellant assuming an active management role – whether the primary judge's findings in respect of the agreement or understanding between the appellants and the respondents were justified by the evidence

EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – FIDUCIARY DUTY – SCOPE GENERALLY – where the first appellant undertook to supervise the day to day management of the Biloela Motor Inn in the interests of the respondents – where the first appellant failed to notify the respondents of the impending auction of the management units for non-payment of rates – where the first appellant attended the auction and procured the second appellant to purchase the management units for $15,000 – where the second appellant subsequently sold the lots for $129,375 – where the primary judge found that the first appellant and the respondent were in a fiduciary relationship and that the first appellant breached its fiduciary duty to the respondents in failing to notify the respondents of the impending auction – where the primary judge found that, had the respondents been informed of the impending auction, they would have discharged the arrears of rates – where the primary judge found that the first appellant breached the "purchase rule" by bidding at the auction and procuring the second appellant to purchase the management units – where the primary judge held that both appellants were liable to pay the respondent the profits made through the subsequent sale of the management lots – where the appellants argue that the primary judge erred in finding that the appellants owed a fiduciary duty to the respondents – where the appellants submit that, if there was a fiduciary duty, the scope of the duty did not extend to the duties to advise alleged by the respondents which were proscriptive rather than prescriptive

in nature – whether the first appellant owed the respondents a fiduciary duty – whether the first appellant breached its fiduciary duty in failing to notify the respondents of the impending auction – whether the appellants were liable to account to the respondents for any benefit or gain derived from the second appellant's acquisition of the management units

Corporations Act 2001 (Cth), s 601EE

Barnes v Addy (1874) LR 9 Ch App 244, cited
Breen v Williams (1996) 186 CLR 71; [1996] HCA 57, considered
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36, considered
Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373; [1975] HCA 8, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, considered
Pilmer v The Duke Group Ltd (In liq) (2001) 207 CLR 165; [2001] HCA 31, considered
Robins & Ors v Potts & Anor [2013] QDC 196, related
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1; [1985] HCA 49, cited
Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18, considered
Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3) (2012) 270 FLR 1; [2012] WASCA 157, cited

COUNSEL: R A Perry QC for the appellants
L Stephens for the respondents

SOLICITORS: Lynch Andrews Lawyers for the appellants
Tobin King Lateef for the respondents

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for dismissing this appeal with costs.

[2] **MUIR JA: Introduction** The first appellant, Gregory Potts, is a director of Niclyn Pty Ltd, the second appellant. At relevant times it was the proprietor of lots 5, 6, 7, 8 and 10 on registered plan SP 106361 in the parish of Prairie. The plan was registered in respect of a complex of 25 units in which the Biloela Motor Inn business was conducted. The registered proprietors of units 1, 2 and 9 were P and B MacSween. They held the management rights in respect of the complex and their units housed the manager's accommodation (lot 1), a restaurant and toilets (lot 2) and a laundry and storeroom (lot 9) (the management units).

[3] In August 1998, Law Partners Mortgages Pty Ltd (LPM), the nominee company of Law Partners Solicitors & Attorneys (LPSA), the principal of which was Mr Nielsen-Brown, advanced $330,000 to the MacSweens to purchase units 1, 2 and 9 and the management rights in respect of the Biloela Motor Inn. The loan was secured by a registered first mortgage to LPM over the management units and two other properties. The $330,000 was provided by the first respondents ($220,000);

the second respondent ($20,000); the third respondents ($40,000); and the fourth respondents ($50,000).

[4] The principal business of LPSA was the making of investments on behalf of clients whose funds were secured by first and second mortgages granted to LPM. Another company controlled by Mr Nielsen-Brown, Law Partners Mortgage Management Pty Ltd (LPMM) managed the collection and distribution of interest on behalf of investors and undertook enforcement action in the event of a borrower's default.

[5] In about September 1998, a further advance of $80,000 was made to the MacSweens by LPM. The second respondent provided $20,000 of that sum and the fifth respondents contributed the balance. The further advance was secured by a registered second mortgage.

[6] Rinkdale Pty Ltd, a company controlled by the MacSweens, was the lessee under a registered lease of all 25 lots. There was a mortgage over the lease and the second appellant acquired the mortgagee's interest in the mortgage in 1998.

[7] LPM's run-out mortgage business was ordered to be wound up pursuant to s 601EE(1) of the *Corporations Act* 2001 (Cth) (as a managed investment scheme operating in contravention of the *Corporations Act*) and a liquidator, Mr Collins of Jefferson Stevenson & Co, was appointed on 31 October 2001.

[8] A meeting convened by LPM's liquidator was held on 18 December 2001 for purposes which included the introduction of investors in the units in the motel complex to each other, the planning of a possible marketing program for the motel complex and consideration of the role, if any, of the liquidator.

[9] On 21 December 2001, the liquidator wrote to the respondents and others advising that the meeting had been attended by the liquidator; Ms Julie Williams of Jefferson Stevenson & Co; Ms Margaret Rimmer of Rimmer Lawyers, representing Private Mortgagees (SC) Pty Ltd as mortgagee in possession of lots 3, 4 and 11–22; the first appellant, representing the second appellant, Niclyn Pty Ltd; the second respondent; the third respondents; the male fourth respondent; and Mr Rafton on behalf of Lambda Group, a financial advisory firm representing the interests of a number of the respondents.

[10] The letter stated that the current management consisted of Mr and Mrs Farrand, personal friends of the first appellant, "… who were brought in to manage the property by [Mr] Nielsen-Brown … on the request of [the second appellant] under a lease provision held by [the second appellant]".

[11] The letter continued:

> "A general discussion followed wherein it was explained by both [the first appellant] and Ms Rimmer that of the 25 units in the property, 3 are externally self-managed, 3 comprise of the Reception / Managers (sic) units and the Laundry. There are 19 units remaining, 14 of which are in the control of Rimmer and 5 are in the control of [the second appellant]. As such, proceeds from Motel letting were in the majority to be dispersed to [the second appellant] and Rimmer.
>
> Further discussion involved the Liquidator suggesting a future direction for the property and a possible marketing campaign for the property.

Both the Liquidator and Ms Williams were asked to leave the room and a general discussion between the investors, Rimmer and [the second appellant] ensued.

Following that discussion, the investors, Rimmer and [the second appellant] requested that the Liquidator distribute the funds held, as follows: -

Percent	**Remitted to**	**Purpose**	**Dividend Distributed**
20%	Law Partners Pty Ltd	To be held for Liquidators Fees & Outlays	9,812.18
10%	Niclyn Pty Ltd	Compensation for investment on fitout	4,906.09
14/19th's of 70%	Rimmer Lawyers	Distribution to investors	25,305.09
5/19th's of 70%	Niclyn Pty Ltd	Distribution to investors	9,037.53
		TOTAL	**$49,060.89**"

The primary judge's findings as to the agreement or understanding between the appellants and the respondents

[12] The primary judge found in respect of the meeting of 18 December 2001:[1]

> "[17] … at that meeting the first [appellant] undertook to those of the [respondents] who were in attendance or represented that he would oversee the day to day management of the Biloela Motor Inn in the interests of all of the investors. In particular I find that:
>
> (a) Whilst Mr and Mrs Farrand were to be responsible for the day to day management of the Biloela Motor Inn he would supervise their management on behalf of all of the investors.
>
> (b) That he would supervise the receipt of income and payment of expenses by Mr and Mrs Farrand and would account to investors for their shares of any surplus, and provide regular accounts.
>
> (c) That in so supervising the management of the motel the [first appellant] would act to protect the interests of the [respondents] by, inter-alia, advising them of matters which might come to his attention as a result of the supervision which might adversely affect their interests."

[13] His Honour also found that the first appellant reached a "like agreement" in a later conversation with the male first respondent and the fifth respondents became aware of and agreed to the arrangement.[2] In respect of an agreement or understanding between the appellants and the respondents, the primary judge, referring to the oral evidence given by the respondents and Mr Rafton, said:[3]

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1 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [17].
2 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [18].
3 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [26].

> "[26] In my view, although the witnesses were not precise in recounting what was said, I do accept that the words used by [the first appellant] at that meeting were to the effect that he was to supervise the day to day managers on behalf of all of the investors, to ensure their interests were protected, to supervise income and outgoings and to report regularly and distribute profits from time to time."

Were the findings in respect of the agreement or understanding between the appellants and the respondents justified?

[14] The above findings, apart from that in paragraph [17](c) of the primary judge's reasons, were not challenged by counsel for the appellants in oral submissions. They were challenged, however, in written submissions, which were not abandoned. The findings were justified by the evidence.

[15] In re-examination, the male first respondent, speaking of a conversation between himself and the first appellant after the 18 December 2001 meeting, said that the first appellant rang to tell him that the Farrands were friends of his and were going to manage the hotel. The first appellant said that he "was oversee (sic) the Farrands … as managers and on behalf of the other motel investors of the units … that he would keep an eye on things". He subsequently confirmed that he agreed that the first appellant would "just oversee the Farrands to make sure the motel was running correctly".

[16] Mr Rafton, who attended the meeting called by the liquidator on 18 December 2001 on behalf of the fourth respondents,[4] said that at the meeting, the first appellant made an offer "to buy out the motel complex" which was rejected. He said that the first appellant said that "he knew people who lived in the area … [w]ho could come in and manage the property … and [that] he was quite passionate about the hotel complex, motel complex". This exchange then occurred:

> "Yes?-- And I remember him saying that because he was already invested in it, the investors did not want to be bought out for such a low rate, that he would continue to help – he would continue to manage the property.
>
> All right?-- In everyone's interests."

[17] The female third respondent said that she attended the meeting called by the liquidator and that the first appellant "had quite a bit to say". She recalled him saying:

> "… we were all in this together … we had to try and make the best of a bad job … [a]nd keep the business going if possible … he said something about he knew somebody who would manage the property."

[18] She recalled that the first appellant also said that they "would be receiving something on [their] investment".

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4 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [20].

[19] Asked in cross-examination about her understanding regarding "what was going to happen with the motel" after the events of the meeting, she said:

> "I thought that the managers were going to manage and [the first appellant] was going to oversee.
>
> So do I take it that you got that information from the meeting?-- Yes, yeah.
>
> … So your understanding was what was said at the meeting that the Farrands were going to continue to manage the motel, but that [the first appellant] was going to oversee them in some way?-- Yes, as a personal friend we took it.
>
> As a personal friend?-- Yes.
>
> So-----?-- Not our personal friend, but the Farrands (sic) personal friend.
>
> I understand. And I think you say that [the first appellant] told people at the meeting that he was a personal friend of-----?-- Yes.
>
> -----the manager's (sic)?-- Yes.
>
> And so your impression, I take it, from the meeting was that because he was their friend – I don't want to put words into your mouth, I'm just trying to express what I think you're trying to say – he was going to supervise them?-- Yes.
>
> Right. Did you have any understanding from the meeting, what was said at the meeting by people, as to precisely what it was that [the first appellant] was going to do in this supervision?-- I thought he would be overseeing the accounts, that the accounts were paid.
>
> Yes?-- And that the motel was being run in the correct manner.
>
> All right.
>
> HIS HONOUR: Could I just ask you, you said before that you thought as a result of the meeting that the [managers] were going to manage the motel and [the first appellant] was going to oversee it?-- Yeah.
>
> Do you remember the nature of anything that [the first appellant] said to cause you to indicate – to conclude that that was likely or that was going to happen?-- Well, that was the impression I got from what he said.
>
> Yes?-- Yes. That's – you know, this wasn't going to be allowed to become a dead loss.
>
> MR LYNCH: No, because everybody in that-----?-- Because everybody had money invested …"

[20] The following exchange occurred in the course of the evidence of the second respondent:

> "Do you remember whether anything else was said at the meeting about the managers, by anyone?-- [The first appellant] said that he knew the managers personally.
>
> Yes?-- And that he could vouch for them.
>
> Yes?-- And that he could oversee it.
>
> Yes. When you say oversee it, what do you mean?-- Keep in contact with them and make sure everything's running right."

[21] Later, she said:

> "I heard him say to me that he will – he knows the managers, he can vouch for them, and he will look after everything."

[22] The male fourth respondent's evidence was to the effect that, after the rejection of the first appellant's offer to buy the respondents' interests at the 18 December 2001 meeting, there was a discussion about what was to happen in the future concerning management of the motel. There was also a discussion that the sale of the motel should be delayed "until the motel could get established on an ongoing … sure footing" and it was "operating effectively", "especially with the laundry and the dining room and the manager installed, someone to look after the swimming pool and all the rest of it". He had previously referred, without objection, to an agreement by the first appellant to continue "his supervisory management role".

[23] The above evidence is not markedly in variance with the first appellant's own evidence. Referring to the discussions at the meeting with the liquidator and to the discontinued involvement of Mr Nielsen-Brown, he said, "So it was expected of me to oversee the managers". He said that he and Ms Rimmer were "actually contributing funds to try and keep the motel running". He accepted that there was discussion at the meeting that he would "continue to supervise the management of the motel, with a view to maintaining it as a going concern and with a view to a not too distant future sale". He also accepted that there was agreement at the meeting that "in the future, and perhaps not too distant future, the motel [would] be sold".

[24] The primary judge also found support for his findings in the contemporaneous correspondence. On 2 May 2002, the first appellant wrote to Mr Rafton at "Lambda Group" and referred to previous discussions with him and a letter from Ms Rimmer concerning "the management agreements for Biloela Motor Inn". He requested that the position of "General Manager and the management account … be transferred to us". He also requested that documents, including business activity statements, leases, insurance documents, etc, in relation to Biloela Motor Inn be forwarded to him "so that the interested parties can make informed decisions as to Law Partners previous management commitments and our position related to thoso (sic)". The letter sought to "revisit the split of the financial position (profit or loss) of the business".

[25] On 27 May 2002, the first appellant wrote to Ms Rimmer and Mr Rafton as follows:

> "Dear Investors,
>
> On the 24th May 2002 the Motel received a letter of demand from capital finance in relation to the phone system leased to Law Partners. As this equipment is vital to the operation of the Motel we intend to pay the due amount of $3956.16 by 5.00pm Tuesday 28th May 2002, unless contrary advises (sic) are received from investors."

[26] The primary judge, correctly, regarded the letter as "clearly indicative" of the first appellant having an active management role.[5] On the same day, the first appellant wrote another letter to investors which commenced:

> "As per agreement we distribute profit from the collective investment in the Biloela Motel. Balance of the account as at date of letter is some $36000.00 with some accounts and expenses pending, thus we retain at least $10000.00 as a float for the Motel. Some expenses are due shortly, and are considered extraordinary so $20000.00 will be considered profit , and distributed.
>
> Thus the 25% management fee of $5000 is divided,
> 25% @ in consideration of lots 1, 2 &9. = $1250.00
> 75% @ in consideration of Equipment and Lease= $3750.00
> The distribution of 75% is in relation to useable units in the Motor Inn.
> Thus $15000.00 is to be distributed
> 70% in M.Rimmer Trust Account = $10500.00
> 30% Niclyn Pty Ltd = $4500.00
>
> We hope to distribute funds on a monthly basis but will consider funds available monthly and will only distribute if substantial profits are available.
>
> Yours Faithfully
> Greg Potts"

[27] A cheque for $1,250 was forwarded to "Lambda Group Trust Account" on 27 May 2002. The primary judge noted that it was suggested that the first appellant identified Lambda as representing the investors in lots 1, 2 and 9 (that is, the respondents). Similar letters, dated 26 August 2002, 23 October 2002 and 11 November 2002, were sent by the first appellant. The letter of 23 October 2002 remarked:

> "As Mintchester Pty Ltd has had to take the responsibility for some expenses of the Motor Inn, while the management agreement is being finalized (sic), these funds distributed are considered funds transferred to the float of Mintchester's account, as per agreement, for the management restructuring of the Motor Inn."

[28] Mintchester Pty Ltd was another company controlled by the first appellant. A draft management agreement prepared by the first appellant's solicitors which was provided to Rimmer Lawyers, Lambda and the respondents, nominated Mintchester as the manager of the motel. The terms of the draft management agreement were unacceptable to Lambda's clients and to the respondents.

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5 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [32].

The primary judge's findings regarding the sale of lots 1, 2 and 9

[29] The primary judge found that:[6]

> "[11] In about April 2003 the local authority, the Banana Shire Council, took steps to sell Lots 1, 2 and 9 for non-payment of rates. A Notice of Sale was sent to the unit holders of those lots of the motel. Subsequently a notice was attached to the door of Lots 1, 2 and 9. The [first appellant] became aware of the proposed auction of the lots by the local authority…
>
> [13] The [first appellant] attended the auction which was held on the 10th of December 2003. The [second appellant] was the only bidder. It purchased the three lots for $15,000. Subsequently, on the 4th of August 2004 it sold the lots to a company, Kirkpalm Pty Ltd as part of a larger sale to that company, for the sum of $129,375."

[30] The primary judge found it "highly probable" that the first appellant did not become aware of the impending auction until "notices of the auction were stuck to Lots 1, 2 and 9 by the council some little time before the auction".[7] He found also that the first appellant determined to purchase the lots at auction and not to notify the respondents. This was "for his significant financial advantage because, effectively, he would thus gain control of the management of the Biloela Motor Inn".[8]

The primary judge's findings of breach of fiduciary duty

[31] The primary judge found that the first appellant and the respondent were in a fiduciary relationship and that conduct of the first appellant in not notifying the respondents of the impending auction "involved a clear breach of the fiduciary duty [the first appellant] owed to each of the [respondents]".[9] He found also, expressly or implicitly, that:

- had the respondents been informed of the impending auction they would have discharged the arrears of rates to the Council;
- because of the fiduciary relationship, the "purchase rule" applied and the first appellant breached it by bidding at auction and procuring the second appellant to purchase lots 1, 2 and 9;
- the second appellant had knowledge of relevant facts through the first appellant, who was its sole director, and was liable equally with the first appellant; and
- the appellants were liable to pay to the respondent the profit made by the second appellant on the sale by the second appellant of the three lots to Kirkpalm Pty Ltd for $129,375.

[32] The respondents' loss was calculated by deducting the purchase price of $15,000 from the resale price of $129,375 to arrive at "damages" of $114,375. The appellants were also ordered to pay interest on $114,375 at 10 per cent per annum

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6 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [11] and [13].
7 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [53].
8 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [55].
9 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [56].

from July 2004 to the date of judgment. It was not contended that if the order to pay $114,375 was justified, the award of interest was erroneous in any respect.

Were the appellants under a fiduciary duty to the respondents?

[33] Counsel for the appellants argued that the primary judge erred in finding that the appellants had a fiduciary duty to the respondents and that if, contrary to their submissions, the appellants, in fact, had a fiduciary duty, there was no such duty to advise that the rates were unpaid or that a public auction of the lots was to take place. Reliance was placed on the proposition that fiduciary duties do not extend to every aspect of the fiduciary's conduct, however irrelevant that conduct may be to the agency or relationship that gave rise to the fiduciary duty.[10] It was submitted that if there was an agency, despite the primary judge having made no such finding, its scope was not such as to give rise to the duties to advise alleged by the respondents. Those duties, it was claimed, were proscriptive rather than prescriptive and thus were not the product of a fiduciary relationship.[11]

[34] The circumstances which give rise to a fiduciary relationship were discussed by Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation*, as follows:[12]

> "I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations (see *In re Coomber; Coomber v. Coomber*, *Jenyns v. Public Curator (Q.)* and *Phipps v. Boardman*) and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease: see *In re Biss; Biss v. Biss*, *Griffith v. Owen*, and *Chan v. Zacharia*." (citations omitted)

[35] A little later in his reasons, Gibbs CJ identified the existence of a relationship of confidence which may be abused as one circumstance which has been relied on as indicating the presence of a fiduciary relationship. The Chief Justice observed, however, that such a relationship was "neither necessary for nor conclusive of the existence of a fiduciary relationship".[13]

[36] The Chief Justice noted that:[14]

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10 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102; *Breen v Williams* (1996) 186 CLR 71 at 82.

11 *Breen v Williams* (1996) 186 CLR 71 at 113.

12 (1984) 156 CLR 41 at 69.

13 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 69.

14 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 70; see also at 118–119 per Wilson J.

> "… the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose." (citations omitted)

[37] Mason J, in *Hospital Products*, accepted that although there was "an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice",[15] it was "altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime … In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship".[16]

[38] Mason J identified the critical feature of accepted fiduciary relationships, such as trustee and beneficiary; agent and principal; solicitor and client; employee and employer; director and company; and partners, as:[17]

> "… 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."

[39] Mason J further explained:[18]

> "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."

[40] Dawson J observed in his reasons:[19]

> "The difficulty in identifying and classifying those qualities in individual relationships which give rise to fiduciary obligations is

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15 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 99–100.
16 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 100.
17 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96–97.
18 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97.
19 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 142.

> well recognized: see, e.g., *Phipps v. Boardman* per Lord Upjohn. There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other: see *Tate v. Williamson*. From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position. In terms of general principle I do not think that it is necessary to go further than that in the present case." (citations omitted)

[41] Having regard to the infinitely varied categories of fiduciary relationships and the duties to which they give rise, Mason J stated, "the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case".[20]

[42] The contention that fiduciary obligations are proscriptive rather than prescriptive in nature must be accepted, at least as a general proposition.[21] In *Pilmer v Duke Group Ltd (In liq)*,[22] McHugh, Gummow, Hayne and Callinan JJ quoted with apparent approval the following passage from the reasons of Gaudron and McHugh JJ in *Breen v Williams*:[23]

> "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 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."

[43] McHugh, Gummow, Hayne and Callinan JJ subsequently observed:[24]

> "The words of Frankfurter J in *Securities and Exchange Commission v Chenery Corporation* bear repetition. His Honour said:
>
> > 'But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?'
>
> In particular, the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by

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20 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102.
21 C.f. *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* (2012) 270 FLR 1.
22 (2001) 207 CLR 165 at 198.
23 (1996) 186 CLR 71 at 113.
24 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 198–199.

> making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed. That is how the matter was put by Mason J in *Hospital Products*. Similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction." (citations omitted)

[44] It was apparent that the management units would be sold so that the respondents and those holding under the first and second mortgages could recover their capital and accrued interest. The mortgagees, and those holding under them, had an interest in obtaining the highest reasonable price for the units. The respondents, to the knowledge of the appellants, did not wish to incur the costs involved in having the liquidator of LPM deal with the exercise of LPM's rights as holder of the first and second mortgage.

[45] Plainly, a higher sale price for the three management units was likely to be realised if the motel business continued to be operated effectively and efficiently. The first appellant, as the primary judge found, offered to oversee the management of the motel in the interests of all the investors. The first appellant also had a strong interest in ensuring the successful operation of the motel and, it may be inferred, in ensuring that the sale and purchase of the management units and the management rights did not adversely affect the operation of the motel business. When the first appellant, at the meeting with the liquidator, offered to supervise the management of the motel, he was implicitly offering to take action which would preserve the respective interests of the appellants and the respondents.

[46] Although the respondents had no security over the management rights, the motel business could not be operated effectively unless the manager had the use of the management units. The respondents, as the appellants were aware, were looking to and dependent on the appellants to protect their interests by supervising the managers and ensuring that the motel could be attractively presented to prospective purchasers as part of a functioning business.

[47] It is thus apparent that the first appellant undertook to act in the interests of the respondents. Because of their practical inability to protect their own interests, they accepted his offer to act on their behalf and became vulnerable to the abuse by him of his position. The first appellant's role put him in an even better position than he had been in before to acquire knowledge about the operation of the motel, its outgoings and revenues and other information which could be of benefit to a potential purchaser or vendor of units in the complex. In particular, the first appellant became better placed than the respondents to acquire knowledge of matters, such as the Council's pending sale, which threatened the interests of the respondents and provided him or, at his election, the second appellant with an opportunity for profit.

[48] The managers may have had no stated obligation under a management agreement to advise proprietors of acts and things which might materially imperil their respective units and their interests therein. It is, however, difficult to accept that a manager paid to manage a motel business of the nature and with the title structure of the Biloela Motor Inn would not be under an implied obligation in this regard. The obligations of the first appellant, in this regard, were, if anything, clearer. He was

aware that the respondents were relying on him to supervise the management of the motel with a view to protecting their interests and to facilitating the sale of the management units by the respondents. That objective would be thwarted and the respondents would suffer obvious financial loss if the management units were to be sold at under market value.

[49] For the above reasons, a fiduciary relationship came into existence between the first appellant and the respondents. The first appellant was in a position in which his interests conflicted with his duties to the respondents when he set out to procure, and then procured, the second appellant to acquire the management units. The first appellant was thus liable to account to the respondents for any benefit or gain derived from the second appellant's acquisition of the management units. The second appellant was a knowing participant in the first appellant's breach of fiduciary duty and is thus liable to account to the respondents for any benefit received by it as a result of such participation.[25] Counsel for the appellants did not submit to the contrary.

[50] In *Chan v Zacharia*,[26] Deane J relevantly observed:

> "There is a wide variety of formulations, of the general principle of equity requiring a person in a fiduciary relationship to account for personal benefit or gain. The doctrine is often expressed in the form that a person 'is not allowed to put himself in a position where his interest and duty conflict' (*Bray v. Ford*) or 'may conflict' (*Phipps v. Boardman*) or that a person is 'not to allow a conflict to arise between duty and interest': *New Zealand Netherlands Society 'Oranje' Inc. v. Kuys*. As Sir Frederick Jordan pointed out, however (see *Chapters on Equity*, 6th ed. (Stephen) (1947), p. 115, reproduced in Jordan, *Select Legal Papers* (1983), p. 115), this, read literally, represents 'rather a counsel of prudence than a rule of equity': indeed, even as an unqualified counsel of prudence, it may, in some circumstances, be inappropriate: see, e.g., *Hordern v. Hordern*; *Smith v. Cock*. The equitable principle governing the liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement 'in which he has, or can have, a personal interest conflicting ... with the interests of those whom he is bound to protect' (per Lord Cranworth L.C., *Aberdeen Railway Co. v. Blaikie Brothers*) or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed." (citations omitted)

[51] The appellants' contended that the primary judge erred in finding, in effect, that the market value of the management units between December 2003 and July 2004 was $129,375 – the sale price to Kirkpalm Pty Ltd. The reason for this, it was asserted, was that when the second appellant purchased the units, they were not offered for sale as part of an integrated motel business, whereas they were sold as such to Kirkpalm. According to the argument, the respondents' entitlement was to be

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25 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397; *Barnes v Addy* (1874) LR 9 Ch App 244.

26 (1984) 154 CLR 178 at 198.

assessed by reference to the value of the units on a stand-alone basis at the time of the auction, namely, a total of $15,000.

[52] A valuer, Mr Sheehan, valued the management units at $150,000 to $170,000 as at December 2003 and at about $429,000 as at April 2009. The primary judge found his evidence "unconvincing".[27] The appellants' argued that Mr Sheehan's valuations were based on a false premise, namely that the management units were integrated into the operation of a trading motel. On the evidence, the motel was trading and the management function was being carried out from the management units and, even if this was not the case, the motel business could not be carried on effectively unless a manager could use the management units. Counsel for the appellants acknowledged that this was so. Consequently, there was no flaw in Mr Sheehan's methodology in this regard.

[53] The valuation evidence, however, is irrelevant to the appellants' obligation to account to the respondents for any profit made through the breach of fiduciary duty. It was not submitted that there was any error, apart from those referred to earlier, in the primary judge's calculation of the profit.

[54] Another argument advanced by counsel for the appellants was that the primary judge erred in finding that, had the respondents been informed of the auction of the management units, they would have discharged the arrears of rates. It was submitted that the respondents gave no evidence that they would have done so. There was no substance in this point.

[55] The evidence reveals that the principal outstanding under the first mortgage in about 2 June 2011 was in excess of $160,000 and that the $80,000 principal remained outstanding under the second mortgage. It would have been foolish of the respondents not to pay the outstanding rates and, as the primary judge accurately observed, it would have been "inconsistent with the actions of responsible persons".[28] Again, the possibility that the respondents may not have acted in their own interests and made the profit that the second appellant made is irrelevant for the reasons given in the following passage from the judgment of the Court in *Warman International Ltd v Dwyer*:[29]

> "… the authorities in Australia and England deny that the liability of a fiduciary to account depends upon detriment to the plaintiff or the dishonesty and lack of bona fides of the fiduciary. Gibbs J. in *Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd.* stated:
>
> > 'Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered injury or loss.'
>
> A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity

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27 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [75].

28 *Robins & Ors v Potts & Anor* [2013] QDC 196 at [57].

29 (1995) 182 CLR 544 at 557–558.

> or knowledge derived from his fiduciary position. The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes: (1) that the fiduciary must account for what has been acquired at the expense of the trust, and (2) to ensure that fiduciaries generally conduct themselves 'at a level higher than that trodden by the crowd'. The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage.
>
> Thus, it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably." (citations omitted)

Additional arguments advanced by the appellants

[56] It is appropriate to mention other arguments advanced by the appellants, although, even if accepted, they would not affect the outcome of the appeal. It was submitted that various matters, including the preparation of the draft management agreement, were "inconsistent with the notion that any binding legal arrangement was made at the meeting of 18th December 2001 and inconsistent with a finding that [the first appellant] was a fiduciary".

[57] I consider it probable that there was no binding agreement between the first appellant and the respondents, but that is not determinative of the question whether there was a fiduciary relationship[30] and the evidence of negotiations with a view to the entering into of a formal management agreement is hardly an impediment to the existence of a fiduciary relationship.[31]

[58] A challenge was made to findings of the primary judge concerning the familiarity of some of the respondents with the physical attributes of the motel. What the respondents knew in this regard is marginal, at best. It has little or no bearing on their ability to relevantly look after their own interests, their reliance and dependence on the first appellant and the opportunities afforded to the first appellant to act to the respondents' detriment.

[59] In oral submissions, counsel for the appellants argued that the extent of the first appellant's fiduciary duty must be ascertained from the oral agreement at the meeting of 18 December 2001, during which it was agreed that the first appellant's role was that of "supervisor, manager and agent … referred to in paragraph 11 [of the Further Amended Statement of Claim] … [t]hat is, their (sic) role is the collection of the income stream and the distribution of it". The submission did less than justice to the pleadings and even to paragraph 11 which referred to the alleged agreement to "supervise the management of the property on behalf of themselves [that is, the first and second appellants] and the investors". Paragraph 12 of the Further Amended Statement of Claim made relevant "the relationship of the parties" and paragraph 14 made allegations about what was actually done by the appellants "in performance of their duties as managers for the [respondents]". The claimed fiduciary duties were alleged to flow from all of these matters, not merely from an alleged oral agreement.

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30 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97.

31 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11–12.

Conclusion

[60] For the above reasons, I would order that the appeal be dismissed with costs.

[61] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.